CHAPTER 46

INTERNATIONAL LEGALISM AND INTERNATIONAL POLITICS

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1 International Law and Its 'ISM'

Perhaps the most curious thing about the concept of 'international legalism' is the relative scarcity of its use. Rarely will one find an international judge, a legal advisor or even a teacher of international law who openly refers to it, nor is it the explicit subject of any of the great debates in doctrine or theory.[1] Indeed, there seems to be almost a refusal on the part of a majority of international lawyers to directly engage with the portrayal of their own practice as legalist. One reason for this is that the term is often used disparagingly to caricature the stereotypical international lawyer as either a rule-fetishizing utopian or as a conscience-free apologist. Neither description is particularly

[1] AL Paulus, 'Law and Politics in the Age of Globalization' (2000) 11 *European Journal of International Law* 465–72.

appealing to self-conscious professionals, not least as it tends to come either from critical scholars within the discipline or, 'worse', from outside, notably from 'functionalist' international relations scholars.[2]

It is, thus, not surprising that a recent treatise setting out to frame and denounce the international legal project as 'perilous' global legalism caused a good degree of uproar among those to whom it intended to attach the label. That treatise is, of course, Eric Posner's 2009 monograph, *The Perils of Global Legalism*, which in turn followed his and Jack Goldsmith's 2006 book *The Limits of International Law*.[3] In essence, both books argue that international law is ineffective in creating and maintaining international order—or, as Posner puts it, in solving global collective action problems—and that, as a consequence, all those international lawyers who claim otherwise are misguided and, indeed, perilous global legalists. Given that most international lawyers who self-consciously associate with that job description would, as a matter of course, fall into the latter category, Posner's (and Goldsmith's) argument unsurprisingly caused a distinct irritation in many quarters of the international legal academy.[4] This reaction was, arguably, not only due to the fact that both interventions seemed to simply recycle old style realist international law scepticism but also that they did this, polemically, in the wake of the (then) Bush administration's perceived pathological disrespect for international law, international institutions, and multilateralism in general. For many international lawyers, this was yet another gauntlet thrown down on behalf of the adherents of what Louis Henkin had previously called the 'cynic's formula'[5]—a *Feindbild* which, in the eyes of most international lawyers today, is comprised of international relations scholars, neoconservatives, neo-Schmittians and, generally, (American) exceptionalists, as well as those 'law and economics' rationalists that align with any of the former.

Yet, for all its apparent provocation, the response to *Perils* was similar to the one to *Limits*, which was, as one commentator observed, simply 'quarantined as

[2] M Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26 *International Relations* 3–34, at 5.

[3] EA Posner, *The Perils of Global Legalism* (University of Chicago Press Chicago 2009); EA Posner and JL Goldsmith, *The Limits of International Law* (OUP Oxford 2005).

[4] H Cohen, 'Book Review—Eric A Posner's *The Perils of Global Legalism*' (2012) 13 *German Law Journal* 67–75; S Kupi, 'Book Note—*The Perils of Global Legalism* by Eric A Posner' (2011) 49 *Osgoode Hall Law Journal* 43–4; A D'Amato, 'New Approaches to Customary International Law—Posner, Eric A, *The Perils of Global Legalism*; Guzman, Andrew T, *How International Law Works: A Rational Choice Theory*; BD Lepard, *Customary International Law: A New Theory with Practical Applications*' (2011) 105 *American Journal of International Law* 163–7; R Hockett, 'Promise against Peril: Of Power, Purpose, and Principle in International Law' (2010) 17 *ILSA Journal of International and Comparative Law* 1–32; CJ Eby, 'Global Legalism: The Illusion of Effective International Law' (2010) 38 *Denver Journal of International Law and Policy* 687–99; and most recently JD Ohlin, *The Assault on International Law* (OUP Oxford 2015).

[5] L Henkin, *How Nations Behave* (Council on Foreign Relations New York 1979) at 49.

if it were a strange new variety of antigen in the body of international law scholarship, with a fast-growing hedge of reviews and review essays playing the salutary role of antibodies'.[6] Hence, in the main, the immune reaction has consisted of simply turning the table on Posner's indictments, with the main line of defence being the attempt to rebut his presupposition that the assertion that international law was effective was founded on a tautology without empirical grounding.[7] Thus, where Posner endeavours to muster evidence for the ineffectiveness of customary and treaty law in solving global collective action problems ranging from climate change to the 'war on terror', his critics simply deny his pessimistic reading of the facticity of legalized inter-state relations.[8] Where he derives that ineffectiveness from the purported fact that 'states can [and will] depart from international law' because they are fundamentally interest-driven,[9] they counter-argue by pointing to the numerous examples of functioning inter-state cooperation underwritten by (international) law. And where, finally, Posner reveals his scepticism to be based on the absence of effective international institutions resulting from the inexistence of a world government, they argue that 'law without government' was a much more empirically realistic and normatively desirable proposition than he makes it out to be.[10]

However, typically for many an international lawyer's response to rule scepticism,[11] these refutations have tended to be casuistic in nature, seeking to get the better of Posner on empirical grounds while shying away from his argument's deeper tenets. In essence, these are, again, that international law's effectiveness is not empirically verifiable, that international law cannot, in any case, work in the absence of a real or presumed world state, and that promoting it is, therefore, misguided because it sets the wrong priorities and impedes effective problem solving in the international realm.

These positions echo three common variants of scepticism that have accompanied the international legal project since its inception. The first variant could be called epistemological scepticism and stems from a negative answer to the question of how international legality can be identified, notably that it cannot (be clearly identified). It hits at the heart of a rather specific type of law which, for it to be applied to facts, needs always first to be found or, as contemporary legal positivism

[6] 'Promise against Peril' (n 4) 7.

[7] JP Trachtman, 'Eric A Posner, *The Perils of Global Legalism*' (2009) 20 *European Journal of International Law* 1263–70; 'New Approaches to Customary International Law' (n 4).

[8] *The Perils of Global Legalism* (n 3).

[9] EA Posner, 'The Rise of Global Legalism' (Max Weber Lecture No 2008/04 delivered at the European University Institute, 16 January 2008) <http://cadmus.eui.eu/bitstream/handle/1814/8206/MWP_LS_2008_04.pdf>.

[10] Ibid.

[11] DC Gray, 'Rule-Skepticism, Strategy, and the Limits of International Law' (2006) 46 *Virginia Journal of International Law* 563–84.

would have it, ascertained.[12] If this cannot be done up to a certain standard, then, according to Posner, that project's foundational premise—notably that states *feel* and, thus, *are* factually bound by legal norms knowable and known by them—would turn out to be unfounded. Then there is what could be termed the ontological variant of scepticism that arises from the different interpretations of how international law *really* works when observed, as it were, from outside. Here the portfolio ranges from the canonical—and, according to its critics, therefore legalist—legal formalism that objectifies the internal perspective's norm-centric world view to Posner and company's realist anti-legalism that reduces international law to a form of (albeit ineffective) political discourse driven by rational state interest. Lastly, there is also an axiological dimension which, to Posner-like sceptics, inheres in the international legal project. It relates to the presumption, allegedly held by international lawyers of the legalist kind, that (international) law has a value of its own that bestows on it a fundamental legitimacy vis-à-vis other forms of (international) ordering, most notably (what Posner calls) politics. Indeed, by this line of argument, international law's legitimacy is even held to be capable of outpacing its own legality, or, rather, the ascertainment thereof. The intra-disciplinary fallout over the 'illegality but legitimacy' of the 1998 Kosovo bombings is the *cause célèbre* here, regurgitated by Posner to illustrate his point.[13]

The point behind the point is, of course, that law—or, rather, the rule of law—is here taken better to advance certain values, or valued objectives, such as peace, equity, or justice, than political process. The international legal project is, thus, essentially seen as a plot to spread the rule of law globally as a means to achieve a certain type of world order. It is, in other words, held out to be better than politics, or, indeed, the better politics, and it is this presupposition that is at the heart of Posner's critique. The latter's central tenet is that counterfactually to promote a law that is actually dysfunctional in terms of solving 'global collective action problems' risks advancing the wrong objectives. Such a law does not, in Posner's words, 'advance [people's] interests and respect their values';[14] it cannot, thus, be taken to be legitimate.

None of these scepticisms are particularly new, and the startled uproar following *Limits* and *Perils* was, arguably, due not so much to their originality but to the brash tone in which they were advanced. This has, however, made it easy for *Perils*' targets—virtually all self-professed international lawyers—to simply discard the argument as ideological propaganda, and to refrain from engaging with the concerns underlying the critique, even as questions surrounding international law's legality, legitimacy, and reality continue to haunt it, not least at a time when

[12] J d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP Oxford 2011).

[13] 'The Rise of Global Legalism' (n 9) 29; 'New Approaches to Customary International Law' (n 4) 164.

[14] *The Perils of Global Legalism* (n 3).

it seems, paradoxically, to be experiencing at once new heights of relevance and unprecedented challenges.[15]

At the heart of this reluctance to engage directly with such scepticism lies, arguably, a continuing unease about law's (most) significant other, notably politics. To be sure, after half a century of critical legal scholarship, the 'p'-word is no longer taboo in the discipline and many an international lawyer has become confident enough to offer a political gloss on the margins of her scholarship, not least in order to talk back to those who have long claimed interpretive authority over (international) politics.[16] Yet, revealing the 'politics of international law' and rendering the discipline more overtly political is not the same thing.[17] Hence, the real *agent provocateur* is, arguably, not Posner and Goldsmith's empiricist challenge to legal objectivism but their implicit attempt to move the terms of the debate onto the terrain of (realist) politics and to compel an answer within this remit. Most of the actual respondents did, indeed, refuse to take the bait by mounting a political defence of legalism but, instead, sought simply to undermine the realist interpretation of international legal practice. The question of the relationship between law and politics was, however, thereby left to be answered, as if a deeper and more direct engagement carried the risk of opening a Pandora's Box the contents of which might infect the lawyer's disciplinary high ground.

For inside that box lurks something that international lawyers, arguably, fear even more than the ritual provocations by political realists, and that is to find that their own discipline might, in fact, be something different from what it seems. What is, of course, hinted at here is the contention that international law is, in essence, an ideological framework; that its professional practice is, thus, ideological; and that its practitioners are, consequently, ideologues. Posner, of course, claims as much

[15] For instance, the recent expansion of international criminal law can be taken to point to a growing tendency to assess complex political theatres by international legal standards and to base action on such an assessment: see SMH Nouwen and WG Werner, 'Monopolizing Global Justice: International Criminal Law as a Challenge to Human Diversity' (2015) 13 *Journal of International Criminal Justice* 157–76. On the other hand, such intractable issues as the proliferation of insurgent activities deemed terrorist or the consolidation of global migration streams seem to be capable of generating reactions by states that appear to be inconsiderate of even the most fundamental and established legal principles: see P Fargues and A Di Bartolomeo, 'Drowned Europe' (Migration Policy Centre, European University Institute, Policy Brief No 2015/05, April 2015) <http://cadmus.eui.eu/bitstream/handle/1814/35557/MPC_2015_05_PB.pdf>; T Basaran, 'The Saved and the Drowned: Governing Indifference in the Name of Security' (2015) 46 *Security Dialogue* 205–20.

[16] M Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *European Journal of International Relations* 395–422; 'Law, Teleology and International Relations' (n 2).

[17] M Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4–32; M Koskenniemi, 'The Politics of International Law—20 Years Later' (2009) 20 *European Journal of International Law* 7–19.

when he defines global legalism as 'akin to an ideology or attitude or posture—a set of beliefs about how the world works',[18] except that to those charging others with being under the sway of ideology, it represents a wrong or at least distorted view of that world and the role of law in it. For at its (Marxian) most basic, an ideology is a function of the structural forces that shape social reality and, simultaneously, a cosmetic device to conceal their operation.[19] Hence, (international) lawyers-as-ideologues would, merely through their practice, be implicated in at once running and dissimulating, including to themselves, a particular 'scheme of things'. That 'scheme of things' would have an empirical grounding in factual power relations, though these would be continuously misrepresented in what amounts to a dialectical interlocking of reality and mystification.[20]

If, in other words, international law was an ideology, this would mean that international lawyers of the legalist kind would be both ignorant of the 'true' workings of the law, and, by militantly defending their 'false' view, complicit in a gigantic scam. Needless to say, this is not a representation likely to please those to which it is applied. Nor does it sit well with most lawyers' self-understanding as appliers, rather than defenders, of their particular type of knowledge (about rules), of being conveyors of the (objectively) given rather than crusaders for a cause, and of being mere servants of a (legal) Jupiter rather than shouldering the responsibility that comes with being a Hercules.[21]

It is that ideological attitude which the term 'legalism' is meant to express, with the 'scheme of things' it refers to being, of course, that grand meta-narrative of modernity, notably liberalism. In fact, if one follows a historical-critical reading of international law, the discipline was already born as an ideological framework to defend a liberal internationalist project.[22] However, after half a century of critical legal scholarship—more than a century if one adds the American legal realist tradition—none of this comes as much of a surprise any more.[23] That the Western legal tradition in general, and international law in particular, is implicated in the story of the unfolding of a liberal (capitalist) world and that it is, in that sense,

[18] 'The Rise of Global Legalism' (n 9) 11.

[19] S Marks, 'Big Brother Is Bleeping Us—With the Message That Ideology Doesn't Matter' (2001) 12 *European Journal of International Law* 109–23.

[20] Ibid 123.

[21] F Ost, 'Júpiter, Hércules, Hermes: Tres Modelos de Juez' (1993) 14 *Doxa—Cuadernos de Filosofía del Derecho* 169–74.

[22] See M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Helsinki 1989). Citations will, henceforth, be to the reissue: M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (reissue CUP Cambridge 2005) at 71.

[23] A Hunt, 'The Theory of Critical Legal Studies' (1986) 6 *Oxford Journal of Legal Studies* 1–45; JA Beckett, 'Rebel without a Cause—Martti Koskenniemi and the Critical Legal Project' (2006) 7 *German Law Journal* 1045–88.

political, has been worked out in great detail and with increasing clarity since, at least, the (first) publication of Martti Koskenniemi's *From Apology to Utopia*.[24] That international legal practice is, therefore, marked by structural (political) bias and its substance by the historical legacies of colonialism and imperialism has by now been charted in its most intricate facets.[25] There is little, if anything, to add to this grand ideology critique of international law.

Yet, despite all this, those at whom it is primarily directed, the operators of that very ideological law, seem to remain largely undaunted by critique and solidly in the grip of liberal legalism. To them, legalism—denoting, again, the mindset that is produced by and, thereby, reproduces, that liberal ideology—is not, it would seem, an essentially contested concept at all. In fact, as was already hinted at, it is not even part of the day-to-day vocabulary. One reason for this may be the 'false consciousness' under which ideology critique postulates the legalists to be operating. However, such a purely epistemological conception of ideology in which those under its thrall would be but mindless automata incapable of self-reflective insight is highly implausible.[26] The reason why, after three decades of 'immanent critique',[27] contemporary international lawyers still tend not to engage in and act upon the critique of their own ideology is, arguably, that they choose not to do so. That choice results from the aforementioned deep reluctance to step outside of the box and to speak politics, whether it is an openly liberal or an anti-liberal one.

Legalism is the label that stands for this reluctance in the dual sense that it, on the one hand, represents international lawyers' professional preference for legal objectivism and political agnosticism and, on the other hand, their equally professional unwillingness to openly admit to this preference. It is, hence, everywhere and nowhere in international law, a paradox produced by the still empty space between the law and the political. For while the origins of this gap have largely been deciphered and its continued existence explained, bridging it has remained a tentative and marginal exercise, if, indeed, it has been deemed a worthwhile exercise at all. Is this because of some ontological property which renders law and politics fundamentally incommensurable, or is it because the gap, premised on particular (mis)conceptions of both law and politics, serves a specific function within the wider, liberal 'scheme of things'? Thus, as a metaphor for this gap, legalism can still be meaningfully explored (even if only legalism with a small 'l'), in between the lines of the grand narratives of both liberalism and its critique.

[24] See *From Apology to Utopia* (n 22) ch 2.

[25] See ibid; A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP Cambridge 2005); L Eslava and S Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45 *Journal of Law and Politics in Africa, Asia and Latin America—Verfassung und Recht in Übersee (VRÜ)* 195–221.

[26] 'Big Brother Is Bleeping Us' (n 19).

[27] *From Apology to Utopia* (n 22) 600.

2 Liberal Legalism as International Law's Ideology

The starting point for any attempt to measure the gap between law and politics is a recapitulation of where the liberal project of international law stands after the critique—where, in line with a post-Frankfurtian conception of *Ideologiekritik,* 'after' neither denotes a chronological order nor an end point, but simply the disposition of that critique 'out in the open'.[28] To attempt to do such a critique remotely any justice, a treatise the size of this *Handbook* would be necessary. Instead, the scene shall be drawn in a few rough strokes that merely aim to elucidate the basic question at hand, namely why (liberal) international lawyers continue to refuse to talk politics and whether there is any alternative at hand.

For these more limited purposes, an appropriate starting point might, arguably, be a quick glance back at two intellectual movements with which the term legalism is associated and which predate and prefigure its association with modern liberalism and liberal internationalism. The first concerns an ancient Chinese political theory, subsequently described as legalist, which accompanied the formation of a unified Chinese state during the so called Warring States period (475–221 BCE) and which extended into the first imperial dynastic period, the Qin Dynasty (221–206 BCE). Here the term legalism was employed to refer to the 'amoral science of statecraft' and it was developed in contrast to both Confucian moralism and Taoist naturalism. It expressed a position in which positive law was seen as the primary instrument to uphold the centralized rule of a unified sovereign.[29] As such, legalism (*fajia*) with its constituent elements of power (*shi*), method (*shu*), and law(s) (*fa*) broadly alludes both to Machiavellian (political) realism and to Hobbesian sovereigntism, with hints of legal positivism in its rule centrism and moral relativism. With its stress on the central role of positive law for the maintenance of effective control over people and territory it bears a certain likeness to the development of the Westphalian concept of statehood and sovereignty as well as to the empirical process of legalization that accompanied it. Hence Qin legalism stands for a particular conception of law and law's role in (political) society, as well as for a certain militancy towards the realization of this vision. As a doctrine, however, legalism came to be strongly repudiated for its alleged amorality and perceived cruelty in post-Qin times, even if it continued

[28] See S Žižek, 'Introduction: The Spectre of Ideology' in S Žižek (ed), *Mapping Ideology* (Verso New York 2012) 1–33.

[29] PR Goldin, 'Persistent Misconceptions about Chinese "Legalism"' (2011) 38 *Journal of Chinese Philosophy* 88–104.

to inform significant aspects of Chinese political thought under the cloak of Confucian(ist) rhetoric.[30]

The second semantic context with which legalism is frequently associated is Christian theology, where it is used to refer to the object of the Pauline critique of the 'salvation through (the) law' doctrine. Stylized as the Jewish Christian position that compliance with Mosaic Law (*Torah*)—for instance in the form of male circumcision—was a prerequisite for salvation, it was contrasted by Paul with the notion that justification, that is, freedom from (original) sin, could only be attained through (God's) grace by means of faith.[31] While Paul's position on the Mosaic Law was actually ambivalent and may have been primarily concerned with finding a bridge between the (old) law and the (new) revelation, subsequent interpretation created a clear dichotomy between legalism and anti-legalism.[32] At its heart lie fundamentally different views on the role of individual agency in the quest for redemption. For legalists, it is the proactive compliance with preordained rules or other precepts, including 'good works', that contributes significantly to the redemptive process, whereas for anti-legalists, it is 'merely' the (albeit equally proactive) acceptance, through faith, of the gift of (God's) grace that delimits a human being's redemptive agency.

Ultimately, the difference between (theological) legalism and anti-legalism comes down to one between exteriority versus interiority, that is, between privileging either the collective adherence to a framework of rules external to individual conscience or, inversely, the primacy of that individual conscience, deemed to constitute the receptacle for grace, over any human-made or human-interpreted system of rules. Although, contrary to a commonly held view, this difference does not squarely map onto the Catholic–Protestant dichotomy, it does contrast, on an abstract level, a communitarian-multilateral approach with an individualist-unilateral one, even if a single unifying force, in this case God's will, remains in a more or less mediated form behind both conceptions.

What is significant about these two highly disparate historical debates is that they introduce many of the issues around which the contemporary discussion of legalism in international law is structured. Hence, the question of the meaning and role of (legal) sovereignty versus (real) power is prefigured, as is the related issue of the status of positive rules in (international) life. And in the background,

[30] K Hsiao, 'Legalism and Autocracy in Traditional China' (1976) 10 *Chinese Studies in History* 125–43.

[31] See, in particular, *Romans* 3:20 (KJV): 'Therefore by the deeds of the law there shall no flesh be justified…' and *Galatians* 2:16 (KJV): 'Knowing that a man is not justified by the works of the law, but by the faith of Jesus Christ, even we have believed in Jesus Christ, that we might be justified by the faith of Christ, and not by the works of the law: for by the works of the law shall no flesh be justified'. See TJ Shaw (ed), *The Shaw's Revised King James Holy Bible* (Trafford Bloomington 2010) at 567 and 587.

[32] T Schirrmacher, *Law or Spirit? An Alternative View of Galatians* (RVB International Hamburg 2008).

the (political) theological question of the nature of the international as a society of interests or a community of values, and of the primacy of law or politics in it, is articulated. What is, of course, at first sight puzzling are the more counter-intuitive associations of legalism in these two discourses. That law be seen as a mere instrument of power, as in Qin legalism, seems to contradict the contemporary narrative of it being an antidote to the latter. That the precedence of external rules over (political) judgement might be deemed negative seems to fly in the face of the dominant view that political will must be curtailed through externally binding rules. Yet, it is in this shift in the semantics of law, from it being an instrument *of* power to one *against* it, from it being a limitation of (political) freedom to it being its principal safeguard, that the work of liberal ideology can be discerned.

At the base of that ideology lies, arguably, the grandest of all meta-narratives, namely that of modernity itself. Of its many plotlines, one concerns the loss of a transcendental foundation for political authority and the consequent crisis that characterizes the modern predicament.[33] (Very) broadly speaking, that predicament poses the fundamental question of how order can be produced under conditions of plurality and from within the world. Its answer requires, amongst other things, some scheme to overcome the gap between the universal (abstract) and the particular (concrete) left open by the loss of transcendental-mythical authority. This gap threatens to pulverize social order and paves the conceptual way for the notorious *bellum omnium contra omnes*, with the modern history of (political) ideas, arguably, representing a continuous effort to overcome it.[34]

One scheme to this end has, of course, been liberalism which, in essence, operates by means of three ideological moves. First, it stylizes reason as a universal instrument for the articulation of (individual) self-interest, which, in turn, is deemed to be driven by the desire for self-preservation. Political freedom is, thus, simply the capacity to enact the precepts of reason with regard to one's self-interest. This is then deemed to 'naturally' introduce the need—as well as the individual insight into such need—for a political society which serves the (sole) purpose of enforcing order among its self-interested and, therefore, always potentially antagonistic members. Conceived of as a constraint on individual liberty, such ordering requires consent, which, in turn, is given by means of a hypothetical (social) contract. This, then, gives rise to liberalism's second ideological move, notably the postulate of a rigidly divided public and private sphere. For what liberal individuals ultimately consent to is a scheme for social order that is geared to ensuring that the

[33] See generally H Arendt, *Between Past and Future* (University of Chicago Press Chicago 1961). See also M Antaki, 'The Critical Modernism of Hannah Arendt' (2007) 8 *Theoretical Inquiries in Law* 251–75; F Hoffmann, 'Facing the Abyss: International Law before the Political' in M Goldoni and C McCorkindale (eds), *Hannah Arendt and the Law* (Hart Oxford 2012) 173–90, at 173.

[34] Q Skinner, 'The Ideological Context of Hobbes's Political Thought' (1966) 9 *Historical Journal* 286–317, at 298.

exercise of their liberty is not threatened by the inherent antagonism this implies. Liberalism purports to achieve this by separating off a private sphere, in which articulations of individual liberty are located, from a (much smaller) public sphere, in which the terms of basic collective survival are politically negotiated. However, this only works if politics is tightly enclosed in a girdle of fundamental rights and institutions representing a stylized *volonté general*—as well as, of course, a market-based, decentralized form of economic exchange and distribution—which radically reduces the space for political contestation and, thus, violence. In other words, the particular that gives rise to difference—in value or identity—is largely removed from the realm of politics in order to constitute a politically neutral public sphere which allows a universalized *homo oeconomicus* to (self-)interestedly pursue her individual well-being. The neutrality of this public sphere is, of course, not 'real', as the outcomes of the liberal scheme of politics are not universally equal but are distributed asymmetrically and linked to particular interests. This, however, impels the third ideological move of liberalism, notably the need to conceal the particularity of the value and identity positions that underwrite the liberal 'scheme' under a cloak of universality that makes them appear as necessary and 'natural'. Hence, liberalism's approach to avoiding the *bellum omnium* is to mythologize its own foundations—just as modernity itself does, namely by covering up its lack of foundation through a simulacrum of foundation.

Law, or rather, a particular conception of law, plays a crucial role in this scheme. It is the primary instrument through which the public–private divide is sustained and, hence, the means by which liberal politics is constituted. The particular conception that underlies liberal law is based on several premises which flow from the positivist ontology that derives from the instrumentalist conception of rationality that is privileged in (liberal) modernity. Hence, law is considered to be objective in the dual sense of being anchored in empirical social practice (termed, variously, as effectiveness, concreteness, or facticity) rather than in an ideal moral universe, as well as in its specific identity as a clearly delimited set of ought propositions endowed with the force to order or regulate their referent society (termed normativity or validity).[35] The empirical reality on which law's objectivity is premised does not, however, itself belong to the realm of law, but is, instead, represented through substantiations of a basic norm, a rule of recognition, or a 'first constitution'.[36]

Being an offspring of the neo-Kantian attempt to move philosophy into the age of scientific positivism, such legal positivism is concerned with defining a specifically legal category of cognition and with differentiating it against other cognitive

[35] *From Apology to Utopia* (n 22).

[36] See, respectively, H Kelsen, *The Pure Theory of Law* (M Knight trans) (2nd edn Lawbook Exchange Clark 2009 [1934]) and HLA Hart, *The Concept of Law* (PA Bulloch and J Raz eds) (3rd edn OUP Oxford 2012 [1961]). See also J Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' in J Kammerhofer and J d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP Cambridge 2014) 81–113.

categories.[37] Its central purpose is to bestow upon law an unmistakable identity that is autonomous in content and operation and can, thus, only be properly known and described in its own terms, that is, by an internal perspective which is non-reducible to other system logics—such as politics. Legal positivism aims both to explain that autonomy and to outline the conditions for understanding a particular type of normative language as law.[38] Hence, the ascertainment and application of such law must follow formalist lines, that is, the rules which make it up must be considered to be capable of being logically derived through their pedigree and to render determinate normative outcomes in adjudicatory contexts. As a performative language (game) structured by a uniform—yet, therefore, necessarily self-contained and closed—grammar, law must, in principle, be conceived of as being accessible to and useable by all members of its referent society on equal terms and, hence, universal. Liberal law is, thus, a jurisprudential amalgam of legal positivism, formalism, and objectivism.

These features evidently underwrite liberalism's ideological moves. For a law that is conceived as at once empirically objective and autonomous in operation is but an expression of the instrumentalist rationality which liberalism enshrines and which privileges function over purpose or, put differently, the 'how' over the 'why'. It thereby also feeds into the antagonistic individualism at the base of liberalism, geared towards the pursuit of self-interest in abstraction from the totality of social relations (and, indeed, from history itself). This, in turn, is only possible because, under positivist premises, law must be conceived as value free, and, thus, in strictly relativist terms,[39] a *conditio-sine-qua-non* for law to appear as a neutral procedural safeguard of individual liberties. Only thus can it maintain the smokescreen of a public sphere in which politics is stylized as a tightly regulated but, in principle, open-ended balancing of individual interests at the same time as it privileges, in the background, its own concrete order of (liberal) values. For the postulate of an objective and autonomous law that can be 'positively' ascertained makes it impossible to thematize from within its own premises the values which underlie it. The latter are, thus, (nearly) perfectly concealed behind a veil of formalism which makes their identification—and critique—an a priori *a-legal* act outside the remit of 'the law' and, hence, professionally irrelevant to (most) lawyers.[40]

[37] S Hammer, 'A Neo-Kantian Theory of Legal Knowledge in Kelsen's *Pure Theory of Law*' in SL Paulson and BL Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP Oxford 1999) 177–94.

[38] See eg T Huff, *Max Weber and the Methodology of the Social Sciences* (Transaction New Brunswick 1984); B Bix, 'Law as an Autonomous Discipline' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP Oxford 2003) 975–87; OM Fiss, 'The Autonomy of Law' (2001) 26 *Yale Journal of International Law* 517–26.

[39] J Raz, *Between Authority and Interpretation* (OUP Oxford 2009).

[40] See eg JE Alvarez, 'International Law 101: A Post-Mortem' *ILPost* (American Society of International Law, 12 February 2007). See also WP George, 'Grotius, Theology, and International Law: Overcoming Textbook Bias' (2000) 14 *Journal of Law and Religion* 605–31.

Historically, this liberal 'scheme of things' is linked both to the constitutionalization of political power in the domestic sphere and to the constitution of (Westphalian) statehood in the international sphere. Modern international law is, thus, quintessentially a liberal law, with all the strings that attach to this label. Through the concept of (state) sovereignty—and analogous to individuals in the domestic sphere—states are conceived as self-interested monads which acquire identity through antagonistic differentiation vis-à-vis one another.[41] State action is conceived as inherently strategic and utility-oriented, reducing international relations to a network of 'private' economic and military engagements.[42] This private pursuit of survival comes to constitute the public sphere of states, while the public pursuit of freedom is relegated to the private sphere of civil society. It is inherently paradoxical in its 'structural coupling' of utopian legalism and the apology of sovereignty.[43] On one hand, international law's near exclusive focus on the state enshrines the idea of antagonistic sovereignty and creates a false *nomos* of politics; on the other hand, its articulation of universal features of humanity abstracts from concrete human beings and inverts cause and effect of (their) political action.[44] As such it serves to cover up any imbalance in the name of abstract humanity and substitutes political solutions with technical ones.

3 Empire-Building: The Liberal Legalization of (International) Politics

Anthony Carty has called this liberal 'scheme of things' a 'false ontology' based on a 'deuteronomistic' framing of both politics and law.[45] It derives, for him, from the Hobbesian conception of (international) order, built upon 'the opposition of the domestic and the foreign, and…a state system which rests upon the mutually exclusive suppositions that each is a self for itself and an other for all the others'.[46] It reduces politics to rational (self-)interest-driven *Realpolitik* which privileges the

[41] A Carty, *The Philosophy of International Law* (Edinburgh University Press Edinburgh 2007) at 161.

[42] H Arendt, *The Human Condition* (2nd edn Chicago University Press Chicago 1998).

[43] *From Apology to Utopia* (n 22) 570.

[44] L Keedus, '"Human and Nothing but Human": How Schmittian Is Hannah Arendt's Critique of Human Rights and International Law?' (2011) 37 *History of European Ideas* 190–6, at 195.

[45] *The Philosophy of International Law* (n 41) 143.

[46] Ibid 161.

'pure fact' of power and pits it against a (powerless) law enshrining the (value) ideals of justice and peace. Out of the former, the discipline of international relations would emerge as, initially, the realist venture to frame international life in strictly functional(ist) terms and thereby to kill off international law's pretence of objectivity and autonomy.[47] The latter, in turn, would linger on as a residue of naturalism and the permanent (bad) conscience of international society.

Yet, as was seen, this stylized antagonism is part of liberalism's plot, for only a clear-cut dichotomy between the apologism of power politics and the naïve utopian faith in the values of legal cosmopolitanism could compel the sort of compromise solution liberalism has on offer. It comes in the form of the Vattelian 'classical' system of international law, which has, arguably, been providing the basic blueprint for the way in which the international, its law and its politics are conceived in liberal modernity. In essence, that blueprint is based on the paradoxical combination of a strong concept of (state) sovereignty with the equally strong presumption of the rationality of state action. Hence, the narrow balance between the *bellum omnium*, on one hand, and hegemony (and subjection thereunder), on the other, is achieved by simultaneously attributing to each component of this 'society' free (political) will *and* the (rational) insight that free will must not be exercised discretionarily but in such a way as to be compatible with its (continued) exercise by all. In other words, political power and universal rationality are here deemed to relativize, and, indeed, neutralize one another.

In this scheme, law is not just an instrument to safeguard this balance but its very expression. It forms a new epistemic horizon which structures the way in which power-holders and their rationalizers (that is, international lawyers) communicate amongst themselves about the (international) world. To be sure, the history of modern international law has been nuanced on this count and there have been significant variations of emphasis in terms of the precise balance between apologism and utopianism. Hence, Vattel's 'classical' conception of international law has, notwithstanding his own differentiated position, been seen as coming out on sovereignty's (that is, apologism's) side, whereas the 'Grotian tradition', for instance, and its espousal of some form of legal cosmopolitanism has been deemed utopian.[48] In fact, what emerges from the ever more detailed picture of the development of modern (liberal) legal doctrine is not just its internal variety along a spectrum running from apologism to utopianism but also the inconsistency with which these labels are applied and the conceptual associations they carry. However, what all these different approaches share is a commitment to 'the law'—however it

[47] BA Simmons and RH Steinberg, *International Law and International Relations* (CUP Cambridge 2006); G Simpson, 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power' (2000) 11 *European Journal of International Law* 439–64.

[48] See eg E Jouannet, 'The Critique of Classical Thought during the Interwar Period: Vattel and Van Vollenhoven' in this *Handbook*.

is precisely defined—and a scepticism towards politics, seen in its realist guise as the (national) interest-driven will to power. Indeed, only if politics is, thus, styled as the 'bad cop' of international relations can (liberal) law emerge as its unequivocal 'good cop' who at once holds international society together and transforms it into a community of (liberal) values.

This double quarantining of politics—by first squeezing it into the straightjacket of realism and then by legally ring-fencing it within a rump public sphere—corrodes the foundations for political authority, producing a vacuum into which 'the law' is drawn. Yet, law is, of course, not a real substitute for political authority. It can only mimic it in form but not in substance, and indeed, it must continuously expand its formal rule in order to cover up its inherent lack of political substance, leading to a process of legal hypertrophy. Liberal international law must, in other words, continuously expand and incrementally cover all the discursive space of international life in order to protect its (purely formal) authority and eliminate the possibility of uncovering its lack of (political) authority. As such, international law strives to rule, and the ideal of the international rule of law is a reflection of this imperialist discursivity.[49] Liberal legalism denotes, hence, not just a particular ontological position—or 'consciousness'—on what (international) politics is—namely *Realpolitik*—and what (international) law is; namely a liberal rule of law aimed to neutralize the former, but also a militant stance towards (legal) empire-building.[50] Its empirical articulation is that of the gradual legalization of international life, a process underwritten by what legal sociologists have long identified as the modern phenomenon of juridification.[51] It springs from one of modernity's core characteristics, notably the rationalization of social relations that accompanies the rise of the 'spirit of capitalism'.[52] For, from a (post-)Weberian perspective, the complexities of a theologically 'disenchanted', pluralist, and capitalist world lead both to the rationalization of the cognitive horizon (in other words, lifeworld) through which individuals

[49] BZ Tamanaha, 'The Dark Side of the Relationship between the Rule of Law and Liberalism' (2008) 3 *New York University Journal of Law and Liberty* 516–47.

[50] JL Cohen, 'Whose Sovereignty? Empire versus International Law' (2004) 18 *Ethics and International Affairs* 1–24; JE Alvarez, 'Contemporary International Law: An "Empire of Law" or the "Law of Empire"' (2008) 24 *American University International Law Review* 811–42.

[51] R Kreide, 'Re-Embedding the Market through Law? The Ambivalence of Juridification in the International Context' in C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Oxford 2011) 41–64; D Loick, 'Juridification and Politics from the Dilemma of Juridification to the Paradoxes of Rights (2014) 40 *Philosophy and Social Criticism* 757–78.

[52] M Weber, *The Protestant Ethic and the Spirit of Capitalism* (G Baehr and GC Welsh eds and trans) (Penguin London 2002 [1905]). See also S Kalberg, 'Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History' (1980) 85 *American Journal of Sociology* 1145–79.

perceive themselves within society, and also to the emergence of functionally differentiated systems which are increasingly decoupled from that cognitive horizon. In particular, the economic and the political systems enable, through, respectively, the monetarization and the formalization of the allocation of power, continued societal coordination and integration under conditions of complexity and plurality.[53]

Law, in its modern conception as formalized, positive, and autonomous, is given a crucial, if paradoxical, role in this process, namely as both the medium through which the different functional systems are articulated, and as the primary mediator between the instrumentalist rationality of the latter and the communicative rationality of a lifeworld premised on mutual understanding. Yet, it plays this role to ambivalent effect: first, in the early modern state, it helps differentiate a rationalized and autonomous economic and administrative (functional) system out of a still largely traditional lifeworld, then, in the course of the 'bourgeois' revolutions of the seventeenth and eighteenth centuries, it is used to keep these systems and an increasingly rationalized lifeworld in reciprocal check by means of an institutionalized rule of law and a formalized popular sovereignty, only to subsequently 'colonize' the lifeworld by transforming ever more aspects of social life into legalized administrative acts in the wake of the rise of the welfare state.[54]

In other words, the ever increasing functional differentiation of late capitalist 'world society' is necessarily accompanied by an expansive juridification that unfolds as a dialectic of systemic imposition and emancipation. It is, of course, a dialectic that inheres in modernity itself, a 'dialectic of enlightenment' in which modern reason oscillates, Janus-faced, between empowerment and subjugation. Theodor Adorno and Max Horkheimer notoriously interpreted this inherent ambivalence of modern rationality in light of its apparent abnegation through the Holocaust and 'total war'.[55] To them, these very modern phenomena revealed modern reason's 'dark energy', notably the will to power, born out of the urge for self-preservation and, concurrently, for domination over nature, destiny and myth, which amalgamates (subjective) interest with (objective) knowledge and power (*Macht*) with validity (*Geltung*) into instrumental rationality. If Adorno,

[53] LC Blichner and A Molander, 'Mapping Juridification' (2008) 14 *European Law Journal* 36–54, at 39.

[54] J Habermas, *The Theory of Communicative Action* (T McCarthy trans) (2 vols Polity Press Cambridge 1989) vol 2, at 301. For a review of the phenomenon in the contemporary European Union, see D Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press Cambridge MA 2011) and the review of the review in A Orford, 'Europe Reconstructed' (2012) 75 *Modern Law Review* 275–86.

[55] M Horkheimer and TW Adorno, *The Dialectic of Enlightenment* (G Schmid Noerr ed and E Jephcott trans) (Stanford University Press Stanford 2002).

in particular, eventually resigns critical theory to the mere description of this 'negative dialectic', his student Jürgen Habermas purports to salvage the modern project by reconstructing the liberal constitutional state as a framework in which the imperatives of instrumental reason as they play out in public administration and the market economy can be balanced out through public deliberation based on non-instrumental ('communicative') rational argumentation.[56] Constitutionalization in this Habermasian sense is deemed capable of recharging the law with (political) legitimacy and thereby enabling it to resist its own systemic instrumentalization with a view to re-establishing the autonomy of the public sphere.

With the advent of globalization this modern predicament has transcended the black box of the state and has come to characterize the world at large. Hence, the much debated fragmentation of international law can essentially be seen as the increased juridification of international life which, in turn, is the consequence of an ever increasing functional differentiation lying at the heart of the globalization process itself.[57] Its normativity is linked to the multiple functional logics of a world society without a world government, and the identity of such governance is no longer exclusively determined by pedigree—notably (state) consent—but increasingly by normative output. Hence, a host of distinct international legal regimes—such as on trade, the environment, or armed conflict[58]—cater to specific functional imperatives, each with their own technical terminology and institutional edifice, not to mention professional career paths.[59] What connects them is not a common normative bracket but the shared cognitive horizon of being part of an ongoing process of functional differentiation—expressed through the conceptual artifice of (global) governance. International lawyers are, thus, transformed into expert managers who follow the precepts of a system-specific instrumental rationality and act as colonizing agents of their own lifeworld. As such, they are engaged in replacing substantive criteria to describe and manoeuvre the international with purely relational ones, such as efficiency, accountability, or transparency, and, thus, help produce a simulacrum of universality.

[56] J Habermas, *Between Facts and Norms* (W Rehg trans) (Polity Press Cambridge 1997).

[57] M Koskenniemi and P Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553–79; G Teubner and A Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1046; International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682.

[58] See T Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press The Hague 2010).

[59] PM Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1998) 31 *New York University Journal of International Law and Politics* 791–807.

This is, of course, the process which Koskenniemi has tirelessly exposed as the turn to managerialism in international life, a move which, to him, is akin to a disciplinary take-over attempt—or, indeed, colonization—by the functionalist logic of 'international relations'.[60] In fact, he likens it to a new naturalism in international law which 'gives voice to special interests in functionally diversified regimes of global governance and control,'[61] and which, it may be added, is, like the old natural law, meant to stand against the uncertainties of political deliberation. In its stead, it purports to introduce a new objective normativity into international affairs, one that aspires to a paradigm of technically optimized self-regulation in which systemic functionality is isolated against disturbances from the lifeworld.

Yet, as critical scholarship has pointed out, the functionalist aesthetics of transparency, accountability, and participation is not neutral: it contains a normative agenda that serves the interests of, in particular, transnational markets. Cloaked by the universalist appeal to the (Weberian) values underlying modern statehood in abstraction from geography and historical trajectory, the (good) governance agenda is meant to make the state safe for a globalized market economy.[62] It aims to reshape public administration into an instrument of technocratic regulation and democracy into a strictly controlled mechanism for interest mediation. As such it transcribes the (neo)liberal paradigm into a legal notation geared to immunizing the state, and 'international society' against (re)distributional politics.[63] Hence, the less states govern through law the more governance there is by law—a state of affairs that the Posnerian realists claim to fear but in which they are just as implicated as their liberal legalist antagonists. Indeed, the apparent inescapability of the managerialist paradigm would seem to indicate the triumph of liberalism—and with it of liberal legalism—as the all-pervasive ideology of late modernity. Is this, then, the end of history and of international law (as we know it), or does the moment of liberal triumph carry the spark of hubris, as the dialectic of enlightenment would have it? And where should one look for an alternative, to a renaissance of an 'older' conception of international legality or, instead, to the genesis of a new politics?

[60] See eg M Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1(1) *European Journal of Legal Studies* article 1; 'The Politics of International Law' (n 17); 'The Politics of International Law—20 Years Later' (n 17); 'Miserable Comforters' (n 16).

[61] 'Miserable Comforters' (n 16) 411.

[62] C Thomas, 'Re-Reading Weber in Law and Development: A Critical Intellectual History of "Good Governance" Reform' (Cornell Legal Studies Research Paper No 118, December 2008) <http://scholarship.law.cornell.edu/lsrp_papers/118>.

[63] JT Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law' (1999) 5 *Buffalo Human Rights Law Journal* 107–74.

4 Speaking Politics to Law: Back to the Roots or Out into the Wild?

An answer to this question requires, initially, a fundamental choice by all those wishing to think and do international law between engaging, or not engaging, this 'new obscurity'.[64] Choosing not to engage amounts to adhering to a culture of muddling-through, to take the language, the institutions, the professional community at face value, to uncritically adopt the latter's habits and world view, to dispense with trying to understand one's practice and to derive an ethical stance therefrom, to relinquish independent judgement; in short, to reject theorizing. Choosing to engage, by contrast, requires precisely that: namely the taking of a position in a spectrum of theoretical frameworks which respond to the predicament of international law in late (liberal) modernity. The defining feature of that spectrum is the dichotomy that lies at the heart of this reflection on legalism, notably the one between law and politics, or, put differently, between whether (international) law is seen as part of the solution or part of the problem when it comes to what Koskenniemi has termed 'questions of preference, of distribution, of good or less good choices'.[65]

AQ: amend to 'different'?

Yet, politics and law are, of course, themselves ambivalent fields that look differently in different spectral ranges. In fact, they can only be defined in relation to one another, that is, by the degree of autonomy with which each field is deemed to be invested vis-à-vis the other. For it is autonomy that is, arguably, at the heart of the debate about international law's role in international politics. Legalism implies a certain stance on the respective autonomies of law and politics in international affairs, anti-legalism another. Hence, the question Koskenniemi has put on the table is not so much what the equilibrium between absolute conceptions of law and politics is or should be, but how autonomy, or lack thereof, defines both fields relationally. This is, arguably, the question behind the question of politics (in international law) and the deeper reason for the ambivalent attitude of many contemporary international legal scholars—including Koskenniemi himself—when it comes to (their) politics. Hence, taking (a) position means not just to side with either law or politics as the solution for 'global collective action

[64] J Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies' (P Jacobs trans) (1986) 11 *Philosophy and Social Criticism* 1–18.

[65] M Koskenniemi, 'The Politics of International Law' (Lecture delivered at the Lauterpacht Centre for International Law, University of Cambridge, 26 January 2012) <https://www.youtube.com/watch?v=-E3AGVTHsq4>.

problems', but to also come out on the 'nature' of either in terms of their respective autonomy or heteronomy.

What is more, there is a third colour in the spectrum which further complexifies the picture, notably the question of what a particular theory is meant to do, or rather, on which level of analysis it is situated and within which framework of reference it operates. It has, again, been Koskenniemi who has staked out the spectral range here, notably by working at once on a structural theory of modern international law and on a professional ethos for its practitioners. He has thereby picked up a question that has been exercising the social sciences since their inception, notably what the relationship between the macro-(structure) and micro-(agency) level of analysis is. Thus, positioning oneself on the theoretical spectrum also means to answer the question of what a particular structural theory of international law implies for one's individual professional *praxis* and, conversely, what a particular *praxis* entails for one's view of the law's structure and the concrete outcomes it produces.

These three spectral lines—the primary one alongside the law/politics dichotomy and the two ancillary ones on the autonomy/heteronomy and structure/agency ranges—are well illustrated in two statements (again by Koskenniemi) which highlight different aspects of the spectrum (at different points in his intellectual evolution). Hence, in 1990, two years before the triumph of liberalism and the end of history would be notoriously proclaimed by Francis Fukuyama,[66] Koskenniemi declared that

> our inherited ideal of a World Order based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, *for reasons internal to the ideal itself*, rely on essentially contested—political—principles to justify outcomes to international disputes.[67]

Yet, twenty-three years later, he issued a '*jus cogens* prohibition' on politicization projects in general, and on the politicization of (international) law, in particular.[68] Drawing on Wittgenstein's rabbit–duck allegory, he claims that it is now meaningless to attempt to resolve the indeterminacy and structural bias of the law by making it more openly political. To be sure, one may—and some have—interpret(ed) these statements as simply contradictory, evidence of the maturation of Koskenniemi from insolent critic on the margins of the discipline to its veritable *praeceptor* at its centre,[69] who has simply come around to most international lawyers' core article of faith, namely that the

[66] F Fukuyama, *The End of History and the Last Man* (Free Press New York 1992).

[67] 'The Politics of International Law' (n 17) 7 (emphasis in original).

[68] See 'The Politics of International Law' (n 65).

[69] J Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues' (2013) 27 *Temple International and Comparative Law Journal* 417–35.

best—and only—professional way to advance a progressive political agenda is by letting the law—the very canonically hermetic, Eurocentric, conceptually limited, and biased international law which he and others have done so much to expose—do its job. Yet, if one looks carefully, there is not really any contradiction here, just different emphases on different aspects of the theoretical spectrum and what it entails to position oneself on it. The inescapability of politics and how one deals with it, as something other to the law or something of it, is one such aspect. The distinctiveness of the law (and the lawyer) and the consequences of this for political action is another.

Yet, which positions does the contemporary theoretical spectrum actually have on offer? At the risk of gross oversimplification and eclecticism, but for the sake of taxonomical clarity, one may broadly distinguish between those theoretical frameworks that conceive of (international) law as a remedy for the ills of international politics—here termed legalist—and those that see it as an impediment for the realization of a successful international politics—termed anti-legalist. Within this general divide, theories can then be further differentiated along an axis that depicts the degree of autonomy through which the relationship between law and politics is defined. This then yields a four-dimensional matrix within which the different positions can (very broadly) be charted: on the legalist side, the two principal positions are *international constitutionalism*, on one hand, and *legal pluralism*, on the other. The former can broadly be seen as an attempt to contain fragmentation and functionalist managerialism by recasting international law in terms of liberal constitutionalism.[70] To this end, it seeks to reconnect the dispersed legal regimes by means of higher-level constitutional principles geared to the realization of (individual) human dignity through 'the assurance of peace and freedom under the rule of law'.[71] In the absence of a global *pouvoir constituant*, these principles can however, only be derived inductively, notably by reconstructing from select legal regimes—human rights law, humanitarian law, and trade law are popular candidates here—a shared set of values which is then attributed to a (hypothetical) international community.[72] This introduces a hierarchically superior level in form of an imagined legislator whose stamp of legitimacy becomes a necessary requirement for international legality.[73] It is an axiological conception in which the law is deemed to be governed by a set of normative expectations that lie outside of (and above) it. As such constitutionalism essentially proposes to salvage liberal legalism by applying it to itself, that is, by purporting to reverse-colonize the fragmented functional regimes from the vantage point of a (presumed) global

[70] A von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223–42.

[71] M García-Salmones, 'On Carl Schmitt's Reading of Hobbes: Lessons for Constitutionalism in International Law' (2007) 4 *NoFo* 61–82.

[72] HG Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community' (2011) 44 *New York University Journal of International Law and Politics* 1049–1107.

[73] J von Bernstorff, 'Georg Jellinek and the Origins of Liberal Constitutionalism in International Law' (2012) 4 *Goettingen Journal of International Law* 659–75.

lifeworld—'humanity'[74]—constituted by the liberal value canon. International law would, thus, be shielded from the disintegrative force of functional differentiation and re-unified under the umbrella of an international community of values. The price for rescuing liberal legalism through constitutionalization is, however, a double surrender of autonomy because, on the one hand, the law is made a mere instrument for the realization of a specific value set—and the interests of those professing to hold it—and, on the other hand, it has to stake its empirical plausibility on the factual hegemony of particular regimes the essentialized normative substance of which it elevates to constitutional superiority.[75]

On the other side of legalism stand legal pluralist approaches which pretend to make a virtue out of the vice of fragmentation by redescribing international law as a transnational network of differentiated norm systems.[76] At their (autopoietic) extreme, legal pluralists take the legally polycentric world of fragmented 'regime rationalities' at face value.[77] It is a world in which law reigns supreme because the internal hierarchy tying it to (political) sovereignty has been replaced by a horizontalized web of private and transnational legal regimes that regulate 'world society'.[78] The latter has, as Niklas Luhmann already affirmed, 'no head or center',[79] state and non-state actors alike are turned into co-equal subjects of a global law that autopoietically reproduces itself.[80] Functional differentiation—in other words, fragmentation—is not the problem but rather the solution to system theory's principal normative concern, notably the old Hobbesian question of how (nowadays admittedly highly complex) societies can preserve themselves over time. Legal pluralism's particular answer is, of course, spontaneous order or, more precisely, the self-regulation of differentiated functional regimes which is deemed to generate some form of equilibrium over time. However, for this to work, the decoupling of law from political—in other words, lifeworld—concerns needs to be empirically accepted and normatively affirmed, each legal regime has to be able to follow its 'internal rationality' (*Eigenrationalität*), and interaction between legal regimes, in particular, and between law and other function systems, in general, has to be unconstrained by 'external' factors.[81] Indeed, radical legal pluralism can be said to

[74] R Teitel, 'Humanity Law: A New Interpretive Lens on the International Sphere' (2008) 77 *Fordham Law Review* 667–702.

[75] P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law* 815–44. For a recent critique, see A Orford, 'The Politics of Anti-Legalism in the Intervention Debate' (30 May 2014) *Global Policy* <http://www.globalpolicyjournal.com/blog/30/05/2014/politics-anti-legalism-intervention-debate>.

[76] 'Regime-Collisions' (n 57) 999. See also G Teubner, '"Global Bukowina": Pluralism in the World Society' in G Teubner (ed), *Global Law without a State* (Dartmouth Aldershot 1997) 3–28.

[77] 'Constitutionalism, Managerialism and the Ethos of Legal Education' (n 60).

[78] G Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' (1997) 31 *Law and Society Review* 763–87.

[79] N Luhmann, 'Die Weltgesellschaft' (1971) 57 *Archiv für Rechts- und Sozialphilosophie* 3–35.

[80] P Zumbansen, 'International Law as Glass Palace: Towards a Methodology of Legal Concepts in World Society' (unpublished manuscript on file with author).

[81] 'Regime-Collisions' (n 57).

transpose the liberal(ist) plotline onto the systemic level, so that it is not individuals or states, but function (or communication) systems that need to be surrounded by a ring of negative liberties. As a consequence, however, individuals and states are reduced to mere relay devices for different functional logics—if anything, a limited degree of state agency is still required to police recalcitrant actors and prevent them from making demands that may destabilize systemic functionality.[82]

A different and, arguably, less radical approach to legal pluralism is represented by the Global Administrative Law (GAL) school which aims to go back to the original purpose behind international law as a jurisprudential discipline, namely by identifying, collecting, and systematizing the 'real' rules that govern international life. As such it seeks to open up the black box of the (classical) sources doctrine and to shift law-ascertainment from its canonical focus on subjects and pedigree to normative output.[83] Like its systems theoretical (distant) relation, it (re)cognizes all forms of international and transnational, soft and hard, public and private normativity but unlike systems theory, it is primarily concerned with deriving from these the administrative legal principles that lurk behind global governance.[84] By, thus, postulating a higher-level structure that governs governance, GAL would appear to be closer to constitutionalism than to pluralism.[85] However, unlike the former, its focus is on the facticity of normative outcomes and not on their validity in terms of normative expectations. Its proposition is, hence, more that of a realist positivism than of a constitutional moralism. Moreover, the administrative principles distilled by GAL, including such liberal legalist staples as accountability, transparency, participation and, generally, due process and judicial review procedures, share with systems theory a penchant for (global governance) functionalism, notably as 'instrument[s] to uphold and secure the cohesion and sound functioning of an institutional order that is justified independently'.[86] What both approaches also share is an empirically justified commitment to the autonomy of a(n) (international) law the functional logic of which they deem to be irreducible to politics.

[82] K-H Ladeur, 'The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law: From the Hierarchy of Norms to the Heterarchy of Changing Patterns of Legal Inter-Relationships' (EUI Working Paper Law No 99/3, April 1999) at 16.

[83] J d'Aspremont, 'Cognitive Conflicts and the Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship' (2013) 46 *Vanderbilt Journal of Transnational Law* 1119–47; I Venzke, 'Contemporary Theories and International Law-Making' in C Bröllmann and Y Radi (eds), *Research Handbook on the Theory and Practice of International Law-Making* (Elgar Cheltenham forthcoming 2015).

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[84] B Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *European Journal of International Law* 23–57; A Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20 *European Journal of International Law* 985–95.

[85] M-S Kuo, 'Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-C Global Constitutionalism' (2011) 44 *New York University Journal of International Law and Politics* 55–102.

[86] B Kingsbury, N Krisch, and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15–61.

Indeed, both constitutionalism and legal pluralism not only presume that law and politics are distinct, but also that law is ultimately superior to politics in dealing with Posner's 'global collective action problems' (the equivalent of Koskenniemi's 'questions'), a claim based on the empirical presumption that there is neither a global polity nor a unified global legislator to which a global politics could be attributed. To these legalists, international *Realpolitik* is a pseudo-anarchical cacophony of (self-)interest-driven states the doings of which are either deemed illegitimate—lest they be governed by constitutional principles—or dysfunctional because of their inherent incapacity to live up to a functionally differentiated world society. As was seen earlier, the main type of anti-legalist challenge to this view, notably the *political realism* of Posner and others, draws on much the same argument only in an inverse key. For these scholars it is precisely the lack of a global sovereign that either seriously weakens or entirely invalidates the idea of an (empirically) hard international law. It is a tradition of thought that stretches from Hobbes to Carl Schmitt and from Hans Morgenthau to the 'law and economics' approach adopted by the author of *Perils*.[87] It pervades, in more or less direct ways, a substantial part of the international relations literature,[88] though it also underwrites the position of anti-legalist legal scholars of a rational choice or neo-Schmittian sovereigntist persuasion.[89] It is premised on two fundamental assumptions, namely that political authority is autonomous and indispensable and that actors are rational, with rationality in this context meaning 'choosing the best means to the chooser's ends'.[90] Political authority, in turn, is not a formal legal term but linked, ultimately, to the capacity to establish and maintain identity through differentiation, with rational action being defined as strictly instrumental to this objective. As was seen, such a deuteronomistic conception of politics is premised on the inherent antagonism of all actors and on the concomitant 'will to power' of each within a particular 'game'.[91] Such (identity) politics can only lead either to anarchy or to hegemony,

[87] See A Vermeule and EA Posner, 'Demystifying Schmitt' in A Vermeule and EA Posner (eds), *The Cambridge Companion to Carl Schmitt* (CUP Cambridge forthcoming 2015).

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[88] JL Dunoff and MA Pollack, 'What Can International Relations Learn from International Law?' (Temple University Legal Studies Research Paper No 2012-14, 2012); MC Williams, *The Realist Tradition and the Limits of International Relations* (CUP Cambridge 2005); K Raustiala and A-M Slaughter, 'International Law, International Relations and Compliance' in W Carlsnaes, T Risse, BA Simmons (eds), *Handbook of International Relations* (1st edn Sage London 2002) 538–59.

[89] R Cristi, 'Carl Schmitt on Sovereignty and Constituent Power' (1997) 10 *Canadian Journal of Law and Jurisprudence* 189–201; C Burchard, 'Puzzles and Solutions: Appreciating Carl Schmitt's Work on International Law as Answers to the Dilemmas of His Weimar Political Theory' (2003) 14 *Finnish Yearbook of International Law* 89–128; R Howse, 'From Legitimacy to Dictatorship—and Back Again: Leo Strauss's Critique of the Anti-Liberalism of Carl Schmitt' (1997) 10 *Canadian Journal of Law and Jurisprudence* 77–103; M Koskenniemi, 'International Law as Political Theology: How to Read *Nomos der Erde*?' (2004) 11 *Constellations* 492–511.

[90] RA Posner, 'Rational Choice, Behavioral Economics, and the Law' (1998) 50 *Stanford Law Review* 1551–75.

[91] *The Philosophy of International Law* (n 41).

with the latter being the ontological power to determine the limits through which identity is defined, or, as Schmitt put it, to decide on the exception.[92]

From this perspective, norms and (sovereign) power are inherently inimical: they can only be brought together through strict hierarchization. Indeed, the realists' charge against liberal legalists is, in essence, that they make a category mistake when they assume the primacy of law over politics, when, to them, it is 'really' the other way around.[93] To them law is a function of politics, or rather of those who hold (hegemonic) political authority and if there is no such authority, as realists allege to be the case in international affairs, law is but another word for a passing coincidence of wills.[94] There is, of course, a strange disconnect amongst many adherents of this position between a hardcore instrumentalist and anti-objectivist stance vis-à-vis international law and a simultaneous acceptance of the liberal legal constitutionalist paradigm in relation to domestic law and politics.[95] It is strange because it seems to contradict realism's anti-liberal premises, though it may equally express the view that liberal hegemony has simply not yet been established in the international sphere. For, as was seen, the realist 'politics redux' is a prerequisite for legal liberalist intervention, a causal relationship Schmitt and his latter day followers have naturally tended to underexplore.[96]

The opposite side of the anti-legalist spectrum is occupied by structuralist readings of the law/politics divide, most notably positions inspired, in one way or another, by Marx. While only relatively few scholars now openly identify with Marxism, many more, not least within the critical legal fold, work with structuralist premises that derive from a (broadly) Marxian analysis. The, perhaps, crucial theoretical distinguishing marks of this line of thought are the Hegelian legacy in terms of a philosophy of history and the application of materialist premises to it. These moves translate into two fundamental hypotheses, namely that history is directional, that it has a *telos* and, therefore, an overall meaning which provides a measuring rod for its individual instances, and that it is driven by society's material basis, most notably, in Marx's case, the process of capital reproduction based on a materialist theory of labour. This historical materialism, however, implies a determinism which renders both law and politics epiphenomenal in the sense of being essentially functions of the material base at a particular historical stage.

[92] JP McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' (1997) 10 *Canadian Journal of Law and Jurisprudence* 163–87; 'International Law as Political Theology' (n 89).

AQ: should 'Perils' in footnote text be amended to 'The Perils of Global Legalism'?

[93] D Dyzenhaus, 'Carl Schmitt's Challenge to Liberalism' (1997) 10 *Canadian Journal of Law and Jurisprudence* 3–4.

[94] *The Realist Tradition* (n 88) 19; 'Perils' (n 3) x.

[95] *The Perils of Global Legalism* (n 3); L Vinx, 'Carl Schmitt and the Analogy between Constitutional and International Law: Are Constitutional and International Law Inherently Political?' (2013) 2 *Global Constitutionalism* 91–124.

[96] 'Demystifying Schmitt' (n 87).

Historical materialism, hence, redefines the relation between law and politics at least in their conventional-bourgeois (that is, realist-liberalist) connotation by denying them both autonomy and respective primacy. In their existing form, neither politics nor law have the capacity to problem-solve, in the Posnerian sense, or emancipate from the colonization of their respective other—only a fundamental change of socio-economic conditions can bring this about. Hence, *grosso modo*, a Marxian structuralist position is not only anti-legalist but also anti-political in the sense that it is bound to reject political agency from within 'the system'; indeed, some have critically argued that agency is here generally restricted to being the recognition of what is objectively necessary.[97] Yet, whatever the bounds of political agency in a structuralist perspective and however autonomous it is deemed to be in relation to wider social relations, (international) law is clearly seen as both lacking autonomous being and emancipatory (political) potential. As one of this perspective's primary exponents has plainly put it, in order to

> fundamentally change the dynamics of the system it would be necessary not to reform the institutions but to *eradicate the forms of law*—which means the fundamental reformulation of the political-economic system of which they are expressions. The [political] project to achieve this is the best hope for global emancipation, and it would mean the end of law.[98]

This—in any case very roughly sketched—fourfold positional matrix does not, of course, exhaust the gamut of possibilities. There are, in particular, a number of positions that attempt to budge the choice between legalism and anti-legalism and between the full endorsement and the fundamental critique of the liberal (legalist) master narrative. They tend to combine a critical reading of liberalism—and liberal legalism—with an acknowledgement of its facticity, not least in legal and diplomatic practice, against the backdrop of the perennial challenge that the critical (legal) project allegedly fails to offer a tangible alternative to the current mindset of the majority of international actors (and their lawyers).[99] Hence, ironically though not surprisingly, international law's ontological position between apology and utopia also affects the (political) choices open to those who consider a direct engagement in and with the 'real existing' international legal project to be either desirable or inescapable.[100]

[97] WA Suchting, 'Marx and Hannah Arendt's *The Human Condition*' (1962) 73 *Ethics* 47–55; J Ring, 'On Needing Both Marx and Arendt: Alienation and the Flight from Inwardness' (1989) 17 *Political Theory* 432–48.

[98] C Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill Leiden 2005) at 318 (emphasis in original). See also A Carty, 'Marxist International Law Theory as Hegelianism' (2008) 10 *International Studies Review* 122–5.

[99] JH Schlegel, 'CLS Wasn't Killed by a Question' (2006) 58 *Alabama Law Review* 967–77; WH Simon, 'Solving Problems vs Claiming Rights: The Pragmatist Challenge to Legal Liberalism' (2004) 46 *William and Mary Law Review* 127–210; SL Cummings, 'Critical Legal Consciousness in Action' (2007) 120 *Harvard Law Review Forum* 62–71.

[100] On the inescapability and yet futility of that engagement in terms of pinning down the project's 'true' social significance, by someone who has, herself, critically yet sympathetically engaged

The, arguably, foremost attempt at such synthesis between law and politics from a counter-(liberal)-hegemonic persuasion is, of course, Koskenniemi's own 'culture of formalism'. Although he has, by some accounts, abandoned the philosophical elaboration of this idea and has, by other accounts, transposed it into a political historiography of international law,[101] it still stands as the most elaborate proposal for both an alternative position and an alternative to positioning as such. In essence, the 'culture of formalism' seeks to reframe international legal discourse from within, notably by showing it to contain the elements necessary to move it back from managerialist deadlock to being a—indeed, perhaps, *the*—privileged language to advance such progressive utopias as global peace and social justice against the 'new natural law' of international relations.[102] To this end, Koskenniemi proposes to make a virtue out of (liberal) international law's vice of indeterminacy by drawing on the inherently open-ended nature of legal discourse, its innermost nature as an argumentative *praxis* that 'brings out into the open the contradictions of the society in which it operates and the competition of opposite interests that are the flesh and blood of the legal everyday'.[103] This clever theoretical move enables him to turn the inherent structural bias of (formalized) international legal practice, that is, the a priori 'shared understanding of how the rules and institutions should be applied',[104] into the very wedge by which it can be exposed and thereby undermined. For it is in the nature of that legal practice, by enabling an open-ended process of argumentation among nominal equals, to break down universalist claims into the particular positions and interests that drive them, while simultaneously enjoining the participants of that practice to make their particular claims (hypothetically) universalizable. In other words, as Jeffrey Dunoff has recently put it, Koskenniemi interlinks—what he sees as—international law's purpose with its promise, thereby opening up a navigable passageway 'between the Scylla of Empire and the Charybdis of fragmentation, [with] the culture of formalism resist[ing] reduction into substantive policy, whether imperial or particular'.[105] Hence, it is neither a new politics nor a different law that provides, for Koskenniemi, the most hopeful platform for transformative politics under current global conditions, but the vocabulary of formal (legal) norms and the judicial and quasi-judicial institutions within which it is performed.

with the 'culture of formalism', see A Orford, 'Scientific Reason and the Discipline of International Law' (2014) 25 *European Journal of International Law* 369–85.

[101] M Koskenniemi, 'Why History of International Law Today?' (2004) 4 *Rechtsgeschichte* 61–6; A Carty, 'Visions of the Past of International Society: Law, History or Politics?' (2006) 69 *Modern Law Review* 644–60.

[102] 'Miserable Comforters' (n 16).

[103] 'Law, Teleology and International Relations' (n 2).

[104] *From Apology to Utopia* (n 22) 608.

[105] JL Dunoff, 'From Interdisciplinarity to Counterdisciplinarity: Is There Madness in Martti's Method?' (2013) 27 *Temple International and Comparative Law Journal* 309–37.

This may seem like 'regulated madness',[106] but the inspiration for the argument is actually deeply embedded in the Western (liberal) canon, notably in the form of Kantian cosmopolitanism—interpreted, admittedly, in an anti-systemic and counter-hegemonic way. For unlike his nemeses, the 'miserable comforters' of international relations and liberal legalism, Koskenniemi refuses to weave Kant's reflection on the ontological pre-conditions of inter-state peace into a theoretical system and, instead, foregrounds its ethical dimension. Hence, international law as a practice is not about 'an end-state or party programme but the methodological use of critical reason that measures today's state of affairs from the perspective of an ideal of universality that cannot itself be reformulated into an institution, a technique of rule, without destroying it'.[107] Its politics, is thus, not substantive but procedural; it is a politics of redescription in which the language of the law becomes 'a place-holder for the languages of goodness and justice, solidarity and responsibility'.[108] Koskenniemi's cosmopolitan legalism is meant to strike at both realist politics and the liberal legalist response to it, though it does so at the cost of replacing political theory with professional ethos. For the 'virtue ethics' which Koskenniemi is, arguably, advancing in the 'culture of formalism' turns international law into a 'vocabulary to help evaluate political action', presumably by providing an independent discursive position from which to deconstruct political rhetoric and expose what lies behind it.[109] As such, international law would avoid representing any particular political position, and, thus, remain autonomous, while being deeply tied into the political system as a privileged language to render itself self-reflexive, or, as Anne Orford put it, to continuously engage with the question of 'how we may encounter, comprehend, and negotiate with other laws'.[110] In a recent essay on (anti)legalism in the debate on humanitarian intervention, she reinforced this (critical) legalist point, notably by arguing that, by appealing to diffuse legitimacy bestowing principles, anti-legalism, be it in its traditional realist or its liberal interventionist variant, seeks to pre-empt open and public debate about the grounds and justifications for intervention. Hence, by 'rejecting as morally suspect the public justifications that other governments give for their actions and the subsequent analysis of those justifications by international lawyers means that anti-legalists can present their interpretation of moral principles as universally valid and the practices they seek to champion as uncontroversial'.[111]

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This is a strong point which, arguably, corresponds with many an international lawyer's view (on the subject and on their particular role). However, does the focus by such a 'culture of formalism' on what amounts to a critical and

[106] Ibid 334. [107] 'Miserable Comforters' (n 16). [108] Ibid 21.

[109] 'Towards a Culture of Formalism?' (n 69) 431.

[110] A Orford, 'Moral Internationalism and the Responsibility to Protect' (2013) 24 *European Journal of International Law* 83–108, at 108.

[111] 'Politics of Anti-Legalism' (n 75).

non-essentialist ethics of legal practice represent a distinct (political) position or merely a variant of an overall still liberal scheme of things? After all, its conceptual cornerstones resemble Habermas' social-theoretical reconstruction of the Kantian ideal in modern liberal democracy, even if Koskenniemi, unlike Habermas, refuses to substantialize Kant's normative model of a cosmopolitan republic into a concrete historical form.[112] He remains, as Jan Klabbers has put it, an 'iconoclast by temperament',[113] yet even that other great iconoclast, Richard Rorty, could ultimately 'only' offer irony to temper the liberalism he felt compelled to endorse as the (only) framework within which a politics of redescription could take place.[114]

Is this the final position, then? The realization that both liberalism and legalism are inescapable, that they prefigure and pre-empt their own critique, even when that critique is nonetheless held to be the only way to instil political meaning into a legalized notion of practice? A withdrawal into an—admittedly enlightened—professional ethics, combined with a 'turn to history' that renders not just the liberal but all meta-narratives contingent? The ironic upshot of this (non-)position is, of course, that the only tenable standpoint that seems to remain is that of Rorty's liberal ironist for whom 'the demands of self-creation and of human solidarity [are] equally valid, yet forever incommensurable'.[115] The bird's eye view of the ironist is, hence, bought by splitting the space of politics into two: a private one in which political vocabularies are generated, and a public one in which they are mainstreamed to the lowest common denominator consistent with a (reasonably) peaceful coexistence (that is, collective self-preservation). The law's role is to uphold this division and to police the public sphere against potentially dangerous transgressions from private political projects. Adherents of the culture of formalism nonetheless believe that this liberal law—and *only* this liberal law—can be turned against itself; that it can create pathways across the divide, and that it can thereby render the public sphere open for progressive ends without the totalizing premises of either revolution or hegemony—though at the cost of legalizing political action. Politics is, thus, made contingent upon the 'comfortable inauthenticity of [legal] formalism',[116] or, as some would have it, on a legal iron cage in which complex issues are necessarily reduced to a handful of legal categories, however much these may be open to continuous (re-)interpretation.

[112] P-A Hirsch, 'Legalization of International Politics: On the (Im)Possibility of a Constitutionalization of International Law from a Kantian Point of View' (2012) 4 *Goettingen Journal of International Law* 479–518.

[113] 'Towards a Culture of Formalism?' (n 69) 424.

[114] M Funakoshi, 'Taking Duncan Kennedy Seriously: Ironical Liberal Legalism' (2009) 15 *Widener Law Review* 231–87.

[115] R Rorty, *Contingency, Irony, and Solidarity* (CUP Cambridge 1989) at xv.

[116] M Koskenniemi, 'Formalism, Fragmentation, Freedom: Kantian Themes in Today's International Law' (2007) 4 *NoFo* 7–28.

Is law—and legalism—hence, the better politics? Yes, if one endorses liberalism's concept of politics. No, if one considers that concept to, be, in fact an anti-politics that obscures the 'real' meaning of politics. For the latter, one may turn to Hannah Arendt, who was, arguably, as inspired by Kant as Koskenniemi, but who drew the opposite conclusions from him. Her concern was to wrestle the political as a distinct and autonomous category back from the stranglehold both of liberalism, by which she saw it reduced to the competition of conflicting interests, and of Marxism, in which it was a mere epiphenomenon of dialectical historical process. In both cases is the meaning of politics, notably the continuous exchange over the meaning of 'living in community', is pre-determined and, thus, rendered literally meaningless. For, to pose the question of meaning means, for Arendt, to also continuously question whatever system—of thought, political institutions, law and so on—is in place, a proposition which, she felt was acceptable neither to liberalism nor to Marxism. For Arendt, both are ideologies, systems of thought premised on foundational myths—human nature and historical structure—camouflaged as natural, that only work as long as their mythological foundation remains hidden. For her, politics is, on the contrary, a continuous de-mythologizing exercise in ideology critique. At its centre lies her conception of political action as not an (instrumental) making of an object as in fabrication but the purposeless (*zweckfrei*) exchange among subjects who recognize one another in their subjectness.[117] The basis for this is difference: the plurality inherent in human existence, without which there would not be a public sphere in which an exchange over meaning could take place. Indeed, it is only by acting within that public sphere, that is, by acting politically, that human beings can articulate their humanity, in fact, they are thereby metaphorically (re)born unto their fellow human beings, a process which Arendt termed natality and which she considered definitive of human existence. Political action is, hence, at once the fulfilment of one's humanity and the concerted answering of the question of meaning. In accordance with this conception, Arendt also defines power in political terms, namely as the capacity to 'not just to act or do something, but to combine with others and act in concert with them…it emerges among human beings when they act together, and it disappears when they scatter'.[118] This stands, of course, in contrast to conventional conceptions of power since Weber, which define it as the successful enforcement of one's will vis-à-vis others. For Arendt, however, this undue assimilation of power and force comes out of the logic of modernity and the prevalence of capitalism and imperialism it produces—they banish political action into the private sphere and thereby individualize and neutralize it, turning what she termed the *oikos*, that is, questions of material survival (that is, 'the economy'), into the only legitimate topic of

[117] H Arendt, *The Human Condition* (University of Chicago Press Chicago 1999) at 188.
[118] Ibid at 200.

the public sphere. They, thus, substitute the purposelessness of political action with the instrumental rationality of (realist) politics.

It is not quite clear what role for law Arendt foresaw in her project of recovering the lost meaning of politics. She certainly was not a legalist, for law for her could never substitute genuine political action, yet neither was she an antinomian. Law accompanies politics but cannot not prevail over it, it is either a *nomos* which delimits and secures the space in which political action can take place, or a *lex* by which (temporary) linkages between political interlocutors are articulated.[119] After all, political action is, to her, essentially about 'promising, combining, and covenanting'[120] juridical terms within a political realm. Perhaps law was, to Arendt, a particular form of political action, not qualitatively distinct from it and without a logic of its own. It would express both the self-reflexive awareness by all (political) actors of their own actorness, as well as the heightened sense of responsibility that promises, combinations, and covenants imply. In contrast to Koskenniemi, law would, thus, also (but not only) be a wedge to enable (political) judgement, it would additionally be about naming things, insisting on argument, attempting to grasp people and things, as best as possible, in their complexity, resisting conclusion, facing up to contingency. It would, thus, be simultaneously within and outside of Koskenniemi's *jus cogens* prohibition, for it would be a means to give voice to an openly political militancy against the realist-liberalist politics redux that reigns (in) international relations. However, to go back to these roots of international legal discourse requires more than a comfortable walk around the paved roads of contemporary international law, it calls for a march out into the wild.

[119] C Volk, 'From *Nomos* to *Lex*: Hannah Arendt on Law, Politics, and Order' (2010) 23 *Leiden Journal of International Law* 759–79.

[120] H Arendt, *On Revolution* (Viking Press New York 1963) at 212.