

FORMALISM, FRAGMENTATION, FREEDOM.

Kantian Themes in Today's International Law

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We international lawyers have always been surprised, and often embarrassed, as we reach the middle of Kant's *Zum ewigen Frieden* (1795) to find that he dismissed the fathers of international law - Grotius, Pufendorf and Vattel - as "*leidige Tröster*", miserable comforters. Why would Kant wish to attack this most significant attempt so far to humanise the relations between nations at war and to construct what Pufendorf called "universal jurisprudence"? Surely Kant did not quite mean what he was saying...

I would like to suggest that Kant's dismissal of the early modern tradition of *jus naturae et gentium*, natural and international law, resonates with themes prevalent in today's international world. That tradition was born in an age as sceptical as ours.¹ It aimed to create a scientific law *moro geometrico*, out of combining the only thing we could be certain of in social life - that human beings were egoistic - with an argument according to which egoism could best flourish in conditions of legal constraint. Here is Pufendorf, writing in 1673, about the purpose of the state and the law of the state:

¹ The view of early modern natural law - especially Grotius and Pufendorf - as seeking to respond to late-16th and early 17th century sceptics (given the voice as "Carneades" in their writings) is forcefully made by Richard Tuck. See e.g. his 'The Modern School of Natural Law', in Anthony Pagden (ed.) *The Languages of Political Theory in Early-Modern Europe* (Cambridge University Press, 1987) and *Philosophy and Government 1527-1651* (Cambridge University Press, 1993).

"The over-riding purpose of states is that, by mutual cooperation and assistance, men may be safe from the losses and injuries which they may and do inflict on each other. To obtain from those with whom we are united in one society, it is not enough that we make agreement with each other not to inflict injuries on each other, nor even that the bare will of a superior be made known to citizens; fear of punishment is needed and the capacity to inflict it immediately. To achieve its purpose, the penalty must be nicely judged, so that it clearly costs more to break the law than to observe it; the severity of the penalty must outweigh the pleasure or profit won or expected from wrongdoing. For men cannot help choosing the lesser of two evils".²

Everything about this was objectionable to Kant: the reduction of states into mechanisms for avoiding "losses and injuries"; the view of obedience to law based on a calculation of costs and benefits; and the image of human beings as passive slaves to their pleasures. Kant seems to be saying that modern natural law offered security and well-being at too high a price, human freedom. I cannot think of a more relevant argument today.

The latest issue of the *American Journal of International Law*, the most widely read periodical in the field, carried two lead articles. One was titled "The Customary International Law Game". The authors use a prisoner's dilemma scenario to show, as they say, "that contrary to the arguments of some critics, it is plausible that states would comply with customary international law under some conditions". The other one - titled "Form and Substance in International Agreements" explored the "design features" of international conventions, outlining how trade-offs between such features "deepens our

² Samuel Pufendorf, *On the Duty of Man and Citizen according to Natural Law* (De officio hominis, Ed. by James Tully, CUP 1991), p. 139-140 (Bk II Ch 7).

perception of agreement dynamics and can contribute to the design of more effective and robust international accords".

There were no other articles in that issue, just shorter comments and reviews. Both texts were intended to *defend* international law against critics suggesting that it provides neither effective nor legitimate regulation of international matters. I am in sympathy with the authors. But I am puzzled about the taking away of "law" from international law analyses of this type, replacing it by a vocabulary of empirical political science, techniques and strategies to read the interests or objectives assumed to stand "behind" law and to have a reality or importance far greater than it. Do not remain enchanted by the form, these authors write. Look behind rules to their consequences. Assess costs and benefits. Calculate.

This is Pufendorf attacking the Lutheran Aristotelianism of his time; mocking the *monstrum* of the Holy Roman Empire, fragmented in so many ways like the present international world - Pufendorf looking for a novel vocabulary to streamline law with the technical advances of his time.

My presentation tonight will consist of three parts. I will begin by laying out a Kantian alternative - formalism - and the critiques of formalism as they have enfolded within international law. Second, I will run through elements of the novel *jurisprudentia universalis* as a technical and empirical science. Finally, I will end with a few proto-Kantian responses about the meaning, of freedom in the world today.

I. FORMALISM AND ITS DETRACTORS

1.1. A Political Formalism?

There are many ways to set out the Kantian critique of Pufendorf. It seems to confuse the empirical and the rational: a law that seeks the fulfilment of pleasure, will necessarily fall short of universal. For it, law has no normative weight of its own, independent of the weight of what it wants to achieve. Its practice is that of managerial control (as Lon Fuller and Michel Foucault have suggested). Freedom is undermined in two ways: by doing away the distinction between human society and natural history, and by viewing human relationships in instrumental terms.

There are many Kantianisms: some suggest a firmly hierarchical international order - others speculate about intervention and democratic peace. Some are cosmopolitans, others constitutionalists. But I want to embrace Kantian formalism, a formalism *sans peur et reproche*, against the novel natural law of empirical political science. For this formalism, the point of law is neither punishment nor control but the pull of legal rationality itself: the only justifiable act is one that is motivated by fidelity to the law, not to its consequences. Law's virtue lies not in what it does, but in its being law. This is the normal starting-point for analyses of Kant's *Rechtslehre*. But let me start from the *Critique of Pure Reason* in which Kant observes that no rules lay out the conditions of their own application.³ In this regard, Kant seems to suggest, the legislator will always fail. Law cannot be used as a technique of control: everything will be left to the judgement by the law-applier. A Kantian such as Hans Kelsen agrees. There is no more striking sentence in the *Reine Rechtslehre* than this:

³ Immanuel Kant, *Critique of Pure Reason*

"...there is no criterion on the basis of which one of the possibilities given within the frame of the norm to be applied could be favoured over the other possibilities".⁴

The meaning of a legal norm is "a problem not of legal theory but of legal policy".⁵ But how is it that legal formalism as theory leads into a conception of legal practice that is thoroughly political? Can formalism - the fidelity to law - and legal indeterminacy be reconcilable? Kant as critical legal studies?

1.2. Critiques of Formalism

Formalism is a bad word. It means that which is abstract, inflexible, cold, and insensitive to the requirements of life and society; lazy, bureaucratic and superficial. Generations of international lawyers have attacked their opponents as "formalists". In the 19th century European customary law and civilization became a robust antithesis to French revolutionary abstractions. After the first world war, lawyers attacked the pre-war absolutism of formal sovereignty, celebrating trade and interdependence as the law's anti-formal foundation. The drafters of the United Nations Charter, again, rejected what they saw as the failed legalism of the League Covenant. And policy-oriented jurisprudence in the 1950's and 1970's always accused international law as holding fast to the dead forms of diplomacy.

Two critiques of formalism are everywhere today. One sees the formal equality in the UN that puts democratic and rogue states on the same footing as a moral anathema. The other points at the uselessness of universal rules as techniques of

⁴ Hans Kelsen, *Introduction to Problems of Legal Theory* (Transl. by Paulson & Paulson, Oxford, Clarendon 1992), p. 81.

⁵ *Id.* p. 82.

management and control of a functionally diversified world: over-inclusive and under-inclusive - covering cases we would not wish to cover, and not applying in situations where we think they should be applied. Instead of rules, we need particularistic decision-makers by experts. Thus specialisation: a global trade system managed by trade experts at the WTO, an environmental treaty system managed by environmental experts, human by human rights experts, security by security experts and so on. As functional requirements dominate, formal distinctions between national/international, public/private, political/technical, lose their sense somewhat like the categories of theology that Pufendorf aimed to set aside in the rational management of early modern Germany.

From status to contract. The collapse of efforts for a global regime for investment protection - the MAI agreement - in 2001 was immediately followed by a network of over 2200 bilateral investment treaties. As a result, private investors are today suing the Government of Argentina in the World Bank's dispute settlement organ for the Government's policies during the country's financial crisis.

International rules being produced and managed by experts and private stakeholders. Best practices, standard technologies and de facto expectations take over the space of international law, often reduced to a frame for further negotiation and adjustment. Equity, proportionality and soft law pay homage to administrative discretion. Even rights turn into rights-regimes within which experts balance conflicting values: freedom versus security; ownership versus health; individual rights versus communal identities. Everything is fluid, negotiable, revisable. Only the optimum counts. Figure out the costs and benefits. The bomb is ticking and torture might save

lives. Should the innocent always be sacrificed to the moral absolutism of some?

II FRAGMENTATION

The turn from status to contract, or from form to function. International lawyers call this fragmentation. It is not only about technical specialisation; it is about a profound change in the organisation of faith and power, on a par with the transformation of ecclesiastic and civil organisation in Pufendorf's day. Let me briefly lay out the six steps that inaugurate a novel vocabulary to replace the civilizing antics of the old faith.

2.1. *From institutions to "regimes"*

The first step lies in thinking about norm-complexes not in terms of formal public law institutions but as informal "regimes", that is norms, practices and expectations within specific "issue-areas", defined by the distribution of available technologies of knowledge-production. Where the law of international institutions, focused on formal competence, representation and accountability, regime theory is thoroughly functional.

How do regimes emerge? By redescriptions of the world through novel languages that empower novel groups. Think, for example, the spectacular rise of environmental law put of a vocabulary of territorial sovereignty that now seems completely outdated. Or about the characterization of certain interests as the "human rights" of those claiming them. *Lex mercatoria* may still lack the orthodox text book and case collection - but look inside large law forms and you will find an unproblematic

routine of transcribing contract terms under new standard formulas to give voice to the concerns of dominant clients.

These vocabularies are written in the grammar of strategic action: experts use them to decide on a case-by-case basis. Hence the concern with regime "design" in the field. Variables such as membership, scope, degree of centralisation, control by members and flexibility provide tools to bring about optimal results.⁶

Regime theory does not replace realism, but embraces it. The basic units remain power, interests and rational actors seeking to maximise both. As pointed out by one of the fathers of regime-theory, its very purpose is to focus on observational behaviour so as to avoid "slipping into formalism" (the expression is his) and -lo and behold - might even consider instruments such as the 1927 Kellogg-Briand pact "even though they had no behavioural implications".⁷

2.2. *From rules to "regulation"*

A second anti-formal step collapses the distinction between law and regulation. In regimes, "legalization" is a policy-choice sometimes dictated by strategic interests. Hard law is usually difficult to attain, and costly to manage. But sometimes it may be a forceful instrument. Think for example the way functional systems such as the WTO or the European Human Rights system have been dressed in a constitutional language so as to decorate their decision-making with a high degree of solemnity. The relevant literature is full of

⁶ See Barbara Koremenos, Charles Lipson & Duncan Snidal, 'The Rational design of International Institutions', 55 *Int'l Org* (2001), p. 761-799, 763.

⁷ Robert Keohane, 'The Analysis of International regimes. Towards a European-American Research Programme', in Volker Rittberger (ed.), *Regime Theory and International Relations* (Oxford University Press, 1993), p. 27.

analyses of harder and softer techniques of regulation, using variables such as obligation, precision and delegation, for instance, to canvass the alternatives.⁸

The move from law to regulation highlights the need for control. Because the targeted audiences are assumed to behave as strategic actors, the inducements must become equally strategic. Sometimes sticks, sometimes carrots. Sometimes disagreement are settled ("problems are resolved") through assistance or "facilitation", sometimes by negotiation or administratively ordered sanctions, rarely through formal settlement. Soft law alternates with hard, private constraint with public as normative politics is replaced by what the experts call "new global division of regulatory labour".⁹

Academic research on regulation is thoroughly instrumental. Its outcomes are invariably a set of variables to strengthen the regime, research and policy-making become indistinguishable. As proudly exclaimed by a recent study on international institutions:

"our approach also provides an appropriate formulation for prescribing policy and evaluating existing institutions".¹⁰

2.3. *From government to "governance"*

A third step consists in a move from a vocabulary of formal "government" to informal "governance". If "government"

⁸ See e.g. Charles Lipson, 'Why are Some Agreements Informal?', 45 *International Organization* (1991), 495; Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance', 54 *International Organization* (2000), p. 434-454; Dinah Shelton, 'Introduction', in Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding...* (Oxford University Press, 2000), p. 10-17.

⁹ Lipschutz-Fogel, in Hall-Bierstaker, p. 117.

¹⁰ Koremenos-Lipson-Snidal (2001), p. 767.

connotes administration and division of powers, with the presumption of formal accountability, "governance" refers to de facto practices and is - like those corporate enterprises in which the term originates - geared for production of maximal value for the stakeholders. Hence indefinite detention may take place by administrative degree - to "deem" someone dangerous as an expert statement about that person, and thus abolishes the need of judging him criminal under the law. The power of suspending the law as the ultimate victory by governance over government.

Globalisation organises special interests in functionally diversified regimes of world-wide governance as world-wide control. Remember to bring your credit card details next time you fly over to the US! Because there is no superior truth than that provided by each system, the regimes re-create within themselves the sovereignty lost from the nation-State.¹¹ The international world of autonomous regimes as the *monstrum* of the Holy Roman Empire famously described by Pufendorf from behind a pseudonym.

2.4. *From responsibility to "compliance"*

The fourth replacement is the move away from the backward looking obsession lawyers have with formal conformity, breach of the binary code of legal/illegal, declared in formal dispute-settlement, courts in particular, typically requiring reparation of damage, and guarantees of non-repetition. As a mechanism of deterrence, responsibility will fail in an international context where routines are few, situations idiosyncratic and interests great. In such cases formal

¹¹ See Judith Butler, *Precious Life. The Powers of Mourning and Violence* (London, Verso, 2004)

lawfulness is of relatively minor importance and insisting on it often counter-productive.¹²

Invoking responsibility might even seem a net loss for the regime. A formal declaration of illegality might undermine solidarity and a general commitment to regime objectives. Hence, instead of "breach", new environmental and economic treaties speak of "non-compliance" and "non-violation complaints" and instead of formal responsibility, set up mechanisms for reporting, discussion and assistance: informal pressure.

2.5. *From law to "legitimacy"*

The foregoing four steps all point away from normative to empirical vocabularies that cannot distinguish between coercion and the law, the gunman and the taxman. How to make that distinction? How - to draw again a parallel - to accept Hobbes but sound like Grotius? This was Pufendorf's project, captured by modern political science through the vocabulary of "legitimacy".¹³ What is "legitimacy"? Conceptual history tells us that the earliest uses of "legitimacy" coincided with "legality". Something was legitimate is it was lawful. This, however, is not the "normative optic" of the regime analyst who wants, instead, to ask the further question: Why *should* law be obeyed? When Western experts claimed that the intervention in Kosovo in 1999 might have been illegal, but was quite legitimate, their point was precisely to find a normative vocabulary overriding formal validity.

¹² A study on informal norms in the international system based on an ASIL workshop in 1996 received the title "commitment and Compliance" - the two functional equivalents to "law" and "responsibility".

¹³ For the following text, see further MK, "Legitimacy, Rights and Ideology: Notes towards a critique of the new moral internationalism", *Associations: Journal for Legal and Social Theory* (2003), 349-374

This, however, tends to collapse legitimacy into the pre-modern question of political "good". Yet as Thomas M. Franck asks in the leading work on international legitimacy: "...When different belief systems contend, what can one say about the justice of rules?"¹⁴ Regimes, governance and compliance are needed precisely between morally disagreeing agents. In his later work, Franck speaks of legitimacy as procedural "fairness".¹⁵

"Fairness" and "legitimacy" are mediate concepts, rhetorically successful only so long as they cannot be pinned down either to formal rules or moral principles. Ian Hurd writes - without irony - of legitimacy as expressing "a kind of feeling" about authority and "a sense of moral obligation".¹⁶ As such - as a "feeling" - it opens itself to empirical study. The political scientist only describes the "operative process" whereby this "feeling" emerges through "internalization by the author of an external standard".¹⁷ Legitimacy becomes a psychological fact indifferent to the conditions of its existence: fear, desire, manipulation, whatever. *Die normative Kraft des faktischen*. This is how Marcuse once analysed American democracy studies:

"the criteria for judging a given state of affairs are those offered by...the given state of affairs. the analysis is 'locked'; the range of judgment is confined within a context of facts which excludes judging the context in which the facts are made, man-made, and in which their meaning, function, and development, are determined".¹⁸

¹⁴ Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) p. 210-211.

¹⁵ Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press 1995).

¹⁶ Ian Hurd, 'Legitimacy and Authority in International Politics', 53 *International Organization* (1999) p. 383-389, 388. Note the difference between the political philosophy question about "moral obligation" and the empirical question about the "sense" of moral obligation.

¹⁷ *Id.* p. 388.

¹⁸ Herbert Marcuse, *One-Dimensional Man* (2nd edn. London: Routledge, 1991) p. 115-116.

Legitimacy is not ideological because it would be a Trojan horse for external moral ideas but simply by embedding the vocabulary of "legitimacy" itself, and thereby the authority of the profession that speaks it. The more there is debate about "legitimacy", the more there is pure noise, and the less we are able to hear whatever critiques "law" or "morality" might offer.¹⁹ Legitimacy is not about normative substance. Its point is to *avoid* such substance but nonetheless to uphold a *semblance* of substance. Therefore, it is exceedingly suitable for production within the communications industry, including the academic publication industry.

"Legitimacy" is not about norms but about strategic action. As Chayes and Chayes put it in their widely used book on compliance with international agreements:

"The American people have not always understood that even when the United States has the military or economic power to act alone, the effectiveness of its actions might be undermined if it did not seek and achieve a degree of international consensus to give its actions legitimacy".²⁰

The perspective is control. The normative framework is in place. Action has been decided. The only remaining question is how to reach the target with minimal cost. This is where *legitimacy* is needed - to ensure the warm feelings of the audience.

Legitimacy has also naturalized a shift in the structures of disciplinary power. It sets up an *Ersatz* normativity to

¹⁹ The legitimation of the imperial machine is born at least in part of the communications industries, that is, of the transformation of the new mode of production into a machine. It is a subject that produces its own image of authority, This is a form of legitimation that reacts on nothing outside itself and is reproduced ceaselessly by developing its own languages of self-validation." Michael Hardt & Antonio Negri, *Empire* (Harvard University Press, 2000) p. 33.

²⁰ Abram Chayes & Antonia Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Harvard University Press, 1995) p. 41.

replace the formalistic conservatism of law on the one hand, and the radical arbitrariness of justice on the other. In the conditions of a fragmented consciousness that stands in awe before the breath-taking generalisations by globalization experts, anything that looks like a reassuring normative language can be internalised. It is not a language against which power might be assessed but a vocabulary produced and reproduced by power. It is also the policeman at the door of law and political philosophy, showing the way to the political scientist who suggests that it might be possible to fight modernity's political battles without modernity's heavy armoury, at most by occasionally flashing some well-used weapon from its arsenal, with the expectation that potential adversaries would not even enter the fight by exhaustion at the memory of its inconclusiveness.

2.6. From lawyers to international relations experts

The sixth, and final move is from law into international relations. In the 1990's lawyers began to hear an invitation to collaboration with international relations experts at US universities. A discipline had arisen that addressed the same world international lawyers had addressed but with a complex technical vocabulary about prisoners dilemmas, dependent and independent variables, strategic action and rational choice. Classical realism had given way to empirical studies with normative tinge. The "dual agenda" of international relations scholars and international lawyers were supposed to have become a "liberal agenda".²¹

Very little "collaboration" followed outside the US. This is understandable. For the call was never to any co-operation but to replacing the vocabulary of international law by

²¹ Slaughter, Doyle etc.

instrumental political science. For if the five steps are taken seriously, nothing is left of law. If, as regime experts argue, "governments will negotiate agreements and establish institutional rules that they intend to follow in any case", then law becomes fully epiphenomenal. Why would anyone care?²²

In a book published this year, Professors Jack Goldsmith - the author of a memo on transferring prisoners from Afghanistan but now Professor at Harvard Law School²³ - and Eric Posner from Chicago argue that the traditional defence of international law - that most states abide by most international law rules most of the time - is true only because of the way lawyers dress actual behaviour as law. But this provides no independent explanation for *why* States behave as they do. If, as they argue, State behaviour is caused by, and should be explained by reference to "coincidence of interest and coercion", then to say that it is "law" is an irrelevant decoration.

For these analysts, treaties are bargains between rational egoists seeking to resolve co-ordination or co-operation problems so as to minimise transaction costs resulting from unclear communication of their expectations under customary law.²⁴ States do not comply because treaties have "binding force" but "because they fear retaliation from the other state or some kind of reputational loss, or because they fear a failure of coordination".²⁵ Treaties are surfaces over which parties exercise pressure against each other. As Goldsmith and Posner conclude their analysis with relish: "we have explained

²² Miles Kahler, 'Conclusion. The Causes and Consequences of Legalisation' 54 *Int. Org* (2000), p. 673.

²³ Jack Goldsmith III, Memorandum for Alberto R. Gonzales, Counsel for the President, in Karen Greenberg (ed); *The Torture Papers. The Road to Abu Ghraib* (CUP 2004), 367.

²⁴ Goldsmith and Posner, *Limits*, p. 84-85.

²⁵ Goldsmith and Posner, *Limits*, p. 90

the logic of treaties without reference to the notions of 'legality' or *pacta sunt servande* or related concepts".²⁶

[From this perspective, the provisions on the use of force in the UN Charter constitute a bargain States once made to have protection. That bargain is now undermined by the possession of weapons of mass destruction by terrorists of "rogue states". Hence, for States as rational egoists, the "costs of strict adherence to the UN Charter in a world of new security threats" has just become too great.²⁷]

Strategic action and game theory receive their appeal from the same source from which realism has always spoken: the nonsense posture of speaking the tough truth. As Goldsmith and Posner conclude, with Pufendorfian tones:

"A literature built on the foundations of wishful thinking cannot withstand the winds of scepticism. What [customary international law] scholarship needs, three quarters of a century after a similar development in domestic legal scholarship, is a dose of legal realism."²⁸

The vocabularies of "consent", "validity" or "dispute settlement" are replaced by the social science vocabularies of "explaining" behaviour and attaining "compliance".²⁹ And because achieving compliance is all that counts, the interdisciplinary call is not really about co-operation but conquest. As Goldsmith and Posner conclude: "There is a more

²⁶ Goldsmith and Posner, *Limits*, p. 90.

²⁷ John Yoo & Will Trachman, 'Less than Bargained for: the Use of Force and the Declining Relevance of the United Nations', 5 *Chi.J.ofIL* (2005), p. 384.

²⁸ Goldsmith and Posner, 'Custom', p. 98.

²⁹ As pointed out in Jack Goldsmith - Eric A. Posner, *The Limits of International Law* (Oxford University Press, 2005), p. 15.

sophisticated international law literature in the international relations subfield of political science".³⁰

III BETWEEN CONSTRAINT AND FREEDOM

We now have the elements of the post-modern natural law in place: the move from formal institutions to functional regimes, the replacement of general rules by amorphous commands called "regulation", the turn from government into governance and from legal responsibility to factual compliance. The normative optic is received from a "legitimacy", measured by international relations - a discipline performing as Supreme Tribunal of a managerial world.

This brings us back to Kant's critique of Pufendorf. If law is defined as what causes compliance, then the distinction between power and law is lost. Pufendorf was, after all, a theorist of absolutism. If one tries to introduce that distinction by "legitimacy", then one owes an explanation of how is that different from assessing either lawfulness or justice the Prince. The former tack would re-create the danger of formalism and the latter that of radical arbitrariness from which it was the point of natural law to liberate us. Reducing legitimacy to a "feeling" - *jouissance* - falls back into power as ideology. The question is about whether you deserve your *jouissance*. For Kant, empirical arguments about conformity or the masochistic happiness induced by conformity cannot reach the moral law. Nothing sounds more like self-imposed immaturity - the contrary to enlightenment - than orienting oneself by one's "feelings"?

³⁰ Jack Goldsmith - Eric A. Posner, *The Limits of International Law* (Oxford

But the threshold between pleasure and pain is easy to cross; and as empiricism fails on its own terms, it will always cross it. In the Appendix to Perpetual Peace, Kant introduces the distinction between the "political moralist" and the "moral politician". The former, he writes "makes the principles subordinate to the end" (PP 118-121). These ends have no independence from the ends of *some* people, namely those in a position to constrain others, and their academic advisers. Today's constraint will begin to seem natural as it exists for the sake of future happiness - eternally postponed happiness. As the end remains elusive - think of Falluja - nothing limits the means to be employed. The progression from the future happiness of all to the imperative necessity to torture many now follows, as Kant suggests, from properties internal to natural law - international relations - itself.

For the political moralist lives on a hubris, the hubris of full knowledge about the objectives of the law, and of the costs and benefits of reaching them. But, Kant would ask, where would such full knowledge come from.

Objectives, first. If these are defined as happiness, then they must be less than universal: what access do we have to the happiness of others? And what if the happiness of some can be attained only through the unhappiness of those others? Is humanitarian intervention allowed under the UN Charter? Well, yes and no, the lawyer would respond. The Charter is both for peace and for human rights. Beyond that, there is only speculation about what should be a useful, good, way to apply it. It is not that these questions cannot be decided but *how*. The Charter is not only about peace and war. It is also about jurisdiction and it has transferred the competence to decide on peace and war to UN bodies, especially the Security

Council. No legal rule exists alone, like an island in the sea of arbitrary choices. It is linked to other rules, both substantive and procedural. We may have opinions about particular rule-applications and, as Kant would insist, we should debate those in conditions of free public exchange - though only until the moment the decisions are made.

The objective of the law is law itself - hence the duty to move from a state of nature to the condition of right. This is not to say that there would not sometimes be a good reason for disobedience - perhaps Kosovo was one. A serious formalism will sometimes deviate from the mainstream interpretation, and the structural bias. But when such moments emerge, they should not be subject to expert debates within closed chambers and through vocabularies that cannot articulate the weight of the legal system itself, in abstraction from what it does. And that weight, Kant would say, is the weight of freedom, not only the freedom of political strategists and program-managers but of the 500 Serbians killed by the NATO bombings, and of all of us, affected by the lowering of the threshold of political violence.

International relations scholars would respond to this by stressing the need of "balancing"? But what items would go into the "balance", and how would they be measured? Would future happiness count the same as present - or the happiness of those who are absent? Hobbes had an answer to such questions - *Wer kann, darf auch* - and Pufendorf dressed essentially the same response in a more appealing garb. The world of calculation may be indeterminate in substance, but highly significant in pointing out who shall decide, *quis judicabit*. Hobbes might have thought of the Leviathan, but soon after it began its descent into an instrumentality for special interests: economy, technology, identity. The King's

body became a calculating machine in which the "social" was arranged as a set of ostensibly private hierarchies: citizens conceived as rational egoists, the Leviathan as a *homo economicus*.³¹ Andersen's tale is reversed, we see bright-coloured clothes with different fabrics, with the King shrinking into insignificance beneath them, until the clothes finally begin to bear themselves.³² This is today the international world of regimes not of law but of truths, experts computing compliance outside politics and contestation. The hubris of instrumental knowledge.

Talk about compliance presumes the knowability of what there is to comply with, namely that the instrument, policy, regulation has one clear meaning instead of another.³³ But as every lawyer knows, nobody is ever in breach, everybody is always complying, though perhaps in an unorthodox way - invoking a counter-principle for a principle, an exception for a rule. But the expert has no time for lawyers' talk "on the one hand - on the other hand". Now let's get on with it! And thus the expert reveals his own formalism, the belief that *his* text or policies do not suffer from the problems that infected the lawyer's texts or principles. He will have to think that *his* purposes are fully determinate and form a harmonious whole. This is not just formalism, this is a caricature of 19th century *Gesetzpositivismus* - with the twist, however, that the guiding policy - objective, interest, value - is not argued but taken for granted. This seems easy, because the political moralists already knows how to decide, what to do. As Kant pointed out, they will always find a strategic

³¹ See also Istvan Hont

³² Cf. Butler, p. 52-53

³³ When the IR scholar turns into an analysis of the American constitution, she will make points about the will of the founding fathers and the intrinsic meaning of the words in the fourteenth amendment that will make a European lawyer look like an amateur.

consideration that justifies putting other people into harm's way and thus putting:

"... man into the same class as other living machines which only need to realise consciously that they are not free beings for them to become in their own eyes the most wretched of all earthy creatures".³⁴

Rational choice presumes that the interests of actors are knowable, like facts of nature, and derive behavioural directives from those interests and apply them in the empirical world. Each step along the way is vulnerable to Kantian doubts about the limits of both pure and practical reason. The premises of the experts can only be justified by their own conclusions: the noumenal world remains beyond reach: is the Doha round about development or trade? Is UN reform about security or human rights? And what do "security" or "rights" mean? The answer will depend on which expert you will ask - whose categories you will employ. But even if one knew whom to ask, perpetual peace could still not be reached by prudential calculations alone. Fortuna affects any settlement; something argued good for all will prove bad for many. Expert discourses are just as indeterminate as law; truth regimes just as conflicting, internally contradictory, and uncertain. A regime, like a nation, is an imagined community. A regime, like a nation, can be a prison. The problem is not formalism - that cannot be avoided - but what to do with it.

Now I am not taking sides between deontology and consequentialism. No doubt, it is possible to reduce absolutists into moral relativists by scenarios of ticking bombs and raped mothers - just as simple, in fact, as turning relativists into absolutism by pointing out that when the time

³⁴ Kant PP 123.

of decision comes, then one scale of values, out of alternatives available still a moment before, must be vindicated at the exclusion of others. Absolutism and relativism, principles and calculations, are both impossible positions to sustain for any length of time. Kantian lawyers may have tended to err on the side of absolutism, but this becomes pathological only if they simultaneously fail to take seriously the antinomy of the law and the judgement and believe that the (proper) constitutional rigorism in regard to the former prevents them from a close analysis of the particular cases they have to judge.

IV LAW AND FREEDOM

Whisch brings me to judgement, and the relationship of law and freedom. If the political moralist looks beyond the law in order to reach happiness, others are reduced to instruments of his own desire. The more he insists he will thereby also provide for the happiness of others, the less he is able to think of those others as free. Against these, Kant puts the "moral politician". This is the formalist whose fidelity is to the law, not to its hypothesised purposes, the law understood as the "sum of the conditions under which the choice of one can be united with the choice of another in accordance with the universal law of freedom".³⁵

This is the famous condition of right. It is a condition of indeterminacy. If the critique of reason - as Kant explained - was intended to make room for faith, then the faith revealed by that critique to the lawyer is experienced as the indeterminacy of expert systems. "You just do not understand". When truth vocabularies run out one judges only particulars.

³⁵ Kant MM, p. 24.

Here the Kantian fidelity to the law transforms into that Weber would have named a calling, consciousness that deciding in public office will always be about freedom but also of personal power and responsibility - a political task than must be subject to political contestation, not to expert calculation.

Here is the difference between Pufendorf and Kant, the political moralist and the moral politician, the work of the expert and the calling of the lawyer. For the former, law is a tactic, for the latter, a relationship with others. It is something you work towards through education - *Bildung* - and realise in the judgement that uses what Kant would have called understanding and reason but also what he termed the faculty of imagination, namely that of being in the position of others.

None of this means that law could not go wrong. Rules do make mistakes.³⁶ But there is a difference between legalism and fidelity to the law as an ideal relationship between free individuals and communities. The UN Charter, with all its problems and bad faith aspiration is certainly not a world constitution. yet it is more than bargain that can be negotiated anew each time a "problem" emerges. It is also, as Philip Allott would put it, the condensation of a society's past into its ideal future as an aspiration of how the world might be, if only we were better. The Charter speaks of a "we", linking each individual actor to a common project of freedom. law's failures, in this regard, only highlight the significance of its aspirations.

Law makes universal. It lifts a claim of violation, or a claim of right, and a claim of power, from particularity into the

level of universality, as representative of something grander than merely the "private" interest of the speaker.³⁷ Now these claims remain, of course, also particular. Hence their irreducible "politics". But they are a politics with a twist; a politics that seeks inclusion rather than exclusion, and are keen on all the old tropes of the "internal morality of law" - non-contradiction, fairness, honesty, concern for others, accountability, and all that. Law may of course fail on each of such scales, and often does, for law is a human creation. But without law, there would be no such scale. And without such scales - where everything would only be an aggregate summing up of special interests - life would be - well - livable but unlovely, perhaps today's EU.

Freedom presupposes a scale of universality. It may be impossible to reach this scale, at least for longer than a second, as both Hannah Arendt and Alain Badiou suggest. But imagine life without the pursuit of it! Fragmentation is a name for what we ordinary human beings who fail to reach universality fall back on. It is the name of particularity: our daily routines, our accustomed ways of being and systems of thinking. We all inhabit that territory.

Yet the fact that we do does not negate universality. And often we reach towards it. Especially when our own "system" breaks down, or shows itself insufficient, or we feel imprisoned within it. And as we do, we have recourse to law: we claim a right or accuse someone of a violation. We call for accountability or take that responsibility ourselves. We do this by reference to universal standards, not to private pleasure. At such moments, we are more than just individuals, and the world more than a purposeless aggregate of more of

³⁶ E.g. Fred Schauer

³⁷ See further my 'What Should International lawyers Learn from Karl Marx', 17 Leiden Journal of International Law (2004), 242-6.

such individuals, pursuing equally random forms of private *jouissance*. The law's internal morality - truthfulness, transparency, decentering of one's preferences, neutrality - are so many names for universality and so many opportunities for moral failure, but also intermittent success and possibility for learning. Out of crooked timber nothing straight was ever made.

Two notions of freedom are at play: hubris and enlightenment. The former lives in strategic action - the undetermined decision as the existential affirmation of oneself. "Infinite freedom" as the limitless search for *jouissance*, immersion in the pleasure principle, pre-genital fixation and failure to reach maturity. The only thing that counts is distance from the mother's breast. But *jouissance* consummated is happiness destroyed; and you must move on to the next pleasure, and then the next, and the next... Freedom as enlightenment is about casting away that kind of self-incurred immaturity. If you do know the world, you know, too, however tragic that may be, that your *jouissance* is no more valuable than that of your neighbour's and that if your *jouissance* is the only thing you pay attention to, well, then your neighbour will call in the police before the night is over. Freedom as enlightened judgement does not ask "what should I do in order to fulfil my preference" but "what ought I to do in view of the justified claims others may make on me"? That is a legal question, a question that cannot be articulated without the idea of (valid) law. Asking that question you yourself become more than just yourself. Freedom is the miracle of formalism.