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Laborious Law

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Inaugural Address at Utrecht University, on the occasion of accepting the Chair in Political Economy of Human Rights
21 MAY 2001

BAS DE GAAY FORTMAN

Contents:

Dear Rector,
Ladies and Gentlemen,

PROLOGUE: LAW, POWER AND MORALITY: WHO WINS?

Should Thucydides be read in the light of the Sophists or is he better understood as a predecessor of Aristotle? Although his account of the Peloponnesian War was written almost two and a half millennia ago, the question still bothers the minds of students of International Relations. The usual interpretation of this Greek author as founder of the Realist School bases itself particularly on the Melian Dialogue.[1] Crucial in that exchange of views between the militarily strong Athenians and the weak inhabitants of the island of Melos is a still often quoted admonition by the former to the latter:

'not to imagine that you will influence us by saying … that you have never done us any harm …since you know as well as we do that, when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that *in fact the strong do what they have the power to do and the weak accept what they have to accept* ("δυνατα δε οι προυχοντες πρασσουσι και οι ασθενεις ξυγχωρουσιν")'.[2]

The Melians, however, do not accept, trusting in the justice of their cause and hoping for the help of the Gods and the Spartans. Subsequently, the whole story ends with the conquest of Melos by the Athenians, the killing of all male inhabitants of military age and the selling of all women and children into slavery. Justice, the message seems to be, is not for international politics. What counts is 'the law of the stronger'.

In a recent article Nancy Kokaz argues that Thucydides does criticize Sophistic dichotomies of power and justice, human nature and convention, domestic and international politics.[3] Her point is that throughout the Melian dialogue 'there is never a doubt that the Athenian action violates rules of "fair play and just dealing".'[4] The Melians use the wrong arguments, referring as they do to their own self constraint in regard to the Athenians and to Athenian self-interest – if you conquer and destroy us, the Spartans will come and do the same unto you – while hoping for outside help. They do not, however, appeal to justice. In fact, the Athenians do have a normative view on power: 'to stand up to one's equals, to behave with deference towards one's superiors, and to treat one's inferiors with moderation'. This maxim is called 'safe rule' rather than 'just rule', probably, Kokaz feels, because in the Athenian mind there could be no conflict between genuine considerations of safety and justice. The condition of humanity[5] is not that power automatically amounts to domination: it 'offers both constructive and destructive possibilities depending on its use'.[6] The Athenians only maintain that the standard of justice varies with the power of those concerned. What Thucydides hates, like Aristotle after him, is mere 'cleverness' as expressed in the Melian arguments. Practical wisdom goes deeper; it requires moderation and justice. Thucydides, Kokaz argues, 'offers us an invitation to move beyond the Sophists and rediscover our human potential for political excellence.'[7]

Here we are, at the beginning of the third millennium, and still discussing Thucydidean perspectives on moderating power. But should that surprise us? Has humankind in the ages since Thudydides found conclusive answers in the triangle of law, power and morality? Should *human rights* perhaps be seen as a way out of these dialectics, some sort of synthesis in the form of a decisive instrument to moderate power by binding its use to internationally accepted legal standards? Is this humankind's definitive response to the moral history of

inhumanity as exemplified by the killing of the Melian men and all those terrible violations of human dignity through the ages?[8] No – I wish to argue today – it is a beginning, marked by strong ideals and convictions but also by constraints and setbacks. To try and protect human dignity by law implies toil and trouble: *laborious law*, in other words.

Human rights and the dialectics of law and power

The tendency to abuse power is as old as human history. Therefore the use of power should always be tied to certain norms. Where such norms express legal protection of the fundamental freedoms and basic entitlements of each and every human being, we speak of 'human rights'. Since here human dignity itself is at stake, claims based on these rights should normally trump other types of claims, both private and public.

Notably, however, the global endeavour for the realization of human rights suffers from a huge *deficit* that is all too often submerged in the general euphoria of human rights declarations, conferences, committee meetings and workshops. Watch, for example, the still so difficult struggle against impunity of state-related perpetrators of violations of civil and political rights; look at the apparent lack of protection offered to minorities; consider the continued barrier of the public-private divide and its paralysing effects on the struggle against domestic violence; note the non-fulfilment of economic, social and cultural rights (ESCR) in a world in which so many people's basic needs remain denied. That fundamental weakness in human rights concerns their relation to social reality: *declared* rights, all too often, at the beginning of what are bound to be long and enduring struggles for implementation rather than *acquired* rights in the sense of formal legal protection of freedoms and titles that had already acquired societal recognition as sources of *entitlements*.

The purpose of *rights*, as interests protected by law (Von Jhering), is to put conflicts of interests in a normative setting and thus to prevent their manifestation as pure power struggles. But although rights are abstract acknowledgements of claims in the sense of a general commitment to offer legal protection for their realization, the world is full of denials of claims founded upon people's fundamental freedoms and basic entitlements. Actually, while the whole idea of rights is based upon the expectation that evident violations would lead to contentious action resulting in redress, *human* rights often remain without effective remedies. This is due to two crucial deficiencies: firstly, the often prevailing inadequacy of law as a check on power, and secondly, the lack of reception of these rights in many cultural and politico-economic contexts.

In terms of the role and rule of law, society is expected to function in such a way that rights are respected, and claims based on entitlements connected to those rights get honoured. Dispute settlement is confined to cases in which there are conflicting claims protected by different rights (between landlord and tenant, for example). In the case of human rights, however, adequate embodiment in positive law is all too often lacking, while they get violated in and from centres of power, too. There are notable differences in context here. While in the Netherlands, for example, freedom of speech is protected by a historically *acquired* right, in China it is based on an internationally *declared* right that is structurally violated from the national political centre. In the case of economic, social and cultural rights general recognition at the centres of power in the global economy is even lacking.

The character of human rights as 'declaratory' rather than 'conclusive' concerns economic, social and cultural rights in particular and manifests itself especially in countries in the South.

This is not just a matter of *socioeconomic* context: no jobs, no access to land and hence extreme pressure on scarce productive resources that breeds frustration and aggression rather than recognition of other people's freedoms and needs. There is also a *political* setting that finds its background in the history of colonialism and its effects on the distribution and control of power, both internationally and in local contexts. As a result the fight for *social justice* in a modern economy and polity has a long way to go. Internationally that struggle has not yielded impressive fruits up till now. Over the past two centuries the gaps between the richest and the poorest countries have widened while in absolute terms in the poorest region, sub-Saharan Africa, the number of people living on less than one US dollar a day increased considerably during the nineteen nineties.[9] As a result of decisions taken in the name of economic progress, the world's poor often face increasing hardships from day to day.[10] In that dim light the toughness of the struggle for social justice within so many developing countries could hardly be seen as surprising.

Obviously, the human rights venture as envisaged requires laborious law based on functioning legal systems, internationally as well as in domestic settings. To see what that means let us now first go a little deeper into the meaning of law.

BETWEEN SYSTEM AND LIFEWORLD: THE ROLE OF THE *REGULAE IURIS*

The essence of law, as we have seen, is that it binds power to certain norms, implying at the least normative processes of settling disputes. This is a mission of a highly noble character as exemplified in the inscription shown in the reading room of the Harvard Law School's library: OF LAW NO LESSE CAN BE ACKNOWLEDGED THAN THAT HER SEAT IS THE BOSOM OF GOD.[11] The reference to the Upright One implies an allegiance to justice. Legal norms then are meant not only to *regulate* in the sense of securing order but also to reflect what is generally seen as *right* and hence ought to be enforced. Law, in other words, binds power to a morality that is seen as essential to the integrity of the community as such.[12]

This rather idealistic view depicts law as it is meant to be: *justice* incognito. At the other extreme we find *anti-law*: the use of legal instruments to institutionalize *injustice*.[13] Karl Marx saw law as rooted in class relations: 'right can never be higher than the economic structure of society and its cultural development conditioned thereby'. Socioeconomic power, in that view, completely dominates law. Or, in the words of a 16th century English song: 'Law grinds the poor and rich men make the law'.[14]

Reality tends to lie somewhere between, on the one hand, the binding of power to norms rooted in morality and, on the other hand, the reflection of existing power relations in the setting and execution of such standards. These dialectics of law and power are appealingly echoed in the way in which the notorious villain Bul Super – a comic figure in Marten Toonder's *Adventures of Tom Poes* – expresses his view on law: 'right is something crooked that has been twisted'.

The issue then, is law's moral foundations and connections. Obviously, human rights are rooted in justice, first and foremost. Yet, the global venture for the protection of human dignity is shaped in modern universalistic law, with bureaucratic mechanisms of standard-setting, monitoring and procedures to enforce compliance. Consequently, the whole project has certain traits of a functional *system*, and it is precisely in its fundamental link to morality that the human rights system needs constant renurturing from a lifeworld perspective.

I am expressing myself now in terms of Jürgen Habermas' distinction between 'system' and 'lifeworld'.[15] For Habermas, the impersonal relationships that typify an exchange economy as well as a modern polity, imply that both tend to function as *systems*, separated from the *lifeworld* of culture, social interaction and personality. A topical illustration of what this refers to is the organization of agriculture in the European Union and its alienation from the lifeworld of animals and people. Law, then, secures the independence of economy and state from lifeworld structures. It regulates exchange relations through property and contract and institutionalizes the political system by defining bureaucratic positions based on administrative law. Modern law is not grounded in normative rightness but is: *positive* in the sense of the outcome of established processes of law-making; *legalistic*, implying an orientation towards rules; and *formal*, meaning that cases are judged under what has been regulated with a view to 'equal' treatment of 'equal' cases.

Yet, it is precisely in the lifeworld that morality (and immorality for that matter) finds its roots.[16] Modern law then is functional coercion and as such in need of normative justification. This confronts us with the crucial notion of legitimacy. While Weber saw law's claim to legitimacy as based purely on political domination, for Habermas enacted law cannot secure the basis of its legitimacy simply through legality.[17] Indeed, with its many manifestations of illegitimate rule the twentieth century has generally confronted humankind with the complexity of legitimacy as a concept transcending formal-procedural legality. Grounded in people's conviction that the way power is exercised over them and the way in which they are being ruled are *right*, legitimacy transforms power into authority. In this light legitimacy becomes not so much a fact but a process. The right procedures (*due process*) are only one aspect of this; other elements concern the *right principles* and institutions and an *outcome acceptable* to those affected by the exercise of power.[18] In terms of legitimacy the continuous challenge is, in other words, to *find* law in its 'lifeworld' connection to justice.[19]

Notably, that need to transcend purely formal legality is nothing new. Through the ages substantial legitimization has been enhanced by applying the old principles of law-finding: the *regulae iuris*. They throw light upon concrete cases in which legal rules first have to be determined as applicable and then applied in line with a correct interpretation. As maxims (*maximae propositiones*) the *rules of law* rest on everyday common sense; as concise declarations of the demands of justice (*generalia iuris principia*) they are rooted in morality. An example of legal common sense is the rule that everything that has come into being through certain causes, can be dissolved by the same causes.[20] General principles of justice may be illustrated by the rule that without guilt there can be no punishment.[21] Often the *regulae* combine elements of both logic and fairness, exemplified, for example by the rule that whosoever carries the burden should also be entitled to the benefits.[22] Usually their form is short and succinct while their authority rests on past experience in law-finding. In the difficult task of weighing the different interests involved, the *regulae* assist those charged with law-making as well as those responsible for law-finding in concrete cases.

These rules of law then, exert an immediate appeal to both heart and mind. Thus, Baldus stated that a party in a court case that can invoke a *regula iuris* might be considered as being *prima facie* in its right.[23] While apparently that could be said in the fourteenth century, the *regulae* have maintained their validity through the ages. For example, the stipulation that no one can change his policy to another person's unfair detriment[24], acquired a modern

translation in the principle of good government which demands that justified expectations as have been raised, cannot be neglected. Paul Scholten has typified such general principles of law as the desk light that may shine so clearly upon a case that what the ceiling light of the statute books could not reveal, suddenly becomes clearly visible.[25]

Some *regulae* are quite precise, particularly those that pertain to due process. As examples may serve the well-known rule that not just one party but both parties should be heard (*audi et alteram partem*), and the rule that no one can be a judge in his own case (*nemo iudex in sua propria causa*). Other *regulae* are of a highly general character, e.g. the exclamation that freedom is of inestimable value (*libertas inaestimabilis res est*).[26] A little more concrete, but still common to many topics is the requirement of good faith (*bona fides*). Beside such rules there are also those which are particular to one topic, e.g. sale can break no rent.

As 'the general principles of law recognized by civilized nations' the *regulae iuris* have been acknowledged as a source of law-finding for the International Court of Justice (art. 38(1)(c) of the ICJ Statute). But apart from their role as guidelines in adjudication they also play their part in law-making and administration. While most rules originate in Roman law, many have been incorporated in the *Corpus Iuris Canonicis* and in subsequent law books as well. Yet, legal incorporation in recognized texts such as Dinus' treatise on the Rules of the Sext is not the essence. Important is not the formal source of a rule of law but its immediate appeal to the legal mind and the moral heart. Principally their role lies in the need for legitimacy rather than pure legality. It is that evident connection to formal and substantial justice through which they may play such a significant part in political, administrative and judicial decision-making.

In a Habermasean framework the *regulae* may be seen as a first mode of resistance by the lifeworld to a rules-driven jurisprudence. In regard to the various waves of juridification in modern history Habermas himself mentions three distinct ways in which the lifeworld has resisted a strict separation of law from morality (as argued by Weber[27]). A first response to law as pure formality is embodied in the modern notion of the human being as *an individual with rights*. This implies legal protection of individual interests against detrimental use of power by others, including the sovereign (the state). Different subjective rights may well clash, necessitating in concrete cases a weighing of the various interests involved in the light of the normativity embodied in legal rules. Secondly, *democratization of the political order* tends to confront persons holding office with reactions by those in whose private and public interests power is supposed to be executed. Finally, in modern industrialized countries the *social welfare state* guarantees freedoms and rights against the economic system.

These three modes of resistance to law as pure domination may well be conceived as bridges between systems of functional formality and the lifeworld of (inter)personal normativity. In this address the emphasis is particularly on the first bridge, taken in its normative setting of *human* rights.

Human rights as *laborious* element in legal systems

From a legal-philosophical perspective human rights may be seen as connecting general principles of justice with the conception of human beings as individuals with subjective rights. Each distinct human right has a *core* that relates to human dignity. Behind that core is a general principle connected with *public justice* in the sense of a communal conviction of what is right and so crucial for the integrity of the public-political community that it ought to

be enforced. Examples of such principles of justice as reflected in the *International Bill of Rights* are liberty, equality, due process (with sub-principles such as *habeas corpus* and objectivity and impartiality in judicial decision-making), humanity (respect for human life), the integrity of the body, privacy, stability of possessions[28], participation[29], etc. The next step in terms of standard-setting is to elaborate these principles in legal texts aimed at incorporation in different types of domestic law. The relative success of such attempts to further positivize human rights depends firstly on the question whether in the country in question legal systems do function, secondly on their judicial and political openness to the crucial issue of legitimacy as a notion transcending pure formal legality, and thirdly on cultural factors. Indeed, spiritual roots of a culture of human rights have to be found in different social and cultural contexts.[30] Hence, in accepting their responsibility for the implementation of human rights states are well advised to look for religious and other types of moral support for efforts made within the environment of their specific jurisdiction as well as in an international setting. This applies to the North as well as the South. Particularly problematic in the American setting, for example, is the principle of recognition of need – *social justice* – that lies behind articles 22 to 25 of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The struggle for social justice appeals to people's sense of solidarity and collective responsibility. But in the context of a settlers' society like the USA – a country that has such a dominant influence on global culture – it is individual autonomy rather than social justice that dominates legal and political thinking. ('Your well-being is not my concern. I made it, now you have to make it!'). As we all know, this type of politico-legal thinking is not confined to just the USA. Notably, the culture underlying economic globalization is generally based on possessive individualism rather than social justice.

While the international community still lacks the means to enforce the fundamental freedoms that have been declared as universal rights, basic entitlements for each and every human being apparently cannot acquire a human rights *profile* by simple declaration. Yet, the formulation of basic entitlements to education, health care, food, clothing, housing and employment as *rights* has raised expectations and 'rights-based approaches' further increase these. Thus, the world of human rights is a world of unfulfilled expectations. While, inevitably, human rights have to be incorporated in the systems of our time, a serious concern today is that they have become a typical *system* of their own: intergovernmental and nongovernmental centres, compliance and complaints procedures with commissions, committees and courts of law, training programmes and academic teaching courses, often quite far removed from lifeworld perspectives. The term 'secular religion' is used in this connection, and that is meant particularly in an institutional sense.

Is it advisable, then, to capitulate and abandon that whole venture for the protection of human dignity through rights? My answer is no, because in the global struggle to bind all use of power to essential standards we have nothing that could better suit the requirements of protecting people's human dignity in a modern setting. Rhetoric, true, but a strong and morally compelling rhetoric. Rights do, indeed, fulfil the important function of providing legal protection to subjective claims based on recognized interests, and hence incorporation of human rights in functioning legal systems must be seen as essential, but even where this is not yet the case they can still be seen as *statements of what is right*, an objective *moral* code, in other words.

At this point an aside is in place: the word 'moral' here concerns the grounding of these rights in morality and does not imply that human rights should be considered as 'moral rights' as opposed to 'legal rights'. It is particularly in political science circles in North America that we find that juxtaposition. The term 'moral rights' stands for rights that cannot be enforced or, in other words, rights without remedies.[31] But, one might ask, isn't that the essence of the human rights deficit: rights without remedies? Well, my answer to that would be that remedies are never automatic; for one thing rights-holders always have to claim what they are due. So the term 'acquired rights' should not be misinterpreted to mean rights with automatic remedies. Rights are 'performative' (Austin) and one of the things that make human rights distinct is that, perhaps more than other rights they are particularly performative. The point made earlier is that in many respects the struggle for their implementation is still in its early stages, and hence these rights often cannot offer immediately effective remedies.

The word 'right', then, holds a *legal* significance, signifying that what is confirmed in such terminology is *right* and ought to be protected by law so as to guarantee enforcement. Like law itself, rights find their meaning in order and justice. As human rights are rooted in justice, their realization is not just a matter of enforcing positive law but a moral issue.

Political economy of human rights

Let us now return to the strategic model on which the global human rights venture is based: international standard-setting and monitoring coupled, principally, with local struggles for enforcement and implementation. In this endeavour international agencies for development cooperation such as the United Nations Development Program (UNDP) have chosen to concentrate their efforts on 'enabling environments' in the sense of enhancing the right type of conditions under which people can exercise their human rights. It is abundantly clear, however, that many people live in environments which, far from being conducive to local implementation, must be regarded as hostile to any efforts for the protection of basic human dignity. In such *disabling conditions* human rights tend to function not so much as legal resources but as *political instruments* to mobilize dissent, protest, opposition and collective action aimed at social and economic reform.

It is particularly in adverse conditions as those pertaining in situations of extreme pressure on scarce resources that a political economy analysis may be enlightening.[32] It implies a meta-juridical approach that looks beyond disciplinary boundaries. Empirically, the triangle economy-polity-law is of central importance. Crucial is the analysis of economic, political and legal aspects of problems and policies at their interface and in their interaction.

Political economy of human rights, then, is a way of looking behind systemic violations and structural non-implementation. Remarkably, its contribution is not restricted to economic, social and cultural rights. Lack of implementation of civil, political and cultural rights, too, has to be assessed in a politico-economic context. Lederach has pointed, for example, to the 'justice gap' in efforts directed at peace-making.[33] Behind collective violence there often lies a 'root conflict' (Galtung) related to economic aspects of public justice. Apparently, when the violence ends, people expect not only pacification but also serious efforts towards economic justice.[34]

Yet, the primary contribution of political economy of human rights lies in the field of socioeconomic rights. The core focus is acquirement: why and how people succeed in

acquiring what they need for sustainable livelihoods. The methodology I have proposed here starts with Amartya Sen's notion of *entitlement failure*, as advanced in his 'Poverty and Famines'.[35] Indeed, behind failing claims to essential goods and services are deficient entitlement positions, and behind entitlement failure are malfunctioning entitlement systems.

Of course, this address is not the right occasion to present a full introduction to entitlement (sub)systems analysis. The Chair in Political Economy of Human Rights, as established in the Law Faculty of this University, relates to both the Netherlands Research School on Human Rights and the CERES Research School for Development Studies. In that institutional setting I intend to further develop and elaborate this methodology into an operational framework for the study of situations of structural non-implementation of economic, social and cultural rights. I shall now restrict myself to just a brief explanation of its essence. First a basic distinction has to be made between rights, entitlements and claims. A right implies neither more nor less than an *abstract* acknowledgement of claims. Entitlement is concrete: lawful command over a good or service in a specified use.[36] A claim is an actual *act* of acquirement. Let me give you an example: The owner of a house is generally presumed free to use it. This includes the presumption of an entitlement to live there. Hence he may well claim actual occupancy of those premises. But it is quite possible that another person is already entitled to occupy that house, a tenant, for example. If both claim occupancy at the same time the judge in question will look behind the conflicting claims and weigh the relative strengths of the respective rights as well as the different interests of the parties. If in the light of the rules and the facts the case seems to be unclear, general principles may well provide the clarity that is needed to find the law in this specific dispute. In regard to this type of case, for example, an old *regula* says *'Nemo de domo sua extrahi debet'*; a modern principle is 'Sale can break no rent'.

In the same way in which the relation between abstract rights and concrete entitlements is not mechanical, neither is there an automatic link between entitlements and honoured claims (actual acquirement). Usually, in order to claim what one wants certain activities are required within processes of production, distribution and consumption of goods and services: land has to be worked, commodities have to be manufactured and sold, services have to be delivered, consumer goods have to be bought in shops, a door has to be opened with a key, etc. Entitlements provide neither more nor less than access to such processes; actual acquirement also requires activities and action.

Now, suppose a person is homeless simply because she lacks any concrete entitlement to occupy any premises. What then, in terms of concrete entitlements, is the implication of her housing right as defined in article 25 of the UDHR and article 11 of the ICESCR? Well, unfortunately, this human right does not generally function as a direct source of concrete entitlements. If, however, a homeless individual takes concrete action in order to find a roof above her head, that housing right as recognized in international law, may well play its part. In the Netherlands this is what actually happened in the nineteen-sixties and seventies when squatters began occupying houses that stood empty as the owners used their property for speculative purposes only. Another type of consequence that might follow from the general housing right is a judicial prohibition to deprive human beings from access to their sole resort without offering an alternative. In Indian public interest litigation, for instance, the Supreme Court has ruled that homeless beggars cannot be simply removed from pavements of streets on which they lay their heads. In short, while generally economic rights have been declared as rights without entitlements, entitlements following from the human right in question can

be asserted through concrete action. Human rights, in other words, are *transformational*, too: they establish a normative framework for processes of social change.

As there can be rights without entitlements, the opposite may equally obtain. Thus, a peasant may have lawful access to a plot simply because a relevant authority – e.g. the chief of his tribe – granted this for as long as he works that piece of land. Indeed, institutional relations may also serve as entitlement (sub)systems. Highly relevant in this connection is the relationship between citizens and their state. Generally, state power may serve as a source of many concrete entitlements. However, the state may also interfere negatively in people's entitlements, through expropriation for example. Hence, for the purpose of human rights implementation government policies and actions have to be closely monitored in their effects upon the entitlement positions of those living in daily hardship.

It is the universality of human rights as internationally accepted standards of legitimacy that makes it possible to mobilize international support in struggles against their violation, too. International pressure, through reporting or other types of procedures by the United Nations *Special Rapporteur for Housing* for example, may well contribute to processes of acquiring actual recognition of people's housing needs. Indeed, it is often (international) nongovernmental organizations rather than states that fight side-by-side with those carrying out their responsibilities in UN compliance mechanisms.

Epilogue: Alternative approaches to law, power and morality

Notably, the possibility of taking human rights abuse to court tends to be underestimated, particularly in regard to economic, social and cultural rights. Although, as has been pointed out, a homeless individual cannot usually sue the state for provision of a house, forced evictions or cutting off essential services can be contested in courts of law. There is a difference, in other words, between a state of non-implementation and a concrete act of violation. Now, if human rights were no more than subjective rights albeit of a special type, the four major areas of impunity characterizing the human rights deficit mentioned at the beginning of this presentation (*impunity* of state-related violators of basic human dignity, of perpetrators of crimes within the four walls of the home, of oppressors of minorities, and of those responsible for socioeconomic deprivation) would have a paralysing effect on the whole venture. In that case the issue would be confined to *justiciability*. But the main point I am making in this address is that precisely in situations in which the use of legal resources becomes problematic, the function of human rights as *standards of legitimacy* is activated: confrontation of abuse of power with norms based on protection of human dignity. Government housing policies, to come back to our example, must be based on the right of everyone to live in a decent house, and government budgets should reflect the priority given to the satisfaction of people's housing needs.

Human rights, then, must be seen not merely as subjective rights – to be enforced through claims based on entitlements derived from them – but also as general principles of justice. In the latter meaning they may play their part in adjudication too, not as a direct basis for the acceptance of certain claims but to throw light upon a case, in the same way in which the old *regulae iuris* perform that function.[37] Let us take, for example, the damages suffered by small fishermen when, in the name of development, big trawlers are introduced that go into the shallow waters, destroying the breeding grounds for the fish that forms the basis of their livelihoods. It is true that in contentious action these people may fail to get recognition of

claims based on a subjective 'right to development' but in concrete litigation procedures the right to development may well be invoked in order to determine responsibility for a tort.[38]

Thus far, the emphasis has been on law in a modern universalistic sense, i.e. enforcement of rules through regularized mechanisms. If, however, the realization of fundamental norms binding the use of power were purely dependent on formal legal processes, in many places deficits in the enforcement of crucial standards would be much worse. Fortunately, however, law can also work through *informal* mechanisms or, in another terminology, as *living law.*[39]

While 'law' manifests itself as regulation of power, living law has the nature of 'anti-power'. An illustration may be taken from the social history of slavery in Barbados. Records of slave births and sales show that from the end of the eighteenth century onwards infants were no longer sold apart from their mothers and the nuclear family became a common phenomenon among slaves, implying among other things that husbands and wives were also not sold separately.[40] Apparently female slaves regarded motherhood as 'a customary right'; yet there was no justiciability whatsoever since slaves were regarded as chattel and certainly not recognized as legal subjects. What we come across here is noticeable self-enforcement of human rights by informal means.[41]

Moreover, as has been stated several times already, human rights function not only as legal resources but as *political instruments*: standards of legitimacy, applicable to any use of power, whether by the state or by non-state actors. The processes through which this is effectuated may have a formal as well as an informal character. Besides living law, in other words, we also touch upon *living politics* as a way of confronting power with human rights standards. To illustrate the meaning of living politics it may be helpful to juxtapose two distinct situations: a parliament without a free press means *dead* politics, a free press without a parliament would lead to *living* politics. In the case of the fishermen described above, those in power might feel aware of a potential resistance that is still submerged but would be likely to get activated when the local population see their fishing grounds destroyed. Such a hidden potential, based as it is on strong feelings of justice and injustice, might discourage big trawlers from fishing in shallow waters. It is, indeed, in regard to non-state actors, too, that *living politics* is likely to become increasingly relevant.[42]

Notably, globalization today also affects interpretations of legitimacy. As a consequence, principles in regard to the use of power become more and more *general* in the sense of being shared in the whole *ius gentium.* In regard to human rights this opens the way to more *inductive* approaches. To clarify: a deductive approach derives concrete rights from international treaties and other formal sources; an inductive approach starts from what people see themselves as the fundamental freedoms and entitlements that everyone should enjoy. Such a growing focus on lifeworld contexts also applies to processes of legitimization. Non-state actors, too, face the consequences of this development.

The point is of course that notwithstanding their formal legal position all institutions today exercise their power in a world in which there is growing consensus as to the unacceptability of human rights abuse in general and in regard to interpretations of what precisely constitutes such abuse in particular. Whereas it is true, for instance, that the churches in the Netherlands do not fall within the realm of the General Equal Treatment Act[43], they may be expected to face increasing pressures from within Dutch society to observe the principle of non-discrimination. Although general principles pertaining to legal entities stipulated in the Dutch

Civil Code are formally not applicable to churches, to mention another example, in practice analogous application of principles as *bona fides* by secular law courts has already been accepted by the Supreme Court.[44] The same applies to general principles of worker's protection that lie behind labour law, notwithstanding formal exemptions of churches from such legislation.[45]

In short, then, institutional decisions that affect the lives of people are more and more confronted with universal standards of legitimacy, including the old *regulae iuris* and modern human rights. While the international venture for the protection of human rights has been set up with particular emphasis on the role of the state, today there is a growing attention to human rights observance by non-state actors (*Drittwirkung*). Since historically the applicability of rules of justice has never been confined to the state, such a development should not surprise us. Moreover, in the major challenge of bridging functional systems and lifeworld morality, states and non-state actors need each other.

It is time to conclude. Our concern has been with human rights as a global response to the dialectics of power and justice as discussed almost two and a half millennia ago by Thucydides. The project of protecting the basic human dignity of each and every human being by *declaring universal rights* did not prove to be simple. Declared *rights* are rights, and a rights-based organization of society demands functioning legal systems. This is already a major challenge, as De Soto has shown in the key chapter on 'The Mystery of Legal Failure' in his recent book *The Mystery of Capital.*[46] *Declaring* rights further implies that much more is necessary than just protecting already acquired bundles of entitlements. Human rights law is *laborious law.* In many a politico-economic context the transformation of these declared rights into acquired rights *with* guaranteed freedoms and entitlements for everyone, requires long and enduring struggles. As for civil and political rights it is the political order that has to be confronted. In the case of economic, social and cultural rights it is the entitlement (sub)systems that lie behind structural non-implementation which would have to be changed and that means a confrontation with the economic powers that be.

Actually, the whole human rights venture faces three major threats from within. The first is a simplification of human rights, with universality seen as just a matter of international law – and with that an already settled issue. Although clear in a legal sense, in political and cultural terms universality remains a major challenge, requiring continuous mobilization of support from every possible quarter in the struggle to protect the dignity of all. Indeed, the global human rights venture necessitates so much more than just the involvement of international lawyers, however important their role may be. The second danger also lies in a conceptualization of human rights as pure *system,* far removed from *lifeworld* realities. I am referring here to legal instrumentalism: law as an instrument of social change. In fact the assessment 'rights with remedies' is as simplistic as 'rights without remedies'. The real tasks we are facing today are no longer primarily in standard-setting but in the tribulations of implementation. The third risk is in capitulation: the feeling that human rights law is of such a laborious nature that we had better abandon the whole venture. What I have tried to show today is, firstly, that *laborious law* is not impossible law as long as one refrains from positivist dogmatism, while being prepared to look creatively for new ways of using human rights as legal resources. In this connection I have sketched the role of human rights as not just subjective rights in the conventional sense but general principles of justice which may play their part in adjudication in a way similar to that of the old *regulae iuris*. In regard to both economic, social and cultural rights and collective rights this opens new venues in

litigation. Secondly, and related to that, I have pointed to the role of human rights as general standards of legitimacy. As such they may function in alternative approaches to the dialectics of power and morality such as living law and also as instruments in the politics of protecting human dignity.

Human rights, then, is to be seen as a laborious, but not impossible, venture and from a civilizational perspective a crucial challenge in our world today.

Dixi.

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[1] For the original text in Greek see Thucydidis, *Historia Belli Peloponnesiaci* (Ed. Ioannes Matthias Stahl, Lipisiae: Ex officina Bernhardi Tauchnitz, MDCCCCX, pp. 46-50. An English translation has been published in Thucydides, *History of the Peloponnesian War*, New York: Penguin, 1972.

[2] Thucydides, V.89.

[3] Nancy Kokaz, 'Moderating power: a Thucydidean Perspective', in *Review of International Studies*, 2001, Vol. 27, PP 27-49. See also David Bedford and Thom Workman, 'The tragic reading of the Thucydidean tragedy', in *Review of International Studies*, 2001, Vol. 27, pp. 51-67, and William O. Chtittick and Annette Freyberg-Inan, 'Chiefly for fear, next for honor, and lastly for profit': an analysis of foreign policy motivation in the Peloponnesian War, in *Review of International Studies*, 2001, Vol. 27, pp. 69-90

[4] *Loc. Cit.*, p. 34.

[5] 'Human nature being what it is', in Thucydidean terminology (I.22).

[6] *Ibid.*, p. 41.

[7] Kokaz, *op. cit.*, p. 49.

[8] Cf. Jonathan Glover, *Humanity. Moral History of the Twentieth Century*, Yale: University Press, 1999

[9] See, for example, *Human Development Report 1999* (New York: United Nations Development Program), and the World Bank Report *Global Economic Prospects and the Developing Countries*, Washington DC: World Bank, 2000

[10] See Berma Klein Goldewijk and Bas de Gaay Fortman, *Where Needs Meet Rights. Economic, Social and Cultural Rights in a New Perspective*, Geneva: WCC publications, 1999, chapter 2: Development-Oriented Approaches, pp. 19-35

[11] See W.F. de Gaay Fortman, *Het geheim van het recht*, Dies Natalis address, Free University, Amsterdam, 22 October 1962, published in W.F. de Gaay Fortman, *Recht doen*, Samson: Alphen aan den Rijn, 1972, p.16.

[12] The term *integrity* in regard to law was coined by Dworkin. See Ronald Dworkin, *Law's Empire*, London: Fontana, 1986, p. 404

[13] One may think here, for example, of the Neurenberger race laws and the South African apartheid legislation. On anti-law in general see Jean Carbonnier, *La Révelation Chrétienne et le Droit*, Paris, 1961

[14] Another verse typically describing law as an expression of existing power relations, relates to the common good:

> *The Law locks up the man or woman*
> *Who steals the goose from off the common*
> *But lets the greater villain loose*
> *Who steals the common from the goose.*

[15] See *inter alia* Jürgen Habermas, 'Law and Morality', in S.M. McMurrin (ed.), *The Tanner Lectures on Human Values*, Vol. 8, Salt Lake City: University of Utah Press, 1988, pp. 219-279, and Jürgen Habermas, *Legitimization Crisis*, Cambridge: Polity Press, 1997 (first ed. 1973); see also Mathieu Deflem (ed.), *Habermas, Modernity and Law*, London: Sage, 1996

[16] Female infanticide, for example, and genital mutilation are typical lifeworld practices in contravention of human rights that hence have to be fought primarily in a lifeworld setting.

[17] See Jürgen Habermas, *Faktizität und Geltung*, Frankfurt am Main: Suhrkamp 1992, p. 51

[18] See Goldewijk and Fortman, *Op. Cit.*, chapter 9: Legitimacy and Legality, pp. 118-119

[19] On law-finding see T. Koopmans' excellent revision of G.J. Wiarda's jewel *3 typen van RECHTSVINDING*, Deventer: Tjeenk Willink, 1999

[20] Omnis res, per quascunque causas nascitur, per easdem dissolvitur: *Corpus Iuris Canonicis*: DECRETAL. GREGOR. IX, LIB. V, TIT .XLI.,DE REGULIS IURIS, CAP. I

[21] Sine culpa, nisi subsit causa, non est aliquis puniendus: *Corpus Iuris Canonicis*: SEXTI DECRETAL., LIB. V, TIT .XII.,DE REGULIS IURIS, Bonifacius VII, Regula XXIII

[22] Qui sentit onus, sentire debet commodum, et e contra: *Corpus Iuris Canonicis*: SEXTI DECRETAL., LIB. V, TIT .XII.,DE REGULIS IURIS, Bonifacius VII, Regula LV

[23] See P. Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims*, Edinburgh: University Press, 1966, p. 154

[24] Nemo potest mutare consilium suum in alterius inuriam: *Corpus Iuris*: DE DIVERSIS REGULIS IURIS ANTIQUI, L 17, XVII, 75

[25] See P. Scholten, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlandsch Burgerlijk Recht. Algemeen Deel*, Zwolle: Tjeenk Willink, 1931, pp. 83 ff.
[26] Paulus libro secundo ad edictum, *Corpus Iuris*: DE DIVERSIS REGULIS IURIS ANTIQUI, L 17, 106. See also 123: *Gaius libro quinto ad edictum provinciale*: 'Libertas omnibus rebus favorabilior est.' A modern source is Ho Chi Minh: 'Rien n'est plus précieux que la liberté et l'indépendence.'
[27] Cf Max Weber, *Wirtschaft und Gesellschaft*, Tübingen: Mohr, 1956
[28] I.e. the principle behind art. 17 UDHR that declares the right to property.
[29] I.e. the principle behind art. 21 UDHR on the right to participate in government. Cf. the *regula iuris* 'Quod omnes tangit debet ab omnibus approbari', as formulated in the *Corpus Iuris Canonicis* (SEXTI DECRETAL., LIB. V, TIT. XII., DE REGULIS IURIS, Bonifacius VII, Regula XXIX)
[30] Michael Ignatieff signals a political crisis, a cultural crisis, and also a *spiritual* crisis in human rights. See Michael Ignatieff, *Whose Universal Values? The Crisis in Human Rights*, Amsterdam: Praemium Erasmianum Essay, 1999.
[31] Joseph Wronka, for one, sees human rights as a process from 'rights as ideals' via 'rights as enactments' to 'rights as exercised'. See Joseph Wronka, *Human Rights and Social Policy in the 21st Century*, Lanham MD: University Press of America, pp. 28-30.
[32] For a definition of political economy I refer to the Review of Political Economy in its mission statement:

> 'Political economy is best defined as an approach to economics, which puts first priority on practical, and policy issues, and tailors theoretical and empirical work accordingly. The economy is regarded as being located in historical time, interacting with a political, social and natural environment. Within the system the agents change and interact in a manner, which cannot be described adequately by the assumptions of neoclassical theory.'

[33] See J.P. Lederach, 'Justpeace –The Challenge of 21st Century', in *People Building Peace. 35 Inspiring Stories from Around the World*, Utrecht: European Centre for Conflict Prevention, 1999, pp. 27 e.v.
[34] Cf. Bas de Gaay Fortman, 'Upholding Humanity. Challenges of Peace in the 21st Century', in Bas de Gaay Fortman and Jacques Paul Klein, *Peace in the 21st Century: Between the Supranational and the Grassroots*, Wageningen: Educatief Centrum Hotel De Wereld, 2000, p. 7.
[35] Amartya Sen, *Poverty and Famines. An Essay on Entitlement and Deprivation*, Oxford: Clarendon Press, 1981.
[36] See Bas de Gaay Fortman, 'Beyond Income Distribution. An Entitlement Systems Approach to the Acquirement Problem', in J. van der Linden et al. (eds), *The Economics of Income Distribution: Heterodox Approaches*, Edward Elgar, Brookfield (UK)/Cheltenham (US),), 1999, pp. 29-75. In this essay I define entitlement as the possibility of making legitimate claims, and hence a function of both power and law. The term 'command' that is used in the present text constitutes a quite appropriate modification suggested by Suzanne Verstegen in her paper *Understanding and Preventing Poverty-related Conflict*, presented at the workshop 'Resources, Entitlement and Poverty-related Conflict', The Hague: Clingendael Institute, 5 March 2001, p. 14.
[37] In that way collective rights, too, can play their part. Thus, as an enlightening principle the right to a healthy environment, for example, or the right to development, may well determine a court case.
[38] The right to development is based on UN General Assembly Resolution 41/128 of 4 December 1986. It stipulates, among other things, the duty of states to adopt development policies that aim at 'free and meaningful participation in development' and 'the fair distribution of benefits' resulting from development. Through a certain period of regular practice, supported by *Opinio Iuris*, principles formulated by the General Assembly may acquire the status of general principles of law. Another example is Sovereignty over National Resources. See Nico Schrijver, *Sovereignty over National Resources. Balancing Rights and Duties*, Cambridge: University Press, pp. 371 ff.
[39] While the term 'living law' is used in different meanings I use it here in the sense of *informal* processes of setting, monitoring and enforcing norms pertaining to order and justice within a certain community.
[40] See Hilary McD. Beckles, *Natural Rebels. A Social History of Enslaved Women in Barbados*, New Brunswick (NJ): Rutgers University Press, 1989, *inter alia* pp. 105 and 107.
[41] Obviously, slave owners feared that non-compliance would imply a considerable risk of slave revolts and hence jeopardize the whole social system.
[42] One of the most striking developments in this respect is the incorporation of human rights clauses in the general principles of transnational corporations. Shell International, for one, not only adopted such a human rights clause in its own code of conduct but also deleted the phrase 'Shell is not involved in politics'. While, naturally, party politics is a different matter, the universal responsibility for the observance of human rights implies that no actor in business can stay out of politics. The whole discussion on corporate responsibility and human rights was sparked off particularly by Shell's traumatic experiences in Ogoniland. See Amos Adeoye Idowu, 'Human Rights, Environmental Degradation and Oil Multinational Companies in Nigeria: The Ogoniland Episode', in *Netherlands Quarterly of Human Rights*, Vol. 17, No 2, June 1999, pp. 161-184.
[43] See Sophie van Bijsterveld, *The Distinctiveness of Churches – The Interplay Between Legal, Popular and Ecclesiastical Perspectives. Church autonomy as a Test Case*, paper for the Conference on 'The Legal Position of the Churches', Leuven: Catholic University, Faculty of Canon Law, 28 February–2 March 2001 (not yet published), p. 9
[44] See HR 15 March 1985, NJ 1986, p. 191 as quoted in Van Bijsterveld, *supra*, p. 6 and n. 10.

[45] For an interesting case in this connection see Kurt Martens, 'Recours aux Tribunaux Étatiques en Matière Ecclésiastique. La Position de la Cour de Cassation Belge à l'Aube du Troisième Millenaire', (2001, not yet published).
[46] Hernando de Soto, *The Mystery of Capital*, London: Bantam Press, 1999