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The Importance and Challenges of Values-Based Legal Orders

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Acknowledgments

My first words must be those of gratitude. I had the honor and privilege to participate from its beginning in the realization of the prestigious LL.M. program in Intercultural Human Rights established in 2001 by my highly esteemed friend and colleague Siegfried Wiessner, very soon effectively supported by Roza Pati. I exactly remember her as student, of course the best, of the first year, and Siegfried with his reliable glance for excellence immediately chose her for the performance of higher functions. To both of them I am deeply indebted for giving me the opportunity to spend so many months here at St. Thomas for teaching. If my teaching was enriching, it was so certainly for me. Further, I owe much gratitude to the whole Law Faculty, headed by Dean Garcia. Actually I had the pleasure to meet some of you serving as Deans during my stays in Miami, and I enjoyed the discussions with all of you a lot. Finally and in particular, I had the great honor to meet the President of this University, Monsignor Casale, not only at a very memorable conference in Bogotá, Colombia, but also on several occasions here at St. Thomas, and I am very honored that he is with us today.

I thank you all for the great hospitality and friendliness you have always extended to me, not least by organizing today's event. If I now terminate my annual engagement, it is not because I would have to complain about anything. On the contrary, I feel more familiar with this faculty than ever. But from the book of the preacher Solomon we all know that everything has its time.[1]

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[1] *Ecclesiastes* 3:1 (King James).

However, I could not leave this great School of Law without bidding farewell in an academic way, i.e., by a lecture. I have entitled my paper "The Importance and Challenges of Values-Based Legal Orders," containing some thoughts which have occupied me for quite a long time.

I. The Emergence of Values on the International Stage

Immanuel Kant, the great German philosopher of the Enlightenment, has stated that human beings as persons are characterized by having no price, but rather intrinsic value, i.e. dignity.[2] Perhaps this phrase was the starting-point of the value-laden debate we are conducting today. It is not only just norms and principles we are speaking about, rather we undertake to give them the character of values, certainly in order to make them stronger, more convincing, immune against doubts and restrictions, underpinning them with express moral authority, in one word: to make them more absolute (if the comparative form is permitted in this context). Especially after the Second World War, values, or perhaps better: norms and principles openly acknowledged as values, have made their way into numerous international and national documents. It is not difficult to see why this happened just at that time. The disastrous two World Wars, the Holocaust, this unprecedented "breach of civilization" or "breach of genus" ("*Gattungsbruch*"),[3] and the experience mankind has made with cynical and degrading right and left wing dictatorships led to the understanding that law must be founded and rest on a moral fundament.[4] This perception is admirably reflected in the Preambles of the United Nations Charter (1945)[5] and the Universal Declaration

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[2] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 42 (Karl Ameriks & Desmond M. Clarke eds., Mary J. Gregor trans., Cambridge University Press 1997).

[3] Rolf Zimmermann, PHILOSOPHIE NACH AUSCHWITZ 25 *passim* (Reinbeck 2005). The term "breach of genus" means the negation of the "common humanity of the human kind." *Id.* at 29, 43.

[4] GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 138 (Stuttgart 1956).

[5] U.N. Charter Preamble.

of Human Rights (1948)[6] and has entered many other international documents.[7] After all, it would have been difficult to understand, for example, that the right to conduct war at will (*jus ad bellum*) would still be an inseparable part of a State's sovereignty.[8] International law could not remain neutral against violations of international peace and security, and could no longer define inhuman and degrading treatment of individuals, be they their own citizens or not, as an expression of the sovereign will of a State, and therefore falling under its exclusive domestic jurisdiction (*domaine réservé*).[9] Regional treaties followed this path. For example, the Statute of the Council of Europe (1949) has established a triad of values which must be accepted by all member States (Article 3): pluralist democracy, rule of law (*Rechtsstaat*), and human rights;[10] the last is understood particularly as defined by the European Convention on Human Rights (1950).[11] Or, to give a more modern example: Article 2 of the Treaty establishing the European Union (in the version of the

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[6] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/60/1 (Sept. 16, 2005), Preamble.

[7] *See, e.g.,* International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

[8] *Cf.* Stephan Verosta, *History of the Law of Nations 1648 to 1815, in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 749 (Rudolf Bernhardt ed., 1995). This comprehension was a core element of the so-called Westphalian system of international law. *Id.* at 749-61.

[9] ECKART KLEIN, MENSCHENRECHTE: STILLE REVOLUTION DES VÖLKERRECHTS UND AUSWIRKUNGEN AUF DIE INNERSTAATLICHE RECHTSANWENDUNG 23-26 (1997); Johan D. van der Vyver, *Sovereignty, in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 379, 394-400 (Dinah Shelton ed., 2013).

[10] Statute of the Council of Europe art. 3, May, 5 1949, 87 U.N.T.S. 103, E.T.S. 1 ("Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council . . .").

[11] Christian Tomuschat, *Democracy and the Rule of Law, in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 469-70 (Dinah Shelton ed. 2013); *see also* Eur. Conv. on H.R. *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf.

Lisbon Treaty, 2007) is actually igniting a firework of values.[12] It maintains that the Union is founded on the values of respect for human dignity, liberty, democracy, equality, rule of law and respect for human rights, including the rights of persons belonging to minorities. [13] And it continues: "These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[14]

Likewise, post-war national constitutions have taken this path. I just remind you of the Basic Law of the Federal Republic of Germany (1949) whose first Article contains the famous dedication to human dignity, reading: "Human dignity shall be inviolable. To respect and to protect it shall be the duty of all state authority."[15] At the same time, human dignity is recognized as the fountain-head of all human rights. In this sense, the Basic Law states: "The German people therefore [sic] acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world."[16]

II. Specific Problems Relating to Values

Before debating how values may be effectively protected, I would like to draw your attention to four principal and difficult issues generally connected with values. They give an idea that dealing with values is not just an easy endeavor. I shall explain what I mean by taking as example human rights which are widely recognized as genuine values.

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[12] Christian Calliess, *Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht [Europe as a Community of Values-Integration and Identity through the European Constitution]*, 59 JURISTENZEITUNG 1033, 1037 (2004) (Ger.).

[13] Consolidated version of the Treaty on European Union, 2012 O.J. (C 326) 13, 17.

[14] *Id.* at art. 2.

[15] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW], May 23,1949, BGBl. I, art. 1(1) (Ger.).

[16] *Id.* at art. 1(2).

1. Human rights, by their very nature, claim universality.[17] Human rights are the most globalized project one may think of. However we know that this claim is rejected by all those who regard this claim as just another form of Western imperialism, proclaiming their own African or Asian values.[18] Apart from the fact that such a proclamation of those values is in most cases based on the arguments of the rulers and not the governed,[19] one cannot deny that in different parts of the world different moral convictions and values exist, and the question arises of how we can deal with this problem.[20]

2. Moreover, we have to see that divergent views on values do not only exist between the Western world and African or Asian countries, but also within the Western part of the world and even within the same region or even country.[21] Denial of values is not the only way of their weakening. Different interpretation may lead to similar results. A good example is presented by the right to life. We know the different views on death penalty and euthanasia on the one hand and abortion on the other.[22] One may agree that international

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[17] Chris Brown, *Universal Human Rights? An Analysis of the 'Human Rights Culture' and its Critics*, *in* UNIVERSAL HUMAN RIGHTS? 31, 31-32 (Robert G. Patman ed., 2000); Eckart Klein, *Universalität der Menschenrechte*, *in* LEITGEDANKEN DES RECHTS 475 (Hanno Kube et al. eds., 2013).

[18] CULTURAL HERITAGE AND HUMAN RIGHTS 4 (Helaine Silverman & D. Fairchild Ruggles eds., 2007) ("It was particularly resisted in non-Western countries that objected to the very idea of universal standards externally imposed because they regarded these standards as reflecting not so much universal as Western values and codes of behavior.")

[19] Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT'L L. 593, 627 (1997) ("The President of Sri Lanka, Mrs. Chandrika Kumaratunga, has expressed the view that 'the free market has become universal, and it implies democracy and human rights.' Asked whether this statement does not imply a preference for 'Western values' over Asian ones, she said that, 'of course, every country has its own national ethos, but in the modern world, it is largely cultural, not a political system, When people talk about a conflict of values, I think it is an excuse that can be used to cover a multitude of sins.'")

[20] JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 109 (Cornell University Press, 1989). *See also* EVA BREMS, HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY 27 (2001).

[21] CHRISTIAN TOMUSCHAT, HUMAN RIGHTS BETWEEN IDEALISM AND REALISM 58 (Oxford University Press, 3d ed. 2014).

[22] Kathryn L. Tucker, *Give Me Liberty at My Death: Expanding End-of-Life*

rules should be framed more broadly, leaving a margin of appreciation for the States concerned,[23] but national rules and, finally, the courts have to take a decision whether a certain action or omission is legal or not.

3. Then we have the question of the hierarchical order of values.[24] Do some values trump other colliding values? Sometimes courts, such as the European Court of Human Rights,[25] have held that life is the highest value, but we all know that the right to life can be restricted, and this is not only true for States which are still applying the death penalty.[26] If life would be the highest value, no State could order its soldiers or firemen to risk their lives in the performance of their duty. In fact, the European Court of Human Rights has never drawn real consequences of its assessment, but has decided the cases on the basis that the right to life is not an absolute right, but has limits.[27] The text of the European Convention affirms that the right to life is not unlimited:

Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence;

Choice in Massachusetts, 58 N.Y.L. SCH. L. REV. 259, 260-261 (2014) (euthanasia); *see also* Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences* (death penalty), 41 AM. J. CRIM. L. 189 (2014); Matthew S. Bowman & Christopher P. Schandevel, *The Harmony Between Professional Conscience Rights and Patients' Right of Access*, 6 PHOENIX L. REV. 31, 32-33 (2013) (abortion).

[23] *See* Yval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907 (2005); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 706 (2006).

[24] *See* Theodore Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. (1986); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006); Eckart Klein, *Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy?* 41 ISR. L. REV. 477, 480 (2008).

[25] Streletz et al. v. Germany, 409 Eur. Ct. H.R. 72, 94 (2001).

[26] Douwe Korff, *The right to life*, HUMAN RIGHTS HANDBOOK, (2006), http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-08(2006).pdf.

[27] *Id.*

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection.[28]

Thus, in practice, the Court has to balance the rights and values at stake, including the right to life, under the aspect of the proportionality principle,[29] and must not, according to a non-existing hierarchy of human rights, let prevail *a priori* the right to life over other values. There is one exception: Under no circumstances may human dignity be infringed upon. This is not only recognized in the German Constitution, which excludes any balancing of rights if human dignity is encroached upon; rather, human dignity trumps any other right or value.[30] In the same way, international bodies are likewise very strict in prohibiting torture under any circumstances, as the prohibition of torture is a direct and genuine emanation of human dignity.[31] Therefore, torture, even if used for the saving of the lives of others, is clearly illegal under international law.[32] Generally, however, law must be flexible to be able to react in a reasonable way to the various individual cases, since balancing the interests, rights and values at stake is unavoidable, because the legislator, whoever it is on the domestic or international plane, is unable to foresee all the possible conflict constellations.

4. Lastly, and this is probably the most serious point, we have to realize that values have the tendency to assess foreign values as non-values. Values claim to be true (not just right). Values are hostile to compromises. One cannot balance truth with untruth. It is

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[28] European Convention on Human Rights, Art. 2, June 1, 2010, Eur. Conv. H.R. *See also*, *id.* at Art. 15. *Cf.* International Covenant on Civil and Political Rights, G.A. Res. 14668, U. N. Doc. A/RES/2200 (XXI) (Mar.23,1976).

[29] Yutaka Arai-Takahashi, *Proportionality*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 446 (Dinah Shelton ed., 2013).

[30] Bundesverfassungsgericht [BVerfG][Federal Constitutional Court] Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 266 (293).

[31] Eckart Klein, *Human Dignity – Basis of Human Rights*, *in* COEXISTENCE, COOPERATION AND SOLIDARITY 437, 446 (Holger P. Hestermeyer et al. eds., 2012).

[32] ECtHR (Grand Chamber), Judgment of 1 June 2010, Gäfgen v. Germany, Appl. No. 22978/05, RJD 2010-IV, p. 247 (para. 87). *See also* ICTY, Chamber, Judgment of 14 January 2000, IT-95-16-T, para. 520 – Furundžija.

for this reason that the well-known — but also, because of his behavior during Nazism, notorious — constitutional lawyer Carl Schmitt spoke of the "tyranny of values."[33] Like tyrants, values are prepared to negate or even eliminate everything that is opposed to them. Fundamentalists are value-driven. We have a lot of examples for that in our world of today as we had in the past. It is evident that this phenomenon is, or at least can be, very dangerous for a peaceful community life. Therefore values have to be tamed. If they form not only guidelines for the private life of an individual, but also enter the social sphere, they must be made compatible with values shared by others. Here law comes into play. Law, however, has not only a taming function, but by the same token it also serves as a very important, perhaps even the decisive mechanism to give effect to values.

III. Law's Taming and Protecting Mechanisms

1. How can this taming process succeed? Values have to be translated into legal norms, institutions and legal policies. As legal norms they can be framed in view of the rights of others and the community, i.e. limits and restrictions can be defined, they can be understood according to the rules of legal interpretation, they can be handled and applied to individual cases. Transformation of values into legal rules does not only serve their respect and application in practice, but also gives them at the same time a legally controlled effect, provided that the law-applying bodies, including and particularly the courts, are able to perform their specific functions.[34] Thus, legally tamed values get manageable, as they, generally, will lose their claim to be absolute. By becoming part of the legal order concerned (national or international), they have to fit into this ambit, and, in this sense, get domesticated. They have to be integrated into

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[33] CARL SCHMITT, EBERHARD JÜNGEL & SEPP SCHELZ, DIE TYRANNEI DER WERTE 9 (1979).

[34] If the courts are dependent on the political forces, the transformation of values into legal rules cannot deploy its taming effect; on the contrary, the tyrannical value gains strength vested with the force of law.

the legal system as a whole. For the legal order of a free and democratic society it is inherent that it recognizes that it is lacking the certainty to know the truth. Rather, it ought to accept that it may fail. Infallibility is only claimed by totalitarian States. All this does not mean that values enshrined in legal norms are no longer values, but their value character can take effect beyond the private sphere only through the filter of the respective legal rule.

2. By the following remarks I wish to point to two mechanisms through which the German Federal Constitutional Court is giving effect to the values protected by legal norms. I choose, for demonstration, the fundamental rights contained in the Basic Law. Primarily, the basic or fundamental rights are featured as subjective rights. Individuals are not only the holders of these rights, but may directly invoke them before the national bodies, particularly the domestic courts.[35] Now, the Federal Constitutional Court has drawn an interesting consequence from the perception that the basic rights are reflecting values, going far beyond the understanding of basic rights as mere subjective rights. The Court has held that the values reflected by the rights form an objective order of values that is not restricted to the basic rights themselves, but is spreading through all branches of the domestic legal order—private, criminal and public law.[36] As part of the objective law, the values being framed into legal norms are not dependent on their invocation, but must automatically be respected and applied by the courts. Thus all domestic legal rules have to be interpreted in the light of the basic rights values, and if the courts fail to do so this failure will amount to a violation of the constitution, and if individuals are affected by such failure, they may take the chance of using the individual complaint procedure before

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[35] By the way, not only can rights guaranteed under national law be directly invoked, but also rights protected on the basis of international treaty law, as far as the treaties have been ratified by Germany and no reservation has been declared in this respect; *cf.* Eckart Klein, *Germany*, *in* IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECTHR IN NATIONAL CASE-LAW 185, 196 (Janneke Gerards & Joseph Fleuren eds., 2014). Article 25 of the Basic Law is the normative foundation for the direct applicability of human rights based on customary international law.

[36] BVerfG Jan. 15, 1958, 7 BVerfGE 198 (205).

the Federal Constitutional Court.[37]

3. According to the jurisprudence of the Federal Constitutional Court, another consequence follows from the concept of the objective order of values. Basic rights entitle individuals, but do not obligate them.[38] It is therefore not possible to make private persons direct addressees of the obligations resulting from basic rights norms. The addressee of the obligation is only the State or, more generally speaking, public authority.[39] The German Court has always rejected the notion of a direct horizontal effect of the basic rights (*unmittelbare Drittwirkung*).[40] International human rights law takes the same stance. The U.N. Human Rights Committee has expressly identified only the States as the obligated addressees of the Covenant rights.[41] This opinion is legally well founded, but it presents problems. We know that not only States have sufficient power to interfere with the values protected by the rights, but also non-state actors which are sometimes even more powerful than States.[42] We know the discussion about Transnational Corporations (TNCs) and the different attempts which are made to bind them by human rights norms.[43] The 2011 Report of John Ruggie to the Human Rights Council, a sub-organ of the U.N. General Assembly, has certainly disappointed many people and NGOs, but arguing from the basis of the existing law it rightly denied a direct obligation of TNCs to abide by international human rights norms.[44] The way out

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[37] BVerfG, Mar. 26, 1987, 74 BVerfGE 358 (370); BVerfG, Oct. 14, 2004, 111 BVerfGE 307 (328).

[38] BASIC LAW, *supra* note 15.

[39] *See* BASIC LAW, art. 1(3) ("The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law").

[40] BVerfG, Apr. 23, 1986, 73 BVerfGE 261 (269).

[41] General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 8, U.N. Doc CCPR/C/21/Rev. 1/Add. 13 (26 May 2004).

[42] *See* David Weissbrodt, *Roles and Responsibilities of Non-State Actors, in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 719, 725 (Dinah Shelton ed., 2013).

[43] DENISE WALLACE, HUMAN RIGHTS AND BUSINESS: A POLICY-ORIENTED PERSPECTIVE 215 (2015).

[44] *See generally*, Special Representative of the Secretary-General, *Report of*

of this dilemma is offered by an idea that again is based on the concept of an objective order of values reflected by the rights. If human rights create such an objective order of values that is penetrating the entire legal order, one may argue that the State not only has to respect the values reflected by the rules, but it also has to protect and ensure them. Thus it is and remains the State which is responsible that the enshrined values are respected by everyone, including juridical and natural persons who can and must be obligated by the laws of the State. The German Federal Constitutional Court has developed this solution on the basis of the objective order of values, and international jurisprudence has found a very similar way to close a dangerous gap in the protection of human rights.[45] Therefore, at the end of the day, national and international human rights obligations do not remain meaningless for individuals and other non-state actors, but they have to be translated into legal norms by and of the States that have the natural potential to bind all those who are subject to their jurisdiction. It is a mere question of the political will of the States. The outcome of the case of *Kiobel v. Royal Dutch Petroleum Co.,* decided by the U.S. Supreme Court in 2013, does not have to be the last word.[46] Thus the duty of the State to protect the values contained in the human rights catalogues by its legislation is the key to make human rights effective also in interpersonal relationships.

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the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/17/31, (21 March, 2011), endorsed by UNHRC Res 17/4 (6 July 2011).

[45] *See generally,* the various contributions to THE DUTY TO PROTECT AND TO ENSURE HUMAN RIGHTS: COLLOQUIUM (Eckart Klein ed., 2000).

[46] *Kiobel v. Royal Dutch Petro. Co.,* 133 U.S. 1659, (2013). For discussions of this ruling, see Anupam Chandler, *Agora: Reflections on Kiobel Unshackling Foreign Corporations: Kiobel's Unexpected Policy*, 107 AM. J. INT'L L. 829 (2013); Julian G. Ku, *Kiobel and the Surprising Death of Universal Jurisdiction under the Alien Tort Statute*, 107 AM. J. INT'L L. 835 (2013); Ralph G. Steinhardt, *Kiobel and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT'L L. 841 (2013); Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 AM. J. INT'L L. 846 (2013); Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*, 107 AM. J. INT'L L. 852 (2013); Vivian Grosswald Curran & David Sloss, *Reviving Human Rights Litigation after Kiobel*, 107 AM. J. INT'L L. 858 (2013).

IV. Collision of Values

1. Another problem we have to tackle is the collision of values. Different values can be very contradictory, at least in certain situations. Since values, as we have seen, claim to be absolute and refuse compromises, any collision tends to become a real clash that cannot be easily overcome. Without a hierarchical order of values which would present *a priori* solutions (but we do not have such a hierarchy),[47] we have to come back to the concept of the transformation of moral to legal values becoming part of the respective legal order and manageable for application within a legal setting. The benefit we get from the legal rules (in contrast to pure values) consists of the chance to discern the peculiarities of each individual case and to react to them in a proportionate and controlled manner.

2. I would like to give you two examples, one from the area of international law, while the other one concerns a highly disputed case decided by the German Federal Constitutional Court. Peace and human rights do not only reflect moral values, they have found their way into legal norms, be they conventional rules, customary international law or general principles of law, all of them recognized sources of international law. Of course, peace and human rights are not contradictory as such, they do not convey different messages, quite the contrary: The great post-war international legal documents clearly connect the maintenance of peace with the respect of human rights, indicating that one is the precondition of the other and *vice versa*.[48] Still, in specific situations both values, legal values now, may enter into conflict with one another. You all are well aware of such hard cases. Think of the horrible events happening just now in the northern part of Iraq and Syria where a fundamentalist movement has established a caliphate and tries, with unbelievable cruelty and brutality, to destroy everything and to kill everybody not in

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[47] *Supra* note 24.

[48] *See, e.g.*, U.N. Charter Preamble; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/ 217(III) (Dec. 10, 1948).

conformity with their own values.[49] This is also an example of the stark destructive effect of untamed values. Any effective decision to stop these outrageous atrocities will have to include the use of military force in one way or the other. Use of force does principally not correspond with the claim for peace,[50] and therefore this conundrum leads to the much debated issue of whether use of force is permitted in order to protect individuals in other countries against serious violations of human rights without the authorization of the government concerned or of the U.N. Security Council.[51] There is no *a priori* solution telling us whether it is more important not to militarily intervene than to save lives or protect other rights of the population concerned, and the Responsibility to Protect (R2P) principle does not help either to find a general answer.[52] There is no hierarchy between the prohibition of the use of force and the protection of human rights. Rather it is reasonable, even necessary to have the chance to assess and balance the legal values at stake. The question of the admissibility of humanitarian intervention cannot be answered negatively or in the affirmative once and for all. The decision gets still more difficult, if one takes into account that any use of force to protect human rights will nearly unavoidably result in other, though undesired, human rights violations. All these aspects have to be considered when relevant decisions are to be taken.

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[49] *See generally* DEFENCE COMMITTEE, THE SITUATION IN IRAQ AND SYRIA AND THE RESPONSE TO AL-DAWLA AL-ISLAMIYA FI AL-IRAQ ALSHAM (DAESH), 2014-15, H.C. 690, at 54 (U.K.); Zachary Laub & Jonathan Masters, *Islamic State in Iraq and Greater Syria,* Backgrounders, COUNCIL ON FOREIGN RELATIONS (Jun. 12, 2014), *available at* http://www.cfr.org/iraq/islamic-state-iraq-greater-syria/p14811.

[50] U.N. Charter, art. 2, para. 4.

[51] *See, e.g.,* Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Ramesh Thakur, *The Use of International Force to Prevent or Halt Atrocities: From Humanitarian Intervention to the Responsibility to Protect*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 815 (Dinah Shelton ed., 2013).

[52] Ingo Winkelmann, *Responsibility to Protect*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL Law 965 (Rüdiger Wolfrum ed., 2010), *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1464?rskey=qrQ7ku&result=6&prd=EPIL; ALEX J. BELLAMY, THE RESPONSIBILITY TO PROTECT (2009).

3. The other example relates to the limits which may be drawn to basic or human rights in order to protect the security of others or the community. The problem has gained momentum in times of national and international terrorism. Following the events of 9/11, the German legislature passed the Air Security Act of 2005.[53] According to one of its provisions, the German Air Force was authorized to shoot down an aircraft that apparently was being used to commit a terrorist act directed against the lives of human beings.[54] The case was brought before the Federal Constitutional Court. The Court, just one year later, declared the relevant provision of law unconstitutional and null and void.[55] The Court held that the aircraft could be shot down, if only terrorists were on the plane.[56] Here, the balancing of the lives of the terrorists against the lives of other people on the ground would result in a decision in favor of the latter. If, however, innocent passengers were on board of the plane, the shooting down of the aircraft would violate not only the lives of those passengers, but also their human dignity.[57] Human dignity means that human beings must not be treated as mere objects (here the Court refers openly to Kant's philosophy).[58] But just this would happen if the life of the passengers and members of the crew were used by the State in order to protect the lives of others. This use in favor of others would deprive them of their rights, reducing them to mere objects, ignoring their subjectivity endowed with dignity and inalienable rights.[59] Of course, one may welcome such a clear statement in favor of human dignity. On the other hand, one may doubt whether the invocation of the human dignity rule was appropriate in this concrete case. At any rate, the reasoning of the Court has opened a serious security gap, clearly admitted by the Court itself.[60] This is all the more grave as this gap cannot be closed

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[53] Luftsicherheitsgesetz [Air Security Act], BGBl. 2005 Part I, at 78.

[54] Sec. 14, para. 3.

[55] BVerfG, Feb. 15, 2006, 115 BVerfGE 118.

[56] *Id.* at 160-64.

[57] *Id.* at 152.

[58] *Id.* at 153.

[59] *Id.* at 154.

[60] BVerfG, Mar. 20, 2013, 133 BVerfGE 241 (260).

by any legal act, because even a constitutional amendment would fail in view of the human dignity clause invalidating any rule that would amount to an infringement of human dignity.[61] Any balancing of the rights concerned is excluded when human dignity comes into play. Here we have the only case where the value enshrined in the legal norm has retained its original power and claim to absoluteness.

V. Different Layers of Value-Laden Legal Rules and their Interpretation

There is a further problem that is complicating our deliberations. Values transformed into legal rules gain legal authority, but by the same token they are subject to interpretation by the relevant authorities, especially the courts. We know that courts may hold different opinions on the same matter. This fact does not create major difficulties as long as there is a supreme court, or whatever is its designation, which may give an authoritative interpretation and decision that is final and binding. This legal situation will be usually guaranteed within a national legal order. The problem I am thinking of originates from the existence of different layers of value-laden legal rules and bodies competent to interpret and apply these rules, and from the interrelationship of these layers.

If I may take up again the example of Germany on the one hand and of human rights as the genuine incarnation of values on the other, one will easily see what I mean. We have first, on the national plane, the basic rights protected by the federal constitution (and, additionally, the constitutions of the single states); it is up to the domestic courts to interpret and apply them.[62] Then, on the regional basis, we have the rights contained in the European Convention on Human Rights[63] and the European Court of Human Rights in

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[61] BASIC LAW, art. 79(3)("Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.").

[62] *Id.* at art. 93.

[63] European Convention on Human Rights and Fundamental Freedoms, Sept.

Strasbourg competent to hand down final and binding judgments against the States parties to the Convention. Still on the regional level we have the European Court of Justice in Luxemburg, the Court of the European Union (EU), which is also concerned with the protection of human rights as far as they have to be applied against the Union itself or against the member States as far as they have to apply Union law. The relevant human rights have been first developed by the Luxemburg Court from the common constitutional principles of the member States and the European Convention on Human Rights, but the member States of the EU have also enacted the Charter of Fundamental Rights of the European Union containing a rather large catalogue of human rights and fundamental freedoms.[64] Finally, we have on the universal level a long list of treaties, from the International Covenants on Civil and Political Rights[65] and Economic, Social and Cultural Rights of 1966[66] up to the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[67] All these treaties have established monitoring mechanisms, committees which have the task to examine whether the States parties are respecting and protecting the rights recognized by the respective treaty, and some committees are even entitled to consider communications from individuals who claim to be victims of a violation of any of the recognized rights by a State party. Although the emanations of these monitoring bodies are not legally binding, they do not lack any legal effect.[68] The States parties would violate their obligations if they would not seriously consider

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3, 1953, adopted 1950 in the framework of the Council of Europe.

[64] The Charter entered into force together with the Lisbon Treaty on 1 December 2009.

[65] International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 UNTS 171.

[66] International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 UNTS 3.

[67] International Convention for the Protection of All Persons from Enforced Disappearance, *opened for signature* Feb. 6, 2007, 61 U.N.T.S. 448.

[68] *See* U.N. Human Rights Committee, General Comment No. 33 on The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, paras. 12 – 15, U.N. Doc CCPR/C/GC/33 (5 November 2008).

what the bodies have to say and give good reasons in case they will not accept the results of the examination.

If you now take all this together we see that Germany's legal order, and of course that of many other States, has become not only part of a multi-leveled system of values, national, regional and global, but also part of a multi-leveled system of different jurisdictions which may hold different opinions on the understanding of the human rights rules. In order to find a way out of this seeming disorder it is important to coordinate the different legal norms as well as the jurisdictions. Concerning the relevant rules I only wish to point out that the Federal Constitutional Court has held that the European Convention on Human Rights—though only having the legal rank of a federal statute—has to be taken into account in the context of the interpretation of the Basic Law's fundamental rights.[69] Not doing so would lead to a violation of the constitutional norm itself. Generally the same is true with regard to the human rights norms in other regional or universal treaties, but we do not have the same amount of jurisprudence concerning those treaties as was developed under the European Convention. In the same way, the Federal Constitutional Court takes the jurisprudence of the European Court of Human Rights as authoritative interpretation of the rules of the Convention. This means that the rights of the Constitution must be interpreted in the light of the corresponding rights of the Convention as understood by the Human Rights Court.[70] Thus a close cooperation and coordination among the jurisdictions and the legal instruments has been established to avoid clashes. However, at least theoretically, those conflicts cannot completely be excluded. According to the relevant decisions of the Federal Constitutional Court any taking into account of a judgment of the European Court would not be possible if it cannot be reconciled with the Constitution itself.[71] The Federal Constitutional Court marks this "red line" with the term "reservation of sovereignty".[72] It is difficult to see that a

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[69] BVerfG Mar. 26, 1987, 74 BVerfGE 358 (370).

[70] BVerfG, Oct. 14, 2004, 111 BVerfGE 307 (328).

[71] *See* BVerfG, Oct. 22, 1986, 73 BVerfGE 339; BVerfG, Oct. 12, 1993, 89 BVerfGE 155.

[72] BVerfG, Oct. 14, 2004, 111 BVerfGE 307 (319).

judgment of the European Court could under no circumstances be brought in line with the requirements of the Constitution. At any rate, until now no such situation has arisen. One has certainly made progress in the acknowledgment of the underlying idea of human rights, namely human dignity, even if the rights themselves are enshrined in different legal instruments on various levels. The rather close judicial cooperation among the constitutional courts in Europe and the two European Courts in Strasbourg and Luxemburg has certainly contributed much to a more common, shared understanding of human rights.

VI. The Change of Values and its Impact on the Legal Rules

1. One last point remains to be discussed. It concerns the change of values or their inherent moral convictions and its impact on the legal rules. *Prima facie* legal rules are independent of their moral grounding. If they have entered into force they are binding notwithstanding any moral reservation a person may have against them. On the other hand, if there is continuous opposition against a legal norm and this objection is supported by a relevant part of the population, the rule, already before its official abolition, may fall into disuse, become obsolete. Such a development will mostly be based on a change or lapse of the moral basis of the norm. Homosexuality provides a good example. When I studied law in the middle of the sixties of the last century (or should I say millennium?), homosexual acts between consenting adults were still considered crimes, but were no longer prosecuted in practice. Only in 1969 the German criminal law was formally changed.[73] Today, now in the field of private law, we have a similar development as far as same sex marriage is concerned.[74] In many societies, the moral opinion on this issue is still deeply divided, while other societies, especially, but not only, of the

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[73] BGBl. 1969 Part I, at 645.

[74] In Germany, same sex marriage is still not allowed, but a quite parallel legal status has been created by the federal statute on life partnership in 2001, BGBl. 2001 Part I, at 266.

Islamic world, are clearly opposed to such a development.[75] Still, despite all possible objections, the evolution of the moral persuasion in the Western hemisphere is fairly easy to predict. Law may, at least for some time, try to delay or even impede moral change. Actually, one should not forget that law, by itself, has some educative function as it can make people think of the propriety of a certain rule. But in the long run, a corresponding conviction must evolve or the norm will lose its legitimacy and authority. The extension of cases of admissible abortions and euthanasia presents other (and in my personal view: sad) examples of vast changes of moral convictions which undoubtedly will leave their traces on the law.

2. Let me finally ask what could or should be the role of the courts, particularly the constitutional courts and international courts or bodies, in this field of interaction between morals, values and law. Generally speaking, I would not recommend that the courts should be the protagonists in this field. However, one may assign to the national courts a role a bit more audacious than that of their international counterparts, because the former can probably better survey and assess the consequences of their interpretive steps. Still in most, if not all morally and controversially debated cases, the German Federal Constitutional Court did not act as a pioneer for constitutional change, rather took account of a moral evolution that had already taken place. Again, the cases concerning homosexuality and also transsexuality are good paradigms.[76] Courts trying to assess the right point of time for a possible change of their jurisprudence would also be well advised to look beyond their national borders. Of course, foreign developments cannot directly influence national law, but they may indicate a more general evolution in the world or at least their neighborhood which might become relevant now or in the future for the interpretation of the nation's own law. Neither

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[75] HOMOSEXUALITY AND RELIGION: AN ENCYCLOPEDIA (Jeffrey S. Siker ed., 2007) at 6.

[76] *See* BVerfG, May 10, 1957, 6 BVerfGE 389 (422) (regarding homosexuality); BVerfG, Oct. 2, 1973, 36 BVerfGE 14 (45) (regarding homosexuality); BVerfG, Oct. 11, 1978, 49 BVerfGE 286 (regarding transsexuality); BVerfG, May 16, 1982, 60 BVerfGE 123 (regarding transsexuality).

individuals nor States live on a solitary island of the blessed untouched from everything that is happening around them.

3. Understandably, the international courts and bodies will be, at least generally, more reluctant as to any interpretation that would pave the way for new developments. The reason for this hesitation is that too progressive a jurisprudence (the term "progressive" may be doubtful in some cases) might be opposed by quite many States parties, and the respective treaty or convention might lose the necessary political support. On the other hand, all international bodies concerned with human rights protection pursue the idea that human rights are evolving instruments that "must be interpreted in the light of present-day conditions."[77] But what are in a community of different States and societies the "present-day conditions," and how can they be assessed? Let us take the jurisprudence of the European Court of Human Rights as the basis for our discussion.

- First, the Court openly declines to create new rights. Thus, it has refused to derive the right to divorce from the right to enter into a marriage,[78] the right to die from the right to life,[79] and the right to acquire property from the right to property.[80]

- Second, the Court is very reluctant to give a legal institution a new substance, for example, by extending the concept of "marriage" traditionally understood as a life-long union between a man and a woman to homosexual partnerships. At least until today, the Court has shied away from doing so. In a relevant judgment of 2010 it held that: "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another.

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[77] Tyrer v. UK, 23 Eur. Ct. H.R. (ser. A) (1978). *See, also* Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) (1979); U.N. H.R.C., Judge v. Canada, Comm. No. 829/98, U.N. Doc. CCPR/C/78/D/829/1998 (2003). *Cf.* Konstantsin Dzehtsiarou & Conor O'Mahony, *Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court*, 44 COLUM. HUM. RTS. L. REV. 309, 319 (2013)

[78] Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) (1986).

[79] Pretty v. The United Kingdom, App. No. 2346/02, Eur. Ct. H.R. (2002) at para. 39.

[80] Fabris v. France, App. No. 16574/08, Eur. Ct. H.R. (2013).

The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society."[81] By the way, the U.N. Human Rights Committee in a case against New Zealand (2002) also did not find a violation of the right to marry (Article 23, para. 2, ICCPR), if the State does not permit a homosexual marriage.[82]

- Third, the European Court does not give an uncontrolled margin of appreciation to the States parties. Rather, as the Court has said in a new judgment (regarding inheritance rights of children born out of wedlock), it "must . . . have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved."[83] The elements of this consensus are mainly found in the legislation and jurisprudence of the States parties.

- Fourth, the case of *Goodwin v. U.K.* (2002) may be referred to as "perhaps the leading Strasbourg exemplar of evolutive interpretation."[84] In three cases, all directed against the U.K., the Court between 1986 and 1998 had found that in the European States was "little common ground" as to the rights of transsexuals, even if the law was "in a transitional stage".[85] But in *Goodwin* the Court changed its opinion,[86] though at the time only 54% of the States parties expressly permitted postoperative transsexuals to marry, 14%

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[81] Kopf v. Austria, App. No. 30141/04, Eur. Ct. H.R. (2010) at para. 62.

[82] U.N. H.R.C., Joslin v. New Zealand, Comm. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (2002).

[83] Fabris v. France, App. No. 16574/08, Eur. Ct. H.R. (2013) at para. 56.

[84] Mads Adenas & Eirik Bjorge, *National Implementation of ECHR Rights: Kant's Categorical Imperative and the Convention, in* CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 62 (Andreas Follesdal, Birgit Peters & Geir Ulfstein eds., 2013).

[85] *Rees v. The United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (1981). *See also* Cossey v. The United Kingdom, 184 Eur. Ct. H.R. (ser. A) (1990); *Sheffield and Horsham v. The United Kingdom*, App. 22985/94, Eur. Ct. H.R. (1998).

[86] *Christine Goodwin v. The United Kingdom*, App. No. 28957/95, Eur. Ct. H.R. (2002) at para. 85.

did not, while the situation in 32% remained unclear.[87] The Court held this to be sufficient. It attached "less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."[88] According to this judgment, the pre-requisite of the relevant change no longer refers to the existence of a common solution, but instead to the acknowledgement that changes are taking place at all. This is rather a bold statement.

4. In a recent article an author has expressed his opinion that evolutive construction of human rights is just "moral reading": "Evolutive interpretation simply denotes a process of moral discovery; the Court is not expanding or inflating the scope of the ECHR rights by treating the Convention as a living instrument; rather, it *discovers* what these human rights always meant to protect."[89] This "voyage of discovery" runs the risk to revoke the transformation of the moral norms into legal norms and to re-establish the purity of the value together with its untamed claim for absoluteness. A first consequence has already been drawn from this approach. In a dissenting vote to a recent judgment of the European Court of Human Rights the judge opined that the judgments of the Court would be legally binding not only on the parties to the dispute, but also upon all the other States parties to the Covenant.[90]

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[87] *Id.* at para. 57.

[88] *Id.* at para. 85.

[89] George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy, in* CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 106, 124 (Andreas Follesdal, Birgit Peters & Geir Ulfstein eds., 2013).

[90] *Fabris v. France*, App. No. 16574/08, Eur. Ct. H.R. (2013) (*See* Judge Pinto de Albuquerque, concurring).

VII. Concluding Remarks

In concluding, I wish to stress that after the experiences mankind has made with the most horrible derailments from the tracks of normal human and humane behavior we cannot renounce the moral foundation of our legal order. We need values as the basis of the law. We need them as the fundament of our legal rules, as an ever animating force, but in their pure form they are hardly apt to regulate social life. Values need legal protection not only against attacks from outside, but also against their inherent self-destructive capacity, just as law needs the foundational values. This reciprocally moderating interaction between values and law corresponds with the expectation that free democracies based on the rule of law have to be States of proportion and moderation.