

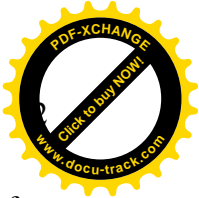
INTERNATIONAL LAW: Between Fragmentation and Constitutionalism

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Canberra, 27 November 2006

1. Last May the European Court of Justice (ECJ) gave its judgement in the MOX Plant case.¹ The case had to do with the operation of a nuclear reprocessing plant at Sellafield, United Kingdom. A complaint had been raised by Ireland against the United Kingdom on account of the potential environmental effects of the plant under two international treaties. One was the OSPAR Treaty having to do with the protection of the environment of the North Sea. The other was the United Nations Convention on the Law of the Sea from 1982. Having heard of these proceedings, the European Commission for its part, raised a claim against Ireland on account of Ireland's having taken the United Kingdom – another member State of the European Union – to international arbitration, that is to say, to be legally ascertained under other rules than those of European law by bodies other than European ones.
2. The Court condemned Ireland on all accounts. Ireland had failed to respect the exclusive jurisdiction of the ECJ, and its duty to cooperate under Article 10 of the EC Treaty.
3. For an international lawyer, this is a stunning case. Not because it would be unprecedented, on the contrary. Since late 19th century, nation-States understood one aspect of their sovereignty as the unconditional primacy of their legal order to anything imposed from the outside. The MOX Plant case is stunning because it falls squarely on the oldest, and most conservative trajectory of European thinking about the role of international law and its relations with national law. It shows the ECJ imagining the European Union as a sovereign whose laws override any other legal structure. To appeal to international law against the United Kingdom, Ireland was violating the sovereignty of European law, like Soviet dissidents once upon a time, appealing to the 1966 UN Covenant on Civil and Political Rights, broke against the hermetic absolutism of the Soviet order.

¹ ECJ, Case C-459/03, Judgment of 30 May 2006.

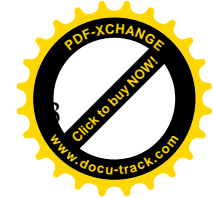


4. The ECJ's view of the relations of European and international law follows the strictures of late-19th century German public law. The two legal orders are separate, while for EU organs, the primacy of European law is imposed as a constitutional necessity. This is the traditional dualistic position which Hans Kelsen once analysed as in fact a monist position with the primacy of the national legal order, a position that Kelsen saw as both solipsistic and imperialistic – this language is his. *Solipsistic* in the sense of capable of seeing nothing else than one's own legal system; *imperialistic* because everything taking place in the world is judged from its perspective.² Or, I should like to say, everything as long as this is convenient. In the *Bankovic* case, the European Court of Human Rights held that the European Convention was *not applicable* as a standard to adjudge the bombing of Serbia by European war planes because it did not cover the actions of European States outside Europe when those acts could not be seen as regular acts of administration of the kind the ECHR had perceived in Turkey's behaviour in Northern Cyprus and it would again see in Russia's actions in Moldova.³

5. But my point today is not to attack European self-centredness, or its hypocrisy. I refer to the MOX Plant case as an illustration of what is happening to public international law, the way it is being sliced up in regional or functional regimes that cater for special audiences with special interests and special ethos. A *managerial* approach is emerging that envisages international law as an instrument for particular values, interests, preferences. This – I would like to suggest – is to give up the universalism that ought to animate international law, and provide the *conditions* within which international actors – States, international and civil society organisations, transnational actors and networks – may seek their purposes without the law subscribing to those purposes itself. It is often said that international law is unable to respond to the challenges of globalisation. The critique is a preface for reforming international law into a technique for the management of the new problems. And as such, its diplomatic mores and institutional structures seem altogether too weak, even dysfunctional. The marginalization of international law by the ECJ in the MOX Plant case is merely one example of a special legal regime and a special ethos – the European regime, the European ethos – claiming priority over anything general, even less universal. The European project, the Court is saying, enjoys precedence over the international project, European institutions –

² Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (2nd edn. Tübingen, Mohr, 1928).

³ *Bankovic v. Belgium and others*, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351, para. 57 and compare with *Cyprus v. Turkey*, Decision of 10 May 2001, paras 69-81.



and their institutional bias – ought to overrule institutions claiming to represent the universal, and their institutional bias.

6. But Europe is not the only such project. Take for example, the *trade law project*. The WTO has been the centre of the construction of an impressive legislative edifice and case-law geared to the management of comparative advantage through free trade. The relationship of that project to other international rules is much debated: trade and human rights, trade and labour, trade and environment. The trade position was clearly stated by the Appellate Body in the *Beef Hormones* case in 1998. Faced with the question as to the status of the so-called precautionary principle under the WTO covered treaties, especially the Agreement on Sanitary and Phytosanitary Substances (SPS Agreement), the AB concluded that whatever the status of that principle “under international environmental law”, it had not become binding for the WTO.⁴ This approach suggests that international law comes to us in separate boxes such as “trade law” and “environmental law” that may have different principles and objectives that do not apply across the boundaries between such boxes. But how do such boxes relate to each other?

7. The existence of special regimes is a commonplace of international practice. 10 year ago in the *Legality of Nuclear Weapons* (1996) case, the International Court of Justice structured its opinion by successively examining human rights law, environmental law, humanitarian law and the law on the use of force.⁵ In the more recent *Palestine Wall* (2004) case, it debated at length the relationship between what it called international human rights law and international humanitarian law. The rules within the boxes were different: one prohibited killing, one permitted and regulated it. But which should have precedence?⁶ The importance of choosing the right box was highlighted by the Arbitral Tribunal set up under the UN Convention on the Law of the Sea in the MOX Plant case. Three different treaty-regimes were applicable. Let me quote the Tribunal: “even if the OSPAR Convention, the EC Treaty and the Euratom treaty contain rights or obligations similar to or identical with the rights set out in [the UNCLOS], the rights and obligations under these agreements have a

⁴ European Communities - Measures Concerning Meat and Meat Products (Hormones) 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 123-125.

⁵ ICJ, *Threat or Use of Nuclear Weapons* case, Reports 1996.

⁶ ICJ, *Palestine Wall* case, Reports 2004, paras 104-106.



separate existence from those under [the UNCLOS].”⁷ The tribunal then held that the application of even the same rules by different institutions might be different owing to the “differences in the respective context, object and purposed, subsequent practice of parties and *travaux preparatoires*”.⁸

8. It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias: to examine nuclear weapons from a human rights perspective is different from looking it from a laws of war perspective; a free trade perspective on chemical transports does not render the same result as an environmental perspective, *whatever the rules*.⁹ And the objective and the ethos of a regime is not just some incidental aspect of it. What is significant about projects such as trade, human rights, or indeed “Europe”, is precisely the set of values or purposes that we link with them. To be doing “trade law” or “human rights law”, or “environmental law” or “European law” – as the representatives of those projects repeatedly tell us – is not just to operate some technical rules but to participate in a culture, to share preferences and inclinations shared with colleagues and institutions who identify themselves with that “box”.

9. Now this would not be too significant if the boxes had clear-cut boundaries and we could resolve jurisdictional overlaps by some superior set of rules. This is how international law saw itself in the late-19th century when the boxes were legal systems of sovereign states. But now there is no such superior set of rules. It is international law itself that is broken down into such boxes, each of them – remember – both solipsistic and imperialistic. The boxes do not emerge from any overarching plan. They grow spontaneously, through *functional specialization* that has separated spheres international life and made them increasingly autonomous from each other. Much of modern sociology is about this and tends to convey it as natural, inevitable process. But if it is so, then it is inevitable only in the sense that the predominance of powerful interests is inevitable in the absence of legal rules. In fact, there is nothing natural or inevitable about such boxes. They emerge from field-construction, of narration, of pinning informal labels on aspects of the world that describe them from the

⁷ *MOX Plant case, Request for Provisional Measures Order (Ireland v. the United Kingdom)* (3 December 2001) International Tribunal for the Law of the Sea, ILR vol. 126 (2005) p. 273, para. 50.

⁸ *Ibid.*, pp. 273-274, para. 51.

⁹ On the key notion of structural bias in the analysis of international legal practice, see my *From Apology to Utopia. The Structure of International legal Argument. Reissue with a New Epilogue* (Cambridge University Press, 2005), p. 600-615.

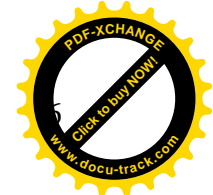


perspective of particular interests or objectives. And any international event may be described from any such perspective: the processing of nuclear materials by the sea relates at least to environmental law, trade law, the law of the sea, perhaps the law of maritime transport and certainly also human rights. The characterizations do not follow from the “nature” of the activity but the interest from which it is described. An activity does not fall into a box because what it is like, intrinsically, but what is the perspective from which we want to describe it. And we have to ask, how is that perspective determined?¹⁰

10. As my friend David Kennedy says, a man with a hammer sees every problem as a nail. A specialised institution is bound to see every problem from the angle of its specialisation. Trade institutions see every policy as a potential trade restriction. Human rights organs see everywhere human rights problems, just like environmental treaty bodies view the political landscape in terms of environmental problems and so on. This is why the ECJ saw in the operation of the British nuclear installation a problem of European law, not a problem in the law of the sea or a problem of the pollution of the North Sea environment. Of course the ECJ would be happy to deal with matters relating to the pollution of the seas, because in so doing, it could make sure that it is treated from the perspective of the interests and preferences – the project – it is called upon to advance. This is like the nation-State, once upon a time, understood by some German lawyers once upon a time as “*Gesamtplan des menschlichen Kulturlebens*”, a total plan of social life.¹¹ In the same way, every system, every regime is capable of extending to the whole world, covering everything from its own perspective, the combination of solipsism and empire that Kelsen saw in the project of the nation-State.
11. The analogy with the State goes further. In the recent WTO case on the European prohibition of Genetically Modified Organisms (GMOs) the question arose whether the Panel should take account of the 1992 Convention on Biological Diversity and the related Biosafety Protocol of 2000. It could do so under Article 31 (3) (c) of the VCLT according to which international agreements – including the WTO agreements – should be interpreted by taking account of the *other obligations* of the parties. The Panel found, however, that *all* parties to the WTO treaty had to be parties to that other treaty as well. Because the United

¹⁰ I have discussed functional differentiation in connection with a theory of hegemony in my ‘International Law and Hegemony: A Reconfiguration,’ 17 *Cambridge Review of International Affairs* (2004), p 197 and especially p. 205-6.

¹¹ Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (Tübingen, Mohr, 1911).



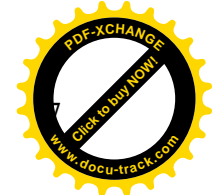
States had not joined the biosafety protocol, it could not be applied.¹² The position is identical with the classical constitutional law dualism that accepts that international obligations may be applied in domestic organs only if their provisions have been incorporated as parts of domestic law. Applied to a multilateral treaty with dozens of parties, the requirement of *identical* membership makes it practically impossible ever to find a multilateral context where reference to other treaties – the other box – would be allowed. The panel buys what it calls the “consistency” of the WTO Treaty at the cost of the consistency of international law.

12. Now the various regimes or boxes – European law, trade law, human rights law, environmental law, investment law and so on – all tend to act in this way. Human rights bodies have developed a steady jurisprudence under which the interpretative principles applicable to human rights treaties differ from principles applicable to other treaties, enabling an activist role by human rights bodies. Or think of the criminal law box. In the *Tadic* case, the ICTY, observed that the standard of responsibility to judge foreign involvement in civil war set down by the ICJ in 1986 – that is, whether that foreign power had *effective* control over domestic guerrillas – were not applicable in international criminal law where a broader standard of “overall control” was applicable.¹³ It is hardly a surprise that the direction of the deviation is in favour of wider jurisdiction of the relevant expert organ.

13. This is *managerialism*. Each regime understood as a purposive association and each institution with the task of realising it. There would be nothing irregular here if that process were controlled by law emanating from something like an international political society determining the jurisdiction of each regime. This was the utopia of inter-war sociological jurisprudence that saw the League of Nations and other international organisations as parts of a global process of functional differentiation through which a global society regulated its own affairs. This was a radical cosmopolitan view that took from Kant and Benjamin Constant the view that trade and interdependence will lead into a global federation in which humanity’s affairs are conducted under a universal republic.

¹² *EC - Measures Affecting the Approval and Marketing of Biotech Products* (7 February 2006) WT/DS291-293/INTERIM, p. 299-309 paras. 7.68-7.89.

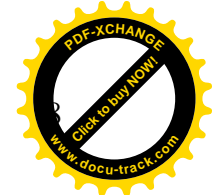
¹³ ¹³ See *Prosecutor v. Dusko Tadic*, Judgment of 15 July 1999, Case No. IT-94-1-A, A.Ch. See also ILM vol. 38 (1999) pp. 1540-1546, paras. 115, 116-145



14. But there is no global legislative power, no world government under which the WTO could be seen like a global ministry of trade, the Kyoto process as activities of a global environmental ministry or trials of war criminals as something carried out by a global executive arm. But Carla del Ponte looks almost like a private entrepreneur. Differentiation does not take place under any single political society. Instead it works through a struggle in which every interest is hegemonic, seeking to describe the social world through its own vocabulary so that its own expertise and its own structural bias will become the rule. The “wide reading of security” by the Security Council is one example. “Sustainable development” still a fragile compromise between development and environmental experts. Every conceptual move a move in a game of power where the one that has mastery for the concept, will also have the power to decide.
15. But if each regime seeks the realisation of a particular purpose, it also has to cope with contingent events and novel problems. The purpose needs to be translated into appropriate reactions to changing circumstances. For this purpose, there have to be experts – treaty bodies, committees, compliance groups and so on – to manage the policy so as to guarantee its optimal fulfilment in practice, to interpret and draw conclusions from it. Out of a huge scope of materials, let me give you just one recent example. At its most recent session in 2006, the Commission finalised a “Draft Convention on the Law of Transboundary Aquifers” – the rights and obligations with regard to the world’s groundwater resources.¹⁴ The main substantive provision of the draft invites States to construct a “plan” for each aquifer system, taking into account “the present and future needs and alternative water sources for the aquifer states”. The “relevant factors” that should be taken into account include items such as “the natural characteristic of the aquifer system”, “the social and economic needs of the States concerned” and “the existing and potential utilisation of the aquifer” and so on, with the ultimate paragraph according to which:

“The weight to be given to each factor is to be determined by its importance with regard to a specific transboundary aquifer or aquifer system in comparison with that of other relevant factors. In determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, in weighing different utilizations of a transboundary

¹⁴ Draft Report of the International Law Commission on the Work of its Fifty-Eighth Session, Chapter VI: Shared Natural Resources. C. Text of the Draft Articles on The Law of Transboundary Aquifers adopted by the Commission on First Reading, A/CN.4/L.694/Add.1 (4 July 2006).



aquifer or aquifer system, special regard shall be given to vital human needs".¹⁵

This pattern is repeated in countless recent instruments.¹⁶ To agree to a treaty is to agree on a continued negotiation and contextual deal-striking between technical experts, with functional interests in a decisive position. It is easy to understand why this would be so. Management on a global scale is difficult. Determining rules cannot be laid out at the outset. For every rule would be over and under-exclusive, it would fail to cover some case we would wish to cover – and it would cover cases that we would not wish to cover. Hence global management will have to take place by open-ended standards that leave experts with sufficient latitude.

16. So we are left with *managerialism* in the precise sense that law turns into rules of thumb or soft standards that refer to the best judgment of the experts in the box-substance, thoroughly committed to advance the purposes that are appreciated in the box. That is why they have been elected to serve in those bodies in the first place. That is why solipsism and empire seem unavoidable: trade bodies condemned to advance trade, human rights bodies human rights, environmental bodies environmental interests and so on.

17. International lawyers have sought to combat this by the vocabulary of *constitutionalism*. This is to imagine, against all odds, that world federation is there, that the UN Charter can be read like a world constitution. Perhaps, after all, Latin formulas such as *jus cogens* or obligations *erga omnes* represent universal values.¹⁷ But which values? No doubt, free trade for trade bodies, human rights for human rights organs, environmental values for environmental regimes, security for the Security Council, each such “value” again subdivided into a mainstream understanding of its practical implications and a minority

¹⁵ Draft Article 5 (2), *id.*, p. 4.

¹⁶ See also the 1997 UN *International Convention on the Non-Navigational Uses of International Watercourses*. UNGA Res, 51/229 (Annex), 21 May 1997. The main standard in the Convention is that of "equitable and sustainable use", defined in terms of a (non-exhaustive) list of economic, environmental, geographical and other "factors". More important are procedures on information exchange, co-operation and negotiation that encourage parties to negotiate local, regional or issue-specific regimes.

¹⁷ Thus, Christian Tomuschat writes of international law as a “comprehensive blueprint for social life” in ‘International Law: Ensuring the Survival of Mankind on the Eve of A New Century, General Course on Public International Law’, 281 *Recueil des Cours de l’Académie de droit international* (2001), p. 63-72. See also the commentary and elaboration in Armin von Bogdandy, ‘Constitutionalism in International Law. Comment on a Proposal from Germany’, 47 *Harv. Int’l L.J.* (2001), p. 223-242. For a Francophone version, see Pierre-Marie Dupuy, ‘L’unité de l’ordre juridique international, Cours général de droit international public’, 297 *Recueil des Cours de l’Académie de droit international* (2002), especially p. 269-313 (on *jus cogens*). See also Stefan Kadelbach, ‘Ethik des Völkerrechts unter Bedingungen der Globalisierung’, 64 *ZaöRV* (2004), p. 1-20 and Erika de Wet, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’, 19 *Leiden Journal of International Law* (2006, forthcoming).



challenge. Constitutionalism, as we know it historically, relies on some basic understanding of the common good, some sense of a law as a shared project for a reasonably clearly defined (and often historically informed) objective.¹⁸ In the international world, there is no semblance of this – that is to say, beyond the very values of free trade, human rights, clean environment, fight against impunity and so on – values that demand managerial regimes for their realisation. If fragmentation and deformalisation have set the house of international law on fire, grasping at values is to throw gas on the flames.

18. A more plausible constitutionalism is formal and suggests that no special regime has ever been understood as independent from general law. In a typical case from 1928, for example, a claims commission interpreting a treaty did not hesitate to state as follows:

"Every international convention must be deemed tacitly to refer to general principles of international law for all the questions that it does not itself resolve in express terms and in a different way".¹⁹

This seems almost self-evident. No lawyer will refuse to find States as States, or ask for evidence for the rule of *audiatur et altera pars* merely because a regime is silent about such matters. They are structurally given, not positively enacted. In its first case, the WTO Appellate Body of observed that the WTO agreements "should not be read in clinical isolation from public international law"²⁰ and later specified that "[c]ustomary international law applies generally to the agreements between WTO members".²¹ Regimes such as the European or Inter-American human rights convention make constant reference to general international law without any act of incorporation.²² Only a few months ago the International Law Commission adopted a Report on "fragmentation" where it found no legal regimes *outside* general international law. The boxes of trade, environmental protection or

¹⁸ As articulated e.g. in T.R.C. Allen, *Constitutional Justice. A Liberal Theory of the Rule of Law* (Oxford University Press, 2001), p. 21-25.

¹⁹ *Georges Pinson Case (Fr. v. Mex.)*, 5 R. Int'l Arb. Awards (1928), p. 422.

²⁰ *United States - Standards of Reformulated and Conventional Gasoline* (20 May 1996) WT/DS2/AB/R, DSR 1996:I, p. 16.

²¹ *Korea - Measures Affecting Government Procurement* (19 January 2000) WT/DS163/R, para. 7.96.

²² In the *Bankovic* case (1999), the European Court of Human Rights "recall[ed] that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part, *Bankovic v. Belgium and others*, Decision of 12 December 2001, Admissibility, ECHR 2001-XII, p. 351, para. 57 (references omitted). For a discussion, see Luzius Caflisch & Cancado Trindade, 'Les conventions américaine et européenne des droits de l'homme et le droit international général', 108 RGDIP (2004), p. 5-63.



human rights did have special rules for rule-creation, rule-application and change. This is what made them special after all. But when the rules run out, or regimes fail, then the institutions always refer back to the general law that appears to constitute the frame within which they exist.²³ Here is a battle European jurisprudence seems to have won. Law is a whole – or in the words of the first conclusion made by the ILC Study Group, “International law is a legal system”. You cannot just take one finger out of it and pretend it is alive. For the finger to work, the whole body must come along.²⁴ How useful is this victory?

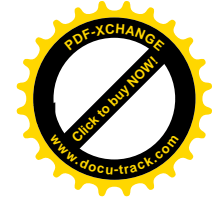
19. Constitutionalists are right to say that functional regimes or expert systems do not float in a normless vacuum. But they do not have definite hierarchies to resolve conflicts between them – they have a vocabulary, but nothing definite to say with it. Although the ILC Study Group discovered that no regime, however special, was autonomous from international law, it did not feel it appropriate to give indication of whether in cases of conflict the special regime should be read as an *exception to* or an *application of* the general law. Practice showed examples of both and it was impossible to determine which way the equation should go in the abstract. Of course, an EU rule might conflict with the law of the sea, or a regime on the use of force might conflict with a principle of humanitarian law. But what to do in such situations would have to depend on the circumstances.²⁵ After all, such cases express the tension between particularism and universalism and the mere speciality or generality of a regime gives no conclusive reason to prefer it.²⁶ It is not even clear what “general” and “special” mean in this context. It may be natural for international lawyers to think of their specialisation as “general”. But it is unsurprising that other lawyers see it as a particularly exotic craft relevant mainly for the quaint traditions of diplomacy, exercised between 45th and 52nd streets, Second Avenue, NYC.

²³ ‘Fragmentation of International Law. Problems caused by the Diversification and Expansion of International law, Report of the Study Group of the International Law Commission’. Finalized by Martti Koskenniemi A/CN.4/L.682 (13 April 2006) (“Analytical Report”). The way allegedly “self-contained” regimes link to general international law is discussed on p. 65-101. The 42 conclusions prepared by the Study Group on the question of fragmentation on the basis of the “Analytical Report” are contained in ‘Fragmentation of international law: difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission’, A/CN.4/L.702 (18 July 2006) (“Conclusions”), p. 7-25.

²⁴ For two more recent examples in a burgeoning literature, see, Anja Lindroos and Michael Mehling, ‘Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO’, 16 EJIL (2005), p. 857-878 and Bruno Simma & Dirk Pulkowski, ‘Of Planets and the Universe: Self-Contained regimes and International Law’, 17 EJIL (2006), p. 483-530.

²⁵ See especially ‘Conclusions’, supra note 23.

²⁶ For the inconclusive discussion in international law of the status of regional vs. universal regimes and for the conclusion on “general law”/“special law” relations see “Analytical Report”, supra note 23, p. 102-115.



20. The problem with constitutionalism is that it imagines itself as a project of institutional *architectonics* based on the assumption that what is wrong with the world is the heterogeneous nature of the interests, preferences, values therein, the nature of the international world as an “anarchical society”. In looking for unity of common values or purposes it aligns itself with Western nostalgia since the Renaissance that looked back to the Roman Empire as the uncorrupted origin of European politics. The constitutionalists still grapple with the division of Christendom and the fragmentation of the Holy Roman Empire – the view of separateness and sovereign powers as a tragedy to be overcome by future unity. That view suggests that international law ought to be seen as an *institutional project*, a project about blueprints for perpetual peace, *civitas maxima*, and world government. This is why no law review article seems credible unless it ends with an institutional proposal. No talk about the United Nations is worth its salt unless it takes a stand on the UN Reform. This is the quintessentially modern response to social anxiety, inspired by an 18th century legacy of rational planning and pragmatic application.
21. Now what I have been saying must also be reflected in the training of lawyers at places like the Australian national University. The view I have sketched suggests that this training should be above all about institution-building and management; the professional ideal the expert at a functional organisation – perhaps the WTO, perhaps the UN, perhaps some body in the Pacific area. The understanding is that these institutions embody the spirit of modern functionalism to which modern lawyers, too, should be trained. Legal education as education to commit oneself to whatever purposes a specialist box might offer. It is not surprising that this educational programme is often dressed in the language of interdisciplinarity. And so academic lawyers painstakingly learn the new vocabularies: to speak instead of institutions of regimes; instead of “rule”, of “regulation”; to change the language of government to “governance”; responsibility to “compliance”; lawfulness to “legitimacy”, and, finally, to think international law as “international relations”.
22. Through this vocabulary, law is finally drained out of international law, conceived as a professional technique for the management of values, purposes, ideals. The new professional sensibility would learn law as a second best, a pointer to good purposes, but pointless if those purposes are known, and positively harmful if poised against them. To be a lawyer would be to exist as a cog in the machine that the regime is, thoroughly committed to the



fulfilment of that value, purpose, or community, assumed to exist *outside the regime*, as a condition of possibility and therefore outside of critical reflection.

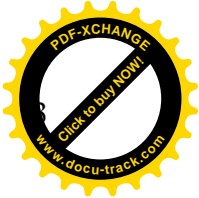
23. But how to have access to those values or purposes? After all, they are indeterminate and in conflict with each other. Should a human rights expert favour the right of privacy or the freedom of speech, the freedom to act, or the freedom to be safe from other peoples' acting? Is free trade about creating wealth or eradicating poverty, aggregate utility or distribution? Is the United Nations about peace or justice? And so on. To solve such questions, each regime must refer back to the discretion of its managers – the rule of law understood in this (instrumental) way as rule by the structural bias in the relevant form of expertise. Let me retrace a bit.²⁷
24. The critique of values and purposes as *hubris* and *Schwärmerei* was the core of Immanuel Kant's political work. Against the popular misconception that it is some CLS extravaganza, one cannot emphasise too much that every aspect of the indeterminacy of values and purposes was already laid out in Kant's attack on the miserable comforters - the natural lawyers Grotius, Pufendorf, Vattel.²⁸ Against them, Kant conceived his strong legalism. Law as the protector of freedom against the projects of unfreedom that were the efforts to think of human beings as objects of management, best visible in the management of absolutist States. But Kant's legalism is not – as it is often believed – a legalism of rules or institutions. It is a legalism of the legal mindset. Rules are just a helpful reference but in themselves, far from sufficient. In Kant's vivid language:

A physician therefore, a judge or a statesman, may have in his head many admirable pathological, juridical or political rules, in a degree that may enable him to be a profound teacher in his particular science, and yet in the application of these rules he may very possibly blunder—either because he is wanting in natural judgment (though not in understanding), and whilst he can comprehend the general *in abstracto*, cannot distinguish whether a particular case *in concreto* ought to rank under the former; or because his faculty of judgment has not been sufficiently exercised by examples and real practice.²⁹

²⁷ The following text reproduces ideas taken from my 'Constitutionalism as Mindset. Reflections on Kantian Themes about International Law and Globalisation', forthcoming in 8 *Theoretical Inquiries in Law* (2007). See also my *The Fate of International Law. Between Technique and Politics*, forthcoming in 70 *The Modern Law Review* (2007).

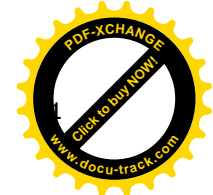
²⁸ Immanuel Kant, 'Perpetual Peace. A Philosophical Sketch', in *Political Writings* (2nd edn. Hans Reiss ed., Cambridge University Press, 1991), p. 103.

²⁹ Immanuel Kant, *Critique of Pure Reason* (Vasilis Politis ed., Everyman's 1991) (1781) (A132-34), p. 140-141. The exercise of judgment, Kant notes, requires "mother wit," for which there are no rules and "the want of which no schooling can compensate." Although Kant says here in a footnote, *id.* at 140 n.1, "[d]eficiency in judgment is



25. But if the rules of law do not spell out the conditions of their application, then their virtue cannot rest on the formulations positive laws may have or on what they purport to achieve in practice. “Rules” are just like “policies”, “objectives” or “values” – open-ended and conflictual. To think one could draw automatic consequences from them was precisely the illusion, the *Schwärmerei*, that Kant detected in previous thought. It was not a politically innocent illusion; the *ancien regime* stood on it, the illusion that social conflict was already settled in some ideological heaven and that the only task for the lawyer was to bring it down so that everyone could see it and bow to its hierarchies. *A Versailles of the imagination*. By contrast, Kant invites us to refuse to believe in our having access to such heaven when only correctly managed. Instead, what we do have access to is our freedom that in social life means our autonomy from other peoples’ projects. There never lacked projects for enlisting freedom for this or that cause. But law is not one of those. Instead, it is a standpoint, or a language, and a practice through which those projects are subjected to critical analysis. As such, law represents that which aspires to the universal / no wonder Kant saw all law as aiming to become a law of nations and a lawful external environment a precondition for legality at home.
26. This re-defines legal training as education in critical sensitivity to the contexts in which lawyers are called upon to act as professional wielders of power. Where managerialism thinks of the legal judgment as a product of regime-rationality, and thus attributable to the institution, or to technique, Kant sees the judgment as the original product of the decision-maker, and thus attributable to that person. Against managerialism as ideology, law is enlightenment as responsibility. This would not be fidelity to any particular meaning of a text or practice. Nor to a systemic effort to reach some objective, purpose, or value. Instead, it would have to be law as a mindset within which the law-applier will have to be about the way the law-applier approaches the task of judging within the narrow space between fixed textual understandings (positivism) on the one hand, and predetermined functional objectives (naturalism) on the other, without endorsing the proposition that the decisions emerge from a “legal nothing” (decisionism). I think about this in terms of the spirit of the legal profession.

properly that which is called stupidity,” in his later writings, and especially in the Third Critique, his assessment is less harsh.



27. In the Appendix to *Perpetual Peace*, 1795, his eyes firmly fixed on the French Revolution Kant made a distinction between the “*political moralist*” and the “*moral politician*.”³⁰ The former, he wrote “makes the principles subordinate to the end.”³¹ These ends have no independence from the ends of *some* people, namely, those managing the regimes and their advisers. Kant stresses the degree to which political moralists are enchanted by their “realism,” that always enables finding a strategic consideration to justify coercing other people. For Kant, their particular vice is viewing society – that is, other human beings – as objects for external purposes – that is to say, not ends in themselves. And when those others, the objects of what I see as the right purpose, realise that they are no longer treated as free, Kant writes, they “become, in their own eyes, the most wretched of all earthy creatures.”³²
28. Against managerialism, Kant endorses the mindset of the *moral politician*, the actor conscious that the right judgment cannot be reduced to the use of instrumental reason. Instead, in judging, that person would seek to act as what Kant calls a “genuine republican” – that is, someone who sees it as his or her task to encompass the perspective of the whole.³³ And how is that possible? As is well-known, Kant’s political theory is complemented by his analysis of the faculty of imagination operative in aesthetic judgement.³⁴ Such judgment cannot be subsumed under a rule but it is not just a subjective whim, either. It claims general assent. To admire a painting or to recommend a novel is not to apply a rule but still to refer to some aspect in them that ought to appeal to everyone. The same is true of the legal judgment: it, too, claims general assent. To say, “this is valid law” is not to say this is *good* or *useful* or *something I happen to desire*. None of us as lawyers would mistake a sentence about valid law to be only about social objectives or states of mind. And yet, we puzzle over what legal “validity” – the legal *proprium* – might mean. What is it that differentiates the lawyer from the trade expert, the human rights expert, the environmental specialist, or the international relations scholar?
29. Contemporary liberal constitutionalists have taken Kant’s aesthetic move literally, and describe law as the practice of creating coherence out of the disparate materials that positive

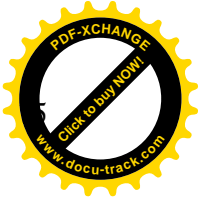
³⁰ For this link, see André Tosel, *Kant revolutionnaire. Droit et politique* (Paris, PUF, 1990), 19-21.

³¹ Kant, ‘Perpetual Peace’, *supra* **Error! Bookmark not defined.**, at 118-21.

³² *Id.* at 123.

³³ *Id.* at 116-25 (especially at 122).

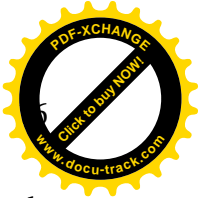
³⁴ Immanuel Kant, *Critique of the Power of Judgment* (Paul Guyer ed., Cambridge University Press, 2000). For the suggestion that the Third Critique forms the core of Kant’s political theory, see especially Hannah Arendt, *Lectures on Kant’s Political Philosophy* (R. Beiner ed., University of Chicago Press, 1982). But see also Alain Renaut, *Kant aujourd’hui* (Paris, Aubier, 1997), p. 405-15



law is. Law as commitment to *system*. But this is too tranquil, indeed morally dubious image. It is a scholar's image that forgets the complex play of power in which lawyers and Kant's moral politicians act. There is no innocent standpoint, no meeting of horizons at some moment of brilliant hermeneutic reflection. Some will continue to win, others to lose. Losing consciousness of this is perhaps the worst possible contribution a lawyer can make. Therefore, I want to look at something else in Kant. Not law as the narrating of social power in its most coherent terms. For Kant suggests something different: to expand toward universality, one must penetrate deeper into subjectivity. The Pietist search for self-improvement, *Bildung*, and spiritual perfection prepares a mindset from which to judge the world in a manner that aims for all the virtues of the "inner morality of law": honesty, fairness, concern for others, the prohibition of deceit, injury, and coercion.³⁵ Legal training as education in personal virtue instead of managerial skill.

30. But one need not look to Kant. The sensitivity to social conflict resonates with the virtues Max Weber and realist tradition had in mind when illustrating the ethos of statesmanship, irreducible to instrumental calculations or to the applications of principle. There is nothing systemic in it. Giving up the dogmatic illusion of total control, responsible politics is judgment in contingency, perhaps in the way Florentine political theory proposed that the only intelligent response to fortuna was *virtue*. Machiavelli, Kant or Weber – each of them pursued a critical project that pointed to the limits of the cognitive vocabularies and to the irreducibility of a (free) decision to any (natural or rational) structure. None of them had faith in institutional architecture. All of them looked at human choice, and the responsibility it entailed.
31. There is one objection. To focus on the inner world of decisions-makers may seem to emerge from an outdated philosophy of the subject. Surely there is no authentic free individual, and spiritual regeneration may appear equivalent to withdrawal into New Age mysticism. True, Kant wrote a long time ago. We now think that instead of subjects, there are subject-positions, and structures in which those subject-positions appear as roles in the performance of particular tasks. Freedom is also a way to govern human beings. Nevertheless, we also know that there is no one spot from which governmentality occurs, no determinate hierarchy or project from which subject-constitution should take place. If there

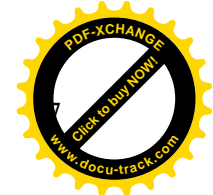
³⁵ For an alternative formulation of this "inner morality," see Lon Fuller, *The Morality of Law*, (Rev. ed. 1964) and, e.g., J.B. Scheenwind, 'Autonomy, Obligation and Virtue: An Overview of Kant's Moral Philosophy', in *The Cambridge Companion to Kant*. (Cambridge University Press, 1992), p. 320-321.



is structure, there is also the indeterminacy of structure, the dangerous supplement, the crack in the mirror, the human stain. What if trade is human rights? What if environment is resource distribution? What if sovereignty is intervention? What if what is black and freedom is possible only through constraint? Last year a British High Court described incommunicado detention in Iraq as a measure to protect human rights.³⁶ Well, then surely everything remains open for justification and contestation. No box is sealed, what it contains depends on what we put inside.

32. Which is why moral regeneration is also about telling social histories and institutions constantly anew. Criticism takes the form of re-description of the pertinent practice so as to influence its structural bias. Look at the EU – it has been told as a peace-making pact, a customs union, and an agency for protecting fundamental rights, each such re-telling pointing to a new form of expertise, a new bias, above all new subject-positions. Liberal hermeneutics is wrong in characterising the ideal legal sensibility as that of a scholarly Hercules having all the time in the world to write a chain novel out of law. But I think it is right in suggesting that law is about narrating. Sometimes we use law to tell stories of rights-bearing individuals acting upon each other, sometimes we use it to focus on how goods, services and capital cross frontiers. Sometimes we describe it in terms of environmental degradation, globalisation of democracy, a place of terror or sexually transmitted disease. We situate events sometimes in national histories, sometimes in world history. Each such telling is an intervention in the world that makes some things visible, renders other things invisible. International law is a practice of telling stories that seek to appeal to everyone, that are about the world as a whole and in which all human beings are worthy of equal concern, not as members in particular projects but as human beings. Let me end by highlighting the virtue of these stories.
33. Kant thought that enlightenment will bring about a universal federation of free republics, ruled by law. What is important here is not the realism of the prognosis, or choosing between the many forms of international order Kant projected. Rather, what is important is the use of law to express a particular kind of critique of present politics. The *ancien régime* existed for the privilege of particular estates; the Revolution, as Sieyès put it, upheld the

³⁶ *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence*, Judgment of 12 August 2005, Case No. CO/3673/2005, [2005] EWHC 1809 (Admin).



rights of the “universal estate.”³⁷ For Kant and other sympathizers, the historical meaning of the French Revolution was the entry into politics of the regulative idea of universality. The Revolution was not one more episode in the traditional ebb and flow of dynastic struggles. A qualitatively novel form of political order was being created that set as its horizon the liberation of humanity itself.³⁸ This effect, this *aesthetic effect*, was brought about by a new constitutional language. The extreme inequality of a society of estates was articulated and attacked by the vocabulary of the rule of law.

34. The virtue of international law follows from a similar universalizing focus, allowing extreme inequality in the world to be shown and condemned. It may be explained by historical causes and described in economic or sociological terms. But a specific vocabulary of legal validity is needed to articulate it as a violation of the equal dignity and autonomy of human beings wherever they are situated. It can be used to show that the suffering created by an international intellectual property regime, for example, or an imperial war in the Middle East, is more than private suffering, that these choices violate more than the interests or benefits of their immediate victims, and that the scandals emerging from them are not calculable as “costs” to be offset by future “benefits.” The use of international law’s vocabulary re-tells individual suffering as an objective wrong concerns everyone – for example the radioactive pollution in the north sea as not just a violation of a regional bargain, but of world-historical significance and a violation concerning all.
35. Likewise, dying of malaria when the available technical and economic resources are sufficient to prevent this, or suffering torture in a hidden detention camp, are not just unfortunate historical events touching only the physical persons concerned. In a secular society, it is the political business of international law to endow such events with sacredness or with a symbolic meaning that lifts them beyond their individuality. It works as a standard of criticism without which expert systems could not be distinguished from crack parties, and calculations of costs and benefits might as well be carried out by lottery. One thing lawyers might learn from the constitutional failure in the EU is that a serious politics of law is resistant, indeed opposed, to managerialism. It cannot survive as an instrumental project. In

³⁷ Emmanuel Joseph Sieyès, *Qu’est-ce que le Tiers-État?* (1789/1979)

³⁸ For the extent to which Kant saw the Revolution as an exception to normal politics (that justified relaxing even many of his otherwise absolute principles), see Jacques d’Hondt, *Kant et la Révolution française*, 2 PHILOSOPHIE POLITIQUE [* first page of article needed *], 39, 46-51 (1992).



a fundamentally unfree and unequal world, international law carries the ideal of a free and self-determining humanity.