

in years to come, and will equally keep researchers and scholars company in law libraries all over the world.

Andre Stemmet\*

*The Empowered Self: Law and Society in the Age of Individualism*, by Thomas M. Franck, Oxford University Press, Oxford, 2000, ISBN 0-19-829841-2 (hardback), 312 pp., £ 35

In his third most recent book, which was written still just in the old millennium, but clearly sets out to usher in the new, Thomas Franck invites us to join him on what he himself calls an ‘adventuresome journey’ (p. 278) to the land of the Unchained Prometheus. After an occasionally bumpy, but certainly very enlightening trip, that essentially takes us from the Roman Empire to ‘post-post-modernism’, we arrive at this brave new world and stand back in awe; for its people, who, in fact, are no longer called ‘people’ but Selves, live the most fulfilled and unalienated life imaginable. Indeed, all oppressive structures have withered away in this promised land and the Selves spend their lives exclusively expressing their very self-ness at any particular moment. They choose their daily names in the morning, have a gender change in the afternoon, and freely associate with other Selves – preferably via the Internet – for any transitory ideals they may have, in the evening; and on weekends they travel to one of the many administrative units – formerly called states – in which they enjoy membership rights. In sum, their lives are, as an old prophet of this land put it, “the true solution of the conflict between [...] freedom and necessity [and] between individual and species. It is the solution of the riddle of history and knows itself to be this solution.”<sup>1</sup> It is nearly paradise, and yet we cannot help having an uncomfortable feeling of *déjà-vu*, a hazy vision of a distant dream that was, long ago, cut short by an all too sober awakening.

Though this is, perhaps, an unfair caricature of Franck’s vision of life in the new millennium, *The Empowered Self* stands out for its thoroughly optimistic, even celebratory discourse, its “rhetoric of inevitability”<sup>2</sup> which does, indeed, have the familiar ring of Marx’ communist utopia and which does make the book a formidable case of what Susan Marks has called

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\* Senior State Law Adviser (International Law), Department of Foreign Affairs, South Africa.

1. K. Marx, Private Property and Communism, cited in S. Lukes, *Five Fables about Human Rights*, in S. Shute & S. Hurley (Eds.), *On Human Rights: The Oxford Amnesty Lectures 1993*, at 20 (New York: Basic Books, 1993).
2. For both characterisations see the excellent review by A. Cole in 99 Mich. L. R. 1409–1418 (2001).

'liberal millenarianism.'<sup>3</sup> This is insofar ironic as Franck ostensibly tries to avoid an offensive and easily discreditable Fukuyama-type liberal triumphalism and instead attempts to offer a more balanced, empirically better informed and, allegedly, more realistic interpretation of life and law in a globalised world. Yet it is precisely his undoubtedly good-faith effort to forge an all-encompassing unity out of the many (dis-)contents of globalisation and to disprove any form of Huntingtonian manicheanism that gives this book, perhaps inadvertently, the somewhat totalising undertone characteristic for liberal millenarian manifestos. Although its publication now lies a good three years in the past,<sup>4</sup> the 'globalisation and its (dis-)contents' debate is by no means over, and there does seem to be a case for re-examining Franck's liberal manifesto two years into the 'new time.' That case has, indeed, become acute in light of what is fast proving to be a major watershed in world politics, namely the ongoing aftermath of the terrorist attacks of 11 September 2001. Both *The Empowered Self*, and Franck stand exposed to a critical questioning of what happened to Promethea since the fall of the Twin Towers.

First, however, it is worth re-visiting Franck's 'adventuresome journey.' It is designed to be a deeply interdisciplinary work, taking in, besides law, aspects of "history, philosophy, psychology, sociology, and anthropology" (as explained in his Acknowledgements), all brought together in order to demonstrate, from as many sides as possible, one central thesis: that the future not just of domestic, but, indeed, of international society belongs to individuals. He accordingly begins by drawing a gloomy picture of the old world where identity was imposed on individuals by autocratic groups, namely tribes, nations, and states. This anachronistic 'triad' he sets out to deconstruct, which he does stringently, and over long tracts, convincingly: he shows the largely imaginary character of an image of states based on clearly identifiable nations which, in turn, are mythologically underwritten by notions of tribal homogeneity. He identifies such notions as 'post-Hegelian romanticism' which, in his eyes, has not only led to such events as the Holocaust, but which, in tarnished and rhetorically polished versions, still informs especially what he conceives as the post-modern critique of liberalism and its (alleged) romanticisation of the 'authentic group' against the individual (p. 24). In a similar vein, he shows the old Vattelien structure of international society which – much like Locke in the domestic context, as he rightly points out – conceives of 'international' society as exclusively made up of states who consciously and self-interestedly contract into it, to be an increasingly inadequate and, if elevated to the level of ideology, potentially self-destructive description

3. S. Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EJIL 449, at 449–477 (1997).

4. And there has, consequently, already been some comment; see especially two longer reviews, Alyson Cole's already mentioned one (*supra* note 2), and another by A. Etzioni in 28(4) *J. of Law and Society* 606–609 (2001).

of reality. For as long as statehood is the *telos* of nationalism, there will be a tendency of aggressive self-assertion and fragmentation which would ultimately lead to a world of up to 2000 mutually hostile states. Franck, who at this point displays almost realist sensitivities, then goes on to persuasively argue how the present system, based, as it is, on the sovereign equality of states, would be incapable of managing such a plurality of sovereigns, and how it would be bound to re-introduce new hierarchies at the apex of which would be a few states who, on account of their power and influence, would consider themselves more equal than all the others. This simultaneous encouragement and rejection of statehood he identifies as a clear paradox in the operation of the international system as it stands. Yet he subsequently relativises this – in itself plausible – argument by pointing out the rapidly diminishing relevance of states as the fora of global – rather than international – politics. While the Vattelian system only accords states a voice in international relations, Franck sets out to show that already now many non-state actors, be they sub- or supranational, are making their voice heard and are effectively sharing in ‘global governance’; indeed, he goes as far as to imply that it is now these actors – who, in his view, seem invariably to be made up of individuals who freely opted into them – rather than artificially constructed states that should increasingly be considered as the bearers of international legitimacy. Though this third line of argument is clearly meant to trump any defence of the old-style state structure, there is a definite tinge of normativism here, an informed wishful thinking that hopes to turn into a self-fulfilling prophecy.

And Franck immediately sets out to sketch this project: it essentially involves a complete shift away from states and towards individuals; if the former were the building blocks of Vattelian international society, the latter are, or, at least, should be, the building blocks of a new global world order. Having set out to show that the old state-nation-tribe triad probably never has been, and certainly no longer is, the main determinant of an individual’s identity, he consequently shifts attention away from national self-determination and towards personal self-determination. The latter essentially consists of the claim that “each individual is entitled to choose an identity reflecting personal preference” (p. 39). To Franck’s mind, this assertion implies, among others, that the individual’s association with groups must be voluntary and is likely to involve multiple allegiances and loyalties, which, in turn, flies in the face of the prevalent tradition that holds that personal identity is, in fact, determined by socio-historical context. Franck, not surprisingly for an Anglo-American liberal scholar, identifies Hegel as the ultimate mastermind of the latter tradition, and he lines up in rapid succession Ernest Gellner, Immanuel Kant, and Thomas Jefferson to argue that, from an anthropological, philosophical, and political perspective, the nation-state should never have been regarded as the great independent variable determining individual identity. He then proceeds to a rather fascinating dissection of multicultural experiences the

world over in order to show that transnational and multiple loyalties have not only always existed parallel to the nation-state, but that they are now in plain ascendancy. Indeed, he is moved to formulate a visionary question, notably whether we are “on the verge of a new stage of human evolution in which loyalty to the state is transformed into a higher loyalty to humanity, symbolised by global (or regional) institutions of government, commerce, education, and communications,” only to immediately and, somewhat nonchalantly, answer that “there is some evidence that we are” (p. 59).

Given this fundamental critique of the nation state, Franck takes as one of the most crucial indicators of this emerging postnational epoch the changing nature of citizenship. If previously it was precisely through citizenship that nation states controlled ‘their’ individuals, Franck sees a clear trend towards the inverse position, where multiple citizenship, *interci-toyenneté* and polypatrism become the norm, and in his by now familiar manner, he goes through a large number of citizenship laws, domestic and international judicial decisions, and other significant incidents to demonstrate his point. What this means, for Franck, is, of course, once again that individuals are ever more able to define their identities in “the liberated pursuit of personal interests and preferences” (p. 68). If the excessive pursuit of self-determination by groups is both oppressive *vis-à-vis* the individuals comprising them and leads to the potentially violent implosion of the Vattelian state structure, the personal self determination of individuals, the foundational act of which is the free choice of their loyalties and affiliations, at once resolves, in Franck’s eyes, all the tensions underlying the state-nation-tribe triad. Misguided are, hence, communitarian worries about the atomisation of society and the general loss of community values, since fully autonomous individuals are, in Franck’s eyes, “less likely to be anarchists than new communitarians” (p. 87), freely choosing which identity groups to associate with and which values to espouse. He, at this stage, widens his focus from nation and state to cultural and linguistic communities, and sets out to show that, like the former, culture, too, is increasingly ‘designable’ by individuals themselves. Indeed, his freed Selves are fortunately happy to re-associate themselves into ‘new communities,’ evidence for which he sees in a general social convergence of values, a spontaneous bonding of “kinsfolk of the mind” (p. 91) facilitated by the Internet and other new means of communication. With a typical, if inadvertent, totalising gesture, he even concedes the basic dictum of post-Freudian psychology, namely that, in a fundamental sense, individuals cannot consciously control their lives, only to immediately relativise that unexpected concession by announcing that the dawning age will precisely make substantive personal autonomy both possible and feasible (p. 94). We are thus bound, in Franck’s vision, towards what he calls ‘post post-modernity,’ or as one might also refer to it, the happy-end of the post-modern critique, which, peculiarly resembling the pre-modern ‘West’ with its “layered loyalties and identities” (p. 98), will reveal itself to be a

“liberal neo-community, a civil society based on socially and legally protected individualism” (p. 100).

Having laid the groundwork for his liberal utopia, Franck then goes on to sketch what life in this neo-community means. He first identifies the freedom of conscience as the quintessential *conditio sine qua non* of choice and autonomous conscientious self-definition, and he ambitiously sets out to refute the argument of its allegedly ‘Western’ provenience, and thereby Huntington’s ‘wars of civilisation’ thesis. He does so by elaborating what amounts to a pathology of toleration, and, to that end, he adduces extensive, and in itself rather interesting, historical evidence on toleration debates the world over. Next he sketches different aspects of personal self-determination, as they have already been emerging in fact; his four well-chosen examples of areas where it is increasingly the individual which chooses her/his identity are *names, gender, career and privacy*. In his treatment of these, he again employs his by now familiar method of giving hard empirical evidence from today’s ‘real world’ a radically teleological interpretation, thus subtly merging the real with the utopian. He then turns to the individual’s emerging position in global society; if her/his rights were originally derivative from the state, and she/he thus essentially a “state-ward” (p. 196), she/he is now evolving into a “shareholder in a global system,” who is increasingly accepted as a legitimate claimant independent of the state. This then provides Franck with the, evidently sought after, opportunity to delve into the current state-of-the-art of international human rights law and bring together recent developments in the treaty- and charter-based mechanisms, including an all too brief mention of social and economic rights, as well as the International Criminal Court, and the World Bank in order to show how already the current human rights regime has shifted (some) of its focus away from the state. He does, however, acknowledge the need to disperse this ‘good news’ to those unenlightened masses that may never even have heard of it.<sup>5</sup>

Franck, finally, turns to the two related, though tricky, subjects of how individuals, groups and the state relate to each other in his new paradigm, and whether individual rights ought to be matched by individual responsibilities. As to the former, his central thesis, again backed up by ample historical evidence, is that there has been a progressive development in which groups challenged the exclusivity of states as rights-holders in international society, followed by a challenge from individuals against both state- and group-determined identity, thereby creating a rights triad which, in his words, is now “tautly balanced in vigorously adversary rival self-assertions” (p. 243). This “dynamic tension,” which, for Franck, leads to

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5. The same applies for the advertisement of class action settlements or, to take another striking example, the German Foundation to compensate former Forced and Slave Laborers: see L. Adler & P. Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 *Harvard Journal of Legislation* 1 (2002).

“discourse and mutual accommodation” (p. 251) may nonetheless occasionally crystallise into diametrically opposed positions, such as with regard to survival, where state, group, and individual interests may fundamentally clash. In such hard cases, Franck argues somewhat disingenuously that individual rights ultimately enjoy a moral priority, since only they are genuinely unacquired, first and truly essential, whereas group and state rights are always acquired, secondary rights. As for the second tricky issue, namely whether, as Franck himself puts it, “personal freedom [...] may actually have exacerbated inequalities and disadvantages” (p. 255), he turns this question into one about the necessity of individual responsibilities alongside individual rights. He rejects the rights-critical ‘human responsibilities’ approach advocated, for example, by the 1997 ‘Universal Declaration of Human Responsibilities,’<sup>6</sup> but co-opts its basic *problematique*, namely the potential of fundamental conflicts of interest between different individuals’ self-determination, into a general call for global democratic legitimacy. This introduces, of course, Franck’s project of old, notably to show that a right to democratic governance is gradually emerging,<sup>7</sup> in support of which he again musters an impressive amount of detailed evidence on a world-wide emerging consensus on a “morally pluralistic constitutional democracy” (p. 276).

In all, *The Empowered Self* goes to great lengths to present its liberal utopia precisely not as an exultation in “smug satisfaction at the ‘end of history’”<sup>8</sup> but as a plausible, if occasionally stylised, interpretation of the world at the turn of the millennium. Though rhetorically convincing, it is precisely this style which attracts immediate critical attention. After all, this is an international lawyer who, by his own admission, ventures into conceptual *terrae incognitae* in order to draw up as holistic a picture of the globalising world as possible. As such his approach duly conforms with that generally adopted by ‘liberal internationalist’ scholars who, in an attempt to escape the confines of pure normativism, have opened a dual agenda of the complementary pursuit of (realist) international relations and (normativist) international law.<sup>9</sup> Indeed, *The Empowered Self* does not only pursue a dual, but generally a multiple agenda, as if to proclaim that mainstream international law is simply incapable of dealing with a post-Vattelien world and still retain at least a minimal relevance. Such critical notions would certainly be welcome, if Franck had only taken them to their methodological conclusion. Yet, instead, he retains the deep structure of

6. Proposed, for example, by the InterAction Council of former ‘world leaders,’ at <http://www.asiawide.or.jp/iac/UDHR/EngDecl1.htm>.

7. See, among others, T.M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992); T.M. Franck, *Democracy as a Human Right*, in L. Henkin & J.L.H. Hargrove (Eds.), *Human Rights: An Agenda for the next Century* 73 (1994); and T.M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).

8. Franck, *Fairness in International Law and Institutions*, *id.*, at 301.

9. The best known article here is, of course, A.M. Slaughter’s, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205 (1993).

international legal argument, which Martti Koskenniemi has so aptly described as lying between apology and utopia.<sup>10</sup> His regular turn to descriptions of the actually existing practice of states and international organisations testifies to the apology side, while his interpretation of these facts is radically utopian. He adopts a rhetorical mode typical for international legal discourse, consisting of both a statement of what the law is, and an underlying plea to recognise it as such. Indeed, over long tracts, *The Empowered Self* reads like an attempt to prove something akin to the *opinio juris* of globalisation. Though Franck compellingly argues that, in order to ascertain that *opinio*, he no longer needs to exclusively look to state practice, but also to a host of now relevant non-state actors, the persuasive force of this – in itself good – argument comes ultimately from the unacknowledged appeal to auto-suggestion which is typical for this type of argument: ‘believe you me, this is what you should be thinking the international law of the globalisation era is.’ In social theory terms, Franck could be charged with what Hans Joas has aptly called the ‘unhappy marriage of hermeneutics and functionalism,’<sup>11</sup> *i.e.*, the argumentative ‘backing up’ of what essentially is a normative re-interpretation of international law with a functional analysis of globalisation. That way, critique of his normative theory can easily be deflected with reference to its functional inevitability, since all it purports to do is to re-state what is actually happening.

It would be mistaken, however, to belittle Franck’s awareness of what his methodological choices mean. Indeed, method has been part of the substance of all of Franck’s work, and *The Empowered Self* is just the most recent and, perhaps, strongest instantiation of his long-standing thesis that we have now reached a ‘post-ontological’ age in which we no longer need to assert the existence of international law, but can finally turn to its evaluation and perfection.<sup>12</sup> And this perfection evidently lies for Franck in the completion of a genuinely Promethean world. Regardless of whether Franck is considered a transnational legal process scholar, a rationalist, an international society theorist, a constructivist,<sup>13</sup> or a neo-Kantian liberal positivist,<sup>14</sup> *The Empowered Self* unequivocally reveals him as a liberal millenarian who fulfills all the criteria set out by Susan Marks: an often counterfactually teleological interpretation of social reality, a seemingly unshakable belief that the *telos* is some form of global liberal democracy,

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10. M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers’ Publishing Company, 1989).
  11. See H. Joas, *The Unhappy Marriage of Hermeneutics and Functionalism*, in A. Honneth & H. Joas (Eds.), *Communicative Action: Essays on Habermas’ Theory of Communicative Action* (J. Gains & D. Jones, translation) (Cambridge (MA): MIT Press, 1991).
  12. As already explored in Franck, *Fairness in International Law and Institutions*, *supra* note 7.
  13. Harold Koh identifies all of these in Franck, in *Why do Nations Obey International Law*, 106 *Yale L. J.* 2598, at 2642 (1997).
  14. See, *inter alia*, M. Koskenniemi, *Book Review*, 86 *AJIL* 175, at 177 (1992); and generally, D. Kennedy, *A New Stream of International Law Scholarship*, 7 *Wisc. Int’l L. J.* 1 (1988).

coupled with a resolutely post-historical standpoint, and a generally optimistic or even enthusiastic tone. To be fair, one should concede that his vision is a fairly accurate description of the lives of the 'global cosmocrats' who are most likely to read the book – and this review –, and who may, even against their own volition, recognise themselves in Franck's Promethean individuals. Yet with respect to all others, the shortcomings of the liberal millennium are more than evident: the all too easy painting over of the many discontents of globalisation, its asymmetries, its conflicts, and its silent exclusion of a great number of people. Though his robust dislike of the old Vattelien system certainly contributes to push international legal discourse towards a long-overdue recognition of the new reality of its subject matter – and as such it is most welcome –, his re-application of the structure of that system to a global society made up of individuals<sup>15</sup> equally actively contributes to sideline debates on the underlying values and the hidden agendas of international actors,<sup>16</sup> and it lacks the critical distance which is, more than anything else, called for in the wake of the many transformations of today's world.

By way of epilogue, the, perhaps, most radical, if unexpected, of these transformations should be mentioned, namely the 'war on terrorism.' For, if anything, it has, so far, consisted of the large-scale and violent re-imposition of precisely the old Vattelien state structure over the (potentially) emerging 'global civil society,' with all the international power politics and domestic oppressions of individual liberties that Franck had already seen waning away. Yet, instead of being up on the – currently all too tiny – barricades of sensible critique against this indiscriminate onslaught on all that seems 'other,' Franck seems to have fallen prey to the very thesis he wishes to reject in the book, namely that this is, indeed, a 'war of civilisations'; and, indeed, by defending much of the US' response to the 11 September attacks, he does apply his 'survival principle' in the same state-nation-tribe-biased way that he goes to great length to refute.<sup>17</sup> The big question that remains after 11 September is, thus, whether *The Empowered Self* will have been anything more than a 'good weather' report that crumbles as soon as the first clouds appear.

*Florian Hoffmann\**

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15. An excellent point made in the earlier review by Alyson Cole (*supra* note 2).

16. See P. Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EJIL 435, at 447 *et seq.* (1997).

17. See especially his short Editorial Comment *Terrorism and the Right of Self-Defence*, 95 AJIL 839 (2001).

\* Researcher, Department of Law, European University Institute, Florence, Italy.