

FORMALISM, FRAGMENTATION, FREEDOM

KANTIAN THEMES IN TODAY'S INTERNATIONAL LAW

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International lawyers have always been surprised, and often embarrassed, as they 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*', sorry comforters (Kant, 1991 [1795], 103). 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 *more 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:

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

* This is a somewhat modified version of my 'Formalismus, Fragmentierung, Freiheit', in *Kreide, Regina & Andreas Niederberger (eds.): Internationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik* (Frankfurt, Campus Verlag 2007). Parts of the text draw upon my 'Miserable Comforters: International Relations as a New Natural Law', Sir Kenneth Bailey Lecture, University of Melbourne, November 2006.

¹ The view of early modern natural law – especially Grotius and Pufendorf – as seeking to respond to late-16th and early 17th century scepticism (Montaigne & Charron particularly) is made by Richard Tuck. See e.g. Tuck 1987 and Tuck 1993, especially 155 *et seq.* The emphasis on scepticism is, however, challenged in favour of stress on the Lutheranism of Pufendorf's natural law in Saastamoinen 1995, 16–17 and *passim*.

profit won or expected from wrongdoing. For men cannot help choosing the lesser of two evils. (Pufendorf 1991 [1673], Bk II, Ch 7, 139–140.)

Everything about this would be later 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.

A recent 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’ (Norman & Trachtman 2005). 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 perception of agreement dynamics and can contribute to the design of more effective and robust international accords’ (Raustiala 2005).

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 reach 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 are saying. Look behind the rules to their consequences and their acceptability in the eyes of audiences that count. 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, looking for a novel vocabulary to streamline law with recent scientific advances in the battle against anarchy and scepticism.² This is Pufendorf, led from a justified concern about how to create order among free and self-loving individuals – and States – to a melancholy defence of (rationalized)

² For Pufendorf’s famous attack on the efforts of 17th century German legal doctrine to analyze the constitution of the Holy Roman Empire by reference to the Aristotelian categories (monarchy/aristocracy/polity), see von Pufendorf 1922 [1667], Ch VI, § 9, 94. For a recent assessment, see Schröder 1999.

absolutism.³ Like the tradition of early modern natural law, today's internationalists view law in fully instrumental terms – as a tool for making nations 'behave' – celebrating the narrowest forms of technical and economic expertise as access-points to global rule (see further Koskeniemi 2007a).

This paper will consist of three parts. I will begin by laying out a Kantian alternative to empirical natural law – 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 possible relationship of (international) law to freedom today.

1. Formalism and its detractors

1.1 A political formalism?

There are many ways to set out the Kantian critique of early modern natural law. This 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 moral anthropology is that of the *homo economicus*; its practice is that of managerial control. A law that only looks for security and the realisation of desire has no concept of obligation; all that counts is what effectively works. Freedom is undermined in two ways: by doing away the distinction between human society and natural history, and by reducing human relationships to instrumental terms.⁴

It is with this background that I want to examine the power of Kant's formalism, formalism *sans peur et sans reproche*, against the novel natural law of empirical political science, offered as an invitation to 'international relations'. For such formalism, the point of law is neither punishment nor control but the freedom that is offered to legal subjects in a society governed by the rule of law. Law's virtue, from this perspective, 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 (Kant 1991 [1781], 140–141 [A132–134]). In this regard, Kant seems to suggest, the legislator will always fail. Law cannot be used as a technique of

³ The expression is from Krieger 1965, 260 and 145–147.

⁴ For a brief overview of Kant's transcendental renewal of natural law, see e.g. Goyard-Fabre 2004, 120–130.

control: everything will be left to the *judgement* by the law-applier – a faculty that ‘does not and cannot require instruction but only exercise’ (Kant 1991 [1781], 140). A Kantian such as Hans Kelsen agrees. There is no more striking sentence in the 1934 edition of *Reine Rechtslehre* than this:

[...] 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. (Kelsen 1992, 81.)

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 tends to denote that which is abstract, inflexible, cold, and insensitive to the requirements of social life; 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.⁶

Two critiques of formalism are everywhere. One sees the formalism of an international system of sovereign equality that puts democratic and rogue states on the same footing as moral anathema and uses a moral language to articulate the idea of an ‘international community’ beyond formal statehood (see e.g. Buchanan 2004). Another points to the uselessness of formal rules as techniques of management and control of a functionally diversified world. Such rules are 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 the anachronistic forms of diplomacy we associate with States, we need effective management of goal-oriented

⁵ Kelsen 1992, 82. For a recent (though only in part satisfactory) discussion of the necessary ‘openness’ of moral-legal judgment in Kant, see Höffe 2006, 55–67.

⁶ For a famous statement, see McDougal 1953.

regimes. Instead of backward-looking formal rules, we need forward-looking decision-making by experts. Hence specialisation: a global trade system managed by trade experts at the WTO, an environmental system managed by environmental experts, human rights 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 perhaps like the scholastic categories that Pufendorf wanted to set aside from preventing the rational management of modern Germany.

Thus we are presented with an image of transnational or global law whose behavioural directives are no longer linked to any (formal) idea of an international public realm (even less of course to that of a world federation) but are being produced and managed by experts and private stakeholders in accordance with diversified functional requirements.⁷ Best practices, standard technologies and de facto expectations take over the space of international normativity. What little is left of formal law is reduced to a frame for negotiation and adjustment. Equity, proportionality and soft law pay homage to functional 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. (See Koskeniemi 2007b.) 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 empty formulation of the rule?

2. Fragmentation

The turn from status to contract, or from form to function. This is what international lawyers today call 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. The ethos of law and republicanism are replaced by individual interests, strategic planning and technical networks; formal sovereignty replaced by disciplinary power; constraint received from cognitive instead of normative vocabularies. Six steps inaugurate a novel disciplinary vocabulary of international relations that seeks to replace the civilizing antics of the old legal faith.

⁷ Out of a large recent literature, see e.g. Berman 2005 and, for example, Fischer-Lescano & Teubner 2006.

2.1 From institutions to 'regimes'

The first step lies in thinking about norm-complexes not in terms of 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, measuring outputs against inputs by reference to alternative behavioural 'models'.⁸

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 out of an outdated vocabulary of territorial sovereignty or about the characterization of certain interests or preferences as the 'human rights' of those claiming them. *Lex mercatoria* may still lack the orthodox text book and case collection – but look inside transnational law firms and you will find an unproblematic routine of transcribing contract terms under new standard formulas to articulate (in English) the voices of dominant clients whose field of operation transcends any territorially limited system of control.⁹

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'. Variables such as membership, scope, degree of centralisation, control by members and flexibility may be introduced to bring about optimal results.¹⁰ As noted by one of its fathers, it is the point of regime-theory to focus on observational behaviour so as to avoid 'slipping into formalism' (the expression is his), exemplified (for him) by the scandalous way in which instruments such as the 1927 Kellogg-Briand Pact had been thought of as 'law' 'even though they had no behavioural implications' (Keohane 1993, 27).

2.2 From rules to 'regulation'

A second anti-formal step collapses the distinction between law and 'regulation'. In regimes, the use of hard law ('legalization') is a policy-choice sometimes dictated by strategic interests, sometimes not. Hard law is often 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 are being articulated in constitutional language

⁸ See e.g. Krasner 1983 and Hasenclever, Mayer & Rittberger 1997.

⁹ See e.g. Loquin & Ravillion 2000 and Martin-Serf 2000.

¹⁰ See Koremenos, Lipson & Snidal 2001, 763.

so as to emphasise the solemnity of its decision-making (see Cass 2005). The relevant literature is full of analyses of harder and softer techniques of regulation, using variables such as obligation, precision and delegation, for instance, to canvass the alternatives.¹¹

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 disagreements are managed ('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'. (Lipschutz & Fogel 2002, 117.)

Academic research on regulation is thoroughly instrumental. Its outcomes are presented as 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. (Koremenos, Lipson & Snidal 2001, 767.)

No doubt, Pufendorf would have been thrilled. All actors are understood in a thoroughly mechanical light: as functions of the regime's regulatory 'objectives'.

2.3 From government to 'governance'

A third step consists in a move from a vocabulary of formal 'government' to informal 'governance'. As a recent enthusiast about collaboration between international lawyers and international relations experts argues, what now is needed, is to think of international lawyers as 'architects of global governance' (Abbott 2004, 11). Now if 'government' 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.¹²

Globalisation organises special interests in functionally diversified regimes of global governance as global control. Because there is no superior standpoint that

¹¹ See e.g. Lipson 1991; Abbott & Snidal 2000, 434–454; Shelton 2000.

¹² For the effort to strike back by re-imagining governance in terms of an international administrative law, see Kingsbury, Krisch, Stewart & Wiener 2005.

would assess the relative value of each regime, or their hierarchical place in some global federation, the regimes re-create within themselves the sovereignty lost from the nation-State – though no longer so much in normative as in cognitive terms, not as rule-regimes but as truth-regimes.¹³ This is what makes the international world of autonomous regimes so much like the *monstrum* of Pufendorf's Holy Roman Empire.¹⁴

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 law in accordance with the binary code illegal/legal 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 lawfulness is of relatively minor importance and insisting on it often counter-productive.¹⁵

Invoking responsibility might even seem a net loss for the regime. A formal declaration of illegality would too easily undermine solidarity and 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 economic and technical assistance: informal pressure and subtle persuasion act as socially embedded guarantees for conforming behaviour (see e.g. Kuokkanen 2006).

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 question, too, to which modern political science responds by the vocabulary of 'legitimacy'.¹⁶ What is it? Conceptual history tells us that the earliest uses of 'legitimacy' coincided with 'legality'. Something was

¹³ The best description of this is Fischer-Lescano & Teubner 2006.

¹⁴ See *supra* note 1.

¹⁵ A study on informal norms in the international system based on an ASIL workshop in 1996 received the title 'commitment and compliance' – the functional equivalents to 'law' and 'responsibility'. See Shelton 2000.

¹⁶ For the following text, see further Koskenniemi 2003.

legitimate when it was lawful. This, however, is not the regime-analysts 'normative optic'. Instead, they wish 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.

This, however, tends to collapse legitimacy into the pre-modern problem of the political 'good'. Yet as Thomas Franck, echoing Pufendorf, asks rhetorically in a leading work on international legitimacy: 'When different belief systems contend, what can one say about the justice of rules?' (Franck 1990, 210–211.) Regimes, governance and compliance are needed precisely between morally disagreeing agents.

'Fairness' and 'legitimacy' are mediate concepts, rhetorically successful if they cannot be pinned down either to formal rules or moral principles. Ian Hurd, for example, writes of legitimacy as 'a kind of feeling' about authority and 'a sense of moral obligation'.¹⁷ As such – as a 'feeling' – it opens itself to empirical study. The political scientist only describes the 'operative process' whereby this 'feeling' emerges though 'internalization by the author of an external standard' (Hurd 1999, 388). Legitimacy becomes a psychological fact indifferent to the conditions of its existence: fear, desire, manipulation, whatever. 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. (Marcuse 1991, 115–116.)

Legitimacy is ideological not because it opens the door for dubious moral ideas but through embedding the vocabulary of 'legitimacy' itself and thus the authority of the profession that speaks it. The more there is noise about 'legitimacy', the less we are able to hear whatever 'law' or 'morality' might say. Legitimacy is not about normative substance. Its point is to *avoid* such substance but nonetheless to uphold a *semblance* of substance. Hence its suitability for endless reproduction within the communications industry, including the academic publication industry.¹⁸

¹⁷ Hurd 1999, 383–389, 388. Note the difference between the political philosophy question about 'moral obligation' and the empirical question about the 'sense' of moral obligation.

¹⁸ '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.' Hardt & Negri 2000, 33.

‘Legitimacy’ is not about norms but about strategic action. As Chayes and Chayes put it in their widely used work 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. (Chayes & Handler Chayes 1995, 41.)

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 a warm feeling in the audience.

Legitimacy sets up an *Ersatz* normativity to replace the conservatism of formal law as well as the arbitrariness of justice. For as fragmented consciousness stands in awe before the breath-taking generalisations by globalization experts, anything that looks like a reassuring normative language – even ‘legitimacy’ – can be internalised. It is not a language against which power might be assessed but a vocabulary produced and reproduced by power. ‘Legitimacy’ enables the political scientist to fight modernity’s political battles without its heavy armoury, by only flashing some well-used weapon from its arsenal, with the expectation that potential adversaries would not even enter the fight by exhaustion due to the memory of its inconclusiveness.

2.6. From lawyers to international relations experts

The sixth, final move is a shift in disciplinary power – from law to international relations. In the 1990's lawyers began to hear an invitation to collaboration with international relations experts at US universities.¹⁹ A discipline had arisen that addressed the same world that international lawyers had addressed but with a complex technical vocabulary about compliance and conformity, 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’ soon became a ‘liberal agenda’ (Slaughter 1995).

Very little ‘collaboration’ followed outside the US. This is understandable. For it would have meant replacing the vocabulary of international law by instrumental political science. If the five steps are taken seriously, nothing is left of law. If, as regime experts argue, ‘governments will negotiate agreements and establish

¹⁹ See e.g. Slaughter, Tulumello & Wood 1998. See likewise Abbott 2004.

institutional rules that they intend to follow in any case' (Kahler 2000, 673), then law becomes fully epiphenomenal. Why would anyone care?

In a book published two years ago, Jack Goldsmith – the author of a memo on transferring prisoners from Afghanistan to places where they can be tortured, but now Professor at Harvard Law School (Goldsmith 2004) – 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 explanation for *why* States behave as they do. If, as they argue, State behaviour is caused by, and should be explained by reference, 'coincidence of interest and coercion', then to say that it embodies 'law' is an irrelevant decoration on it. As Goldsmith and Posner claim: 'we have explained the logic of treaties without reference to the notions of "legality" or *pacta sunt servanda* or related concepts' (Goldsmith & Posner 2005, 90).

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 (*id.* 84–85). 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 (*id.* 90)'. Treaties are surfaces over which parties exercise pressure against each other. Thus, for example, 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 (Yoo & Trachman 2005, 384).

The vocabularies of 'consent', 'validity' or 'dispute settlement' are replaced by the social science vocabularies of 'explaining' behaviour and attaining 'compliance'.²⁰ And because achieving compliance is all that counts, the interdisciplinary call is not really about co-operation but conquest. No wonder Goldsmith and Posner conclude: 'There is a more sophisticated international law literature in the international relations subfield of political science' (Goldsmith & Posner 2005, 15).

²⁰ As pointed out in Goldsmith & Posner 2005, 15.

3. Between constraint and freedom

We now have the elements of the (economically oriented) post-modern natural law in place:²¹ 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 that is different from assessing either lawfulness or justice of the Prince.²² 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. For Kant, this was no news. 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’ (of pleasure). The question that remains is about whether you *deserve* your *jouissance*.

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’ (Kant 1991 [1795], 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 Iraq, or the ‘war on terror’ – 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.

If the objective of law is defined as happiness, then it must be less than universal: but what access have we to the happiness of others? And what guarantee that the

²¹ The point about economic analysis of law as natural law is made in Frydman 2001, 58–59.

²² Pufendorf in fact was compelled to re-introduce the idea of the *justice* of the sovereign (‘just grounds’) in fashion that is inexplicable under his empiricism, as famously noted by Leibniz. See Leibniz 1988 [1706], 73–74.

happiness of some would not entail the unhappiness of 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* they should be decided. The UN Charter is not only about peace and war. It is also about jurisdiction and the competence to decide. No legal rule exists alone, like an island in the sea of arbitrary choices. It is linked to other rules, both substantive and procedural. Together, they represent the legal system that becomes concrete in judgments produced by competent institutions. We may have opinions about particular rule-applications and, as Kant would insist, we should debate those in conditions of free public exchange – but we may not doubt the legal validity of competent judgments. Their ‘validity’ is not simply their ‘usefulness’ from some perspective or their ‘goodness’ under some scale of value. It signifies their claim of being ‘right’ in the legal system of which they are a part.

Yet this is not a commitment to passivity.²³ There might well be sometimes good reason for disobedience – perhaps Kosovo in 1999 was one such situation, certainly also some of the administrative dictates in the ‘fight against terrorism’ are. A serious formalism is not commitment to a particular institution or a particular understanding of a rule. It is committed to the *idea* of law as a system of universal right and of assessing any institution, rule or judgment in view of that idea. Thus it will certainly sometimes – perhaps often – deviate from the mainstream judgment that reproduces the structural bias of the relevant institution.²⁴ But its challenge is always a *legal* challenge, a challenge for the legal accountability of those responsible, or a call for legislative change. It is not an intervention in expert debates within closed chambers and through vocabularies that cannot articulate the weight of the legal system itself, the weight of the *universal ideal* of the institution against which its actions must be assessed. That weight, Kant would say, is the weight of freedom, not only of the political strategists and program-managers but – to give an example – of the 500 Serbians killed by the NATO bombings in 1999, and of all of us, affected by the lowering of the threshold of political violence. (See further Koskenniemi 2002.)

International relations experts would respond by stressing the need of ‘balancing’? But what items would go into the ‘balance’, and how would they be

²³ The tension between Kant’s endorsement of the French revolution and his view of the impermissibility of resistance to lawful authority has given rise to a wide stream of commentary. For one effort at reconciliation (i.e. revolution was right because it was made in the name of law but the execution of the King was wrong because it could not be lawfully justified), see Renaut 1997, 436–455.

²⁴ On the significance of ‘structural bias’ in indeterminate legal systems, see Koskenniemi 2005, 600–615.

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 his time the Leviathan 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*.²⁵ Andersen's tale is reversed; we see bright-coloured clothes with exotic fabrics, with the King shrinking into insignificance beneath them, until the clothes finally begin to bear themselves. This is the international world of regimes not of law but of truths, each computing compliance in accordance with its special logic, 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. 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. The international relations expert, however, 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 bad faith, the belief that *his* texts 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.²⁶ 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 know how to decide what to do. As Kant pointed out, they will always find a strategic 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. (Kant 1991 [1795], 123.)

²⁵ See e.g. Hont 2006. For an analysis of neo-feudal processes of contract and legislation through negotiation between (powerful) special interests, see Supiot 2005, 162–175, 243–273.

²⁶ Perhaps oddly, 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 formalist. See e.g. Goldsmith & Bradley 2005.

Rational choice presumes that the interests of actors are knowable, like facts of nature, and derives behavioural directives from those interests to apply them in an empirical world. Each step along the way is vulnerable to Kantian doubts about the limits of pure 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. Such regimes and interest-analyses are just as 'formal' as law – texts and presuppositions, surfaces on which political conflict is translated as professional disagreement. In the end, the problem is never formalism – for that cannot be avoided – but *whose* formalism, and equipped with what bias?

4. International law and freedom

So I come finally to the relationship of international law and freedom. As Kant's 'political moralists' (international relations scholars, compliance experts) look beyond the law in order to reach happiness, welfare, growth, whatever they deem desirable, they reduce others to instruments of their own preference. The more they insist they will also provide for the happiness of others, the less they are able to think of those others as free. Against these, Kant puts the 'moral politician', the formalist whose fidelity is to the law, not to its hypothesised objectives, 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' (Kant 1996 [1797], 24).

This is the famous condition of right. It is a condition of indeterminacy: after all, rules do not spell out the conditions of their application. (Kant 1991 [1781], 140–141 [A132–134].) Judgment is needed when we move from the legal form to the decision. It is this fact that the natural lawyer and the international relations expert find so difficult to come to terms with. Hence they run away from judgment by imagining their technical vocabularies – that is to say, the institutional bias of their discipline – as controlling. But of course, it was the very point of the critique of pure reason to close this avenue. Kant attacked rationalist utopianism (the Leibniz-Wolff school) and the apologies of empirical civil philosophy (Pufendorf, Vattel) precisely by

privileging practical reason over theoretical reason, normative judgment over instrumental calculation (See Renaut 1997, 150–184).

For the natural lawyer – the international relations expert – law is a tactic through which an unproblematic subject acts upon the external world in fully instrumental terms. The social world is an extension of the natural world, a surface for the fulfilment of interests, realisation of desires, search for security. As political realists from Moses Mendelssohn (Kant’s target) and Hans Morgenthau to Robert Kagan have seen it, the world is pure immanence.²⁷ Politics – like nature – is the eternal recurrence of the same: struggle for power. From Thucydides to Rumsfeld, nothing has changed. We are trapped in an anthropological iron cage: while rulers change, the character of rulership does not.

With Kant, however, truth vocabularies run out and one judges only particulars. What is the appropriate mindset in that case? Here the Kantian fidelity to the law transforms into that which Weber would have named a calling, consciousness that deciding in public office will always implicate choice and responsibility. It is a normative-political (instead of instrumental-technical) task subject to practical contestation, not expert calculation. To think of it in terms of causality and control is to think of it in terms of pure immanence – the glorification of today. To think it in terms of law, by contrast, is to situate the decision in an ideal relationship with others. Instead of endless repetition, history becomes an open horizon where also the deciding subject’s own subjectivity is at stake. The judgment will have to defer to a universal criterion against which the decision-maker’s own prejudices and conclusions must in turn be measured.

Kant’s teleology – the idea of a universal history with a cosmopolitan purpose (see especially Kant 1991 [1784]) – has been one of the most frequently discarded aspects of his political theory. Yet it was not meant as an objective (‘natural’) truth about the future but a regulative idea for the use of practical judgment. (Kant 2000 [1790], § 74, 266–268). It is hard to see how anything like a normative vocabulary – that is, a judgment implicating the idea of obligation – could exist without a view of progress. Standards such as the ‘perfect civil constitution’, or ‘perpetual peace’ are implied in any normative judgment and – perhaps above all – in any critique of the failure of judgment. As Kant makes clear, these objectives do not constitute a positive programme, even less a set of proposed institutions, the European Union, the United Nations, or the like.²⁸ They set a horizon that one works towards through education and practice and that one uses as a public standard of criticism of any present

²⁷ This is what Kant calls ‘Abderitism’, history as the ‘hopeless task of rolling the stone of Sisyphus uphill, only to let it roll back again’. Kant 1991 [1798], 179–180.

²⁸ On this, see especially Goyard-Fabre 2004, 68–70, 79–84.

achievement. Formalism – that is to say, the use of the legal judgment – may of course go wrong. Kant’s own view of the imaginative ability of lawyers was not too flattering.²⁹ Yet its key virtue lies in the *cultural* significance of the idea of the legal form as the surface over which a better future may be built without automatically sacrificing any substantive idea of what such future might be like – that is, without sacrificing the (regulative idea) of freedom.³⁰

Two notions of ‘freedom’ are at play in the contrast between empirical political science and legal formalism: freedom as hubris and as freedom as enlightenment. The former thinks of law in terms of strategic action. Because the law is indeterminate, however, the decision ostensibly made in order to reach the instrumental optimum becomes simply an 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.³¹ 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 (or self-determination) is precisely about casting away that kind of self-incurred immaturity. If you do know the world, you know, too, 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. Formalism 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’? The attention to the form – the legal text, the principle, the

²⁹ Kant 1991 [1781], 140–141 (A132–134). 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 here says in a footnote (note 1, p. 140), that ‘[d]eficiency in judgment is properly that which is called stupidity’, in later writings, especially in the Third Critique, his assessment is less harsh.

³⁰ The lightness of Kant’s irony as he dresses the struggle for freedom in conditions where the critique of theoretical reason has done its work cannot be bettered: ‘So the question is no longer whether perpetual peace is something real or a fiction, and whether we are not deceiving ourselves in our theoretical judgment when we assume that it is real. Instead, we must act as if it is something real, though perhaps it is not; we must work for establishing perpetual peace and the kind of constitution that seems to us most conducive to it (say, republicanism of all states, together and separately) in order to bring about perpetual peace... And even if the complete realization of this objective always remains a pious wish, we still are not deceiving ourselves in adopting the maxim of working incessantly towards it. For this is our duty, and to admit that the moral law within us is deceptive would call forth in us the wish, which arouses our abhorrence, rather than to be rid of all reason and to regard ourselves as thrown by one’s principles into the same mechanism of nature as all the other species of animals.’ Kant 1996 [1797], 123 (6:355).

³¹ In his *Holy Terror*, Terry Eagleton reminds us that Hegel called this – also Kantian – inspired notion of freedom – ‘the freedom of the void’ (Eagleton 2005, 71).

precedent – reconstructs the social bond in terms of legal *obligation*. The legal *ought* – the substanceless form of the law – signals an ‘orientation in thinking’ rather than a set of positive laws or institutions. It is a cultural practice that aims to integrate the claims of others and in which I myself am called to respect the procedural duties of honesty, impartiality, avoidance of coercion, and accountability.

The fragmentation of the international world cannot be wished away. Different rationalities call for realisation in the international world without the prospect of a meta-rationality that could one day recreate a lost hierarchy.³² Kant was clear that however useful these rationalities were in resolving technical and instrumental problems, they should not possess binding force on free human beings. Instead, freedom lay in the ability of the self to judge these rationalities from the perspective of universalisable maxims. This, as a long line of critics from Hegel onwards has argued, can hardly be sustained. The self is not *external* to the rationalities but also a product of them. It follows that ‘freedom’ cannot mean rational self-legislation by an autonomous or transcendental subject. Instead, freedom would become an ability to avoid being immersed or ‘locked into’ any particular technical or scientific discourse or cognitive vocabulary. Instead of a realisation of some authenticity it would mean living in the ‘comfortable inauthenticity’ of formalism (Tadros 2000). This would give a kind of post-modern shift to the Kantian view of enlightenment as the spiritual regeneration of the self. Cultivation of virtue would then become learning formalism as a way of orienting one’s thinking towards the regulative ideals of a society of free republics and a cosmopolitan law. This work on the self aims beyond uncritical assimilation of either the utopia of rationalism or the apology of (empirical) realism. Accepting as a cultural premise and as the structure of its preferred subject-position the reality of progress.

I have elsewhere argued about the ‘wonderful artificiality of statehood’ – that is to say, the formal State as the surface over which social rationalities may compete for influence (Koskenniemi 1994). The argument for formalism in international law is analogous. Formalism is not a binding rationale itself but a cultural disposition, a commitment (‘calling’) to work in an indeterminate setting of competing substantive rationalities with full knowledge of their indeterminacy and their conflict and a sense of accountability for the (indeterminate) judgments one makes. To work as a formalist is to enter a tangled web of discourses none of which can be held as fully authoritative; with the objective of justifying one’s decision by reference to the law and thereby addressing others in terms of a horizon of aspirations that can only be shared inasmuch as we view ourselves as humans, entitled to work for that which Kant’s romantic mind labelled the ‘Kingdom of ends’.

³² The best description of this is Fischer-Lescano & Teubner 2006.

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