What is Legal Reasoning?

Thomas Fleiner

Dedicated to Lidija

"The first thing we do: Let's kill all the Lawyers!"

Shakespeare, Henry VI, part II

A. Introduction

„The first thing we do: Let's kill all the Lawyers!" – With this exclamation the plotters from Ireland in Shakespeare's Henry VI plan their coup against their King. Shakespeare let the butcher Dick proclaim this wish to his friend Jack Cade who was the head of the rebellion. It was still the period of the 100 years war with France and the beginning of the War of the Roses between the houses of Lancaster, York and Plantagenet. At this time Henry VI already ruled his kingdom for 25 years. As a young boy but already as a king he was invited to observe the trial against Jeanne d'Arc from Orléans in 1431.

I. Who should in fact fear the Lawyers?

"Love all, trust a few, do wrong to none", this is the wisdom William Shakespeare tells us in "All's Well that Ends Well". What was then the intention of Shakespeare when telling us that lawyers were dangerous and should be killed? Rebels who want to overthrow the government should never fear lawyers who are running of the mill. Lawyers without integrity always flirt with those who are in power. Such attorneys can easily be exploited by power holders. They are rather useful than dangerous. Certainly the rebels did not want to kill colourless and fuzzy jurists. However, lawyers guided by basic legal values and reasoning based on fundamental principles of fairness were truly dangerous for rebels. Backers of power are renegades. They offer services to any rebels as soon as they are in power. They interpret and adapt the law according to leading servants in governmental position. To reason according to the political will and pressure of the power-holders in the international community is by the way the main reproach to the International Court of Justice with regard to its legal reasoning when justifying the declaration of independence without providing legitimate argumentation. We shall later look into some of the unpersuasive arguments of the ICJ.

Hazardous and thus to eliminate are the lawyers committed to the rule of law. Those attorneys will always remain dangerous for despots and tyrants. They have to be feared by potentates. Indeed, such solicitors may scare insurgents, because they endeavour to apply the law only according to the law and if needed even against the will of the rulers. They follow the principle „That men

are ruled by law and not by men", which was the guideline for the famous decision of Chief Justice Marshall in Marbury v. Madison in 1803.

Shakespeare wrote and staged the drama of Henry VI probably at the end of the 16th century, still under the reign of Elizabeth first. This was also the time of the renewal of the development of new concepts of the rule of law. After the Magna Charta of 1215, that was a new break through done by magnificent and brilliant lawyers of England. This period belongs to a renewal of the rule of law.

Fifteen years after the opening night of Shakespeare's Henry VI in the year 1610 the awe-inspiring Judge Edward Coke ruled the famous Dr. Bonham's case[1] which marked the development of law for centuries, first in England, i.e., Great Britain and later in the United States up to our times. For the first time in the legal history of England Judge Edward Coke overruled an Act of Parliament enacted on behalf of the Crown. This is how for the first time the powers of the executive were to be examined in view of their legality, because they were not in compliance with the traditional common law as the law of the land. With the Bonham's case judicial review and a pivotal role of judges in protecting legality and constitutionality became inherently linked with the rule of law and of justice. With Edward Coke's legal reasoning in Bonham's case was based on the right of the subjects to have a legal remedy against violation of their rights by the whim of their rulers.

II. Bonham's Case

The facts of Dr. Bonham's case are simple: Dr. Bonham received a degree in medicine from the University of Cambridge. With this degree he practiced medicine without a license. Because he disobeyed the order of the royal college of Physicians they convicted Thomas Bonham and imprisoned him based on a statute of the Parliament which entitled them to punish practitioners without license. The college of Physicians was even entitled to one half of the fines imposed by it. Bonham thus disobeyed the law imposed by the sovereign.

In order to fortify the principle of parliamentary supremacy William Blackstone wrote later that the sovereign, that is King-in-Parliament was the antetype of universal might, thus the sovereign can even change a man into a woman in Paris. Nevertheless, almost two hundred years earlier Coke decided in Bonham's case:

> *[I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right*

[1] Dr. Bonham's Case**,** 8 Co. Rep. 107a, 114a C.P. 1610, <http://press-pubs.uchicago.edu/founders/documents/amendV_due_processs1.html>, (English modernized).

and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.[2]

How could a judge justify challenging a statute and thus dispute the issue whether the court has the power to deny the implementation of a statute which delegated the power to a college of Physicians to put a non-obedient practitioner in jail? Could a court challenge a statute which empowers physicians to judge over practitioners belonging to their proper guild? Yes Edward Coke came to the conclusion that the indictment violated basic legal principles. Nobody can be judge in his proper cause. „Nemo judex in causa sua"! And because the statute violated basic legal principles a judge had the power of overruling the indictment.

When physicians are sitting as judges to deliver a verdict on a colleague practicing their profession, they act as judge in their proper cause and thus lack fundamental legitimacy to adjudicate in a case which is directly linked to their own interests. Even the sovereign legislature has no power to overrule such fundamental principle of fairness; there is no power whatsoever to disrespect such basic legal principles. As a consequence Coke denied the statute its validity, annulled the indictment and restored the liberty of Dr. Bonham.

Bonham's Case was and is still today the cradle, the fundament and the prerequisite for the rule of law and its further development. That man are ruled by law and not by men, this was the fundamental idea which guided Edward Coke in his decision in the Bonham case.

An with this we have to ask ourselves today how should lawyers reason when they have to guarantee that human beings are not ruled by men but by law? What should be the fundament, what would be the guidelines and what should be the procedure of a legal reasoning which is only guided by law?

Why should tyrants ruling at their whim be scared from lawyers? Why should usurpers of power fear those who constitute law and justice?

These questions should now be examined and we shall try to displace ourselves into the world of legal minds and legal reasoning. I would like to invite you to a walk through the world of classic literature in order to understand the century old wisdom in the minds of those lawyers who committed themselves to the rule of law and justice and who had the energy and force scaring despots and tyrants. We shall thus explore what gives lawyers the strength to resist and frighten the power-holders abusing the law for their proper interests. For this purpose we shall deal with the three main questions Edward Coke had to address in Bonham's Case: First, he had to analyze the norm prohibiting physicians without license to practice medicine in London. This leads us to the analysis of the substance of norms/normative content. Then he had to look into

[2] http://law.jrank.org/pages/6484/English-Law-DR-BONHAM-S-CASE.html

the facts whether Dr. Bonham was indeed practicing medicine without license. It means that one of the major steps in legal reasoning is to look into the facts and to find out the truth. Finally, Edward Coke questioned the legitimacy of the court which was judging on the issues in which it had invested interests. This third main question with regard to legal reasoning addresses in fact the issue of legitimacy.

B. The Substance of Norms/contents of norms, normative content

In legal reasoning the mind is controlled by norms. What is the content of those norms and how do they differ from the world of the reality or from laws of the nature. In other words, the question to rise is the following: What is the relationship between norms and reality. This question can only be answered if one addresses the issue of the validity of norms first, and then deals with the question as to how reality can be integrated and / or transformed into a legal norm.

I. The Validity of Norms

1. Sentences of Statements – Sentences of Norms

„This is a big room and it is half empty or overcrowded." These are plain statements, not norms. Statements can be either true or false. Put differently: We can verify statements in order to find out whether they are true or false.

However, I can now transform a statement into a norm and e.g. dictate that this room has to be large and full. In this case I cannot anymore ask whether this sentence is true or false. I will rather have to ask whether this sentence as a norm is valid or not. If it is valid, one has to ask for whom it is valid and who is affected by this norm. Who is the addressee, who may be and by whom he/she may be forced with violence to provide a big room and who may be obliged to fill it with listeners? In addition, one has in particular to ask who would be entitled, i.e., who would have the competence or legitimacy to issue such an order or formulate such a norm.

2. The Validity of Norms

In other words: The crucial issue of norms is not the question whether they are true or false, but whether they are valid or not. Only *valid norms* are compulsory. Those who have to implement norms will also have to check the question of their validity.

The great philosopher of modernity Thomas Hobbes formulated the famous statement: „Auctoritas non veritas facit legem". According to Hobbes, one need not ask whether a norm is true or just in order to establish the validity of norms,

one has rather to determine whether the authority which issued the norm had the power of ordering to the people. In consequence, the power is decisive for checking the validity of norms. The power provides validity to the norms?

A norm is valid only when it can be deduced from the authority of those who have the power to issue norms. According to this concept of jurisprudence, norms are valid when adopted by the competent institution and when this institution has followed the proper procedure.

3. Norms of Nature and Norms of States or Governments

As well as we can distinguish different sentences of statements we can also observe different sentences of norms. When examining different categories of norms we have to analyse the criteria under which they differ one from another. Of course we know about e.g. the norms of nature, norms of ethics and norms of governments. The question is how the norms which are valid for human beings differ from norms which are valid for nature. What is the character, the essence of norms providing effects on human beings?

When we open the fist and drop a stone we expect it to fall to the bottom. We are all convinced by this norm, which is that of the gravitation force discovered by Newton. We all know this norm and we expect that therefore the stone will have to fall on the ground.

Let us assume that aliens would be sent to the Earth in order to find out and asses how human beings would normally behave or what kind of norms would be valid for human beings. Those aliens would, according to this mandate, e.g. observe the behaviour of human beings in the traffic. They would detect that cars would stop on the red light and when the light is green they would go. As a consequence the aliens watching the traffic would conclude that there must be a valid norm which is observed by human beings, namely, that one has to stop before the red light and is allowed to go when the light is green. However, what would they have to conclude, if they saw that one car did not stop and it crossed the road/junction despite the red light? Would those aliens come to the same conclusions as a scholar of natural science seeing that all of a sudden the stone does not fall to the bottom but keeps floating in the air?

If the stone floats in the air, scholars of natural science would have to conclude that they should change or at least adapt the norm of the force of gravity. They would have to modify or amend the norms of the science of nature according to the stone floating in the air.

The fact that some drivers do not follow the red light causes a big philosophical debate with regard to the notion of legal norms. There is a philosophical school which says that norms are only valid to the extent that they are also complied with in reality. Therefore, traffic regulations may be valid for 90% depending on the country and/or the circumstances of the traffic e.g. whether the roads are

empty or not. Only norms applied in reality and transformed into reality are valid. This jurisprudential concept has been developed by the so called “Legal Realists”. [3] According to their philosophical understanding, laws which are made to control human behaviour are mainly identical with norms of the nature.

An intelligent alien analyzing the behaviour of human beings in the traffic could also disclaim observing the traffic and consider that the behaviour in reality is not relevant but rather the written law in books. In other words, in order to pursue their mandate, the aliens would rather have to look for the statutes available in the libraries. They would do research in the books in order to find out according to which norms the behaviour of human beings is regulated.

The scholars looking only into the written statutes belong to the school of positivists. One of the most famous of these scholars was the Austrian Hans Kelsen[4]. Whoever is committed to this philosophy would only ask for the written statutes. They consider that written statutes are valid irrespective of whether they correspond to the reality and whether are de facto complied with. Decisive is only the question whether they have been adopted by the competent authority. All norms which have been enacted by the proper institution are valid irrespective of whether they are obeyed in practice. Put differently: There are neither stones floating in the air nor drivers overrunning the red light because only the written norms matter, not the reality itself.

Nonetheless, we can argue that such answers and concepts do not suffice and are not satisfying. There must be a more conclusive and more convincing response to the question, why the laws are and should be valid. We shall come back to this issue in the end of our analysis; let us now first look into the issue of legitimacy.

II. Content of Norms

1. Norm and Precedence

First we have to ask the following question: How can one invent the content of a norm, how should these contents be conceived; how should the statute be linguistically formulated and logically structured in a manner which is clear and simple enough to be understood by ordinary citizens?

Here I will make use of an old example from the former times of the Victorian era in Great Britain which one can already find in the jurisprudence of H.L.A. Hart.[5] As a scholar of Jurisprudence educated within the Common Law sys-

[3] Cp. Namely: ALF ROSS, On Law and Justice, Berkeley/Los Angeles 1959.
[4] HANS KELSEN, Reine Rechtslehre, first ed. Leipzig und Wien 1934.
[5] H. L. A. (HERBERT LIONEL ADOLPHUS) HART, The Concept of Law, 2. Aufl., Oxford 1994 (the first volume has been pulished posthum).

tem[6] Hart investigates the question as to how one can guide the behaviour of peoples with precedence. The question is in fact the following: How can one determine the behaviour of other persons: by giving a good example or by issuing a general rule?

The father enters with his son into to the church, and wants him to remove his hat when entering the church. Now he has two possibilities to determine the behaviour of his son. He can ask him to follow his example. But he can also give him an abstract order with the following content: "One has to remove his hat when entering the church".

In the first case the father regulates the behaviour of his son by his own example namely, by his precedence. Now the son sees that his father takes away his hat when he enters the church. If cases are regulated by precedence, like cases have to be treated alike. Consequently, if the son will behave likewise his father he has to carry out a complicated deliberation. Namely he has to ask whether it is important to take one's hat already on the first step of the stairs, whether he has to remove the hat as his father with the left or right hand, and how fast he has to remove the hat. In other words, he has to find out what is *substantial* with regard to the behaviour of his father or precedence. When life is regulated by precedence one has always to question as to what extent the previous example or precedence is likewise substantial, in order to be able to decide the next case alike.

2. Abstract Formulated Facts

As we have already said, the father can guide the attitude of his son also by giving him an abstract order, norm or a rule: "*if one enters the church one has to remove the hat*." With a general norm the father creates abstract elements of facts (*entering the church*). The content of these abstract elements of facts is just a generalisation of innumerable facts or just of imagined precedence which the drafter of the norm has either experienced or rather envisaged. When the faithful enter the Catholic Church they normally remove their hat. From these facts one can create abstract elements of facts saying who enters the church removes the hat. The content of the norm becomes accordingly just the abstraction of experienced or envisaged concrete facts. However how should one apply an abstract norm to a concrete case?

The rule regulating, who enters the church, removes the hat, is now of course also valid for the son. He has to apply the abstract norm to his concrete case. But also this application requires a complex deliberation. To wit, it is not at all easy for the son to comply with this general abstract norm. He has to examine e.g. what would fall under the notion of "church", are mosques or a syna-

[6] With regard to Common Law and Civil Law cp. Namely THOMAS FLEINER/LIDIJA BASTA FLEINER, Constitutional Democracy, Heidelberg 2008, p.229ff.

gogues also churches? Would one also have to remove the hat when one attends a catholic service held on an open hayfield? In addition, he has to interpret the notion of the "hat". Would a cap, a turban, a fez or a kippa also be considered as a hat? Would the fancy hat with a veil of a lady also be considered a hat?

We see here: even when one has to apply abstract norms one has to make complex considerations. When we have to implement norms we have always to apply abstract elements of facts to the concrete facts of the case. By comparing two cases one has the difficulty to find the essentials in order to compare the cases. If one has to apply abstract norms, one has to interpret abstract notions and to apply them to a concrete case.

Whatever deliberation is to be made, it will likewise require likewise attorneys and judges to establish the facts which matter fora concrete case. Here we come to the next difficult question, the one concerning the truth.

C. What is the Truth?

As a rule, lawyers are not primarily educated to be capable to draft norms. They deal first and foremost with the implementation of norms on o concrete facts. They have to examine whether the concrete facts of a certain event are governed by a certain norm. In the case of e.g. Kosovo one of the relevant questions of fact was whether the authorities declaring independence acted as authorities of the interim government installed by the UN. In this case they could only make such declaration if the UN legal norms would have permitted them to do such a declaration. If the authorities had acted as representatives of the citizens without any other legal limitation, according to the ICJ, they could also represent the people and thus on behalf of the people declare independence. Without any formal fact finding procedure the ICJ pretended its proper view of the truth with regard to this fact. Thus the truth according to the ICJ decision is that the authorities declaring independence acted in their capacity as representatives of the people of Kosovo and not as authorities empowered by the interim Government framework of the UN[7].

I. Ontological and Pragmatic Truth

I suggest now to take again our example of the father entering the church with his son: Let us assume that the father reproaches to his son coming home from the church that he did not remove his hat. Unexpectedly the son answers that he has not been in the church. This brings us to the question what principles have to be respected by courts looking into the relevant facts of a case.

[7] See Decision of the ICJ on Kosovo July 22 2010 No. 105 ss

1. The Pilate Question

When we ask the question what is truth, we are reminded of the historically most famous question of Pilate at the trial of Jesus Christ, when Jesus Christ he declared that: "Everyone on the side of truth listens to me." And Pilate answered with the famous question "What is the truth?"[8] The two depart from different concepts of the truth. Jesus holds for the absolute truth what is ontologically and eternally valid. Pilate, on the other side, looks for a pragmatic truth, which can be operated in this trial.

Incidentally, this trial had an enormous impact on the first freedom charters in the early 13th century for Switzerland. On the question of Pilate: "Are you the King of the Jews". Jesus answers: "My kingship is not of this world. [9] Without this answer Switzerland might even not have existed. Jesus namely assumes that there are two empires: the temporal empire and the spiritual empire. For this reason in early Christianity there were always two separate authorities: the spiritual and the temporal authority. The spiritual authority is entrusted to the pope who rules the church with the spiritual sword. The entitlement for the temporal authority is entrusted by the Pope as the representative of God on the earth who crowns the emperor and passes him the temporal sword.

In the Middle-Ages the emperors had to get the crown, entitlement as emperors and thus the legitimacy for their authority in Rome by the pope. Apparently the path from the north to the south of Europe went already in these times over the famous mountain pass Gotthard. In order to secure their cumbersome journey to Rome the emperors gave already in the 12th century to the three original forest cantons settled on the bottom of the Gotthard a freedom charter. It was these cantons which later formed the early confederation.

More importantly, whoever has knowledge of the early Jewish legal history, should know that according to the then valid procedure the chief priests and elders of the Jewish community could not have condemned Jesus to death as it is reported in the Bible. Such a condemnation of Jesus by the Jews could not take place as it is given account.[10] Today we have to admit that the evangelists or those who have composed the New Testament later have falsified the facts in order to disburden the more powerful Romans and to blame the Jews for the death of Jesus. The unparalleled martyrdom of the Jewish people during the last 2000 years attest what unspeakable harm including the holocaust this falsification has caused. Even in the new - since spring 2008 mitigated formulation - Pope Benedict refuses to renounce to the prayers for the enlightenment

[8] John 18.37/38
[9] John 18.33 – 36
[10] JEREMY COHEN, The Christ Killers, Oxford/New York 1953 and in particular HAIM COHEN, The Trial and Death of Jesus, Jerusalem 1980.

and salvation of the Jews in the worship on Good on Holy Friday before Easter.[11]

2. Pragmatic Truth

We shall continue by addressing now the question of the pragmatic truth. When lawyers ask for the truth they are not interested into the ontological truth but into the pragmatic truth, which is the truth disclosing whether a legally relevant matter has occurred. How can one find this pragmatic truth concerning the facts which are relevant for the implementation of the law?

This question comprises actually two sub-questions: Which truth we are referring to: the truth of the past or the "truth" of the future? In criminal law the lawyer has to seek the truth of the past. Allegations of the parties with regard to a fact completed in the past need to be examined whether they are true and whether they are in accordance to the facts as established by the criminal law at the time the act took place.

However in administrative law, we have often to find the truth of the future. E.g. if one should find the truth concerning the danger of an asylum seeker in his or her homeland one has to examine as to what extent the asylum seeker is threatened in his/her home-country an how real his/her fear is that he/she will not survive or be tortured if he/she will have to return. One needs to know not only the actual degree of the threat and danger but also the future risks in case he/she would be required to return. Thus, one has to forecast the probability of future threats against this refugee. Only based on such probability of future risks can one decide according to the law whether he/she has the right to get the status of a refugee. The challenge of administrative law often concerns the probability of facts in the future. Officers are usually required to take into consideration probable facts, such as e.g. climate changes which might happen in the future. In all these cases fact finding is as a rule the most difficult and therefore often contested.

3. Truth and Probability; Beyond any Reasonable Doubt

With regard to the truth one has in addition to ask a different question coming from a different, but the most important perspective. Namely we need to know what security is needed to examine the facts of the past or of the future. What probability is required with regard to pretended facts which happened or which might happen? Is one required to know the facts which prove the fact of the truth beyond any reasonable doubt or does one only need to establish a certain probability? Unfortunately, this question, which should be the core of a

[11] Cp. Welt Online vom 20. März 2008 <http://www.welt.de/welt_print/article1820121/Protest_gegen_Karfreitagsgebet_zur_Bekehrung_der_Juden.html>

procedure, is very seldom asked. Even the statutes regulating criminal or civil procedure in the continental legal systems often lack any condition requiring from the authorities or courts to determine what degree of probability they have to establish.

Yet one should always ask what security or what probability should be established in order to issue an administrative decision or a verdict in a trial. What kind of security is needed for an atomic power plant, or with what probability of riots we have to count when a town has to give a license for a demonstration, or decide police enforcement for a football game?

When a statute decides as to what degree of probability with regard to past or future facts are required, it determines what kind of evidences is necessary: Beyond any shadow of a doubt, beyond any reasonable doubt; with moral certainty or should there only be a reasonable suspicion or need their be a fair probability or a substantial chance? This issue of the burden of proof and the proceedings of hearings, the use of so called hearsay, is part of a legal education and training in common law countries, whereas in civil law countries this issue is much less in the focus of legal education.

The question regarding the truth implies an additional important question: Namely, who has the power to determine the truth; and what are the most credible or convincing procedures to get to the truth?

4. Who has to find the truth?

Who should have the power or the competence to find the truth? To this question we know of two contradictory answers. One is the answer which was introduced by the Catholic Church in the Middle Ages, saying that that the priests or bishops who hold a higher office in the hierarchy of the church are more capable to find the truth because as hierarchically higher they are considered also to be closer to God. This doctrine is shaped by the value of hierarchy. Accordingly even the civil servant of the Crown is considered to have a closer insight into the truth then the subject or citizen. It is this view, which was is influenced by the canonical thinking, that finally shaped the legal reasoning of the civil law system and mainly conceived administrative law procedures.

There is a German saying, that whom God endows an office it also gives the needed brain. The higher an office the more brain is given. With more brain one is also closer to the truth. In civil law countries the statutes delegate basically to the administration not only the duty but also the power to establish the truth of the relevant facts. Such principle is certainly influenced by this doctrine that the hierarchy is closer to the truth than the subject.

The Anglo-Saxon tradition is rather open to a more democratically conceived concept of the judiciary. The American constitutional right to a jury (Section 2 par. 3 and VI amendment) is to be seen in this context. Democracy in the Brit-

ish tradition was much more linked to the judiciary in earlier times than to the legislature. A jury composed of randomly chosen citizens of the democratic community to decide on the truth of the facts of a certain case reveals the conviction that the more the jury is embedded into the democratic background of the citizens, the more it can be credible in finding the truth. This tradition can be pursued back to the Magna Charta which already in 1215[12] guaranteed in Article 39 that freeman could be imprisoned only by their peers. Moreover, once a jury has decided on the facts, this "truth" can almost never be overruled.

In Switzerland of Middle Ages it was the famous philosopher Marsilus of Padova who professed the democratic wisdom that more eyes see more and better than only two eyes. According to this view, democracy is basically closer to the truth than hierarchy[13].

Who has better skills to find the truth: the Judges, the Jury, the people or the Parliament? We all know the famous legend of the wise judge Salomon from the Old Testament, which by the way can even be found in other cultures and traditions. Salomon not only constructed the first temple in Jerusalem. He is first and foremost known as a wise judge, who had to arbitrate the fight of two ladies before his court, both pretending that they are the real mother of a child. In order to find the truth Salomon proposes to cut the child in two halves and to give one part to each. As expected, with an outcry the real mother wants to protect the life of her child. Of course everybody would assume that the natural mother is also the real mother and that the real mother would never allow the child to be killed[14].

The trial in the Buddhist tradition follows similar lines: the judge places the disputed child in a chalk circle and asks each claimant to hold one of the child's hands and pull the child. This legend gave the famous author Berthold Brecht the content for a drama cold the Caucasian chalk circle. However in the drama peace of Brecht the judge is not a great and wise King. Judge Azdak is rather a judge for poor people. In addition, the "real mother" protecting the life of the child is not the genetic mother but the foster mother. It is indeed the maidservant Grusche of the claimant Vachnadze. The only interest of this genetic mother is to ask with her offspring her right to inheritance. In the end of the play of Brecht the foster mother gets the child because she loves it and for this reason she wants to save the life of the child, in order to leave it to the genetic mother.

How can one explain such contradictory trials? First we should ask who would have the qualification to function as a legitimate judge. What legitimacy would

---

[12] Cp. United States v. Gipson, Harvard Law Review 1977, S. 499-505.
[13] MARSILIUS VON PADUA, Defensor Pacis, Kapitel XIII, § 2,3,4.
[14] Old Testament, book of the Kings, Chapter 3, 16-28.

have had Salomon e.g. if he had been the father of the child? How could he judge in case he would have been the rival in love of the real father? Would one then also consider him to be an outstanding judge? These considerations are leading us again to the Bonham's case, mentioned in the introduction. Nobody can be judge in his/her proper cause. Thus the question whether Salomon is a wise judge does not only depend on his intellectual capacities and on his jurisdiction, but also on the fact whether he is an impartial judge.

Fairness is just only when it is seen to be done. (Justice must be seen to be done?) Only transparent courts with open proceedings are credible and legitimate. This does not depend on the hierarchical position of a judge. Also the poor-people judge Azdak has legitimacy if he is impartial and independent. However, justice is only seen, when those who judge between two adversary parties are also impartial arbiters. No judge should have any connection neither to the parties nor to the concrete case.

In addition courts need not only be impartial between the parties but also be independent from political power. They should neither get political credits or political discredits for their decisions. Neither the legislature nor the people can be a judge. If lawmakers could implement their law, the law would degenerate.

II. In what Procedure Should Courts Find the Truth?

1. Procedure for Faulty Human Beings

For today's courts neither Salomon nor Judge Azdak can help. For instance: it would just be cynical to require asylum seekers to offer evidence in order to proof their danger and the risk for their life within their home-country. What other possibilities might be available to find the truth without cynical requirements to the claimants? To answer this question we should first remind ourselves of the old wisdom of human beings: that we are all faulty human beings. This is why we have to constitute institutions and procedures which protect against the reality of the defectiveness of human beings. One should not delegate to institutions assignments and powers which could only reasonably be exerted by impeccable and integer human beings. If humans were perfect, they would not need guarantees for credible institutions nor fair procedures. Angels don't need constitutions and statutes. On the other hand, it would be futile to limit devils with constitutions and statutes. Humans are neither angels nor devils; they are rather adaptive creatures, which are able to learn from their failures, provided they have incentives to do so.

Institutions and procedures regulating how to establish the truth must be provided in such manner that adaptable but also defective humans can be controlled, because they include the necessary guarantees to make them accountable for their decisions.

How does such wisdom mach the requirement of an impartial and politically independent judge? Judges are also embedded in a procedure including parties, attorneys and peers of the court. Their verdict must be transparent, public and convincing. In addition courts are never inerrable. For this reason judgements of lower instances need to be contestable with a possibility of appeal to the higher instance. The obligation of judges to decide only according to the law does not protect against judicial error. However it is, as history teaches, the best protection against arbitrariness and law of the mob.

Institutions and procedures must rule and constrain us. They need to provide credible guarantees that we do not act ultra vires. This is in fact the fundament of the wisdom of a constitution and the lawmaking procedure of any modern polity. However, when constitutions do not respect this wisdom and instead of conveying powers to convincing institutions and procedures they empower unaccountable dictators; or if constitutions presume, as we very often can observe with dictators, that peoples should namely be ruled by integer and altruistic personalities in other words that "saints" should be installed to the throne, we should be reminded of Lord Actons famous warning: that power corrupts and absolute power corrupts absolutely. [15]

Even if the noblest philosophers in the sense of Platon ruled the polity they would sooner or later be caught up by this brutal reality. Lawyers need to be always aware of this human dimension and be able to learn from it in order to install realistic procedures and institutions.

2. Common Law and Civil Law

Given real nature of human kind, the next question to be raised is the following: Which procedure could provide us with the best guarantees in order to come as close as possible to the basic rule-of-law principles? With respect to this question, common law and civil law give us different answers. In the Anglo-Saxon world of the common law and mainly in the United States one would give us the following answer: Who wins the trial has right. In such a system the procedure must have the highest priority. Only the procedures which provide for both conflicting parties the same chances to win the outcome are considered just, fair and legitimate.

In the tradition of the civil law countries one would give the following answer: Those who have right should win the trial. Important in such case is less the

[15] Lord Acton in a letter to Bishop Mandel Creighton in 1887, in which as a catholic he contests the decision on the declaration of infallibility of the Pope 17 yeares before this declaration occurred with the famous sentence: „I cannot accept your canon that we are to judge Pope and King unlike other men with a favourable presumption that they did no wrong. If there is any presumption, it is the other way, against the holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men", cp. also. JOHN EMERICH EDWARD DALBERG-ACTON, Essays on Freedom and Power, Boston 1948, p. 364.

procedure than the judge who must be capable to know the legal system. Knowing the legal system judges and attorneys should have the insight to issue a verdict which gives the right to the party which has right. Apparently the fact finding procedure in such system is less important.

This different concept of law has apparently also different consequences with regard to the concept and goals of the legal education. Who educates lawyers in the common law tradition will have to train the students in order to give them the capacity to win the trial against the opposite party also represented by an excellent lawyer. According to our civil law tradition we have rather to explain to the students how they can find the good law applicable to a concrete case. It is the knowledge of the legal system which the students need to acquire. They have to become wise connoisseurs of the legal system. Anglo-Saxon education on the other hand will train them in order to empower them to win the trial and to develop students into solicitors who are brave fighters.

These antagonisms do affect also the rules regulating the procedure. The Anglo-Saxon criminal procedure is shaped by the so-called adversary system. According to this system, both parties need to fight for their view of the truth before a jury. If both have the same chances and if they are granted the same fairness, the one who has right will also win the case. This adversary system applies to criminal law and if possible even to administrative law.

In criminal cases of the inquisitory system of the continental civil law tradition the prosecutor representing the Government and defending public interests has a privileged position in the criminal procedure as he is not on the same level as the defendant. In its article 6 par 3 the European Convention on Human Rights provides some corrections with regard to the subjection of the defendant according to the inquisitory tradition. Only if both parties have equal chances the question whether the defendant has committed a crime can presumably be found at best taking into account our human failures.

The main problem of the procedure of the International Tribunal for the Former Yugoslavia on crimes against genocide and crimes against humanity (ICTY) is probably that it tries to combine common law procedures with civil law concepts. It replaces jury which is indispensable for criminal cases in common law by the judge and gives to him/her as well as to the prosecutor competences of the inquisitory tradition which are not known in the common law tradition.

With regard to the criminal and administrative law on the European continent we follow in general the tradition of the inquisitory procedure. In Switzerland it is e.g. Article 12 of the Statute on Administrative Procedure, which establishes the obligation but also the power to decide, which facts are true and relevant into the hand of the authorities. The authorities have to decide on the relevant facts of the past. But they are also competent to forecast the probable facts of the future.

Lawyers often not only have to find the truth of the past, often they need forecasting future facts with a certain probability. For example, constructing rules and regulations may prescribe that one can only get a license to build a house if this house will fit in future to the overall appearance of the locality. But how should the administration decide when it is asked to accept a demand for a license to build a house by the famous Austrian Hundertwasser who is used to build totally fancy houses not at all fitting to the normality. Will such house when it is built fit to the future locality of the environment? In this case the authority will have a large discretionary power forecasting the appearance of the locality in the future.

3. The Truth with regard to asylum Seekers

As the Swiss law on asylum seekers demonstrates, sometimes, the legislature takes it very easy with regard to the truth which has to be found. According to this law peoples fleeing from their country because of their risk of liberty and life have to be recognised as refugees.[16] However who reads the Swiss law on asylum seekers would thus expect that peoples, which are in fact in danger for their freedom or life would have to be accepted as refugees. But the decisive article 7 which regulates how the truth on their being endangered has to be found, does not say - as one would expect - "The authorities determine whether an asylum seeker is at risk for his life or freedom."

Because the fact finding in this area is extremely difficult, the legislature puts the burden of truth against the inquisitory principle to the asylum seekers which have to prove that they are in danger. This Article 7 namely says that asylum seekers need to give evidence of their situation of endangerment or they have at least to make this risk credible to the authorities. The exclusive burden imposed on the authorities according to the legislature is that they are just obliged to assess the credibility of the asylum seeker. On the other side, according to the ius cogens of the international law, the credibility of the asylum seeker should not at all be relevant. [17] The only relevant facts are his or her endangerment. Many asylum seeker suffering from the trauma of a particularly drastic threat of their life or torture may be much less credible than people who feel secure and are just for this reason much more capable to bluff their non-existing credibility to the authorities. The legislature has disburdened the authorities from their basic obligation according to our law on administrative procedure to examine the really relevant facts for asylum seekers which is their endangerment.

---

[16] „1 Refugees are persons, which are exposed to serious harms or which need to have reasonable fear to be exposed to such harms. " (transl. author)
2 Serious harms are threats to life corporal integrity, liberty as well as measures which cause insufferable psychological pressure. The special cases for escape for women are to be taken into account.

[17] Principle of non-refoulement, cp. GUY S. GOODWIN-GILL/JANE MCADAM, The Refugee in International Law, 3. ed., Oxford 2007.

This is in clear contradiction to the very principle of the inquisitory system. Either the truth has to be found in a procedure in which both parties have equal chances, and then the law or the statute determines who has the burden of proof; or the authority has the obligation to find the relevant facts, and then the subject can not be additionally burdened with a proof giving evidence of his/her endangerment.

The Swiss law on asylum seekers goes even beyond this limit. It liberates authorities not only principally to assess whether asylum seekers are in danger for their life. In addition the authorities only have to judge whether asylum seekers are credible. In other words: The authority only assesses to what extent asylum seekers are credible when they pretend that they are at risk for their life and freedom for political reasons.

D. What is Legitimacy?

Until now we have canvassed various aspects of the normative. We have examined who should be empowered and how the competent institution should find the truth. But have we already answered our first question: Why rebels, tyrants and dictators should fear lawyers? Here, we are still lacking the most important question: Namely on what grounds does a court or a legislature or an administration have the indispensable legitimacy to issue a verdict or to enforce decisions or administrative measures. Also with regard to this question we can again detect some insights from Shakespeare namely from his play of the merchant of Venice.

I. Legitimacy of the Law

1. The Merchant of Venice

In the play the Merchant of Venice the heartless creditor Shylock who requires cutting one pound of meet out of the chest of his insolvent debtor is duped by a smart judge. It would by the way be wrong to blame Shakespeare based on this piece of anti-Semitism. In this time, throughout Europe Christians were not allowed to give credits and to ask for interests; for this reason the Jews developed their skills for banking in Christian Europe. The same prohibition was valid for Muslims in the Ottoman Empire.

As a Jew, Shylock was at this time allowed to give credits and to ask interests for his loan. As in all other plays Shakespeare designs the character of individuals such as Kings, Princesses debtors, creditors or judges with their good and bad dimensions without generalising their character as a label for a religious or ethnic community.

However, for us it remains relevant in this play to examine the reasons the judge applied to the contract between the creditor Shylock and its debtor Anto-

nius. This contract gave namely Shylock the right to cut one pound of meet out of the chest of his debtor Antonius in case the debtor becomes insolvent.

Antonius never considers that he might become insolvent because he expected to get a high benefit from his lucrative shipload which floats at the high see. In any case he needed this fund in order to finance the dowry for the marriage of his daughter. Thus he committed to settle his debt as soon as the ships returned to the harbour. However he also agreed that, if he were not able to pay back in time, to offer Shylock a pound of meet which he could cut out of his chest.

Of course it comes as it must in such cases: The ships sank on high see and Antonius cannot pay back the credit. Now Syhlock thumps his right and heads with a butchers knife to the judge to summon Antonius to uncover his chest so that he could cut the promised pound of meet.

In the court, the daughter of Antonius Portia sits covered as a judge and advised by the legal scholar Belarius. Following the advice of Belarius Portia warns Shylock by proclaiming basic principles of law and justice: “For though urgest justice, I assure though that though will get justice and that though will have justice more than though desirest.”

Thus the judge insists that there is a law which is superior to the law which has been warranted in the written contract and Shylock should care for these principles. Now we should ask ourselves, what this law is which is considered superior to what has been contracted literally by the parties? To this question the judge Portia gives the following answer: “This bond give thee no jot of blood, the words expressly are a pound of flesh.”

One may consider Belarius as a nit-picking lawyer who has found the gap in the contract. However one can also interpret the contract in the light of universal principles of the rule of law and of human rights. Nobody has legitimacy to make a deal on immoral rights and obligations which violate basic principles of human rights and are in blunt contradiction to justice and the basic right to life and personal integrity.

Often – and they have a point – good lawyers are able to interpret positive law with subtle arguments. However, on can certainly reproach to the ICJ in the Kosovo case that by reducing the question of the General Assembly of the UN into a mere paper issue of a declaration without considering its factual exertion of the unilateral secession it was hair-splitting and wilfully ignoring the real issue of peoples claim to self-determination at stake. Such subtle arguments however are only justified when they finally bring together the issues at stake to the basic principles of the rule of law which is not at all the case for the ICJ decision on Kosovo.

One can only plead to one’s right in cases, when the written contract or the positive law is in accordance with the universal values. Against the diabolic claims of a Shylock nit-picking hair-splitting and whimsical arguments may be legitimate because courts are only legitimate if they protect the basic principles

of the rule of law. In the Kosovo case however there was no diabolic claim to the ICJ by the General Assembly of the UN. In addition the ICJ has ignored human rights of the minorities living in Kosovo which never had any access to justice to invoke their constitutional and international human rights to participate in decisions which have greatest human rights consequences for each individual living in a secessionist territory.

2. Antigone

To conclude: here is positive written law and there is also law superior to the positive law. In the famous old tragedy of Antigone from the ancient Greek writer Sophokles this tension and even contradiction between positive law made by the powerful ruler and the superior law emerges as a Greek dilemma. This tragedy and dilemma has fascinated intellectuals since the beginning of the European history for more than 2000 years.

What is it about? Antigone the incest daughter from Oedipus and his mother Iokaste wants to bury seemly her killed brother the former king of Theban Polyneikes as it has been prescribed to her by the gods. Polyneikes who has been thrown from his throne of Theban by his brother Eteokles wanted to revenge and defeat him in a battle to re-conquer the throne. Both brothers have been killed in this famous battle of Theban. Successor on the throne is Kreon the father of Haimon who is engaged with Antigone. This new king Kreon of Theban prohibits Antigone to bury her brother seemly and to ignore the rules prescribed the gods. As a punishment for all his atrocities - he orders - the vultures should dig into his cadaver lying on the field.

Already Hugo Grotius[18] mentions that in ancient times people could use their right to resistance against ruthless tyrants and prohibit their seemly funeral. During the reign of those tyrants people however were not allowed to resist their orders.

Antigone answers Kreon that the gods have commissioned her to bury her brother respectably. Invoking the law of the gods she refuses to comply with the positive law of Kreon and resists. She is convicted to death and immured alive. In her death cell she kills her self. Kreon repents his verdict but arrives too late to save Antigone. This is apparently the unsolvable Greek dilemma between tow contradictory obligations: the obligation of the positive law and the obligation of the gods.

This drama has initiated many artists to renew this conflict according to the corresponding historical times. Jean Cocteau already forecast in the early 20th century with his play on Antigone the later catastrophe of a totalitarian power which destroys basic values of justice. Jean Anouilh wrote a play on Antigone

[18] HUGO GROTIUS, De iure Belli ac Pacis, I. book, chapter ., XVI, 3,

in which Kreon represented the Vichy Regime and Antigone the French résistance. During the occupation of the Nazis in Paris Jean Anouilh had to concede many parts to the German censorship. After the war Berthold Brecht uses the story of Antigone to accuse the National Socialism. In his play Kreon is a Nazi.

How can the conflict between legality and legitimacy be solved?

The burglar puts his pistol on the chest of his victim and claims: either money or the life. The tax officer asks for the taxes due to the state and threatens to enforce the order by legal means. What is the difference? What distinguishes the mafia from the tax-officer?

We are aware that if we ask this question to the tax-officer we may get the famous answer of many bureaucrats: we have always done such things, we never granted any exemption, if we accept an exception then everybody would ask for an exception. A much more convincing answer to this question we can find in Max Weber's concept on legitimacy of state power:

II. The Legitimacy of State-Power

1. Max Weber

Max Weber developed the concept of for three different types of legitimacy: rational, historical and charismatic legitimacy.[19] The charismatic legitimacy is dangerous because it was the legitimacy of a Hitler and many other tyrants of our recent past. The historical legitimacy does not lead us any further. Crimes and atrocities committed in the past can never legitimate unjustness of the present.

The rational legitimacy however is based on the recognition of laws; they are considered to be justified because they have been properly enacted and are approved with rational arguments. However I would pretend that the action of the tax-officer to take away my money is not always justified. I assume in addition that at least the statutes which give him this power have been adopted in a rational and correct procedure and that they are constitutionally correct. This acceptance of legal obligation has its fundament according to Weber in the rational legitimacy. In order to have legitimacy the tax-officers have authority delegated by the Government which is also justified to enforce the laws. In fact the law which has delegated this power to the tax-officer is valid if it has been issued by the sovereign. But is there any law superior to the sovereign? This question can only be answered if we can explore the notion of sovereignty.

[19] THOMAS FLEINER/LIDIJA BASTA FLEINER (Fn. 6), p. 126 ff.; MAX WEBER, Die drei reinen Typen der legitimen Herrschaft, in: Gesammelte Aufsätze zur Wissenschaftslehre, Hrsg. J. Winckelmann, 3. Aufl., Tübingen 1968.

The British legal philosopher John Austin was of the opinion that sovereign is only the authority which can claim obedience from the greatest bulk of the society.[20] His follower Hart added to this view the logical consequence, namely that in order to have people complying with the law of the sovereign, they have to recognise the power of the sovereign and those recognized laws are justified and legitimate. Thus, only when laws are recognized by the great majority of people they are valid and legitimate. From this point of view the tax-officer can well be distinguished from the burglar. The burglar's claim to hand him the purse is not recognized but the claim of the tax-officer is backed by the sovereign.

However who is the sovereign? Is sovereign only the one who has the power or the might? To my opinion, sovereignty must build not only on *might* but also on *right*. However here again philosophers have conflicting concepts with regard to the question what has priority the law or the power. Is only might or only right sufficient or does true sovereignty need might to be supported by right?

This controversy I would like to answer with an analogy to the electric light given already in our book on constitutional democracy.[21] We can distinguish between two different types of bulbs. There are bulbs which need a lot of electricity in order to generate little light. But there are also new bulbs which can generate plenty of light however they need only little energy and are even sustainable for much more time. The same should count when we evaluate the sovereignty of a state; it should also according to my opinion be a guideline for good lawyers: We have to care that the sovereign can base its legitimacy on little power and force but rather on adequate justice, legitimacy and recognition.

2. Confucius

In this sense I would come to the conclusion and answer the initial question of legal reasoning of lawyers which have to be feared by dictators with a little story of Confucius. A pupil asks his master: "What is needed to rule a state?" Confucius answers: "needed are an army, food and trust." "Yes but if I have to disclaim on one of these three, which one could I relinquish?" His master answers: "one can abandon the army. Food, that is economy and trust are essentially needed for the survival of the state. Still curious, the pupil is not contented and asks: "Yes, but if of these two: trust and economy I have to waive one, which one could I rather abandon". The answer is: "economy. Trust is the absolute condition for any ruler of the state." [22]

Indeed without trust one cannot rule a polity. Trust for the law and the government made by the law was the dictum more than 2000 years ago and it should

[20] JOHN AUSTIN, The Province of Jurisprudence etc., New York 1965, p. 194.
[21] THOMAS FLEINER/LIDIJA BASTA FLEINER (Fn. 6), S. 345 ss.
[22] vgl. KUNGFUTSE, Gespräche, Übersetzung R. Wilhelm, Köln 1976, S. 123.

be and remain the dictum for any legal reasoning today. The lawyers committed to the principle that men should be ruled by law and not by men have to be feared by any tyrant.