Szymon Mazurkiewicz
Uniwersytet Jagielloński

Human rights and the philosophy of international law – between law of nature and legal positivism?

1. Legal positivism and natural law

The aim of the paper is to present the aspects of legal philosophy that build the fundaments both of the theory of human rights and of the international law as well as to demonstrate the relations between the philosophical ground and the practical problems of human rights protection. My main thesis is that a large number of difficulties that can be seen in the contemporary world has its roots on the deeper theoretical ground. It is the ground of justification and legitimization of international law and human rights. My view is that this issue can be observed as the clash of two philosophical concepts, that is law of nature and legal positivism. I attempt to link philosophy of law with the international law and human rights protection and notice some significant problems on this link.

There are two main theoretical fundaments in the philosophy of law. The first is natural law, and the second is legal positivism. There are totally opposed or even contradictory. In the contemporary legal philosophy, it is legal positivism that seems to be the dominating manner of describing law. In XXI century natural law may be seen as an old and unnecessary theory associated with Tomas of Aquinas and Christian Church. However, there are a few legal philosophers representing natural law in the contemporary philosophy of law. The most known is John Finnis, Australian jurist and the author of *Natural Law and Natural Rights*. The others to mention are Germain Grisez professor on Mount St. Mary's University, Joseph Boyle from University of Toronto and Robert P. George working at the University of Notre Dame[1]. Still, legal positivism is the most common attitude in legal philosophy.

Legal positivism is the thesis that the existence and content of law depends on social facts, and not on its merits[2]. The English jurist John Austin (1790–1859) formulated it thus: "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry"[3]. In other words, the content of a legal regulation is not important for

[1] G. Blicharz, D. Pietrzyk, *Różne współczesne teorie prawa naturalnego* [in:] *Prawo Naturalne - Natura Prawa*, [red. F. Longchamps de Berier], Warszawa 2011, p. 167.
[2] http://plato.stanford.edu/entries/legal-positivism/ (accessed 11 November 2014).
[3] J. Austin, *The Province of Jurisprudence Determined (1832),* Ed. W.E. Rumble, Cambridge, 1995.

its validity. Thus, the law is seen in a very formal way without any material aspects. On the other hand, the natural law theory claims that there is a set of reasons for action that can be seen as normative reasons. That brings a conclusion that, for a natural law jurist, law involves not only a sheer social fact of power and practice, but also some underlying material fundament. Well known legal maxim – *lex iniusta non est lex* (unjust law is not law) is a shortened description of natural law theory.

2. The theory of international law

International law is an example of the clash of these two legal theories in practice. Since the Roman Law times, idea of *ius gentium*, law that is universal to every nation is returning once in a while. It is worthy noticing that it is still alive in contemporary international law, as in thoughts of Hersch Lauterpacht, judge of the International Court of Justice who attempted to explain international law as *common law of mankind* in his post-Grotius glance at international law[4]. Nevertheless, the attitudes different than natural law regarding the legitimization of international law are more significant both in theory and practice. They can be entirely qualified into legal positivism. The last Oppenheim's law, book one states: "It is in accordance with practical realities to see the basis of international law in the existence of an international community the common consent. […] In this sense *common consent* could be said to be the basis of international law as a legal system"[5]. These views are in accordance with hundred years earlier thoughts of Hegel and Austin who sought the fundament for qualifying international law as law in will of the sovereign states.

Furthermore, the jurisdiction of international courts appears to accept such resolution of the problem of legitimization international law. It was especially formed in the *Lotus case* from 1926 by Permanent Court of International Justice. The Court ruled that: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usage generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims"[6]. All phrases mentioned above present that roots of international law are in the will of states. Voluntarism, once respectful in the whole philosophy of law, particularly in XIX century in Austin works, possesses the main position in legitimizing the validity of international law. It is pure legal positivism – a legal regulation, in case of international law a treaty or a custom, is law only for

[4] R. Kwiecień, *Teoria i filozofia prawa międzynarodowego*, Warszawa 2011, p. 118.
[5] *Oppenheim's International Law*, 9th edition, p. 14.
[6] The Case of the S.S Lotus, PCIJ Publ., Series A, No. 10 (1927), p. 18.

the reason that such is will of at least two States. Neither content of law, nor its merits have an effect on the fact whether it is legally binding. These theoretical considerations seem to be proved by the Statute of the International Court of Justice which establishes in art. 38 par. 1 the law that can be applied by the Court to resolve disputes. The full wording of the paragraph is:

"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"[7].

It is worthy noticing that except subsection d. (without broader practical application and not being considered as a source of law but as a substantial source of recognizing law) every subsection constitutes a very positivistic point of view. In subsection a. rules are obliged to be expressly recognized be the parties of a convention. Therefore, a rule which is not expressly formed by states cannot be legally binding in international law. In subsection b. a custom requires both general practice in international relations and being accepted as law *(usus et opinio iuris sive necessitates).* Adding subsection c. that constitutes that a general principle of law demands recognition by nations, there comes a coherent and consistent normative system based only on one fundament – will of states. This will is a will of at least two states as in treaties or a will of whole international community. Nevertheless, it is still common consent that establishes norms of international law.

3. Existence of Human Rights

The Universal Declaration of Human Rights involves a few very important phrases for understanding what the human rights are. The first sentence constitutes that every member of the human family possesses the inherent dignity and equal, inalienable rights[8]. Article 1 establishes that every human being is born free and equal in dignity and rights[9]. Other provisions of the Declaration stipulate and characterize detailed rights. It is extremely important to emphasize that human rights (not only from Declaration but all

[7] Statute of the International Court of Justice, San Francisco, 24 October 1945.
[8] Universal Declaration of Human Rights, Paris, 10 December 1948.
[9] *Ibidem.*

human rights) are rights in the meaning that they claim rights that impose duties or responsibilities on their addressees or dutybearers[10]. In other words, human rights are not just a moral justification of the legal system or the most significant directives for the legislature (both national and international) in creating positive law. They are the rights in the full meaning of this word likewise the rights derived from statutory law. However, it is argued what do the human rights exist as. There can be found four main statements, which define the human rights as: (a) a shared norm of actual human moralities, (b) a justified moral norm supported by strong reasons, (c) a legal right at the national level (where it might be referred to as a civil or constitutional right), or (d) a legal right within international law. A human rights advocate might wish to see human rights exist in all four ways[11]. The most straightforward justification of existence of human rights is that they exist in legal world because of national and international law created by enactment and judicial decisions. Such view has positivistic connotations – human rights are rights for the reason that this is the will of the sovereign. At the international level, human rights exist due to the treaties that declared them, thereby including them in the international law.

Reversing from legal considerations concerning the existence of human rights, let us take advantage of the thoughts of an English jurist Herbert Hart. In his book The Concept of Law from 1961 Hart proposed a new view on the problem of defining law. He used the reflections of English philosophers of language, especially Austin and Strawson, and tried not to define law but to illuminate the concept of law. That attitude is involved with the methodology of philosophical studies, characteristic for the oxford philosophy of language[12]. Austin and Strawson believed that analyzing colloquial manner of using words can bring significant philosophical effects. Yet, it is difficult to find unambiguous criteria of their applying. In other words, it is not possible to define the terms of colloquial language. That is the reason why Herbert Hart intents not to define law but to *illuminate* the concept of law. Hart's research may be useful in understanding what human rights are. It seems that for common people human rights have roots deeper and less statutory-like than legal enactments. A version of this idea is that people come to the world with rights which are somehow inherent or innate in every human being. For others, human rights seems to be pre-rights, from which every right included in legal acts derive. It is worthy to notice that such remarks are totally in accordance with the provisions of The Universal Declaration of Human Rights.

[10] http://plato.stanford.edu/entries/rights-human/ (accessed 11 November 2014).
[11] http://plato.stanford.edu/entries/rights-human/#HowCanExi (accessed 11 November 2014).
[12] J. Stelmach, B. Brożek, *Metody prawnicze*, Kraków, 2006, chapter 3.

Thus, there are strong reasons to claim that the philosophical ground of human rights is natural law. Both legal and common arguments confirm that statement. For instance, The U.S. Declaration of Independence from 1776 constitutes that people are "endowed by their Creator" with natural rights to life, liberty, and the pursuit of happiness. On that point of view, the source of human rights is God. Deducing human rights from God's commands might give them a legitimation on the philosophical level, nonetheless, it is necessary to explain how can we pass from general and abstract rights into specific legal norms found in contemporary national legal enactments and international treaties. Rights derived from eternal law must be very general in order to be applied during thousands of years of human history, not just to recent centuries. But contemporary human rights are often significantly concrete and many of them is applicable because of contemporary institutions (e.g. the right to education or the rights to a fair judicial proceedings). Despite these problems, it is rather accepted that the source of human rights is not a legal enactment, but some kind of natural humanity that belongs to every human being and called human dignity.

4. The philosophical relations between human rights and international law

Nevertheless, a huge contradiction can be noticed looking at the thoughts concerning the theory and legitimization of international law and the remarks on the existence of human rights. The only one sufficient and necessary condition so that a norm becomes a legally binding norm of international law is that this norm must be accepted by states. Therefore, the source of international norms is common consent of at least two states. That draws a conclusion that it is will of the states that creates norms of international law. On the contrary, human rights *may* be expressed in treaties but their roots are in human dignity that is innate and inherent in every human being. These are two completely different and opposite philosophical fundaments. On the one hand, there is hard legal positivism as legitimization of international law, on the other hand, the fundament of human rights is natural law. It is clear that human rights are established by states in international treaties (e.g. International Covenant on Civil and Political Rights or International Covenant on Economic, Social and Cultural Rights, both from 1966) and that they are a part of international law. In that case, no theoretical problem arises.

However, there is a strong complication in grounding the existence of human rights only in the will of state or states. How can the human rights be universal and stand in accordance with article 1 of The Universal Declaration of Human Rights, which claims that: "All human beings are born free and equal in dignity and rights. They are endowed

with reason and conscience and should act towards one another in a spirit of brotherhood"[13]. and the beginning of the Preamble expressing that "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"[14] if the being of human rights depends on the will of a state? In other terms, how is it possible that a state or states could create human rights norms if the fundament of the human rights is human dignity inherent in every human being?

Human rights protection has come very far into own concepts and theories, however, it is still a branch of international law. Nowadays, numerous professors of law and lawyers practicing law specialize more and more in human rights instead of international law. Thus, it is possible that the problem of commonly seen absence of protection of human rights in contemporary world is an effect of these two opposite theoretical fundaments – legal positivism for international law and natural law for human rights.

Assuming that human rights norms are a part of the system of international law norms and consequently that the theory of international law is applicable for human rights, they have to be placed in the sources of international law. The sources of international law are enumerated in art. 38 of the Statute of the International Court of Justice. It is obvious that human rights norms are included in treaties but it is not common to see human rights as being likely to exist as international custom or the general principle of law. Still, such option is not impossible.

5. Manners of the existence of human rights norms

Human rights norms can exist as international custom. International Court of Justice, in advisory opinion of 28 May 1951 in a case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, remarked that the Genocide Convention is based on rules which are accepted by civilized nations as binding for the states even beyond any treaties regulations[15]. Many thoughts regarding customs and human rights are included in the case *Prosecutor versus Anto Forundzija* from 1998 considered by the International Criminal Tribunal for the former Yugoslavia. In point 170 it is judged that: "No international human rights instrument specifically prohibits rape or other serious sexual assaults. Nevertheless, these offences are implicitly prohibited by the provisions safeguarding physical integrity, which are contained in

[13] Universal Declaration of Human Rights, Paris, 10 December 1948.

[14] *Ibidem.*

[15] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [in: http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=90&case=12&code=ppcg&p3=4] (accessed 11 November 2014).

all of the relevant international treaties. The right to physical integrity is a fundamental one, and is undeniably part of customary international law"[16]. Thus, in point 170 and in others, ICT for former Yugoslavia ruled that the fact that even if some category of behavior is not included in a convention as breaking human rights, it does not implicate the lack of protection in international law. The reason is that a right exist as the international custom.

Human rights norms can also exist as unconditionally binding norms, named *ius cogens*. These are peremptory norms from which no derogation is permitted as said in article 53 of Vienna Convention in the Law of Treaties. As for the practice of international courts, European Court of Human Rights for instance only few times established that several norm of the European Convention on Human Rights are peremptory binding. One of the examples is judgment in *Al Adsani versus UK case*, where European Court admitted that the prohibition of tortures is placed in the catalogue of *ius cogens*[17]. Furthermore, ICT for former Yugoslavia in *Celebici Case* stated that Geneva Conventions, Universal and Regional instruments of protection of human rights share common values, which are applied in every time, in every circumstances and to every party from which no derogation is possible[18]. Therefore, it sounds like explicitly establishing the core of human rights as *ius cogens*. Accordingly, neither will of a state, nor custom is able to change these essential international norms concerning protection of human rights.

The conception of *ius cogens* is utile in protection of human rights as well as in the theoretical views on human rights in international law. In practice, it seems that only international courts establish some human rights as peremptory binding. It is obvious that no state will deprive itself of the power to change legal rules by declaring that they are *ius cogens*. In the consequence, no resolution of United Nations or other international organization, which would include a catalogue of human rights considered as peremptory binding, is likely to be issued. Therefore, it is up to the international courts to declare that some human rights are not possible to be derogated. However, the scope

[16] *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: http://www.refworld.org/docid/40276a8a4.html (accessed 11 November 2014).

[17] *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001, available at: http://www.refworld.org/docid/3fe6c7b54.html (accessed 11 November 2014).

[18] *Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic (Trial Judgement)*, IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998, available at: http://www.refworld.org/docid/41482bde4.html (accessed 11 November 2014).

of rights considered by international courts as *ius cogens* remains narrow. Nonetheless, it would not be appropriate to expect that all human rights will obtain such a status[19].

Above mentioned considerations can be enriched by a few philosophical thoughts concerning legal norms, that is also human rights norms. English legal philosopher Ronald Dworkin, in a debate with Hebert Hart, found that in the system of law are not only simple legal rules but as well principles of law. While rules are established in a legal act or a precedent, can be applied in the "all or nothing" formula and are conclusive (they can be either fully fulfilled or not fulfilled at all), there are also legal principles. Principles have some moral connection, have a "weight size" and are not conclusive (they can be fulfilled in a different level)[20]. Principles are used in hard cases, where deductive reasoning on rules is not sufficient.

These philosophical considerations point out that the nature of a legal norm can be different. Norms do not exist in the same type and are not always applicable in the same manner. Transferring Dworkin's views on the ground of human rights, one can draw a conclusion that human rights norms may exist in various ways, both as rules and principles. The general principles of law from art. 38 par. 1 subsection c) of the Statute of the International Court of Justice seems to resemble principles from Dworkin's concepts. They are the very fundamental legal norms thanks to which the whole system is complete. Rosalyn Higgins, judge of the International Court of Justice, claims that: "International law is not rules. It is a normative system. […] And if international law was just "rules", then international law would indeed be unable to contribute to, and cope with, a changing political world"[21]. Therefore, it is worth noticing that human rights norms can exist in a different way from the philosophical point of view.

6. Radbruch formula as justification of humanitarian intervention

Regarding legal positivism and natural law, the German philosophy of law ought to be presented. In the 20th century, the most prominent legal philosopher was Hans Kelsen, who created a hard version of positivism called normativism. In order to purely analyse law, Kelsen separates the spheres of *Sein* (being) and *Sollen* (duty) as he wanted to exclude any sociological method as well as natural law in legal science. As a result, law is placed in *Sollen* sphere as *Pure Duty.* Thus, for Kelsen, legal norm is just a *form*, their content or merits are irrelevant. On the other hand Gustav Radbruch, the opponent

[19] C. Mik, *Ochrona Praw Człowieka w świetle źródeł współczesnego prawa międzynarodowego – współczesne tendencje orzecznicze* [in:] *Prawa człowieka w XXI wieku – wyzwania dla ochrony prawnej* [ed. C. Mik], Toruń, 2005, p. 63.

[20] R. Dworkin, *Taking Rights Seriously*, London, 1978.

[21] R. Higgins, *Problem and Process: International law and how we use it*, Oxford, 1994, p. 1-3.

of legal positivism, claimed that the core of law is to serve justice by coming from the being and striving for justice. Thus, Radbruch found 3 merits of law – equality, purposefulness and reliability. In 1946, to resolve contradictions between these merits, especially from the time of World War II when the Nazi regime established legal acts that enable to kill millions people on the basis of, and in consent with the valid law, Radbruch formulated his famous formula, sometimes referred shortly as *lex iniustissima non est lex* (extremely unjust law is not law). It says: "The conflict between justice and the reliability of the law should be resolved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered *erroneous law*"[22]. Thus, Radbruch claimed that some valid legal norms cannot be qualified as law for the reason that they are extremely unjust.

The question that is necessary to be posed is whether Radbruch views might be useful in human rights. First, Radbruch refers in his theory to *being* and he notices that law is not just a simple form with irrelevant content. That is the nature of human rights – their essence is human dignity inherent in every human being. Secondly, it is clear that the purpose of human rights is to protect a person from violation of their rights, which are sometimes performed in accordance with valid state law. Moreover*, the Radbruch formula* might have a very significant practical application in problems that arise due to positive international law. These are issues when provision of international treaties, particularly bilateral, are clear, but for some reasons international community regards them as ineffective or aimless and intends to circumvent such provision.

It is likely that such situation occurs regarding the issue of humanitarian intervention, when procedural and defining imperfections of the United Nations Charter force the international community to passive observation of breaching human rights or even genocide, war crimes and crimes against humanity[23]. The roots of the problem of justification of humanitarian intervention lie in challenging the unlimited sovereignty of state in international relations. This contesting is based on arguments coming from international human rights protection. It is seen plainly in the thoughts of Secretary-Generals of the United Nations. For instance, Javier Perez de Cuellar in 1991 said: "the rule of not interfering internal jurisdiction of state cannot be considered as a barrier beyond which

[22] G. Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, Süddeutsche Juristenzeitung, 1946, p. 107.

[23] J. Zajadło, *Humanitarna interwencja: zagrożenie dla porządku międzynarodowego, moralny imperatyw czy norma zwyczajowa in statut nascendi* [in:] *Prawa człowieka w XXI wieku – wyzwania dla ochrony prawnej*, [ed. C. Mik], Toruń, 2005, p. 120.

asive or systematic violations of human rights would be performed"[24]. Butrus Ghali in *Agenda for Peace* from 1992 pointed out that sovereignty and territorial integrity still are the fundaments of international relations, but he added next: "the time of absolute and exclusive sovereignty has gone"[25]. These words are an example that, despite a strong provision of UN Charter that prohibits using force against territorial integrity or political independence of any state, except for self-defense and intervention authorized by United Nations Security Council, there can occur situations where other norms overrule this provisions. This overruling is based on the human rights protection. From the positivistic point of view, humanitarian intervention would be illegal because of the lack of any legal norm allowing it. However, the nonpositivist concepts are disapproved and are of the opinion that breaching positive law of UN Charter is legitimated. The strongest idea and surely with the biggest philosophical background seems to be the *Radbruch formula.* Thanks to it, a valid legal norm can be overruled if one concludes that it is unjust or not purposeful, or the consequences of its application would be so, even if this norm introduces stability or certainty.

7. Summary

Presented philosophical concepts of the most prominent legal philosophers of the 20th century may illuminate both international law and human rights. Philosophy of law concerns dilemmas that sometimes are seen as too theoretical for legal practice and legal reality. However a big number of very useful thoughts can be found and be adopted into resolving legal problems which lacks straightforward answers in enactments. Beside that fact, philosophical reflection assists in deeper understanding problems in the legal practice. It is worthy pointing out that in contemporary law, natural law has such a grounded position and a broad influence only in human rights. Next, the problems of human protection in the contemporary world might be the result of the deep positivistic views on the theory and legitimization of international law. On the other hand, it is human rights protection that is likely to weaken the positivism of international law and attempt to replace it by some natural law concepts that are very useful in human rights protection.

[24] quotation from K. Annan, *Peacekeeping, military intervention and national sovereignty in internal armed conflict* [in:] Hard Choices, *Moral dilemmas in humanitarian intervention*, red. J. Moore, Oxford, 1998, p. 58.

[25] Agenda for peace. Preventive diplomacy, peacemaking and peace keeping, http://www.unrol.org/files/a_47_277.pdf, point 17 (accessed 11 November 2014).