Global Harmony and the Rule of Law

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Edited by Thomas Bustamante and Oche Onazi
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THOMAS BUSTAMANTE / OCHE ONAZI

INTRODUCTION

In this volume, which contains the 1st issue of the Proceedings of the 24th IVR World Congress, held in Beijing in the year of 2009, the reader will find a selection of papers presented at that International Congress on the general theme of “Global Harmony and the Rule of Law.” Even though these papers share a general topic, each of them will approach it in a different way. Under the first subsection, Ethical Dimensions of the Rule of Law, the reader finds a selection of eight papers. Leutge’s paper proposes to understand the interface between law and business according to a model of “order ethics” which describes the spheres of law and business as complementary and mutually dependent. Koszicki, in turn, explores the potential tension between radical democracy and constitutionalism in contemporary societies, and suggests a theoretical model to overcome or at least minimize this tension. Mndus’s paper, in turn, offers an empirical-analytic model to build up a genuinely intercultural model for mutual cooperation between Western and Eastern legal cultures on the basis of the idea of Global Harmony and the principle of the Rule of Law. Toprak’s paper, on the other hand, focuses on the relationship between law, professional ethics and morals, taking the works of Ioanna Kupuradi as a theoretical premise. Andersen’s paper, taking a slightly different approach, is worried about the principle of “proximity,” understood as “nearness in the legal proceedings before the court” in litigation, with a view to understand the role played by such principle in juristic argumentation. Vaičaitis, in turn, analyses the idea of law as it is understood in Biblical narratives, in an attempt to demonstrate that the conception of legal system accepted in today’s theoretical accounts was also present in such narratives. Finally, Takikawa’s paper explains how particular political obligation refers to universal legal duties, showing us that the duty to obey the law cannot be read as necessarily particular.

The second section, on the topic Harmony, Rule of Law and Chinese Legal Philosophy, is dedicated to deal with some of the most significant challenges for contemporary jurisprudence in China. Firstly, Yun’s paper deals with the notion of Civic Spirit and its function as a cultural basis for the idea of Harmony in contemporary China. Secondly, Xiaohong and Liyu’s paper explains how the idea of “overall situation” makes sense in the context of the Chinese society and legal practice. Thirdly, Jianwu’s paper is concerned with the idea of legal formalism, which appears to play an important role to secure the certainty and stability under the Rule of Law. And finally, Xiangyang’s paper is interested in the theoretical implications of the distinction between ‘is’ and ‘ought’ in the context of a legal-philosophical debate. By analyzing these notions, he is able to unveil the significance of legal positivism in the Chinese legal culture.

The editors would like to thank the authors of the contributions compiled in this volume for the help in the revision of the manuscripts of their papers, as well as Prof. Zenon Bankowski and the dedicated members of the Chinese Law Society, who worked very hard to select the papers comprised in this volume amongst hundreds of papers received for this publication.
and other court personal in handling cultural, ethnic, and linguistic differences. Parallel to the widespread realizations within various national police forces, the courts could consider to encourage the involvement of a representative section of the population.

Finally, it should be noted that the increasing significance of international and supranational law appears to pose a distinct threat to proximity in law. In the EU, the concern for this development is reflected in Article 5 of the EC Treaty, which lays down the principle of subsidiarity. The language regime ensuring that all official national languages are also official languages of the Union likewise supports the notion of proximity. In the perspective of proximity, these principles are mainly relevant concerning EU legislation whereas the policy makers of the EU appear less concerned with ensuring proximity in relation to litigation. In the future, increased globalization and regionalization will increasingly push such questions up the agenda.

Vaidotas A. Vaiciaitis

CONCEPT OF LAW IN BIBLICAL NARRATIVE

According to Charles Montesquieu (1689–1755), who was one of the first modern legal comparativists, law and religion have very similar functions – to guarantee morality, peace and tolerance in the given society. If a religion may not guarantee all this, it has be done by law and other way around. In the XXth century relationship between law and religion was taken into account first of all by philosophy and sociology (e.g. Max Weber), but in recent years also science of law had an ambition to say something about it.

Paul Ricoeur’s (1913–2005) ideas about looking for sources of evil in various narratives of ancient civilizations, including biblical stories and Greek mythology, inspired me to apply the same method in searching for the sources of the concept of law. This method helped me in better understanding the very origins of the modern concept of law and deserves to be developed further.

First, it should be noted that already in the Old (or First) Testament, especially in the Torah, we can find many different kinds of rules. For instance, relying on Ex 20–23 rules may be grouped into two different categories: casuistic and apodictic. "Casuistic law" applies rules and sanctions to very concrete cases: concerning relationships with slaves, punishment for different wounds and injuries, compensation for various thefts etc. On the other hand, the Prophetic books contain some critique for static and formal application of the Torah’s casuistic rules (e.g. Ex 22, 20; 23, 9–12). The latter rules are proclaimed in the name of God and do not hold any sanctions. Frank Crüsemann considered these commands to be apodictic meta-norms or principles. But this classification of rules does not help us to understand the very notion of law. In reconstructing the concept of law, I decided to look at the biblical story on "original sin" (Gen 3), because it is one of the oldest narratives of our civilization and rather similar narratives may be found in various different cultures. In this story we already observe the establishment of certain rules, their interpretation, violation and punishment. Thus, this narrative may also be interpreted as a legal story. In my opinion this story illustrates the very heart of the origin of the concept of law.

1. First of all, in this narrative we find certain rules of human behavior: God said, “You shall not eat of the fruit of the tree that is in the midst of the garden, neither shall you touch it, lest you die” (Gen 3,3). Here we find some rules prohibiting or limiting certain behavior. These rules do not intend to regulate all possible types of human behavior, but appear when certain limits of this behavior are necessary. Moreover, these limits and prohibitions are not arbitrary but are justified by human needs – ‘you shall not eat … lest you die.’ In other words, the aim of these rules are directed to persons. Here law is not only instrumental in narrow sense, for it does

3 See e.g. collection of articles "Deconstruction and the possibility of justice", Routledge. 1992.
not treat a human being as a mean, but serves for his/her welfare. It has to be said that the concept of law as a set of rules prevails in contemporary legal thinking (at least in civil law traditions).

2. Another feature of law, which we may grasp from the said story is authority and the legitimacy of this authority. The rules are established by God, who has the highest authority in this story and who does not need to justify his rules. 'The serpent' in the narrative does not have the same authority for it cannot establish the rules, but only raise questions about them. In contemporary Western legal traditions all public power has come from the highest authority, which should have sovereignty (and which does not need to be justified) and has even some sacred features (think of the people, a parliament or a monarch). These bodies are supposed to have the highest authority through the concept of sovereignty, which in turn has theological roots. Moreover, the monarch can probably be directly related with sacred authority, but in a contemporary democracy also the parliament can be sacralized in a certain way (e.g. Lords Spiritual are members of the British Parliament).

3. Law has to be promulgated according to the said narrative. Rules are not only announced and promulgated publicly, but have to be clear and unambiguous. Therefore, the rules of human conduct are not to be only justified by the legislature, but should be rationally comprehensible. It is worth mentioning that the requirement of public promulgation of law and that law should be clear and comprehensible is among the commonly accepted principles of modern concept of law.

4. Another aspect of law, which I would like to mention is its founding nature. A new reality is founded by a word-logic: the prohibition to eat the fruit completely new order or reality, which did not exist before and which may not later be ignored. Well-known principle nulla poena sine lege may be grasped from this act of prohibition in the narrative. At the same time a law paradoxically is beyond the time for it appears together with human being and it is not possible to grasp the very moment of its origin. It sometimes operates retrospectively from the future perspective. This aspect of law can be seen in a newly adopted Constitution or, for instance, in a custom which does not have a clear source and a definite time of birth. This retrospective performative aspect of law was analyzed by the French philosopher Jacques Derrida (1930-2004) in his "deconstructive" theory of justice.

5. In looking at the nature of law we also have the possibility of interpreting: the serpent interprets the prohibition to eat the fruit. Here we can see that the law is immanently related with its interpretation, for it may not be found in the same way as objects of nature. It is commonly accepted that the modern concept of law (together with the concept of justice) may not be understood without the interpretive activity of judicial power and legal scholar. Although the meaning of the rule may be seen through glasses of certain tension between different possible significances, but in all cases the interpretation of rules has to be grounded on some reasonable methods, which may not arbitrary lead to opposite meaning of the word.

6. In the said story, law appears from one side as the rules of common behavior (Adam and Eve represent all humanity), but from the other side also contains some aspects of individual or personal responsibility and accountability. Adam and Eve are personally responsible for their activities according to the degree of their guilt. Therefore, the component of guilt-punishment is shown by the banishment from Paradise. As we see from the narrative, the punishment is closely connected with violence. Here we see the law's efficiency and inevitable responsibility as important principles of law. But we also note a certain paradox of law: on the one hand, it creates some rules, but on the other – it also creates the very possibility to break these rules. In other words – law creates the possibility of unlawfulness. Today, nobody questions the general and universal character of law or doubts personal accountability and efficiency as indispensable parts of its character. But it is not popular today to talk about the law's relationship with violence, especially when we are dealing with criminal law, for the latter emphasizes the re-socialization of the convicted, but not his/her punishment. But indeed, without the recognition of punishment and violence as important characters of law we may not reach our modern objectives of criminal law.

7. Here we may also mention the law's performative character, which can be seen in the said biblical story. Law does not function by itself, but has to be put into practice by someone. In our case – the prohibition requires not only one's abstention from action, but also – some concrete positive action. This idea can be found in the letters of St. Paul, where he says that the "righteousness before God" are not those who just hear the law, but those who obey it (Rom 2, 13). This idea is also found in Franz Kafka's "The Trial", where it is shown that law only functions when it is personally realized.

8. In this narrative we also see that law is related with morals. According to Kant law (through prohibitions) determines certain limits of human behavior and establishes rules of moral minimum. I would like to note that although legal positivism still tries to detach law from morals, a majority of theories of law today recognize at least some relationship with morals. Here we may also recall Kant's categorical imperative, which may be also explained as a moral principle justifying law: you should act only according to a maxim which at the same time could become a universal law (norm). Law's relationship with morality is also connected with confidence towards legal order. Law may not be enforced only from above, it requires a certain degree of loyalty and good will.

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6 According to Maria Gimbutas, existence of the serpent and its efforts to give different meaning towards some established rules in the said story, shows certain possible conflict between new and more ancient religious narrative. See Marija Gimbutas. *Goddeses and Gods of Old Europe.*

7 Franz Kafka. *Der Prozess.* Frankfurt am Main and Hamburg. 1960. On the other hand it is interesting to mention here one Chinese philosopher's assertion that "passive Golden Rule" (do not do others what you would not want others to do unto you) routed in Judaism and Confucianism is more welcomed in processes of dialog than Christian-routed "active Golden Rule" (doing unto others what you would like others to do unto you). T. Weiming. *Cultural diversity, intercultural dialog, and harmony – a Confucian perspective.* In Plenary session papers. IVR 24th World Congress in Beijing. Global harmony and rule of law. p. 43.
9. In the said biblical story we may also observe a certain mysticism: it is not explained why the fruits of one tree are poisonous. As Montaigne has stated, the mysticism of law as a duty to follow the rules occurs not because they are just, but because they are the laws. Moreover, every public authority tries to legitimize itself by a certain mysticism or myth: the divine concept of monarchy, a nation’s history and traditions or sovereignty of the people. Relying on Montaigne, Derrida asserts that the mysticism of law reveals itself especially in a (legal) custom: no one knows the origin of a particular custom, but everyone follows it because of the tradition.

10. In the end of this legal reconstruction of the said narrative I would like to mention that justice is one of the main aspects of law. The concept of justice, which we find in the said biblical story may be opposed with the ‘formal’ justice of Greek myths or even of other biblical stories, where the Talmion principle of an ‘eye for an eye’ prevails. But the story of ‘original sin’ may be interpreted in the way, that God for the sake of mercy and compassion breaks his own law: promised capital punishment is ‘substituted’ by exile or by ‘life imprisonment’. Here we see that this kind of justice let us even to break the law or to go beyond it. In this context we may mention the act of grace born in the monarichies already in the Middle Ages, which is used even in contemporary democracies. Moreover, we can recognize the principle of re-socialization here: a man is exiled in order to be ‘re-formed’ and so that his guilt would be redeemed. In this story justice emerges as a meta or extra legal category, but its meaning is revealed rather by via negativa and not as a certain metaphysical definition.

In summarizing this short survey one may note that the essential characters of contemporary concept of law are to be founded in the biblical narrative of original sin. Looking at law through the glasses of this biblical story helps us not only to note the ‘unlawful’ character of law, but also to find two extra-legal sides of law: justice as law’s interior side and violence as its exterior side. As Pascale noted, law without justice becomes arbitrary, but justice without force and violence is inefficient.

HIROHIDE TAKIKAWA

PARTICULAR POLITICAL OBLIGATION AND UNIVERSAL LEGAL DUTY

Do we have a duty to obey the law and if so, why? Since Socrates, many attempts have been made to explain and justify our duty to obey the law. The social contract theory is one classical answer to this question.

This paper aims to elucidate and examine the core of the question of whether we have a duty to obey the law. In order to identify the point of the question, this paper starts by examining political obligation. I then consider whether there is any difference between political obligation and the duty to obey the law. Finally, it is shown that there exists a moral duty to obey the law, which is not particular.

I POLITICAL OBLIGATION

DEFINITION

Thomas H. Green once defined political obligation in his classic Lectures on Principles of Political Obligation as “intended to include the obligation of the subject towards the sovereign, the obligation of the citizen towards the state, and the obligations of individuals to each other as enforced by a political superior”. A. John Simmons asserted in his research on political obligation that it is “an obligation to support and comply with” (to use John Rawls’s phrase) the political institutions of one’s country of residence. In simple terms, a political obligation is generally considered an obligation toward one’s polity (police), typically one’s state.

The concept of political obligation is in contrast with that of moral duty. Political obligation refers to a context in which an individual who belongs to a polity has a special obligation to one’s polity or one’s fellow citizens, whereas moral duty refers to a context in which every person owes a general duty to one another. In other words, political obligation is an obligation that is owed to a state by its citizens, rather than moral persons. By way of example, on one hand, the obligation “you ought to keep a promise” is a moral duty, and every moral person has a duty to keep such a promise. On the other hand, “you ought to protect Japan” is a political obligation, and only Japanese people would owe an obligation to protect Japan. This is the dichotomy between particularity and universality.

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3 A. Johan Simmons, Moral Principles and Political Obligations. Princeton: Princeton University Press, 1979, p. 5. Simmons upholds this definition in his new book Political Philosophy. Political obligations are normally understood by philosophers as “such general moral requirements to obey the laws and support the political institutions of our states or governments, requirements that are usually thought to bind (nearly all) citizens (and other subjects) of (nearly all) modern states” (Simmons, Political Philosophy, Oxford: Oxford University Press, 2008, p. 39).