

# The Normative Foundation of Legal Orders: A Balance Between Reciprocity and Mutuality

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## Introduction

In 1985 The Red Cross of Ethiopia, one of the poorest countries in the world, sent a cheque of 5000 dollar to Mexico in support of the victims of the terrible earthquake that had destroyed a large part of Mexico that year. Why this surprising gift? Well, in 1935 the Mexicans had supported the Ethiopians when their country was invaded by the army of Mussolini's fascist Italy. Obviously the Ethiopians felt a strong obligation, a moral duty to support in return, and even so after fifty years!

Of course, the small amount of 5000 dollars was a pittance in comparison to the enormous damage the earthquake had caused. But achieving a strict balance is not what reciprocity is about. Of crucial importance is the fact that the Ethiopians apparently wished to express their gratitude for the sympathy the Mexicans had shown them in 1935. Once such a tie of sympathy and gratitude has come into existence, the tie itself is more important than the money, the goods and the gifts that are exchanged. As the French say: within reciprocal ties *le lien est plus important que le bien*. The tie is more important than the good.<sup>1</sup>

This story demonstrates the moral strength of the phenomenon of reciprocity. As soon as something is received – a gift, a service, an attention, solidarity – there usually emerges a strongly felt moral duty to give in return, in one way or another, to the donator or to his descendants, in kind or in some other but appropriate form. The French anthropologist Marcel Mauss was one of the first scholars to describe and analyse the gift as a fundamental mechanism of social binding.<sup>2</sup> Later on Claude Lévi-Strauss stated that not the gift as such but rather the underlying structure of reciprocity is the driving force behind the obligations to give, to receive and to return.<sup>3</sup>

In theories of justice reciprocity seems to figure as a self-evident normative foundation of legal orders. But is that not a remarkable assumption? Are the most influential theories of justice not based on the idea of a social contract with its emphasis on a morality of legal rights, rather than on the idea of the gift with its

1 Jacques T. Godbout, *L'Esprit du don* (Paris: Éditions la Découverte, 1992).

2 Marcel Mauss, *Essai sur le don. Forme et raison de l'échange dans les sociétés archaïques* (Paris: Presses Universitaires de France, 2007 [1923]).

3 Claude Lévi-Strauss, *Les Structures élémentaires de la parenté* (Paris: Presses Universitaires de France, 1947).

emphasis on a morality of duty? Therefore, which conception of reciprocity actually is implicated in theories of justice based on the contract model?

In this article, attention is called to the important distinction between reciprocity as a social morality of duty, and mutuality as a contractual morality of rights. Without this distinction between the two moralities that govern human interaction, or so I will argue, it is hard to understand how reciprocity relates to the normative foundations of legal orders.

## Reciprocity

Let us return to the example above. Mexicans and Ethiopians, total strangers to each other, felt the duty to assist each other in times of need and disaster. They obviously did so on the basis of a common experience of misery and desperation. Due to this common experience, a strong identification could arise between the two nations. In the experiences of the other, the memories of one's own suffering at that time returned. Identification proves to be ever again an important source of solidarity. However, identification never happens automatically. A third, intermediary instance is always required, through which the self can return in the other. In this case the common experiences operated as that third instance.

Characteristic of the reciprocal ties between both nations, moreover, is the fact that the support had been given in freedom, and seemingly without being due. There was at least in no way a legal duty of assistance. And indeed, reciprocity in its purest form does not generate rights and obligations in any legal sense. The mechanism of reciprocity has its own and silent laws and rules. According to those rules it is not done when the donator openly says to the receiver: 'When you were in trouble, I helped you. Now that I am in trouble you have the duty to help me.' Of course it is what he thinks and expects from the receiver, and he has moral reasons to do so. But were he to express that expectation – in terms of his right and another one's enforceable duty – their relation would at that very moment change into a contractual one. And that is exactly what the donator and receiver are trying to avoid. By giving, receiving and returning the gift on a basis of an apparent freedom, both parties aim to express their non-legal relations. They want to bind themselves without the compelling force of the law and the contract. The very essence of reciprocity is what the German legal theorist Johannes Köndgen calls: *Selbstbindung ohne Vertrag*.<sup>4</sup> The binding of oneself without contract. One gives because one has been given. In my doctorate thesis on the principle of reciprocity I formulated the corresponding rule as: *do quia mihi datum est*.<sup>5</sup> I return a gift because I have been given a gift. I pass on what I have received. And if I don't, I would feel guilty and shameful with respect to my benefactors

4 Johannes Köndgen, *Selbstbindung ohne Vertrag. Zur Haftung aus geschäftsbezogenem Handeln* (Tübingen: Mohr, 1981).

5 Dorien Pessers, *Liefde, solidariteit en recht. Een interdisciplinair onderzoek naar het wederkerigheidsbeginsel* (PhD thesis Amsterdam, UvA, 1999).

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who, in turn, have the moral expectation and the confidence to receive. Reciprocity is the morality of being obliged to do something, a morality of duty, a morality of being indebted.

The strongest reciprocity is found between relatives: family members or members of a social community, as a neighbourhood, a group of friends or a community of colleagues. They share a common, homogeneous world at great length. This common world functions as the third, intermediary body, enabling its members to see their own experiences, values, habits, and morals reflected in those of the other. As a consequence of this reflecting of the self in the other – the essence of intersubjectivity and communication – human beings appear to be willing to give or to return or to pass on, in the confidence that in due course they will in turn be recipients. The German legal scholar Röhl speaks about a ‘background expectation of reciprocity that is in force in every human interaction.’<sup>6</sup>

Scholars such as Piaget, Lévi-Strauss, Mead and Kohlberg explained the expectation of reciprocity in terms of the reciprocal structure of our mind and cognitive system. To give a simple example: if you reach out your hand to greet someone, or if you ask a question to someone, and the other refuses to take your hand or to answer your question, you feel painfully hurt, even deprived in some sense, because what you gave found no response.

Reciprocity refers to the Latin word *reciprocare*: translated as an unceasing circulation, as is the case, for example, in the breathing system: breath comes in and goes out, in an endless movement of up and down, of coming in and going out. In this way we can regard reciprocal interaction as an endless circulation of goods, gifts, attentions, care and support between persons who are – in alternation and over time – each other’s moral creditor and moral debtor. This is the way social cohesion, social interdependence and solidarity come into existence. And it is in this interpretation that reciprocity functions as ‘the cement of society.’<sup>7</sup> And of course the circulation of goods, gifts and services offers social security to the participants in the circulation process, but at the same time the goods, the gifts and the services that are exchanged express and confirm the appreciation of the relation as well. Again: *le lien est plus important que le bien*. Needless to say, trust is a crucial condition for the continuation of the exchange process.

It is obvious that this form of reciprocity – generating social cohesion and solidarity by means of an incessant exchange – only highlights the positive and normative side of reciprocity. The negative side is no less familiar: I take from another because he has taken from me. If there is any identification at all, the result is not a moral recognition of the other, but, on the contrary, a rejection of the other,

6 Klaus F. Röhl, ‘Über ausservertragliche Voraussetzungen des Vertrages,’ in *Recht und Gesellschaft. Festschrift für Helmut Schelsky zum 65. Geburtstag*, ed. Friedrich Kaulbach & Werner Krawietz (Berlin: Duncker und Humblot, 1978).

7 Aafke E. Komter, Jack P. Burgers & Godfried Engbersen, *Het cement van de samenleving. Een verkennende studie naar solidariteit en cohesie* (Amsterdam: Amsterdam University Press, 2000).

caused by anxiety, jealousy, and aggression, boiling down to revenge and vendetta. And also negative reciprocity brings about an endless circulation.

But the negative side of reciprocity is not my topic here. Nevertheless, it is important to note that positive reciprocity is an impressive and historical reversal of the negative reciprocity. Is, in fact, our primordial condition not one of fear of the other, of the unknown, of the stranger, which all too often expresses itself in defence and enmity?<sup>8</sup> Laying down the spear and reaching out a hand is the first step towards the transformation of negative into positive reciprocity, and as such the first step on the road to peace and civilization.

### Mutuality

Mutuality stands in radical opposition to reciprocity, as the other great category of human interaction. Mutuality stems from the Latin word *mutuus*, meaning: coming from both sides at the same time; handing over simultaneously; crossing over at the same time. What is called ‘paying on the spot.’ Mutuality regards a short, anonymous human interaction. An interaction with a low degree – or a short moment – of identification and recognition between the parties, or even with no intersubjectivity at all. When the deal is finished, the parties lose their interest in each other at once. *Le bien est plus important que le lien*. The goods exchanged are more important than the tie itself.

Mutuality is the morality of contract law and of anonymous market relations. The contracting parties are strangers to each other, with little or no identification among them. That is why not trust, but distrust and suspicion dominate their relationship. This kind of relationships will be entered into on strictly determined conditions only. Everything will be defined in detail and written down officially: the names of the parties involved; the specific content of the contract; the time and place of delivering. As soon as the contracting parties have fulfilled their side of the contract, there is no right or obligation left. Parties can depart from each other with nothing binding them together any longer. The morality of mutuality is an instrumental one: based on the well-known rule of *do ut des*. I give to you in order that you give to me, at once and without delay or within a strictly determined time. Where reciprocity can be described as a morality of being socially obliged to do something, mutuality can be described as a morality of being legally entitled to. It is this thin morality which underlies a heterogeneous and market society like ours.

From an ideological point of view this thin morality is the foundation of political contract theories as well, based as they are on the assumption of enlightened self-interest, and on the legal values of autonomy, private property, freedom of contract and consent. Not reciprocity, but mutuality is the primary morality of the rule of law. The citizens are bound by formal and legal ties only. In a pluralistic

8 Mark R. Anspach, *À charge de revanche. Figures élémentaires de la réciprocité* (Paris: Deuil, 2002).

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society, with a very high degree of division of specialized labour, citizens are strangers to each other, yet – interdependent as they are – nonetheless willing to recognize each other as members of a common legal order. The legal community serves as the third, intermediary instance, necessary for a mutual and rational identification between fellow citizens.

But there is one important condition, the condition of trust. The citizens need to be confident that the State will protect and enforce their rights. Just as trust is a crucial factor within social reciprocal relations, so also it is a crucial factor in legal mutual relations. When the State for a long period succeeds in securing – on the basis of equality – the political, civil and economic rights of its citizens, there may arise a high trust society, as described by Putnam, among others.<sup>9</sup> In such a high trust society even reciprocal relationships between the citizens can come into existence, in the sense of a rational reciprocity. The Western European welfare states are a much debated example of this legal model of solidarity. Citizens are willing to give – by tax paying and social charges – to fellow citizens, confident that they will receive their part when their time of need has come.

### The dynamic relation between reciprocity and mutuality

Of course, what I described as reciprocity and mutuality, are in fact – in the terms of Max Weber – only *Idealtypen*, ideal types. In the reality of everyday life reciprocal and mutual interaction interfere in a dynamic way.

Reciprocity as a way of human interaction within a homogeneous group, embedded as it is in an unceasing circulation of moral rights and moral duties to give, to receive and to return, can become an oppressing system which leaves little room for freedom and for escaping from this – sometimes exhausting – chain of duties. Take the example of the family or of tight communities, or even the example of a criminal organization with strong solidarity rules among its members, like the mafia. If you don't meet the expectations of reciprocity, if you don't give in return what you received, your fate can be one of exclusion, of loss of reputation and of becoming the object of harmful gossip. Within a criminal organization it can even end up with your death. *Die Gemeinschaft macht gemein*, as Nietzsche once said. The close narrow community makes one mean. Under those circumstances the morality of the contract and the market, that is to say of mutuality, can be felt as a relief, as a liberation from social control or even from moral blackmail, and as a freedom to choose your own way of living, with rights and obligations derived from voluntary undertakings. In this sense it is widely assumed that the historical development from the feudal society to the civil society, can also be conceived as

9 Robert D. Putnam, *Making Democracy Work. Civic Traditions in Modern Italy* (Princeton: Princeton University Press, 1994).

the development from a dominant morality of reciprocity to a dominant morality of mutuality.<sup>10</sup>

In turn, as history shows, mutuality has to be compensated as well. A clear example is the development of contract law in the course of the last century. As is often noticed, and not by Marxists alone, contract law as it was codified in the nineteenth century, with its promises of freedom and equality, contained a high degree of ideology. The postulated freedom to associate only on the basis of the mutual legal rights and duties parties have agreed upon, appeared in reality – and in particular in the reality of labour relations – to result in exploitation, social exclusion, and an enormous gap between the rich and the poor.

As a response to the social misery that occurs when social relations are conceived of and practiced as mutual relations only, contract law became subjected to a process of what is called ‘the socialization of contract law’. The very essence of this process was the gradual introduction of norms of reciprocity into the mutuality based contract law. Nowadays legal contracts are supposed to contain an ‘implied term.’ In addition to the legal terms parties agree upon, parties are bound by the moral duty to take into consideration the reasonable interests of the other party, and to fulfil undetermined, moral duties as well (duties of care). In other words, by introducing moral responsibility into contract law – albeit to a certain degree and dependent on the circumstances of the case at hand – contract parties become obliged to recognize each other beyond contract law, beyond the sphere of mutuality, and to give to the other party that what he or she is morally entitled to. In this way law has created a rational reciprocity between strangers, for the sake of social justice.

Not only contract law, but also administrative law is an expression of rational reciprocity, as far as it regards – for instance – solidarity in the tax system, in the social security system, the retirement system and the health system.

### **Justice between generations: based on mutuality or reciprocity?**

After this explanation of the conceptual distinction between reciprocity and mutuality on the one hand, and the intertwining of both ways of human interaction in social and legal reality on the other, I offer an example that might illuminate the practical relevance of this conceptual distinction. The example is derived from the ongoing debate about the role of reciprocity in matters of justice between present and next generations. In this debate many authors – with John Rawls among them – invoke reciprocity as the moral basis for our responsibility for future generations. This opinion is motivated in accordance with what I described as the typical rule of reciprocity: *do quia mihi datum est*: we have a moral obligation to pass on what we have received.<sup>11</sup>

10 Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Times* (Boston: Beacon Press, 1957 [1944]).

11 John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), 284-93.

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But nevertheless it remains unclear in which way reciprocity is interpreted in this debate. In fact many issues about justice between generations are cast in terms of mutuality, like the question how coming generations could return in kind what present generations achieve or save to their benefit. Or like the question: who are the future generations, anyhow? How can a yet unborn generation have any rights at all? And what could be the specific content of those rights? As long as the relation between the present and future generations is constructed as a mutual and contractual one, justice seems difficult to achieve. Every attempt will stumble at once upon the features of mutuality: namely a strict balance between strictly defined rights and duties, between strictly defined parties. In other words, every attempt will fail due to the instrumental morality of *do ut des*: pulling off the mutual performances without delay.<sup>12</sup>

To avoid the – in my opinion wrongly perceived – problem of reciprocity in the relation between present and coming generations, legal philosophers looked around for other devices. They found them in inheritance theories. The idea of inheritance, at least as laid down in the law, suggests unilaterality. The gifts and legacies come from one side and cannot be returned to the deceased. There is no mutuality possible. Only a one way responsibility to the next generations.

But a misunderstanding arises again because the distinction between reciprocity and mutuality is not made. What is ignored is the way in which reciprocity functions in everyday experiences. Why do we keep the memory of our parents and ancestors alive, as we do in our graveyards, monuments, museums, names of streets and squares, and in the utmost care we often bestow on objects we inherited? Is it not because we want to continue our identification with our ancestors? To feel ourselves safe within an ongoing succession of generations? To safeguard for ourselves that we didn't come into existence *ex nihilo*, the tragic fate of the bastard? Feeling safely embedded in a chain of generations obviously generates a deeply felt tie, and a duty to honour the previous generations as a way of giving back what we received.

And are we not reciprocally related to next generations as well? A remark of the French legal scholar Irène Théry is interesting in this respect, who states that affiliation law is not about the birth of a new generation, but about death. Human beings want to defeat death and want to survive in their children and grandchildren. The coming of next generations seems to keep death at bay. The next generation offers a vitalizing perspective.<sup>13</sup> Moreover, the next generation also offers the possibility to pass on what we received, as a way of paying back in the endless chain of generations.

12 Axel Gosseries, 'Intergenerationele rechtvaardigheid. Een overzicht van de belangrijkste theorieën,' *Ethische perspectieven* 18-4 (2008): 537-56; Burns H. Westom, 'The Theoretical Foundations of Intergenerational Ecological Justice. An Overview,' *Human Rights Quarterly* 34 (2012): 251-66.

13 Irène Théry, *Des humaines comme les autres* (Paris: Editions EHESS, 2010), 168.

Notwithstanding the repeated misunderstanding concerning reciprocity, the approach to intergenerational justice in terms of inheritance theories has many advantages as compared to contract theories. There is for instance a direct connection with political metaphors, as used in international environmental law, and in particular in its many Declarations and Conventions. Without exception these documents refer in their preambles to 'the human family' or 'the family of man,' to 'our common heritage,' to the planet, the earth, the biodiversity that 'is held in common by the human family.' As such, these political documents are referring to a strong identification, to the reciprocity and to the solidarity usually found within the family or within a close community. As members of this global family we have – according to this approach – the same responsibilities we have in our private family life. We have the moral duty to leave behind to our successors what we received from our predecessors. We are only trustees in the long chain of generations, that is to say, we have the duty to act as guardians of the common good, to pass it on to the next generations in the same or a better state than that in which we received the planet and its natural resources. We do not have the right to disinherit our children and grandchildren.

This vocabulary – or to be more exactly: this political rhetoric – is far removed from the conceptual framework used in political contract theories, with its focus on mutuality as a morality of being entitled to something. It is not only in tune with the vocabulary of international environmental law, but also – and more importantly – it is in tune with the everyday experiences of human beings of flesh and blood.

As to the question about justice between generations, the morality of inheritance, as a deeply rooted morality of reciprocity, might be more persuasive than the morality of the political contract.

Let me draw some conclusions. When exploring the normative foundations of legal orders one must study the social phenomenon of reciprocity as well as its structural laws. It appears to be a fundamental principle of human interaction and – in its positive variation – a principle of social peace as well. But we only can come to grips with the often opaque role of reciprocity if we take into account that other broad category of human interaction as well, namely mutuality. Once reciprocity and mutuality are brought into a subtle and well-considered balance, they both figure as the normative foundations of our legal order.