Chapter 1

WHAT DOES "FOUNDATIONS" MEAN?

Those who seek for the foundations of something might be searching for a fixed basis, perhaps for an ultimate explanation; for determining grounds or causes; he or she looks for an origin, a beginning, for deeper strata, maybe even for an entity, the essence under or behind the phenomena. This investigation can move within hierarchical models: One drills into the depths or one even finds the "basis" up above, the foundations of religious or governmental authority for instance in God and his grace. Foundations are sought and established, however, also in historical dimensions. Political domination is traced back to a first sovereign, maybe to a mythical king, or to an initial contract, the better to avoid investigating into its historical dating. The basis of existing property relationships is seen in a first acquisition, in a first taking possession of unclaimed property, in a first tillage, etc. In all these models justification and explanation form an indissoluble mixture.

Concerning more particularly the foundations of law, we can find a quite trivial starting point—not in grand theories, but in the law itself. The German *Richtergesetz* (law for the judiciary) states in §5a for the first, academic phase of the study of law "compulsory subjects are the core fields of civil law, criminal law, public law and procedural law, including the implications of European law, of the methods of law and of its philosophical, historical, and social foundations." What did the legislator mean by these "foundations"?

1.1. Basic, Fundamental Concepts

By "foundations" one might mean fundamental, crucial elements that appear in a definition of the concept of law, or basic concepts that are used in order to explain important features or the "essence" of law.[1] One starting point often used in legal-theoretical elaborations is the notion of a norm, and this may be further divided into social norms and legal norms. Sometimes we find a sequence running from instinct—custom—convention—morality to law. We find the distinction between state law and customary law. In order to delineate the realm of legal norms usually the notion of physical sanction is introduced or of coercion issuing from a specialized legal staff. Via the distinction between primary and secondary rules or norms one can explain the hierarchi-

[1] This understanding of "foundations" can be found in Schäfer 1989—with further "basic" topics like positivism and natural law, application, interpretation, and improvement of the law. The Festschrift for Peter Landau collects, under the title "*Grundlagen des Rechts*" (Helmholz et al. 2000), contributions mostly devoted to legal history.

cal structure (the "*Stufenbau*") of a legal order. This leads to the distinction between legislation and adjudication as well. Alternatively, one can start with the differentiation between the social system and the legal system. Usually theories contain remarks on the aims or functions of law (or single legal norms), e.g., on social control, conflict resolution, orientation of expectations and actions, etc. The concepts coupled with law are almost innumerable. Among these "law and ..."-relations we find law and morality, law and state, law and politics, law and power, law and religion, law and economics, law and/as literature, law and social classes as well as law and social change/evolution. Or antithetic couplings like: law in the books/law in action, validity and effectivity (or efficacy), not to mention the classical one of natural law and positivism. Finally law is placed in the context of comprehensive theoretical concepts, mostly from general social theories, like social order, anomie, deviance, conflict, consensus, acceptance, legitimation, domination, authority, sovereignty, etc.

1.2. Basic Research

"Basic research," in contrast to "applied research," could mean, in the case of law, that the basic disciplines like history of law, philosophy of law and sociology of law are separated from the practice of law, which forms the focus of legal doctrine and practical advice. The delimitation sometimes is not so sharp, because the basic disciplines also claim to have a practical impact on legal reasoning, e.g., as an "interpretive and evaluative legal theory" (Dworkin 1986) or a "sociological jurisprudence" providing information that can be applied in legal practice.

1.3. Logical and Epistemological Foundations

Theoretical reconstructions of a legal system as a hierarchical order of norms often use the metaphor of a foundation that sometimes is also placed on the top of the order. Kelsen's "*Grundnorm*" transforms into an "apex norm." It is neither explanatory nor justificatory, but is rather understood as a necessary epistemological presupposition in order to interpret a social order as a legally valid one (see below sec. 4.1). And H. L. A. Hart's fundamental "rule of recognition" is interpreted by G. J. Postema to mean: "law rests, at its foundations, on a special and complex custom or convention" (Postema 1982, 166).[2] Dealing with the same topic, Hart's rule of recognition and his notion of a

[2] Cf. Hart 1961, chap. 6 ("The Foundations of a Legal System"). Postema's "foundationalist" article explains Hart's "rule of recognition" as falling midway between "social fact" and "reason for action." On epistemological "foundationalism" in general, see Chisholm 1982; Sosa 1991 and 1998.

rule in general, Stanley Fish (1989, 507) states: "the foundations of law are linguistic," thus shifting the focus to problems of interpretation. This is not what I shall discuss.

1.4. Moral or Legitimacy Foundations

Under the heading of "moral foundations" one might be treating with extra-legal sources for the binding or legitimizing force of legal norms. Why should one obey the law in general or comply with a particular legal norm? (In contrast to the empirical question: Why is law obeyed or not? Cf. Tyler 1990.) Why should, in particular, a judge apply the law or a specific rule? Or from the point of view of a legislator: Should a certain norm be issued? Is the legislator permitted and competent to do so? What are or should be normative restrictions upon a law-maker, in contrast to empirically restrictive conditions for the efficacy of norms? In general one would have to deal with reasons that can be given in order to justify a legal system/order or single legal rules as valid and/or obliging. Such patterns or criteria of justification could be described in their historical development without regard for their validity. One could also, from a moral or normative point of view, try and give reasons for such criteria (cf. Habermas 1992; Kriele 1994).

1.5. Historical, Genetic Foundations of Law

Another sense of foundations is to speak of historical conditions for the development of the characteristic features of a legal system or of law in general.[3] This entails trying to give answers to the following why-questions:

(a) Why is there normativity at all? How do norms evolve? Is there an evolutionary pattern starting from underlying behavioral regularities or instinct or egoistic calculi via → custom → convention → morality → law? Why does *law* exist in human societies—and not other normative orders? What are the conditions for the evolution of law in human societies? Is there an anthropological basis so that only in human societies (and not also in ape-societies) law can exist? An answer to the question about the historical, phylogenetical origin of law certainly depends on a definition of the concept of law. Of course, the definitions given should be applicable to some kind of historical evidence. So one could ask, e.g.: When was the "unity of primary and secondary norms" (H. L. A. Hart) established? When and where did the big bang of the "autopoietical" closure of the legal system take place (N. Luhmann)?

(b) Why does law develop in a certain way? In particular:

(c) What are the prerequisites for the development of a state monopoly of

[3] Schäfer (1989, 1–8) also contains remarks on the origin of law.

force, rudimentarily embodied in a "third" person or party that can issue obligatory decisions in case of a conflict and is capable of enforcing them? One can consider examples from ethnological research. Other examples, however, from societies that are torn by civil wars, guerrilla war(fare), etc. might be revealing as well.

(d) What are the foundations of the secularization of law (e.g., in the Occident, unlike the Islamic world), of the separation of state and church, of politics and creed?

(e) What are the general preconditions for the existence of the rule of law? (Recent examples might be: Columbia, CIS, countries with civil wars—Ulster, Balkans; see below sec. 3.2.1.4 on transformation of the state of nature.) What are the historical preconditions for the development and institutionalisation of principles of the *Rechtsstaat*, limiting political power by valid legal rules; for the relative autonomy of law, making it immune from economic or political instrumentalization? In order to approach these questions, one can look at the European tradition with its doctrines of natural law and social contract theories. Also currently one is faced with the difficulties of the transformation of formerly nominally-socialist countries into societies under the "rule of law."

(f) What are the preconditions for the development of a global official recognition of human rights? (cf. *infra*, sec. 3.2.1.3)

(g) Following another direction, one could finally take a look at the preconditions for an increasing erosion of legal etatism, considering the various countertendencies of globalization, supranational integration and, at the same time, regionalization. What are the legal losses in these cases? What might be the place of law in a decentralized, deterritorialized "Empire" (Hardt and Negri 2000), in which the fields of economics, politics, and culture are communicatively indistinguishable?

1.6. Extra-legal Foundations of Law

These various kinds of historical preconditions can be brought into a synchronous order under the systematic aspect of the *explanation* of certain legal phenomena—namely an explanation given by reference to extra-legal features. This might be what the legislator of the *Richtergesetz* had in mind. One might, then, refer to mythological, religious, moral, biological, anthropological, natural, economic, political, etc., foundations of law.[4] These "foundations" form a complex variety of variables by which an explanation can be given for different aspects of law: its origin, evolution, and function. "Law is the product of other social facts in the society in which it exists" (Cotterrell 1999, 40).

[4] In Nazi legal education there was also a lecture on "*Völkische* foundations of legal science," where *Volk* is to be understood as a racial unity.

1.7. Preconditions for the Efficacy of Law

From a genetic point of view this set of extra-legal variables often is used in order to explain the origin and evolution of law. Thus law has the status of a dependent variable. From an instrumental point of view, however, those extra-legal variables operate as preconditions for obedience to law and the efficacy of law, i.e., the realization of the aims of the legislator. What counted as genetic conditions for the evolution of law can also be interpreted as limiting conditions for the efficacy of legal regulations. So convention might be the basis upon which legal norms evolve and depend. But from an instrumental point of view, from the perspective of the legislator and the enforcement of legal norms, the conventional or customary orientation of the addressees plays the role of a set of restrictive conditions that have to be taken into account.

Given all the above possibilities, I want to make clear that when I speak in the following about foundations of law I generally mean

– empirical factors, variables, features that are referred to in order to explain the origin, the creation, the development of law and its content, and/or

– external conditions that have to be taken into account by a law-maker, i.e., restrictive conditions for the efficacy of law.

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