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The Law's Beginnings

Edited by
F.J.M. Feldbrugge

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Foreword

THE ORIGINS OF THIS PROJECT

Anybody familiar with academic research management will be aware of the strength of the research model dominant in the natural sciences: on the basis of available knowledge, an hypothesis is put forward, information is collected in order to prove the veracity of the statement contained therein, and after analyzing and evaluating this information a conclusion is reached about this statement (true, untrue, or unproven).

In other areas of academic endeavour – *e.g.* the humanities, social sciences, jurisprudence – there are other valid approaches which nowadays can do with some active support. One of these is the investigation of a broader field, where, at least initially, no specific questions are asked, but a wider range of phenomena is observed and described. This procedure may then yield various alternative avenues for further research and may suggest a variety of more specific questions. The researcher is like a 19th century explorer who enters an area which is still blank on the available maps. He does not really know what he is looking for.

In this spirit I devoted my farewell lecture as professor of East Europea *Russkaia Pravda*.[1] Although this is a much-studied subject, it is still bristling with unsolved problems. Some of these concern predominantly the history of medieval Russia and its legal institutions. Others fit very well into a comparative framework. By this I mean that their solution may be helped by looking beyond the borders of medieval Russia, and, conversely, that information gleaned from the study of the *Russkaia Pravda* may be useful outside the field of study of medieval Russian law.

One of the most important clusters of problems coming to the fore in a comparative framework could be identified roughly as 'early law'. Even a cursory acquaintance with the *Russkaia Pravda* suggests parallels with other early Slavic law codes and with the Germanic *leges barbarorum*. The next step would be a comparison with the earliest laws of other Indo-European peoples: archaic Greek and Roman law, Old Irish law, the early laws of India and of the Hittites.

Extending the range further the oldest laws of Mesopotamia come into view and then comparable legal systems outside the sphere of Western civilization: China and Japan, Africa, the native Americans, etc.

A small group of experts in some of these fields met in Leiden on 23 and 24 May 2002 at a symposium entitled *'Beginnend recht'* (more about this title below). Two papers on the overall theme were contributed additionally by a legal philosopher and a legal theorist. The symposium was organized under the aegis of the E.M. Meijers

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1 *Het oudste Russische recht; Gedachten naar aanleiding van de Russkaia Pravda*, Leiden 1998.

Instituut, the research institute of the Leiden Law Faculty. Its support and that of its director, professor Carel Stolker, is gratefully acknowledged.

The papers were originally contributed in Dutch. This volume presents the English versions. Professor Claessen could not attend the symposium, but contributed a paper beforehand.

Title and theme

The genesis of this project has been explained at some length in order to stress that there was no clear-cut theme from the start. It gradually assumed its contours in preliminary discussions among the participants. Initially the accent was on 'early law': the earliest known codifications, or at least articulate legal systems, of a number of primarily European peoples. Further consideration of what was available allowed us to be more specific. It would seem that most of the papers would be concerned with a peculiar phase of legal development in which law divested itself of its close relations with other aspects of social life and assumed a new kind of independence. In the words of the introductory text to the Symposium:

> In this connection one might speak of a juridification of regulation and dispute settlement, occurring at a given moment. Rules of behaviour were more clearly expressed and more subject to reproduction, *i.e.* they might be invoked in subsequent similar situations in unchanged form. This presupposed their fixation in one way or another, in an oral tradition, but especially in written form. Fixation in writing is usually connected with emergent public authority. The registration and sanctioning of customary law evolved into autonomous legislation. One often observes, parallel to this development, a professionalization of legal affairs: judges and other servants of the court, courts, fixed procedures, legal documents, etc.
> The purpose of this Symposium is to direct the attention to this phase of transition, the 'birth' of law. What are the conditions for the juridification indicated above? To what extent can one identify general lines or laws of development?

These ideas were reflected in the Dutch title of the Symposium *'Beginnend recht'*. In English, as in German, French or Dutch (but not in Russian), the verb 'to begin' may be both transitive/active ('I begin the story') and reflexive ('The story begins'), but 'Beginning law' might also be taken to refer to a first-year student who is taking up law. 'Incipient law' has been used by some of the authors in this collection, but I believe 'Law's beginnings' is a more felicitous term.[2]

The fairly generous terms of reference allowed the individual author to devote attention to those aspects of the topic which he/she felt were of the most importance.[3] I have felt that it would be counterproductive to impose strict discipline on a team of

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2 I gratefully acknowledge the suggestions made in this respect by Professor Bernard Rudden, formerly of Brasenose College, Oxford.

3 A most interesting and competent paper on the Chinese legal tradition by Mr. B. van Rooij was presented at the Symposium, but has not been included in this collection because it would in no way fit the format to which the other papers conformed.

seasoned academics of high repute, from a wide variety of disciplines; the richness and scope of this collection have been enhanced in this way.

Si parva licet componere magnis: two books come to mind which attempt to do a job similar to that taken on in this volume: Henry Maine's *Ancient Law* and a German collection, edited by W. Fikentscher, H. Franke and O. Köhler.[4] After more than 140 years Maine's work still towers over all that came afterwards. His grasp of the material available in his day was astounding, but of course a great amount of new material has emerged since that time. However, the boldness of his views and his incisive judgement still make his opinions relevant to modern students of the subject. The German volume has the practical drawback of being entirely in German. As a result it has perhaps not received the international recognition it would deserve on the basis of its contents. But apart from this, the collection of studies it offers suffers from a lack of homogeneity. The three editors open with a long theoretical study of the objectives and possibilities of an historical anthropology of law. This is followed by the most ambitious and longest paper, by Fikentscher, on 'Synepeics and a synepeic definition of law'. It would seem that the author of this concept has not been successful in explaining it sufficiently to the academic community and little or nothing has been heard about it since. The bulk of the volume is taken up by a collection of papers of quite different quality and orientation. Some of them are close to the theme of the present volume and have indeed been quoted in individual papers. Other papers in the Fikentscher volume are not specifically concerned with the earliest period of legal development and deal with some question or another of legal history or anthropology, while others again offer merely a brief overview of the legal history of a specific country of culture.

During the process of working on this project, we gradually acquired a clearer understanding of our central theme, and the tentative titles of the project put forward during this time reflect this understanding: the beginning of law, the origins of law, early law, incipient law, the emergence of law, etc. What is implicit in all this is that there was an era without law and that at a certain moment in history, or rather at different moments in different places, law emerged, was born. And this again requires a concept of law, in order to enable us to recognize it when it appears. Several authors in this volume have explicitly addressed this question. We have, however, refrained from postulating an articulate concept of law as an overall starting-point for our individual papers. Instead we have assumed that a general idea about law, as present in general usage, would be sufficient to start with.

4 W. Fikentscher, H. Franke & O. Köhler (eds.), *Entstehung und Wandel rechtlicher Traditionen*, Freiburg/München 1980.

THE SEQUENCE OF THE PAPERS

The collection starts with a paper by a legal philosopher (Cliteur), because some elucidation of what we understand by law seems useful.

Then a series of papers deals with the earliest legal systems of several Indo-European peoples, because this is where all modern legal systems have their roots: Indian (Kolff), Irish (Edel), Greek (van der Vliet), Roman (Sirks), Germanic (Frisian: Algra) and Slavic law (Feldbrugge). This section is concluded by a paper which attempts to sketch some common Indo-European elements (Zimmer).

The following section contains three papers examining legal systems outside the Indo-European sphere: the early law of Mesopotamia (Veenhof), early legal systems of the non-Western world (Claessen), and the modern symbiosis of Western and non-Western systems (Hoekema).

The collection is concluded by a short reflection on the results obtained.
It goes without saying that the collection could have gained by the inclusion of papers on other legal systems which are (comparatively) well documented in their early development: Egyptian, Hittite, Chinese law, to mention the most obvious examples. The reasons for not including these were purely practical: in a two-day symposium not more than a dozen papers could be accommodated.

F. Feldbrugge

Contents

Incipient Law

Aspects of Legal Philosophy

Paul B. Cliteur

The initial Dutch title of the project, to which this paper is a contribution, was *beginnend recht* ('incipient law'). Its subtitle read: 'the development of law in a society, as seen from the viewpoint of legal history, legal anthropology and legal theory'. My contribution will be that of the legal philosopher or legal theoretician.

Incipient law for legal philosophers. But what is law? When does 'incipient law' become 'law'? Does legal philosophy provide any answers to this question? Or would it be better to consult certain legal philosophers, but not others? And if so, who are they?

At first sight legal philosophers are not so well equipped to answer this question as legal historians and legal anthropologists, who, after all, have studied the first patterns of customary law that evolve into 'law'. Or rather: written law. But it does not take long to realise that this question brings up some very fundamental issues of legal philosophy, the most obvious one being: what is law? How should those early normative patterns be interpreted? Is it ethics? Is it religion? Is it custom? And how does it relate to 'aw'?

In other words, the 'incipient law' issue presumes an opinion about 'completed' or 'finished law'. Legal philosophers have written much about this. Or rather: this is virtually the only subject about which they write. A large chunk of legal philosophy is a search for a convincing concept of law. As you know, according to Kant, lawyers had still not succeeded in their search in the eighteenth century and I fear that the situation has not much improved since then.

Every academic student of jurisprudence faces this embarrassing shortcoming when the *sources of law* are discussed.[1] These are means to identify applicable law. As such the books mention: legislation, custom, case law and treaties. With regard to the *existence* of those sources there is – at any rate for Europe in the year 2002 – considerable consensus, but not as a rule about the *ratio* and the comparative *significance* of those sources of law. Or, in other words: no one will dispute that legislation, custom, case law and treaties are sources of law. But the question what the comparative *importance* of each of those sources is, and the question whether or not one source should be considered the foundation for the other sources evokes a cacophony of opinions.

Legal philosophy, however, does comprise a school of thought that believes that the question of what law is can be answered unambiguously. It is the analytical doc-

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1 For an extensive survey, see: Allen, C.K., *Law in the Making*, Oxford 1951 (1927), 1-60 and Williams, Glanville, *Learning the Law*, London 1982 (1945). Also useful: Pollock, Frederick, *A First Book of Jurisprudence. For Students of the Common Law* (Sixth Edition), London 1929, Part II, Chapter II and Bodenheimer, Edgar, *Jurisprudence. The Philosophy and Method of the Law* (Revised Edition, Fourth Printing), Cambridge (Mass.) and London 1981 (1962), 323-445.

trine that goes back to the work of John Austin and Jeremy Bentham, which was further developed by H.L.A. Hart.[2] But if I understand it correctly, these legal positivists remained utopians: searching for the Holy Grail, which to this date has not been found. What's more: many of today's philosophers of law teach us that this Holy Grail will never be found. Below I will discuss the reasons for this.[3]

Let me start by making some remarks about the four sources of law referred to above.

First, legislation. Legislation is a popular source of law. Most of all with the general public. One popular misconception about the study of law is that lawyers should know statutes because they contain all law exhaustively. We know that for certain areas of law such as criminal law this perception is more or less correct. In an area of law in which legal certainty is an important ideal, law based on legislation, if not to be preferred, deserves pride of place. In the nineteenth century in particular this view inspired an aspiration after codification in criminal law, constitutional and civil law.[4]

To what extent did those major codifications help us? Do they clearly mark the transition from incipient law to law? Of course they intended to, but reality has proven more wilful than envisaged by the legal utopians (and as I mentioned earlier: that is what the legal positivists were).

Perhaps the following everyday and well-known example can serve as an illustration. In the twenties a dentist in The Hague tapped electricity illegally by blocking the electricity meter by the insertion of a pen. He was taken to court on account of 'theft'. The Dutch criminal code defines theft as the wrongful appropriation of an item that belongs, wholly or partially, to someone else.[5] But is electricity an 'item'? And does the insertion of a pen into a meter constitute 'appropriation'?

The Dutch Supreme Court answered this question in the affirmative.[6] Here lies – and that is vital to our subject – the first defeat of legal utopianism. It is, after all, the *court of law* that provides for clarity, not the legislator. Napoleon as well as other codifiers would no doubt have regarded this as a crushing defeat.

Legal utopians are of course aware of this problem. The solution proposed by Thomas Hobbes, one of the predecessors of Austin and Bentham, was that the court use the phrase *'in the name of the law'*. And of course that is partially correct. Moreover, an attempt can be made to bind the court to the law as strictly as possible by means of stringent interpretation techniques such as a historical and grammatical interpretation.[7] But that does not change the fact that legislation *cannot explain itself* and that the court's discretion will never be far away.

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2 For information about Bentham and Austin and what of their work holds up: Hart, H.L.A., 'Positivism and the Separation of Law and Morals', in: *Harvard Law Review*, 71 (1958), as cited in: H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, Oxford, 1983, 49-87.

3 See also: Feldbrugge, F.J.M. *Tussen theologie en medicijnen. Recht als regels en recht als proces*, Leiden 1968, 6, who refrains from giving a definition of law.

4 See: Tang, G.F.M. van der, *Grondwetsbegrip en grondwetsidee*, Arnhem 1998.

5 Article 310 Dutch Criminal Code.

6 Supreme Court, 23 May 1921, *Nederlandse Jurisprudentie*, 1921, 564.

7 See: Kay, Richard, 'Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses', in: *Northwestern University Law Review*, 82 (1988), 226-292.

When I was a law student myself, the gas meters in Amsterdam could be tipped in such a way as to reduce the registration of gas consumption. Was this theft? The ruling about the dentist in The Hague could be a precedent in settling this new, yet old issue.

A precedent means a decision by a court of law. In particular the American philosophy of law emphasises the contribution of a court of law to the creation of law. 'The prophecies of what the courts will do and nothing more pretentious are what I mean by law', are the famous words written by Oliver Wendell Holmes in his essay *The Path of the Law*.[8] He wished to view law 'realistically' and thought he could best do so through the eyes of the 'bad man'. The 'bad man' is interested in the risk of sanctions. The people tipping the gas meters are not interested in grandiloquent considerations of natural law, but in the risk of a court equalling 'gas' with 'electricity' or 'tipping a gas meter' with 'inserting a pen into a electricity meter'. Lawyers are expected to make a 'prophecy'. That – and nothing more pretentious – is law, according to the father of American realism.

As with all revolutionary theories, there are always people *plus royaliste que le roi* and the king of American realism was quickly passed over by students who took an even more cynical attitude towards the law than the sceptic Holmes. To Jerome Frank the prophecies were just a gamble and law came about only after the judge had pounded his gavel and pronounced a concrete judgement. Law is a 'law suit won'. An obligation is a 'law suit lost'.[9] It will be clear that this type of law is produced all the time. In their *Journal, mémoires de la vie littéraire* (1835) the Goncourt brothers described the production of law as follows [in translation]:

> Inside the Law was buzzing about. As soon as one suspect had left the dock, another took his place. And all at a terrifying speed! One, two or three-year sentences rained down on the heads so fleetingly perceived. It was frightening to see punishment gurgle from the president's mouth like water from a fountain, in a steady, never-ending stream. Examination, witness statement, defence and claim, it was all over in five minutes. The president turned to one side, the justices nodded, the president muttered something, and that was the judgement.

Judgement as law. Could it be so simple? The Goncourt brothers compared the law to water from a fountain. But that does not make a fountain *identical* to water. And although law contains an element of indeterminateness, does that mean that there is nothing but indeterminateness?

Perhaps here *custom* could play a role, which brings us to the German Von Savigny. 'In dem gemeinsamen Bewusstsein des Volkes lebt das positive Recht, und wir haben es daher Volksrecht zu nennen' (positive law lives in the common awareness of the people, which is why we should call it people's law), according to Von Savigny.[10] Law, therefore, is not a conscious creation. Neither by the legislator, nor by the court. Law is a structure of spontaneous growth. It is, rather, a national spirit, working and

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8 Holmes, O.W., *The Path of the Law*, in: *Harvard Law Review*, 1897, 457, cited in: Holmes, Oliver Wendell, *Collected Legal Papers*, Peter Smith, New York 1952, 167-202, 173.

9 Frank, Jerome, *Courts on Trial*, Myth and Reality in American Justice, Princeton University Press, Princeton, New Jersey 1973 (1949), 9.

10 Savigny, Friedrich Karl von, *System des heutigen Römischen Rechts, Erster Band*, Berlin 1840, 14.

living in all individuals, which produces law. The people form a natural unit, or 'Einheit durch die einander ablösenden Geschlechter hindurch' [a unit transcending the successive generations), which links the present to the past.[11]

Not only did Von Savigny stop the aspiration after codification in Germany, but in other countries as well.[12] His ideas live on in the general principles of proper administration (which, according to some administrative law experts, are principles that live in the *sense of justice).*

In particular in the 'seventies and 'eighties of the twentieth century great importance was attached to principles of law. Ronald Dworkin made it his primary weapon in his fight against H.L.A. Hart's legal utopianism.[13] According to Dworkin the law cannot be identified as a 'system of rules', as Hart thought he did in his book *The Concept of Law.*[14] The law includes 'principles, policies, and other sorts of standards'. Legal positivism, which believes that the law can be identified by means of a test that is related not to content but to 'pedigree', fails.

Law is not an order of the highest ruler in the state, as John Austin claimed, nor a system of rules, as Hart wrote. Law is a *story.*

With this last argument the American Dworkin sustained the criticism set in by his compatriot Lon Fuller (without Dworkin paying any royalties, by the way). Fuller compares the development of law to the telling of a funny story or a joke. When you try to retell a funny story, Fuller said in 1940 in a series of lectures that were published under the title *The Law in Quest of Itself,* it is always the product of two factors.[15] First the story as you heard it. That is, *'as it is* at the time of its first telling'.[16] Legal positivists (or in my terminology: legal utopians – they who think that you can identify law with an unambiguous factual criterion) are preoccupied with this element.

The legal positivist ideal translated into interpretation could be that the interpreting party tries to carefully reconstruct the story 'as it is at the time of its first telling'. This is done when an interpretation technique such as 'original understanding' is used, which is favoured by various members of the American Supreme Court,[17] as well as the controversial Robert Bork.[18] Fuller, however, finds this much too re-

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11 Von Savigny, *System,* I, 20.

12 In the United States, for instance, through the work of James Coolidge Carter. See: Carter, James Coolidge, *Law: its Origin, Growth and Function,* New York and London 1907.

13 See: Dworkin, Ronald, *Taking Rights Seriously,* Cambridge (Mass) 1978 and the later main work: Dworkin, Ronald, *Law's Empire,* Cambridge (Mass.), London 1986.

14 Hart, H.L.A., *The Concept of Law,* Oxford 1961.

15 Fuller, Lon L., *The Law in Quest of Itself,* Chicago 1940 (AMS edition 1978).

16 Fuller, *The Law in Quest of Itself,* 8.

17 Such as Scalia. See: Scalia, Antonin, 'Modernity and the Constitution', in: Smith, E. (ed.), *Constitutional Justice under Old Constitutions,* The Hague, London, Boston 1995, 313-318; Scalia, Antonin, *A Matter of Interpretation. Federal Courts and the Law, An Essay by Antonin Scalia with commentary by Amy Gutmann, Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, Ronald Dworkin,* Princeton, New Jersey 1997. But the Chief Justice as well: Rehnquist, William H., 'The Notion of a Living Constitution', in: *Texas Law Review,* 54 (1976), 693-706.

18 Bork, R.H., 'Neutral Principles and Some First Amendment Problems', in: *Indiana Law Journal,* Vol. 47, 1971, 1-35; Bork, Robert H., *Slouching towards Gomorrah. Modern Liberalism and American Decline,* New York 1996; Bork, Robert H., *The Tempting of America, The Political Seduction of the Law,* London 1990.

stricted. When we consider how we tell a funny story, we are aware that it is not just the story as it was told for the first time. In retelling a story, the point of the story becomes the focal point. In other words: 'the story as it should be'.[19]

A retelling of the story always combines these two elements. If the story was told poorly, you try to improve on it to make it sound as you think it should. You try for maximum effect.

42 years later, in 1982, Ronald Dworkin would embroider on the same idea as Fuller in an article entitled *'Natural' Law Revisited*.[20] Like Roscoe Pound[21] and Lon Fuller[22] before him, Dworkin advocated a moderate or non-traditional variant of natural law. Dworkin compares the judge to a mythical figure, Hercules, who is entrusted with the difficult task of further developing the law in the light of past events, but also against the background of what could be regarded as a desirable development. Every interpreting party is a link in a process that resembles a chain novel.

What is someone to do who writes a chain novel together with others? The author is bound by the past. Characters that were killed off by previous authors cannot be revived, and previous events are binding. But an author could (and should) use his creativity to help the story evolve in the best possible way, by wondering 'which decisions make the continuing novel better as a novel'.[23]

In my view the above is close in spirit to Von Savigny and Fuller. Fuller concluded his 1940 lectures with the words that in interpreting the law it is impossible to ascertain whether a specific contribution is novel or rather 'the better telling of an old story'. As to the judge, Mansfield observed: 'he is playing his part in the eternal process by which the common law works itself pure and adapts itself to the needs of a new day'.[24]

This brings me to a fourth source of law: the treaty. The law of treaties as a source of law became extremely popular after World War II. In a comparatively brief period the 1948 Universal Human Rights Declaration took the world as a moral Esperanto that has been adopted almost everywhere. Some years later various European treaties (pursuant to Articles 93 and 94 of the Dutch Constitution) became directly binding in the Dutch legal system. The fundamental rights in the Dutch Constitution with its ban on review have been made virtually obsolete by the effect of human rights clauses in treaties.

The sense of awe inspired by the law of treaties is also remarkable. The question whether or not certain conventional obligations should be modified met with a storm of indignation in legal circles some years ago. The law of treaties is regarded as almost

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19 Fuller, *The Law in Quest of Itself*, 8.

20 Dworkin, Ronald A., *'Natural' Law Revisited', in: University of Florida Law Review*, 34 (1982), 165-188, also in: David M. Adams, ed., *Philosophical Problems of the Law* (Second Edition), Belmont etc. 1996, 93-99.

21 See: Pound, Roscoe, 'Natural natural law and positive natural law', in: *Natural Law Forum*, Volume 5 (1960), 70-82 en Pound, Roscoe, *The Ideal Element in Law*, Indianapolis 2002 (1958).

22 As best known in: Fuller, Lon L., *The Morality of Law* (Revised Edition), New Haven and London 1978 (1964).

23 *Dworkin*, op.cit. 94.

24 Fuller, *The Law in Quest of Itself*, 140. See also 114.

immutable. It has thus acquired a significance of quasi-natural law – or is perceived as such. Rightly so or not, I will discuss later. For the moment I wish to confine myself to the observation that philosophers of law are divided on the relation and prioritisation of sources of law. Where legal positivists and legists point to the law's primacy, they are contradicted by realists such as Holmes, Gray[25] and Frank who consider statute law merely as *potential law*. Legists and realists in turn contend with the followers of the Historic School, Friedrich Hayek[26] or Lon Fuller[27] who recognise the law in the spontaneous structuring in society. It seems this strife in legal philosophy is far from over. A 'master rule', the ultimate rule of recognition by which law can be distinguished from its peripheral manifestations, seems more remote than ever. This is why I dubbed the legal positivists who think they have found the key to the concept of law 'legal utopians'. Another apt name would be 'scientific optimists'. But the same reproach could be made against the followers of the Historic School or the realists, for they, too, believe that in custom or case law they have found that one source of law from which all other law can be derived. Fuller (who himself remained critical) described what the legal utopian has in mind as follows: 'Its object is to develop a criterion which will enable us to distinguish between those ideas or meanings which are only trying to become law and those which have succeeded – to set up a kind of finishing line, as it were.'[28]

Perhaps a comparison with theology would be appropriate here, a comparison which I have taken from Fuller, but which can also be found with Kelsen.

Before Hobbes and Bodin appeared on the stage, morality and jurisprudence were dominated by a multitude of 'deities'. 'Polytheism' was the norm. Reason, custom, consensus, the state's mandatory power – all were regarded as factors that could structure the relations between people. As with the old gods in Greek society and the Roman empire there was no clear division of tasks. Sometimes they were allies, and sometimes they were adversaries. But with Hobbes a new era set in: monotheism. This is when 'one supreme power ruling over the whole legal universe' was introduced, Fuller wrote.[29] Custom, for instance, may create law only if the law refers to it.

Fuller himself leans more towards polytheism than towards monotheism. The master rule is an illusion, legal utopianism untenable. It is difficult to make a demarcation between law and incipient law, between law and morale.

This inevitably begs the question: why is this so? After all those efforts by the greatest minds, why is it impossible to identify the law with an unmistakable demarcation criterion, as envisaged by the legal positivist? Why are lawyers *still* trying to find a definition of their concept of law? Why haven't we reached the monotheism stage yet?

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25 In Gray, John Chipman, *The Nature and the Sources of the Law* (Second Edition from the Author's Notes), by Roland Gray, LL.B., New York 1948 (1909).

26 Especially in: Hayek, F.A., *Law, Legislation and Liberty. A new statement of the liberal principles of justice and political economy*, London, Melbourne and Henley 1982.

27 Especially in: Fuller, Lon L., *The Principles of Social Order. Selected essays of Lon L. Fuller* (edited with an introduction by Kenneth I. Winston), Durham, N.C. 1981.

28 Fuller, *The Law in Quest of Itself*, 56.

29 Fuller, *The Law in Quest of Itself*, 80.

My answer would be: because this is not just an intellectual task, but a search for the most satisfactory ratio of elements that can be found only through long experience.

Let me explain. Many disciplines of science focus on discovering patterns in reality that occur independent of the human will. We cannot *choose* the law of gravity or the theory of relativity, but we should recognise certain patterns as they present themselves to us. Because jurisprudence, too, can be regarded as a science, the misconception can take root that we can study legal reality in the way we study natural reality. In this way the law could 'in essence' be called a command from the sovereign. Or a complex of rules that are identified as law by a master rule. Or a complex of rules and principles and standards that have evolved into a spontaneous social structure. Or ... take your pick.

But this could easily give rise to the misunderstanding that the law is something that somehow *exists in reality*, whereas the law is a matter of *what we wish to regard as such*. The law is a man-made construction that we wish to use. It is a pragmatic construct, which has a more or less useful function. It presupposes an entirely different form of scientific study than is common in sciences in which a segment of reality is discovered that forces itself upon us, independent of the human will.

It is possible to regard law as the rule formulated by a judge, as envisaged by Gray. Or as the judgement passed by a judge, as Frank wants to have it. Or as the rule laid down by the legislator, as defined by Austin. Or as the 'results of human action but not of design' arising from the spontaneous order of actions, as Hayek observed in imitation of Ferguson.[30] None of those views is 'true' in the sense that it depicts reality better than another opinion. Each view, however, does have different consequences.

As yet we do not have much experience with what those consequences are. We only have about two hundred years of experience and since then we have been experimenting with different opinions about what could be regarded as law. In the laboratory of history experiments are carried out to find the best balance between legislation, custom, treaty and case law. By the British, the Americans, the Dutch, the French and other nations. Each of these systems features an entirely different ratio between the different sources of law. *Law* does not mean the same to an American as it does to a Frenchman.

Yet today there are many similarities between the different systems. One dominant model that tries to balance several sources of law is the *model of the constitutional state*. Again – as goes for other legal constructs – the constitutional state is a deliberate construction with which we are experimenting. We know that governing a country requires power. Men are no angels.[31] But we have learned from our mistakes. In par-

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30 Hayek, F.A., 'The Results of Human Action but not of Design', in: Hayek, F.A., *Studies in Philosophy, Politics, and Economics*, 1980 (first edition 1967).

31 'What is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.' James Madison in *Federalist papers*, edited by Isaac Kramnick, Harmondsworth 1987, no. 47.

ticular in the 20th century.[32] We know that a concentration of power in the hands of a government can easily lead to perversion. This is why we started looking for safeguards with which power can be granted to a government, but at the same time can be curbed and be brought under the control of those governed. For this purpose the constitutional state has been designed. The constitutional state indicates in what way government control can be checked by the law.[33]

The first element of the constitutional state is that the government or state, too, is *bound by legislation*. This is the principle of legality. It has aspects of constitutional law and of criminal law. Each, however, attaches great value to legislation.

But the constitutional state does not coincide with the regularity of the administration. This, at any rate, has proven too restricted. We were confronted with 'gesetzliches Unrecht' (legal injustice) and set out to find new conceptions of the constitutional state.[34] Since the sixteenth and especially the seventeenth century there have been lawyers who claimed that we can only bind the government to the law effectively if in addition to the binding force of legislation, a binding force would be awarded to subjective higher rights.[35] This is the origin of natural law, which would later take the shape of constitutional or human rights to be codified. Even if they are not yet rooted in statutes or conventions, some people regard these rights as an unequivocal part of the law. As customary or natural law or as legal principles generally perceived as just.

But what to do with these principles, besides establishing their existence? In 1803 John Marshall, an American judge, carried out a historic experiment. As Chief Justice in the American Supreme Court he passed a judgement in which he designated the *court of law* as the body that could review the binding force of the legislator's ordinary laws against the principles contained in the American constitution.[36] Case law thus became a major source of law. That case law is a source of law is therefore not a far-fetched idea. It does not form part of the natural order of things. It is a historic fact. And will remain so for as long as we want it to. And we want it to as long as we like the system's consequences.

This is the actual topic of discussion. Some people say that with judicial review case law has gained much too much in importance as a source of law.[37] And this is a problem because it is contrary to the ideal of democracy. Democracy is served best if *legislation* takes pride of place as a source of law. Laws, are, after all, – these days at any

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32 Clive Ponting called fascism the only original 'philosophy' of the twentieth century. See: Ponting, Clive, *The Twentieth Century. A World History*, New York 1999, 7. See also: Glover, Jonathan, *Humanity. A Moral History of the Twentieth Century*, Jonathan Cape, London 1999.

33 See for a well-founded definition of the concept of the constitutional state (and the Anglo-Saxon equivalent constitutionalism): Zoethout, C.M., *Constitutionalisme. Een vergelijkend onderzoek naar het beperken van overheidsmacht door het recht*, Arnhem 1995, 218-223.

34 Term coined by Gustav Radbruch. See: Jansen, C.J.H., 'Gustav Radbruch', in: P.B. Cliteur & M.A. Loth (eds.), *Rechtsfilosofen van de twintigste eeuw*, Arnhem 1992, 71-91.

35 See: Corwin, Edward S., *The 'Higher Law' Background of American Constitutional Law*, Ithaca, New York 1955.

36 Clinton, Robert L., 'Precedent as Mythology: A Reinterpretation of Marbury v. Madison', in: *The American Journal of Jurisprudence*, 1990, 55-86.

37 See the symposium 'The End of Democracy? The Judicial Usurpation of Politics', in: *First Things*, 67 (November 1996), with contributions by Robert George, Robert Bork *et al.*.