

How Would You Like Your ‘Legal Change’ Done Today, Madam?

Basak Cali*

1. Introduction

International law contains many tensions stemming from diverse theoretical approaches that make international law their home. The way in which these approaches respond to specific legal questions create further tensions. One place where such tensions manifest themselves is when international lawyers voice their positions regarding ‘legal change’. Theoretical tensions, one may think, make a subject matter intellectually rich. They make a diverse range of arguments and issues *available* for international lawyers when making pronouncements about legal change. Theories increase the kinds of justifications that can be given for particular actions and the ways we can think about those actions. For contemporary international legal scholarship however, this paper will argue this is not the case.

This paper aims in Part I to sketch how legal positivism and post-modernism function in ways which impoverish the discipline of international law, and as a result relinquish the practice of grounding international legal arguments to a crude pragmatism. Pragmatic justifications about international legal change depend on one’s own values, and the current set of values which seem to define practitioners can be characterised as a form of liberalism. The common feature I identify in these two theoretical approaches is the inadequate way they deal with the need to make an *interpretive investment* in international law. Part II aims to sketch an account of the contours of interpretative investment.

2. Appeal to External Vantage Points

Legal positivism and post-modern approaches to international law share a common feature. They both rely on a view that one has to adopt the standpoint of an *outsider (or impartial observer)* with respect to the object of inquiry. This perspective involves an attempt to distance oneself from the object and to assume the role of observer. The legal positivist claims to observe ‘the law’ and the post-modern theorist claims to observe the activities of international lawyers. The common feature of these modes of being outsiders is that those who adopt them cannot advocate any particular conception of the point and purpose of international law. The perspectives depart from different presuppositions and employ diverse kinds of methodologies in maintaining distance and avoiding engagement.

If one is a legal positivist international law can change, when a set of ‘valid moves’ are made.¹ The disagreement is about the precise amount, and timing, of valid moves.² The legal positivist is not interested in arguments that cannot be supported by evidence from the acts and

* Lecturer in Human Rights Law and Politics, School of Public Policy, University College London. I would like to thank Saladin Meckled-Garcia and Juan Amaya-Castro for support, discussion and disagreement they have provided.

1 Simma and Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, 93 *American Journal of International Law* (1999) 302.

2 Brownlie, ‘Kosovo Crisis Inquiry: memorandum on the International Law Aspects’, 49 *International and Comparative Law Quarterly* (2000) 878.

deeds of states. What cannot be positively proven cannot be a source of international legal knowledge. The role given to the international lawyer in this framework is one of a distant sterile observer of laws (or norms). States change the law and what the international lawyer does is to meticulously study the legally relevant data to verify that change. Working in the mode of a notary, the international lawyer needs to ascertain how to establish when the rules have changed. However, since there can be no involvement by the international lawyer in changing the laws, the procedure of deciding how the law may have changed becomes purely a question of method. By applying a set of techniques, the international lawyer establishes an opinion on the end result. The problems that 'change' poses to the determination of laws persist (such as how many events constitute a change). Yet the problem is diagnosed as one of verification rather than interpretation:

Not only is it difficult to say at what point a rule of international law, especially a customary one, has ceased to be valid, but it is even more difficult to say when a new practice has hardened into law. Between these two stages lie many transitory ones when an old practice, once universal law but gradually abandoned by a large part of international society, fades away and a new practice has not yet spread sufficiently or become definite into a rule of law.³

However, this distancing from (advocative) legal engagement is deeply problematic. Without having an idea of what it is that international law is supposed to do, it is a fallacy to assume that one can ascertain its current standing and its change from one proposition to another. How do we establish which events matter, how many of them, performed by which agents, of which degree of importance, and so forth? The inadequacy of legal positivism is that it is not interested in dealing with these questions precisely because it holds that these questions cannot be arrived at by examining positive evidence. It is prevented from offering arguments about what the substantive project of international law should be by its central methodological commitment. Yet that question needs to be addressed in order to answer such interpretive questions as which events are significant in norm definition in international law.

Post-modern legal theory also employs a distancing move. This time, however, the distance is not from law as such but from international lawyers, since international law is what international lawyers talk about.⁴ It is described as a set of projects initiated by various groups at various times. The post-modern legal theorist uses the technique of rising above the agents she observes in order to criticise the particular projects of international lawyers. She does not engage with the validity of the particular projects themselves, but diagnoses the practice and attempts to disqualify any and every move within it by pointing out the inadequacies, fallacies, circularities, appeals to authority and the like of its practitioners.

In the eyes of a post-modern theorist, change itself can be understood as a 'self-refuting ideal'.⁵ From this perspective, direct engagement with questions of change in international law, as they are presented in contemporary debates, just constitutes '*buying into*' widely accepted

3 M. Akehurst, 'Custom as a source of international law', 47 *British Yearbook of International Law* (1979) 1.

4 D. Kennedy, 'What is New Thinking in International Law?' 94 *ASIL Proceedings* (2000) at 125.

D Kennedy, 'When Renewal Repeats: Thinking against the Box', 32 *New York University Journal of International Law and Policy*, (2000) 335.

5 Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority', in Drucilla Cornell, Michael Rosenfeld, David Gray Carlson, *Deconstruction and the Possibility of Justice* (Routledge, 1992), esp. 3-29.

practices, which is not really to engage in change at all. This is because change is a radical notion requiring you to stand outside of the prevailing practices and traditions. The idea of engaging with second order international legal questions is then one of disinterested disengagement. This view has the potential to reduce all international legal relations to power and all normative positions to rationalisations of interests. By keeping one's distance from international law one keeps one's distance from power and its corrupting influence. The post-modern distance is an anthropological one and even without clear intent, it falls into the relativist trap of the strong legacies of colonial anthropology: it has to assume a separate and contingent set of normative grounds to explain every intellectual effort, grounds which lie outside the justifications and understanding of the observed agents themselves. These intellectual efforts cannot be compared to one another. It is neither possible to show or defend which one gives a superior account of what international law is for this will require direct engagement with, or commitment to, a substantive project. Again, the central feature of post-modernism, the principle of avoiding direct engagement, leads to an unsustainable commitment to silence on the substance of the particular legal projects. But only by engaging in substantive commentary on legal projects can the postmodernist establish whether any norm or event has a greater claim to being part of international law (or a change within it) than any other. Once more, to do so would require an engagement with the question of the ends of the practice, and a commitment to one view about those ends.

I have aimed to sketch here that the very characters of legal positivism and post-modernism prevent these theoretical accounts from giving arguments about what it is that international law is for and for what purpose international lawyers engage with it. What does it mean to be an international lawyer? In the midst of the inadequate engagement with these questions by these accounts, international law is prone to being left in the hands of pragmatism: 'so, we are international lawyers and these are what we do around here these days'.⁶ A pragmatic account of international law, in principle sees no use in engaging in the question of what point there is in engaging in international law, because that question need not matter. A pragmatic approach advises us to stop thinking about what international law is for, because the relationship between a particular legal question and a universal principle is regarded as redundant. When such questions arise the resolution is left to a set of beliefs or intuitions one happens to hold. International law becomes a hasty application of some liberal ideas, since most international lawyers seem content to employ international law to pursue their liberal views, with no commitment to a view about whether and how this is an appropriate approach to international law.

3. Problem of Interpretation

The inaugural conference of the European Society of International Law is curiously entitled 'Between Traditional and Renewal'. How does the ESIL understand the notion of tradition? How will the renewal of international law take place? Do we want it to be more liberal, simply because there seems to be many international lawyers who hold liberal views? Are there expectations that we can return to the doctrinal debates about custom formation, treaty interpretation, the relationship between treaties and custom and general principles of law? Is the anticipated renewal one about methodology? Does the renewal mean raising once again the question of the point and purpose of international law?

⁶ The 'this is what we do round here' motif can be found in the writings of Richard Rorty.

My answer to these questions is that the problem of tradition as well as renewal in international law is one of interpretation: An interpretation that requires an act of ethical investment on behalf of the international lawyer, which includes a justification not only of their particular project (which on its own would be consistent with pragmatism) but also of a committed stance on the point and purpose of international legal practice itself.⁷

The concept of ‘change,’ for example, is itself is a theory-sensitive category in international law. Modern international lawyers have located the art of making international legal arguments ‘somewhere’ between arguments grounded in sociological reasoning of what is accepted to be the law by states and normative claims about what international law should be. And it has been precisely how such realignments are made that provides and answer the question of whether international law can change and if so, how.

The category of change in international law only makes sense when international law is understood as stuck between majoritarianist and substantive principles of interpretation. The former locates questions of change in the assessment of degrees of agreement amongst states. The question of whether the changes in the law are right or wrong is irrelevant for ascertaining change itself. The latter, on the other hand, is not concerned with a study of beliefs at a given time at a given place, but rather whether a particular proposition is true and justified given its subject matter. A question which cannot be answered merely by doing a head count.

A thread of similar tensions to the above is mirrored in the structure of international legal arguments. Kennedy’s pendulums⁸ between state autonomy and international community, naturalism and positivism⁹, and Koskeniemi’s pendulum between apology and utopia¹⁰ see arguments in international law as oscillating between two poles. Any substantive point can be made by choosing a selection of arguments from either pole. If I want to construct an argument saying that it is unlawful in international law to try a civilian by a military tribunal, I can make this point both by collecting evidence on the number of states that do not try civilians by a military tribunal or by showing that military tribunals trying civilians are unfair and unfair trials are prohibited in international law by major international treaties. I can also do the opposite: I can show evidence of a number of states that civilians are tried by military tribunals to argue that it has never been prohibited in international law. I can, furthermore, point to lack of any explicit treaty law that prohibits civilians by military tribunals and argue that fair trials are about process and not about the status of judges. I make endless moves supporting either of these positions by going back to state consent and making deductive normative claims. The swings international lawyers make between these two poles of reasoning are not merely a feature of international law, but constitute its nature. International law arguments are neither only about observation nor only about justification, but a mixture of both. But in moving between the two types of argument, where should one come to rest?

7 The notion of ethical investment in the context of politics and law are put forward by Laclau in *Ethics, Normativity and the Heteronomy of Law* Political Theory Daily Review (2004) at <http://www.politicaltheory.info/essays/laclau.htm> and Laclau, ‘Ethics, Politics and Radical Democracy – A Response to Simon Critchley’, 4 *Culture Machine* (2002) at <http://culturemachine.tees.ac.uk/Cmach/Backissues/j004/Articles/laclau.htm>.

8 Kennedy, *International Legal Structures* (Baden Baden: Nomos, 1986).

9 Kennedy, ‘The Sources of International Law’, 2 *American University Journal of International Law and Policy* (1987) 1.

10 Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989)

If we avoid the problem about the point and purpose of international law, *stepping outside* seems to be a quick and easy answer. Discussion either never stops (post-modernism) or it stops by an appeal to *arguments from authority* (legal positivism) or it does not matter whether it stops or not (pragmatism). Fallacies and justifications of violence and oppression are subjects for historians and sociologists of international law, but not international lawyers.¹¹ The critical assessment is always ex-post facto.

The below, however, is not adequate. It does not deal with the deep problem of interpretation in international law. 'International law' is a contested concept in the sense that even the notion of the point and purpose of the concept is itself contested. International law does not serve a set of coherent (or systematic) values and none of the approaches I outlined offer an account of how we distinguish between a value that is a part of international law and one that is not. If I were to provide a list of purposes, such as avoidance of war, equal respect among societies, redistribution of world's resources, an interpretative approach will require understanding why any of these may be an aim of international law, and if there were a conflict between them how we should go about addressing the conflict. Interpretation will also require an anticipation of how the relationship between particular issues and the purposes that give meaning to international law are to be understood. This requires an *interpretative investment*.

4. Interpretative Investment

Given the essential dispute about the meaning of international law and how that meaning relates to particular instances, it is necessary to make an interpretative investment. It is easier to tell what such investment is not about: The *investment* that is required is not a doctrinal or a technical one, even though it may lead to alterations and reformulations of doctrines. It may delegitimise widely accepted practices. Arguments from analogy, say by jumping from one arbitrary case to another, arguments outlining 'legal, but illegitimate' or 'illegal but legitimate' patterns will not suffice as an adequate investment. Quick fixes relying on a 'lack of a consensus', 'an overwhelming majority', 'a new consensus' also do not add up to an investment since they are based on avoiding the question of the meaning of international law.

Interpretative investment, however, requires political engagement with international law. Political engagement is about being explicit in reinstating what the purpose of the discipline is, what ends it should serve, what ends it should not. It also has to state what actions it will be prepared to accommodate and what actions it will categorically keep outside of legal justification. If this engagement requires taking a radical stance in some cases, by for example endangering compliance with international law, political engagement requires taking that stance nevertheless. International law implies entitlement to make claims about unlawfulness, even if they will not be complied with. Political engagement with international law may also require resistance to the legalisation of a certain set of purposes which are based in irresolvable moral dilemmas. Interpretation of tradition is actively participating and determining what the tradition is and there is no tradition without our interpretation of it.¹² Clearly, not everything ought to be relevant to

11 Antony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law," 5 *Social and Legal Studies* (1996) 321-336; Anne Orford, *Reading Humanitarian Intervention. Human Rights and the Use of Force in International Law* (2003).

12 Gadamer, *Truth and Method*, translation revised by Wersheimer and Marshall, Sheed and Ward: London, (1993, 3rd edition).

questions of international law. The decisions about what stays in and what stays out, however, is also determined by the nature of the investment.

Interpretative investment is not theoretical, preceding more practical arguments. Nor is it a substantive one which preceding the more formal ('technical') or 'properly legal' arguments. Battles over formal question are only part of larger battles over content and practice, involving acts of interpretation linking a particular problem and the purpose of trying to solve it.

5. Conclusion

This paper aims to offer a sketch of how the very theories we embrace to enrich our understanding of international law bring with them an impoverishment of our interpretation of concerns within its practice. Even though legal positivism and post modernism attempt the same move of distancing, albeit from fundamentally different starting points, this strategy leads to similar consequences for the intellectual health of international law. It becomes a field left to pragmatic reasoning of saving the day by self-selected values without reference to a justification of their appropriateness for international law.

I aimed to show is that international law needs some table-clearing. This table clearing must be both about our preconceptions, which make our understanding of the discipline possible, and about which of our preconceptions hinder our understanding of that discipline.

The notion of interpretative investment, which I have only sketched here, would aim to avoid an authoritarian ethics of majoritarianism, which places out of reach discussions on the point and purpose of international law. It also aims to avoid the an impoverishment of the sources of justification for interpretive moves in international, an impoverishment which is also a lack of political engagement.