
Behind Relative Normativity: Rules and Process as Prerequisites of Law

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Abstract

For some 13 years, Prosper Weil's defence of the classic liberal understanding of public international law went largely unchallenged. Recently, however, John Tasioulas, in an attempt to promote and support a theoretically credible natural law perspective, launched an influential and wide-ranging critique of Weil's position. The present paper offers an analysis of that critique. It is suggested that Tasioulas' counter is unfair and ineffectual; both of these charges stem from Tasioulas' deployment of Dworkin's interpretative concept of law. This is unfair because Dworkin offers a theory of adjudication, not of obligation; one which, moreover, is inappropriate to public international law. Nonetheless, the deployment of Dworkin is an implicit acceptance of the necessity of process in norm creation; but, as Tasioulas conflates norm creation and application, the procedure tendered comes too late to play this role. This is compounded by the fact that the procedure deployed begs its own subversion in the international arena. The key point here is that, even if it were not unfair, inappropriate and late, Dworkin's theory simply could not perform the function it is allocated.

* Research Student, University of Glasgow. Many people have helped me to construct this paper, and to identify and refine the ideas which led me instinctively to oppose the relativist position. Originally written and submitted in partial fulfilment of an LLM degree, it owes its genesis to Catriona Drew's insightful and passionate classroom defence of relative normativity. The evolution and refinement of the paper would not have happened without the constant support and critique offered by Scott Veitch and Iain Scobbie, while Emran Mian, Kay Goodall and Therese O'Donnell merit special thanks among those who commented on earlier drafts. Finally, I would like to thank Dr Tasioulas himself for taking the time to read, and comment upon, a late draft. Needless to say, I do not wish to implicate any of these people in my ideas, let alone in the weaknesses of their present exposition, but only to credit them for what coherence and sophistication readers may discern.

1 Introduction

A priest explained
 how clever it was of Giotto
 to make his frescos tell stories
 that would reveal to the illiterate the goodness
 of God and the suffering
 of His son. I understood
 the explanation and
 the cleverness.¹

In 1983, Prosper Weil launched an assault on the drift towards relative normativity which he felt to be undermining the concept, and therefore the efficacy, of public international law (PIL). This was contended on two levels, the first was the graduation of normativity inherent in the concepts of *jus cogens* and international (state) crime. The more fundamental objection, however, was to the horizontal ‘dilution’ of normativity (the expansion in the class of actors bound by a given rule) inherent in the concept of obligations *omnium*, and which Weil saw as undermining the fundamental pluralism and voluntarism of PIL. These charges were exacerbated by their interdependence, those norms considered of greater vertical normativity also assume universal horizontal dilution, and further by the apparent malleability of the ‘normativity threshold’, the point which must be crossed to turn a non-normative rule into a law.²

In a response intended to counter this charge, John Tasioulas portrayed it as a manifestation of disquiet regarding changes Tasioulas felt were inherent in modern PIL. He argued that the crux of the criticism was an indeterminacy and anti-pluralism perceived by Weil as inherent in natural law theory. This led to Tasioulas’ ‘abstract purpose’, to use the refutation of Weil’s thesis as the foundation for a natural law paradigm capable of countering charges of indeterminacy and anti-pluralism.³

Each theorist clearly believes his approach will better further the ends of PIL, and these are agreed — for the purpose of the thesis and counter-thesis — as cooperation and co-existence. Thus the debate, although conducted essentially within the rarefied air of legal theory, takes on a functionalist perspective. Weil argues for a value-free process of norm creation as best securing the agreed ends, Tasioulas advocates a value-centric system to the same purpose.

Rather than rehearse, or more accurately recapitulate, a full defence of the classic, positivist, methodology of PIL, the purpose of the present paper is simply to respond to the specific arguments raised in favour of relative normativity. To this end, Tasioulas’ arguments are met within the functionalist paradigm proposed by, and used to critique, Prosper Weil. The response is conducted essentially within the confines of the

¹ Norman MacCaig, *Assisi*.

² Weil, ‘Towards Relative Normativity?’, 77 *AJIL* (1983) 413. See especially *ibid*, at 417 on the nature of the normativity threshold.

³ Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’, 16 *Oxford Journal of Legal Studies* (1996) 84.

Nicaragua case, precisely because this was chosen by Tasioulas as the paradigmatic example of the functional superiority of relative normativity.⁴

The argument is largely one over the relative strengths of form and content, and of which has the dominant, or exclusive, function in norm creation. However, it is suggested that Tasioulas to some extent confuses matters by conflating norm creation and application rather than replying in kind to Weil's strictly observed delimitation between the existence of norms on the one hand, and their attempts to regulate the concrete case on the other. In blurring this distinction, Tasioulas sets the ground for evading the central question of how to differentiate between law and non-law: when does a law *exist*? It will be argued that the reason for this evasion is that the question — logically prior to that of application — can only be answered 'positivistically' by strict reliance on a 'pedigree' or source-based theory. Indeed, the inevitable, but unwritten, assumption of any 'interpretative' theory of law is the existence of such identifiable rules.

For the sake of consistency, and ease, the terminology used by Tasioulas and Weil is adopted in the present paper. Thus those natural-law-based schools which give substantive values a central role will be classified as relative normativity, relativism or relativist positions. In contrast, the epithet 'positivist' will be used for the classic liberalism advocated by Weil, and indeed for any other value-neutral or 'source'-based theory.

2 Tasioulas, Kirgis and Dworkin: The Value of Values

Tasioulas predicates his immanent functionalist critique of Weil on positivism's alleged inability to secure the requisite values in practice. This is claimed to be evidenced by the *Nicaragua* decision. Tasioulas adopts and expands Frederic Kirgis' rationalization of the *Nicaragua* case⁵ suggesting, in its defence, that it cannot be considered an 'ad hoc and arbitrary manipulation of the traditional understanding of custom'⁶ but should rather be seen to have 'a deeper rationale in Dworkin's re-statement of natural law theory'.⁷

Thus Dworkin's interpretative concept of law is deployed to provide parameters within which the World Order Values (WOVs) necessary to the relativist approach can be contained. In this way, it is intended that indeterminacy would be reduced, and radical indeterminacy, a 'spectre . . . conjured up by positivists like Weil', would be 'exorcised'.⁸ The obvious implication is that Dworkin provides a theory which can mediate between radical indeterminacy and value imposition.

Dworkin's theory is predicated on 'constructive interpretation', a 'matter of

⁴ It is worth observing at this point that Tasioulas' choice of terrain may be inapt, even unfair, as he is using a theory of adjudication to critique a theory of obligation; the difference between the two is particularly marked given the voluntary nature of adjudication in PIL; see *infra*.

⁵ Kirgis, 'Custom on a Sliding Scale', 81 *AJIL* (1987) 146.

⁶ As suggested by Simma: see Tasioulas, *supra* note 3, at 110.

⁷ *Ibid.* at 110–111.

⁸ *Ibid.* at 115.

imposing purpose on an object or practice'. For analytical purposes, this is accomplished in three distinct stages. First, the 'raw data' to be interpreted is identified. Secondly, that data is interpreted to discern the rule to which it gives rise. Finally, at the post-interpretative stage, the interpreter 'adjusts his sense' of what the data really requires, so as to better suit the rule he has distilled from it.⁹

This interpretative process takes place within a matrix created by the 'relationship between the dimensions of fit and substance which condition the acceptability of an interpretation'. Fit is the extent to which the rule discerned coheres, or 'fits', with the data from which it is drawn. Substance is, essentially, the desirability of the rule.¹⁰ In customary international law, the raw data to be examined, and with which a proposed rule must 'fit', would be state practice and *opinio juris*, while the 'substance' of the putative rule would be measured in terms of its appeal to WOVs.

However, the two dimensions of fit and substance are not 'discrete hurdles that competing interpretations must negotiate',¹¹ nor are they 'fixed' by reference to any set external standard.¹² Rather, 'they must be balanced against each other in order to ascertain the best interpretation'.¹³ This happens in several ways: fit influences substance, as any interpretation which best fits is *prima facie* to be preferred; substance affects fit, allowing deficiencies to be compensated by reference to the desirability of the proposed rule from a WOV perspective. Moreover, and more radically, however:

The 'minimum level' of fit is not an 'external', invariant standard unconditioned by substantive considerations¹⁴

The constraint imposed by fit rather relies for its efficacy on the good faith of the interpreter. Only by refusal to subordinate fit entirely to substance can the decision-maker be seen to interpret, rather than invent, the law. There is no hierarchy between fit and substance, and therefore neither can overrule or eliminate the other:

Thus, the determinacy of interpretation is emergent upon the tension among, and the process of mutual adjustment between, the different convictions of fit and substance the interpreter accepts: 'Whether any interpreter's convictions actually check one another, as they must if he is genuinely interpreting at all, depends on the complexity and the structure of his pertinent opinions as a whole.'¹⁵

Drawing on Kirgis' suggestion that state practice and *opinio juris* could be separated,¹⁶ that an abundance of either could be used to compensate a deficiency of the other, and that the aggregate needed to 'create' a norm could be varied by reference to WOVs,¹⁷ Tasioulas defends the sliding scale:

⁹ *Ibid.*, at 111.

¹⁰ *Ibid.*, at 112.

¹¹ *Ibid.*, at 113.

¹² *Ibid.* This is certainly true of fit, but is substance not decided in reference to fixed, albeit indeterminate, WOVs?

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at 115.

¹⁶ This idea had already been implicitly mooted by, *inter alia*, Cheng and Kelsen.

¹⁷ Kirgis, *supra* note 5, at 149.

as a sketch of that part of a working theory of the interpretation of customary law which elaborates the relationship between fit and substance [which] permits the adoption of an interpretation as best even though it fares poorly on the dimension of fit (e.g. because, despite considerable support in normative words (*opinio juris*), little state practice supports the putative norm and much practice conflicts with it) provided the putative norm possesses very strong appeal on the substantive dimension (i.e. it expresses an essential part of the good which the institution ... of customary international law is supposed to achieve, such as peaceful co-existence).¹⁸

However, as the raw data which an interpretation must fit is the aggregate of state practice and *opinio juris*, there would be no reason to see this example as one of poor fit. It could rather be seen as one in which a reasonable to high degree of fit is achieved through the malleability of the raw data itself.

The problem, and the testing point for the rationalizations put forward by Tasioulas and Kirgis, comes sharply into relief when limited *opinio juris* is relied upon to 'absolve' a deficiency in state practice and therefore the interpretation 'fares poorly on the dimension of fit'. In this case, each would appear to agree, a 'particularly necessary rule' (i.e. one with high WOV consonance) could be found at a considerably reduced aggregate, and even in the face of inconsistent practice. Tasioulas would accomplish this through the responsiveness of fit to WOVs; Kirgis by a less exacting method of discovering the necessary elements.¹⁹

This brings a major complication to light: *opinio juris*, having been separated — as opposed to more traditionally abstracted — from state practice, must have its own source, and the spring from which it flows would appear to be sustained by WOVs.

According to Tasioulas, *opinio juris* can be found in UN General Assembly resolutions, but:

The construal of the *Nicaragua* approach as straightforwardly endowing General Assembly Resolutions with legislative (or quasi-legislative) status is too simplistic; in particular, it fails to take into account the vital role of substantive world order considerations relating to the content of the putative norms.²⁰

Tasioulas expands this point, and perhaps construes Kirgis' concurrence:

It is the vital significance of the substantive considerations of world public order in the process of norm formation, the issues that are expressed by Kirgis in terms such as destabilization, moral distastefulness, human values and reasonableness, that explains why it is erroneous to interpret the *Nicaragua* judgment as straightforwardly conferring legislative status upon widely accepted treaties or resolutions provided there is no practice predicated on a contrary norm. This also explains why, *contra* Weil, the doctrine of customary obligations *omnium* does not straightforwardly lend itself to justifying an uncontrollable proliferation of such norms,

¹⁸ Tasioulas, *supra* note 3, at 113.

¹⁹ Kirgis, *supra* note 5, at 149. Kirgis never explicitly writes of a lowering of the required aggregate, as opposed to an increasing ease of interchangeability between the elements (*opinio juris* and state practice), but does note that: 'A reasonable rule is always likely to be found reflective of state practice and/or the *opinio juris* than is an unreasonable (for example, a highly restrictive or inflexible) rule.' Kirgis' illustrative diagram also adverts clearly to an aggregate standard which is responsive to some external variable.

²⁰ Tasioulas, *supra* note 3, at 101.

irrespective of the subject-matter of the treaties and international instruments from which they are sought to be derived. Given the importance of substantive value judgments in determining the trade-off between state practice and *opinio juris*, it is simply wrong to think that, for example, the considerations that allow for the toleration of little or no supporting practice in the case of a norm of humanitarian law or the law on the use of force will also be present, and in the same measure, in the case of a norm pertaining to the law of the sea.²¹

It is not then the form, the forum, or the popularity of a given resolution, treaty or whatever which allows it to be considered as *opinio juris*, as the ‘raw data of constructive customary interpretation’. Rather it is its substantive content, and the concurrence of this with WOVs. There is no logical reason, given or extant, not to reduce this simply to WOV = *opinio juris* = raw data.

That this is essentially the crux of Weil’s disquiet is apparent when he notes:

‘It is not the form of a general rule of international law’, wrote the International Law Commission, ‘but the particular nature of the subject-matter with which it deals that may . . . give it the character of *jus cogens*’; ‘pre-eminence of [certain] obligations over others is determined by their content, not by the process by which they were created.’²²

To illustrate this point two hypothetical UN General Assembly resolutions could be postulated. The first concerns the suppression of the North/South imbalance (assumed to be of high WOV merit), the second the maximum length of boat to be registered as a ship rather than a tanker (assumed to be of low WOV merit). Each of these imaginary resolutions is adopted by the UN General Assembly by 173 votes to 4, with 8 abstentions. Each in a way could be considered raw data, but only the former produces self-standing *opinio juris*.

Working within the interpretative method devised by Dworkin and advocated by Tasioulas, the International Court of Justice if — in a subsequent imaginary case — called upon to deal with an issue regarding economic injustice can: examine the first resolution; consider it to provide independent *opinio juris* vouching for a customary rule on point; allow this to overrule — outweigh — inconsistent practice; lower the aggregate needed for norm creation; and therefore apply the resolution, or rather its underlying WOV, directly as ‘customary’ international law — even, according to Tasioulas, against one of the dissenting states in the example.²³

This example could be taken further still, as form, forum and popularity are

²¹ *Ibid.*, at 110. It is interesting to note that while Tasioulas conceded that WOVs are an evolving and growing concept, which includes some form of economic justice between states, he also contends that they would not extend to norms regarding the law of the sea. This is important because Weil’s article — given its timing and his interest in the law of the sea — was likely to have been written, at least in part, as a reaction to the ‘common heritage of mankind’ provisions intended to govern the deep-sea bed under the original UN Law of the Sea Convention regime. The explicit object of these ‘law of the sea’ provisions was to provide a system of distributive justice in an attempt to freeze or narrow the wealth gap between North and South. As such they ought, at least, to be considered optimum WOVs despite their nexus to the law of the sea.

²² Weil, *supra* note 2, at 425.

²³ Of course, given the absence of centralized adjudication, and the consequent diffusion of authoritative decision-making, not only the ICJ but any other authoritative decision-maker (a state, NATO, etc.) could use this method; a point expressly accepted by Tasioulas: see *infra* note 37 and the accompanying text.

irrelevant but the end result remains. In Tasioulas' scheme, it is WOVs which give normativity to the 'normative words' of otherwise non-normative instruments. Thus in the extreme case;

- 1 WOV, as 'fit', creates *opinio juris*;
- 2 WOV, as 'fit', allows this *opinio juris* to dominate over state practice; therefore WOV determines the 'raw data' from which a norm is to be distilled;
- 3 WOV, as 'substance', lowers the threshold value of norm creation;
- 4 WOV, as 'substance', defines the 'best' norm to be chosen;
- 5 WOV entrenches this in post-interpretative correction;
- 6 therefore, the WOV becomes law.

This must form a truly striking example of the 'stealthy rise from non-law to superlaw',²⁴ which, at the very least, leaves open the door to radical indeterminacy.

However, Tasioulas, it appears, has anticipated this argument by acknowledging that the 'identification of the data depends crucially on a "very great deal of consensus" among the participants', and adverting to the inevitability of the "double hermeneutic" dimension of the social sciences'.²⁵ This entails the necessity of interpretation at the pre-interpretative stage, and highlights the crucial role of theory in data identification. The deployment of this concession is, however, misleading. Within domestic, or even traditional international law the identification of raw data is indeed theory dependent. The mistake is to conflate a dependency on theory, to discriminate admissible from inadmissible data, with the use of undeclared substantive preferences to the same end.²⁶

The 'strict positivism' advocated by Weil offers a good illustration of this distinction. Under Weil's approach, custom is distilled from the combination of state practice and *opinio juris*, and from that 'objective' combination alone. However, state practice can only be identified by reference to *opinio juris*, which in turn can only be extrapolated from state practice. This 'vicious circle' can only be broken by reliance on theory to provide alternative criteria for the identification of state practice and *opinio juris*; put another way, only through the deployment of theory can the 'raw data' required by the positivist concept be discerned.

However, the distinction between positivism and relativism becomes apparent when consideration is turned to what the 'very great deal of consensus' is required on. Under Weil's approach consensus is required on the theory to be implemented, and the results it produces in any given case. Under Tasioulas' approach, on the other

²⁴ Weil, *supra* note 2, at 427.

²⁵ Tasioulas, *supra* note 3, at 111.

²⁶ In *Natural Law and Natural Rights* (1982) 241–243, Finnis suggests that substantive preferences form part of the very theory which determines data. However, this contention can actually be mapped onto Weil's position in a way which avoids both contradiction, and violence to either thesis. This is because the role played by substantive preference in Finnis actually pre-dates Weil's concerns. Preference dictates support for, or opposition to, a rule in a given area, and then for a given rule. However, by Finnis' own assertion, the question then becomes an 'empirical' (i.e. value-free) one: 'is there sufficient practice and *opinio juris* to form a rule?' As it is only at this point that Weil's theory begins a consideration of the issue, the question ('is there, positively speaking, a rule in existence?') is exactly the same for each theorist.

hand, consensus is needed not only on the application of criteria, but on the substantive values which form the *criteria themselves*. In other words, under Prosper Weil's approach the form of data decides on its status, while for John Tasioulas it is the substantive content of the data which does so.

Weil's approach does not alter from rule to rule, the process (*opinio juris* — including tacit consent and acquiescence — and state practice) is fixed, regardless of the apparent desirability of the instant rule. Relativism on the other hand requires constantly renewed agreement on those values capable of forming laws, and Tasioulas openly admits that these must continue to evolve and expand.²⁷

However, Tasioulas simply asserts his position, and attempts to turn the question into one of onus, when he suggests that:

Opponents of relative normativity such as Weil thus have the harder task of showing that the sliding scale conception of custom does not articulate a sufficiently complex relation between fit and substance to produce the requisite tension in any particular case.²⁸

By doing so, Tasioulas clearly implies that this is the only way to portray relative normativity as precluding a genuine distinction between interpreting and creating the law. This is an interesting, but ultimately disingenuous approach. In the first place, its relevance is questionable, as Weil was concerned with the existence and opposability of norms, not their interpretation and application.²⁹ Besides which, Tasioulas cannot escape the obligation to prove his case by simply turning the issue into one of onus, yet he merely asserts his own position and challenges Weil to disprove it. No justification is offered for this apparent reversal of roles.

Moreover, Tasioulas' challenge, even if it were appropriate, presupposes an external, *quasi*-objective, category of raw data, rather than one whose very existence is defined by reference to the criteria of substance. In other words, while fit and substance may be able to temper one another, this can only have a genuine effect where the data an interpretation must 'fit' has an existence external to the 'substance' by which that 'fit' may be modified. Yet in Tasioulas' scheme the 'fit' and the 'substance' of data are evaluated from the same source, WOVs. These are then effectively asserted to exercise a 'normative drag' on themselves, a clearly impossible suggestion.

3 The Unsuitability of Dworkin: Immanent Tensions Magnified

Dworkin's theory has two central assumptions neither of which is sustainable in PIL. These are the existence of a 'thick', or value-homogenized, community (whose values may, indeed often must, be imposed on dissenters) and the centrality of adjudication in the understanding and functioning of law. Both assumptions merit consideration, but attention will be focused primarily on the differing roles of

²⁷ Tasioulas, *supra* note 3, 123.

²⁸ *Ibid.*, at 115.

²⁹ Weil, *supra* note 2, at 414.

adjudication in each system. The reason for this is pragmatic; the extent to which Dworkin captures the notion of societal morality in national societies is debatable (as indeed is the very applicability of the notion at all), questions revolving around the role of morality in the international society (and indeed the very existence of this society) are more complex still. This is not true of courts in each system. The centrality of adjudication in the Anglo-American domestic legal systems is manifest, its peripheral status in PIL equally so.

Although the question of the role of adjudication, and the use of a theory of adjudication to answer a pre-adjudicative question of the existence (and identification) of law (the rules to be adjudicated on), is itself problematic, it is demotion of the courts from the 'Capitals of Law's empire',³⁰ in Dworkin's thesis, to little more than interesting villages in PIL's theoretical topography which is of most concern. Due to the voluntaristic nature of adjudication in PIL, the courts move from a central to a contingent role, with a consequent diminution in involvement and prestige.

This is a centrally important point, because the tendency towards stability, the role of law, and the avoidance of radical indeterminacy in the Dworkinian analysis are all predicated on the centrality of the courts, or at least of the possibility of unilateral recourse to the courts. Dworkin relies on the courts to stabilize the law (and thus authoritatively determine which values are in the system), but in PIL they simply cannot play this role. Stability, the independence of the law, can only be protected by the law itself. This is what necessitates a *process* to determine which values may enter the system, *and* necessitates that this process is not open to change based on substantive preference.

This process may be slower and less responsive than that offered by Dworkin, but, given the absence of centralized adjudication, and the consequent fracturing of 'authoritative decision-making',³¹ value-centricism, and thus the diffusion of the right to embody values in the law, effectively denies the law content. To preserve a role *for* law it must be focused on certainty and the prevention of subjective alteration.

Moreover, although the assumption of community morality is in many ways really the central point of debate, and despite advocating a theory reliant upon it, Tasioulas actually evades the question of its applicability:

Mediating the conflict between the statist and communitarian conceptions is a central problem in the theory of international law, and not one that can be resolved here.³²

This once more highlights the difficulties inherent in grafting Dworkin's thesis from the domestic to the international legal paradigm. In other words, regardless of the accuracy of Dworkin's analysis of domestic law — indeed regardless of the potential for debate over its ability to capture the nature of community morality in *either system* — the decentralization of judicial decision-making alone precludes the use of Dworkin in PIL. This is because the presuppositions of moral homogeneity and centralized

³⁰ R. Dworkin, *Law's Empire* (1986), at 407.

³¹ For a sympathetic, but nonetheless useful, account of this notion, see R. Higgins, *Problems and Process: International Law and How We Use It* (1994) 1–16, especially at 9–11.

³² Tasioulas, *supra* note 3, at 119.

adjudication are not distinct, but share a symbiotic relationship; a surplus of either can alleviate deficiencies in the other. However, unless perhaps it can be shown with absolute certainty, neither presupposition can suffice alone.³³

The relationship between these presuppositions is implicitly recognized by both Weil and Tasioulas, as the latter remarks:

As Weil concedes, the problem would be alleviated if the World Court asserted an activist role in determining customary norms on the basis of considerations of world public order.³⁴

The problem, however, is that the ICJ cannot perform this role.³⁵ This is brought into relief by consideration of the appropriateness of the model suggested by Tasioulas: the US Supreme Court.³⁶ This is a court of compulsory jurisdiction, applying its choice of laws, in a (relatively) value-homogenized society, whose values it has greatly aided in homogenizing. The contrasts between this and the ICJ are well highlighted by Tasioulas' 'paradigm case', *Nicaragua*. The only reason the ICJ had to even consider a relativist approach was because it could not choose which law to apply. Moreover, the most tangible result of the case was the withdrawal of the US acceptance of compulsory jurisdiction.

Indeed, the ICJ's limitations in this respect are implicitly accepted by Tasioulas when he suggests that an 'institutional diminution of indeterminacy' can also be effected by 'states, international organizations, non-governmental groups, and individuals'.³⁷ Yet the very point being made by Weil, and reiterated here, is that, given such diffusion of decision-making power, the direct introduction of subjective value into the normative process tends not to determinacy, but rather to radical indeterminacy.

Indeed, Tasioulas appears to accept this when he acknowledges the need for determinate WOVs:

It is only to be expected that relativistic doctrines will be indeterminate if there are no universally accepted criteria in terms of which the value judgments they require may be assessed. From this it is evident that the anti-pluralism charge is the more fundamental of Weil's two objections, since it explains why in the last resort any appeal to values in international law process is inevitably indeterminate.³⁸

³³ That is, the judge can determine *which* values are included; or values absolutely shared will impose themselves on judges (and therefore other decision-makers) and thus bring their own determinacy.

³⁴ Tasioulas, *supra* note 3, at 104.

³⁵ Indeed, it could be argued that, given the disavowal of any system of precedent by Article 59 of the ICJ Statute, the ICJ *should not* take on such a role. This attempt to limit the effects of ICJ judgments can be seen as a direct corollary of the decentred and voluntary nature of international judicial resolution. The ICJ adjudicates *disputes* between parties (often on the parties' choice of laws) and this should not bind third states, whose views of the merits, and of the appropriate laws, were not considered. See Scobbie, 'Res Judicata, Precedent and the International Court: A Preliminary Sketch', 20 *Australian Yearbook of International Law* (2000) 1 especially at 17–19. For a slightly different (and more contemporary) reading of the *Anglo-Norwegian Fisheries* case discussed by Scobbie, see Evenson, 'The Anglo-Norwegian Fisheries Case and Its Legal Consequences', 46 *AJIL* (1952) 609, especially at 619–622 and 629–630.

³⁶ Tasioulas, *supra* note 3, at 126–127.

³⁷ *Ibid.*, at 104, note 95.

³⁸ *Ibid.*, at 116.

This is a strange, but accurate, concession; any response to the anti-pluralism charge opens itself to the charge of indeterminacy, and *vice versa*. In Koskenniemi's terms, the potential answers, for reasons immanent to themselves, *cancel each other out*.

It can therefore be seen that Tasioulas' arguments against indeterminacy are little more than a framework, and perhaps even an unnecessary framework at that. They do not provide, or even tend towards, determinacy themselves; rather they show how a value imposition, already presupposed to be legitimate, can be controlled.³⁹ Yet even this control relies for its efficacy on the determinacy of the values to be imposed. Therefore, if WOVs cannot be proven, the anti-indeterminacy argument collapses, as the framework for limiting their role is irrelevant if their existence and content are indeterminate. Moreover, if WOVs can be proven, the controls offered by Tasioulas are ineffective, and the only bulkhead against radical indeterminacy is the determinacy of the WOVs themselves, which renders any attempt to control the parameters of their content redundant.

The positivist position is simple, to avoid both value imposition and radical indeterminacy *simultaneously*, the creation of valid laws must be mediated through a process. Tasioulas implicitly accepts this when he offers Dworkin's matrix of fit and substance to fill this role. However, this cannot succeed unless the values themselves are determinate, which must be achieved without value-imposition; effectively necessitating a second process to determine which values are the subject of a 'communal consensus for a just world order', or an additional (value-free) process for determining the 'raw data'.

The purpose of Tasioulas' paper was a critique of Weil's on a functionalist basis: to accomplish this he must prove his thesis is superior to Weil's. This means he must show the existence and effect of WOVs outwith the narrow range of morals and values agreed upon by all states and therefore countenanced by, and already norms of, Weil's positivistic system.⁴⁰ In other words, Tasioulas would have to explain not only why a *consensually* agreed WOV is not already in the *consensually* agreed system, *but also* why it needs help in getting in; unless of course the value consensus in question is a partial one, which may nonetheless be *imposed* on the system.

4 The Functional Case for Relativism's Superiority

However, rather than defend this position, Tasioulas returns to the 'touchstone', the 'functionalist criteria' of cooperation and co-existence by which PIL is to be assessed, and suggests that, as only relative normativity can guarantee these, Weil's

³⁹ Interestingly, as well as doubts which may be harboured as to the applicability of Dworkin's analysis to PIL as a whole, it would appear that Tasioulas actually inverts its logic: where Dworkin says 'value imposition is legitimate, here is how to control it', Tasioulas interprets 'here is how value imposition may be controlled, therefore it is legitimate'. In strict logic, this reversal of antecedent and consequent, the affirmation of the consequence, is illicit.

⁴⁰ This point on systemic location, and the existence of true WOV rules in current positive PIL, is expanded *infra*.

challenge is refuted. This is done by an analysis of the *Nicaragua* case predicated on the reconceptualization of custom formation mooted by Frederic Kirgis and expanded by Tasioulas. While such an approach may render John Tasioulas the ‘winner’⁴¹ in the debate with Prosper Weil, it does little to further his ‘abstract purpose’ of promoting a determinate and pluralistic, natural law paradigm, as its defence of WOVs may be boiled down as follows:

- Relative normativity allowed the court to reach an acceptable conclusion in Nicaragua.⁴²
- Statism would not have done so.
- Therefore, relative normativity is better than statism.
- Relative normativity presupposes WOVs.
- Therefore, WOVs exist.

Or, as Tasioulas puts it:

To this extent, Weil seems to fall foul of the maxim that he who wills the end also wills the means. If he acknowledges co-existence as a grounding objective of the international normative system, then he cannot legitimately be indifferent to the fact that it is most effectively secured through the mechanisms afforded by the relativist trend.⁴³

Not only is this line of argument completely self-referential, and the logical *non sequitur* it introduces less than compelling, it is also based on a false factual premise, as there is no reason why the decision in the *Nicaragua* case could not have been reached by the deployment of a positivist approach.

Thus, *contra* Tasioulas, it is far from:

obvious . . . that were the positivistic method applied in that case, neither the norm against the use of force nor that prohibiting intervention would have been applicable.⁴⁴

Nor is it true that:

From this functionalist viewpoint, the case for relative normativity and its attendant communitarianism seems overwhelming.⁴⁵

These arguments seem — along with the other criticisms of the *Nicaragua* case, indeed along with the reasoning of the International Court of Justice itself — to be predicated on an acceptance of the US objection that a subsequent treaty subsumes

⁴¹ Even this point would be debatable given that Tasioulas has fundamentally altered the rules of engagement by deploying his theory of adjudication. Weil had already stated that he perceived PIL as an *aggregate of norms* (*supra* note 2, at 413) which created opposable legal obligations. The only reason that he would need to show the norms in question to be customary is the US reservation to the jurisdiction of the ICJ, which is only of relevance to a theory of adjudication; and one taking place within the unique confines of PIL at that. In terms of his own theory, Weil could simply point to their embodiment in binding treaties to show the existence and opposability of the norms in question.

⁴² Which of course presupposes that relative normativity exists as an option, surely one of the very points Tasioulas must prove.

⁴³ Tasioulas, *supra* note 3, at 120.

⁴⁴ *Ibid.*, at 119–120.

⁴⁵ *Ibid.*, at 119.

and extinguishes any customary norm on point. Yet this argument is clearly discredited, as stated by the Court, and had previously been categorically dismissed in the *Tehran Hostages* case.⁴⁶ As well as having no clear factual basis, the argument is logically incoherent. This can be shown by looking at either its results or its presuppositions. If the prohibition on force contained in Article 2(4) of the United Nations Charter (UN Charter) had extinguished the identical customary prohibition, force would only be prohibited among UN members *inter se* — thus invasion of or by a non-member would be legally permissible.

The illogicality of the presuppositions is highlighted by Article 51 of the UN Charter. This permits use of force in self-defence but gives no further criteria; thus the concepts of necessity, proportionality, etc. must be drawn from customary law. Yet, if self-defence, as a treaty right, has subsumed the relevant custom then these ancillary concepts must in fact have grown in isolation, or have somehow survived the extinction of the very rule from, *and for*, which they developed. What this means is, assuming for a moment that the prohibitions on the use of force and intervention had customary status before the UN Charter, that the International Court of Justice's approach in looking for subsequent modification was perfectly consonant with a positivistic approach to PIL, and that the functional superiority of relative normativity is thus rendered illusory.

Put another way, agreed imperatives will already have form in law and need not be 'magicked' into existence. Even on its own terms, Tasioulas' assertion of relative normativity's functional superiority is predicated on a very narrow conception of state practice.⁴⁷ As well as overlooking the difficulty of identifying, let alone quantifying, practice directly supporting a prohibition, i.e. abstention from force/interference,⁴⁸ Tasioulas would appear to discount the normative value of protest and other diplomatic forms of state practice; indeed, he appears not to count these as state practice at all.⁴⁹

5 The Customary Status of the Prohibitions on Force and Intervention

Brownlie argues that only an atomized analysis of PIL, focused on the 'weaknesses of the Covenant of the League and the Kellogg–Briand Pact', and ignoring state practice and correspondence, is capable of concluding that the use of force was not, customarily, prohibited by 1939.⁵⁰ Indeed:

⁴⁶ *Case Concerning United States Diplomatic and Consular Staff in Tehran*, ICJ Reports (1979) 4; ICJ Reports (1980) 3.

⁴⁷ This narrow definition of state practice may be deliberate, as its corollary, a wide definition of *opinio juris*, makes Tasioulas' assertion of a free-standing role for the latter appear more persuasive.

⁴⁸ See, for example, Henkin, 'Reports of the Death of Article 2(4) are Greatly Exaggerated', 65 *AJIL* (1971) 544.

⁴⁹ Tasioulas, *supra* note 3, at 96, especially note 52.

⁵⁰ See generally I. Brownlie, *International Law and the Use of Force by States* (1963) 66–112, especially at 107–111.

If the legal materials and especially the diplomatic correspondence of the years between 1928 and 1939 are examined it becomes apparent that nearly every government in existence had at some time estopped itself from denying the illegality of resort to force except in self-defence.⁵¹

He also notes that breaches of these norms, and the resort to or acceptance of violence was the exclusive responsibility of a ‘minority of the community of states’, and that these were not always defended by legal justification. He therefore argues, persuasively and with no shortage of authority, that the customary norm existed, and that the minority breaches had in no way altered its scope, let alone undermined its existence. Brownlie concludes:

The customary rule which existed by 1939 did not create a sharply defined *modus operandi* for those concerned with the application of international law. There was no general agreement on the precise meaning of the terms used in instruments and diplomatic practice relating to the use of force. This still creates serious difficulty but it is absurd to suggest that because there is a certain degree of controversy the basic obligation does not apply to the more obvious instances of illegality.⁵²

Here the distinction between the preoccupations of Weil and Tasioulas comes sharply into relief: Weil looks for ontological determinacy, whether the rule exists or not; Tasioulas seeks to conflate this question with that of how the rule is applied — presumably to introduce some indeterminacy and value-orientation, which he then moves back into the first question (existence) in an attempt to legitimate value imposition at this primary stage.

The position as regards the origin and status of the duty of non-intervention is less clear. Although the:

principle that States should refrain from intervening in matters which international law recognizes as being solely within domestic jurisdiction has gained general acceptance ... its application to different factual situations is difficult and uncertain.⁵³

However, there is a code of behaviour:

which international law prohibits and which state practice and general usage subsume under the heading of the principle of non-intervention.⁵⁴

There is also a powerful systemic argument favouring a rule of non-intervention, such as its implicit acceptance by the Estrada doctrine, the fact that it is a direct corollary of sovereign equality, and the implicit manifestation of a customary duty derived from the restriction of Article 2(7) of the UN Charter to the UN itself. These justify the view that no equivalent provision needed to be specifically addressed to states as they already bore this duty.

Such systemic arguments, particularly that drawn from the linkage of non-intervention with sovereign equality, would be acceptable in positivistic analysis,

⁵¹ *Ibid.*, at 108.

⁵² *Ibid.*, at 111.

⁵³ Schroder, ‘Non-Intervention, Principle of’, in R. Bernhardt, *Encyclopaedia of Public International Law*, vol. 7 (1984) 619.

⁵⁴ *Ibid.*

especially given their consonance with its liberal theoretical underpinnings. Sovereign equality is a prerequisite, a foundational principle, of liberalism and therefore of PIL. However, sovereign equality cannot have this fundamental status in relativist theories, if relative normativity is willing to, or must, countenance anti-pluralism,⁵⁵ at least to some extent. This can clearly be seen to undermine its alleged support for a duty of non-intervention, which is simply a corollary of sovereign equality.

While inconclusive, the possibility that the prohibitions on force and intervention had customary status, along with the US acceptance of this point, would have allowed the International Court of Justice to reach its decision in a far less controversial manner through a simple and consistent application of traditional PIL doctrine. That it did not do so is unfortunate, but does little to prove the functional superiority of relative normativity, let alone advert to the existence of WOVs.

However, this does not render Tasioulas' argument wrong, rather than merely incomplete and inconclusive. It does, however, illustrate a central problem with the policy science or relative normativity approach to PIL, which is the school's inability to prove the existence of, let alone define and control, WOVs.

Tasioulas does not return to a direct attempt to prove WOVs. Having apparently succeeded in his task — the internal critique of Prosper Weil's positivism — he left his abstract purpose to be completed by others. He does, however, warn of the difficulties of:

provid[ing] an account of the substantive values that determine the formation and application of universal international laws which is not vulnerable to general accusations of radical indeterminacy, ethnocentrism, and patriarchy.⁵⁶

Weil's contentions, and his acceptance of an innocuous core of *jus cogens*,⁵⁷ on the other hand, are manifestations of a belief in the fidelity of the international legal system as a reflection of the agreed values of the international community, the true world order values. In other words, if states actually want a rule, if the rule is actually fundamental to world order — as are e.g. cooperation and co-existence — it will already exist in positive PIL, as the relevant norms in *Nicaragua* did.

Relative normativity, far from being functionally superior, is, at best, superfluous. At worst, it can serve only to create divisions and animosities, and to bring the international legal system into disrepute. This stems from Tasioulas' inability to constrain WOVs within the matrix of fit and substance, which means these must constrain themselves. This can happen only in one of two ways, the values can be drawn from the system (in which case relativism is superfluous) or the values can be imposed on the system, in which case relativism provides the route by which the 'international oligarchy' feared by Weil⁵⁸ can systemically embody *its* values of world order.

⁵⁵ As anti-pluralism is the inevitable price of determinacy in a system mediated through value rather than process; see *supra* note 38 and the accompanying text.

⁵⁶ Tasioulas, *supra* note 3, at 128.

⁵⁷ Weil, *supra* note 2, at 428.

⁵⁸ *Ibid*, at 441; see also *ibid*, at 426–427.

To show its viability, and demonstrate its alleged superiority, proponents of relative normativity would have to show its acceptability, and functional advantages over positivist methods, outwith the agreed minimum areas; i.e. the viability and superiority of relative normativity would have to be demonstrated in those areas in which states have not already agreed a rule or allowed themselves to become bound by a customary norm.

Tasioulas implicitly accepts this, suggesting:

that the interpretative quest to articulate and realize world order values which is endorsed by relative normativity will inevitably outrun the austere, minimum world order values posited by Weil.⁵⁹

However, this reopens the charge of relative normativity leading to radical indeterminacy, because the norms accepted as WOVs evolve and grow.

The same processes that led to the enshrinement of co-existence and cooperation as constitutive goals of the international normative system would also validate a comparable status for goals such as the protection of human rights and the environment. Further, the idea that it is possible to hive off the goals of optimum world order from those of minimum world order is in any case dangerously misguided. The reality is that significant interdependencies have to be admitted between the objectives of minimum and optimum world order. The dependence of co-existence on respect for human rights, for example, emerges in at least two ways. First, as a matter of practical politics, it is obvious that one of the main causes of the instabilities that lead to serious threats to co-existence are violations of individual and collective rights. But there is also a second, conceptual dependence. This emerges when we examine the conditions under which peaceful co-existence is valuable.⁶⁰

As well as raising simple questions, such as whose conception of a valuable co-existence should be preferred, this continual expansion combines with the interpretative account's ineffectiveness as a bulwark or corral for WOVs, to leave value-centric PIL of the type advocated by Tasioulas open to charges of politicization or radical indeterminacy. In other words, as his surrogate for process in norm-creation is either ineffective or superfluous, Tasioulas has no protection from the negating tension between the answers to the charges of value imposition and indeterminacy: he can defend his thesis against either only at the expense of conceding the other.

It has, however, been argued that such politicization, *and* indeterminacy, are inherent in PIL, and should be openly acknowledged as such. This would lead to the preference for the best substantive answer in the circumstance, as opposed to a continuation of the charade of objectivity, neutrality and certainty. If this should prove to be the case, if objectivity can be shown as no more than a liberal myth, then the superiority of the open judgments of relative normativity over the hidden values of statism would come once more into relief.

⁵⁹ *Ibid.*, at 123.

⁶⁰ *Ibid.*, at 122–123.

6 The New Stream and Radical Indeterminacy: The Politicization of Law

The concept of inevitable indeterminacy, or political value imposition, is forcefully argued by Martii Koskenniemi. Not unlike Weil, Koskenniemi sees PIL as a liberal theory in which:

From the simple denial of the existence of the principles of natural justice — or at least of our capacity to know them — follow the three liberal principles of social organization: freedom, equality and the Rule of Law.⁶¹

However, Koskenniemi ultimately feels that the liberal façade is hollow, and that:

Our inherited ideal of a World Order based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, *for reasons internal to the ideal itself*, rely on essentially contested — political — principles to justify outcomes to international disputes.⁶²

This is because law could enjoy independence from politics only if it could be simultaneously concrete (that is based on a non-political, verifiable, external standard ‘distanced from theories of natural justice’) and normative (that is directive of state behaviour ‘distanced from actual state behaviour, will or interest’).⁶³ For Koskenniemi, this is simply not possible as:

The two requirements *cancel each other*. An argument about concreteness is an argument about the closeness of a particular rule, principle or doctrine to state practice. But the closer to state practice an argument is, the less normative and the more political it seems. The more it seems just another apology for existing power. An argument about normativity, on the other hand, is an argument which intends to demonstrate the rule’s distance from state will and practice. The more normative a rule, the more political it seems because the less it is possible to argue it by reference to social context. It seems utopian and — like theories of natural justice — manipulable at will.⁶⁴

The whole ethos of Weil’s thesis, however, is that such politicization is neither inevitable nor inherent to PIL, but rather springs directly from the current trend towards relative normativity. Nonetheless, Weil and Koskenniemi at least agree that:

To avoid political subjectivism and illegitimate constraint, we must base law on something concrete — on the actual (verifiable) behaviour, will and interest of the members of society — states.⁶⁵

Weil falls squarely within what Koskenniemi terms a ‘rule’ or ‘source’ approach to PIL; as he insists norms pass a formal test of ‘pedigree’ which is not to be varied by reference to their substantive content. Koskenniemi, however, argues that, because the application of any formal test can have relatively indeterminate results and a margin of ‘political’ discretion — i.e. a choice of justice theory — is involved in the

⁶¹ Koskenniemi, ‘The Politics of International Law’, 1 *EJIL* (1990) 4, at 5.

⁶² *Ibid.*, at 7.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, at 8.

⁶⁵ *Ibid.*, at 7.

distillation and application of legal rules, objectivity becomes a myth. This argument, while superficially persuasive, is ultimately unfair. Language, and therefore the articulation of rules, will always permit of a degree of uncertainty, but any suggestion that this precludes objective, or at least consistent intersubjective, understanding is ultimately self-defeating. If this were not so, what would save the written claim of radical indeterminacy from its own charge; why would it alone be intelligible? Ultimately, linguistic indeterminacy must be admitted, but:

It is absurd to suggest that because there is a certain degree of controversy the basic obligation does not apply.⁶⁶

It should also be noted that while law can be (mis)used to validate, or disguise, political decisions — e.g. the deployment of Article 2(7) of the UN Charter to avoid unpleasant decisions by the UN General Assembly — this is not the same as saying law is politics, nor does it undermine the law's independence; it merely questions the enforcement of the law and the morality of those employing it.⁶⁷ Indeed, that such misuse can be identified, or argued, in itself illustrates law's independence from politics.

Moreover, both of these limitations on law are easily explained in terms of the Hartian concept of the core and penumbra of a rule, and neither is really of relevance to Weil's project, as each must first presuppose the rule's existence, the very question of ontological determinacy with which Weil is concerned.

Ultimately, any given law (i.e. substantive rule) will have the degree of precision (determinacy in application) that states are truly willing to concede at the point of its formation.⁶⁸ Therefore, 'soft' rules (imprecise norms) are not logical inevitabilities, but should rather be perceived as manifestations of a lack of consensus or political will on (the details of) the issue in question.⁶⁹ Thus degrees of precision have nothing to do with a given rule's normativity, and must, in a voluntaristic legal system, be dependent on the law-makers' collective willingness to bind their own behaviour.⁷⁰ Put another way, as the law-makers, states, are acutely aware of their own status *qua* subjects,⁷¹ this always conditions their acceptance of particular laws. This does not,

⁶⁶ Brownlie, *supra* note 50, at 111.

⁶⁷ In a system as decentred as PIL, it must be remembered that enforcement does not automatically flow from breach, nor is deployment of the law necessarily (or even probably) subject to authoritative review. Therefore the idea that the law itself can be criticized for failings in these areas is manifestly false, in effect a category error.

⁶⁸ The basic point being made here is that, while the question 'what does rule *x* require in this circumstance?' may be open to different responses and a degree of uncertainty, the question it presupposes, 'is rule *x* a law at all?', need not be. The latter question can *only* have a binary yes/no answer, and it is erroneous to move indeterminacy back to this level; equally, it is erroneous to see the question of the existence of a law, separated from that of its application, as somehow unimportant.

⁶⁹ Soft rules can also be used, e.g. to facilitate change, and allow for technological development. I owe this observation on the constructive use of soft rules to Dr I.G.M. Scobbie.

⁷⁰ See, e.g., Weil, *supra* note 2, at 414.

⁷¹ It is worth considering this absolute identity, as it is the same as that fictionalized by democracy in its search for legitimacy. Thus it could be the source of PIL's immanent authority, and should, at the least, enhance its rhetorical force, on which see *infra*.

however, mean that the norm remains amenable to instant will once adopted or accepted — it does not, except via modification by subsequent (normatively relevant) occurrences.

However, this does not refute, but rather leads to, Koskenniemi's more basic charge that the zero-sum tension between concreteness and normativity precludes the possibility of politically neutral, objective rules or rule formation. While superficially persuasive, this challenge is predicated on a series of misinterpretations: normativity as distance from practice; *opinio juris* as will or consent; and liberty as excluding the power to bind future conduct (or indeed a simple refusal to acknowledge the temporal element in law creation altogether). When these are rectified, it becomes apparent that a developed and consistent sources theory — such as that advocated by Weil — substantially overcomes Koskenniemi's accusations. In other words, such a theory can provide a determinate, intersubjectively consistent, system of laws; a neutral, workable, PIL.

The foundation of such a sources theory is a neutral, external, starting point. In the formation of customary PIL this is provided by the actual, verifiable practice of states. It is on this practice that the concrete constraints of the rule are built. However, not all actions of states have equal normative value, and it is in the differentiation that *opinio juris* comes to the fore. *Opinio juris* is not intention, nor is it a state's understanding of its actions. Rather it is the *belief* that those actions are countenanced or commanded by law; it is not a consensual value judgment of the given law. Only those actions motivated by the requisite *opinio juris* — on the part of the state actor and/or perceived by its peers — form part of the process of norm creation or evolution.⁷² In this regard wilful breach and consensual adherence must be distinguished from *opinio juris*, which is simply the belief that a given rule is binding, regardless of attitudes as to its content.

This is of crucial importance, as it is from here that the normativity of a rule flows. Once *opinio juris* is distinguished from will or interest it becomes apparent that not all state actions amount to state practice in the normative sense (i.e. tending towards norm formation or variation); some state actions are simply breaches of extant norms of PIL. At this point, efficacy and normativity must be distinguished.⁷³ A rule

⁷² This was implicitly recognized by the International Court of Justice in the *Nicaragua* case, ICJ Reports (1986) 14; the assertion that deviations must have been *treated* as breaches (*ibid.*, at para. 186) is reference to *opinio juris*, and its effects on the normative status of state actions.

⁷³ This is due to the decentralization of the determination and sanctioning of breaches, and the absence of a court of compulsory jurisdiction in current PIL. Many theorists regard this as unfortunate, even unsatisfactory, and thus, implicitly, assert the centrality of law in social life. However, the system framing PIL has chosen to decentre law — hence the absolutely voluntaristic nature of international adjudication; see e.g. *Legality of the Use of Force (FRY v. USA)*, Preliminary Objections, ICJ Order of 2 June 1999, para. 30, (1999) 38 ILM 1188, at 1195: 'there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law.' This distinctive feature must be reckoned with. One method of doing so is to perceive it as re-centring morality (and other non-legal considerations) so that these need not be included in law, which can then remain an autonomous and determinate discourse, providing a clear — but rebuttable — reason for action. In this light, PIL can be perceived as having highlighted the systemic value of moral

demonstrates its normativity and independence through its ability to provide criteria by which consistent conduct may be distinguished from breach. Provided this can be established, the rule is normative; a law exists.⁷⁴ Thus a norm is a rule directive of state behaviour, regardless of will or interest. In other words, normativity actually ought to presuppose consonance with, rather than distance from, state behaviour, as the rule should direct this behaviour, or, at least, compel justification or sanction for deviant behaviour.

It is, however, vital to realise the temporal element in the evolution of rules: although a rule grows initially from state practice, it must — to retain its normativity — ultimately direct, rather than merely reflect, *subsequent* practice.

According to the requirement of normativity, law should be applied regardless of the political preferences of legal subjects. In particular, it should be applicable even against a state which opposes its application to itself. As international lawyers have had the occasion to point out, legal rules whose content⁷⁵ or application depends on the will of the legal subjects for whom they are valid are not proper legal rules at all but apologies for the legal subject's political interest.⁷⁶

Again, however, it is the role of *opinio juris* — the sense of legal duty — which should safeguard the rule's normativity. The simple fact that a, or all, state(s) agree with a given rule *does not reduce that rule to a descriptive apology*. The test of normativity does not arise when states agree with a rule, but rather comes into relief at the point of application, especially when one or more cease to agree. It is then that the objectivity, the autonomy, of the rule comes to the fore. It is to be hoped⁷⁷ that at this point the rule will prevent the state's deviation, i.e. will act authoritatively and direct state behaviour. However, even if the lack of system efficacy (absence of compulsory jurisdiction and centralized coercion) precludes this, a law's normative role will have been fulfilled if it has provided at least a consideration to be weighed against the desire to act; and against which any decision to act can be evaluated and criticized by other states and interested actors. Put another way, a rule retains its independence and normativity provided that it does not merely change to accommodate deviant practice.

judgments of the law, as a de-centred legal command can be discounted if the actor's morality (etc.) deems this sufficiently desirable or necessary. However, such moral evaluation is inevitably precluded by any system which would conflate law and morality. It is worth noting that this can lead to a regressive set of questions beginning with the law's ability to adjudicate on a claim to non-compliance, or a state's absolute right to discount law; but this may, ultimately, be more important to PIL's self-image than to genuine questions over sovereignty and the location of power in the international society. Unfortunately, such a discussion lies outwith the scope of the present paper. For Tasioulas' tentative thoughts on the nature and location of sovereignty, see *supra* note 3, at 116–118.

⁷⁴ This obviously assumes that the rule in question has already 'passed' the sources test, the normativity threshold, and is considered to be a law.

⁷⁵ Here content at the point of formation — which does depend on the will and interest of the aggregate of legal subjects — must be differentiated from content at the moment of application — which is disinterested in the will of the subject(s) in question; this distinction is not apparent in Koskenniemi's argument.

⁷⁶ Koskenniemi, *supra* note 61, at 8.

⁷⁷ However, see note 73 above.

As noted, the role of *opinio juris* is crucial in this context. A state may perceive a given rule as restrictive, unfair etc. (against its current will and interest), but as long as it continues to see it *as a rule*, a factor to be weighed in considering its conduct, the *opinio juris* is preserved. This being the case, the deviant conduct is not properly motivated state practice, and does not tend towards the removal or modification of the rule, which is instead preserved with its content and normativity intact.⁷⁸

This clearly illustrates the limits of voluntarism, and allows a better understanding of the concept of a consensualist legal system like PIL. PIL is both consensual and voluntaristic, as it is made by and governs over a heterogeneous mix of, theoretically equal, sovereign states. However, this voluntarism only applies to the initial formation and horizontal coverage of laws. Once a norm has attained consent, and passed the normativity threshold, it becomes binding, not for as long as convenient, but until the law is amended, or exceptions created, by the correct processes. This is the states' liberty to bind their own future conduct, which falls clearly within the voluntaristic, statist, paradigm advocated by Weil, and offers an effective guard against both value imposition and radical indeterminacy.

In other words, although normativity and concreteness are separate qualities, they are intrinsically linked: normativity evolves *from* concreteness, it does not contradict it. Thus state practice gives rise to the rule, but once this rule has entered the legal system — has *become* normative — its normativity attains self-sufficiency. This is what provides the stabilizing force of the norm; it has become a rule of conduct which states ought to obey. In this way it is the normativity of the rule which provides a standard by which subsequent conduct may be judged; be this compliance *or deviance*.

In short, the flaws in Koskenniemi's argument become apparent when normativity is given its proper meaning, directive of behaviour, which in turn presupposes consonance⁷⁹ with behaviour and illustrates the illusory nature of the alleged paradox. What must be remembered is that a norm is formed at the point of agreement, but tested at the point of disagreement. Thus, as a rule is simultaneously concrete and normative precisely because of its independence from instant state will, Koskenniemi's paradox is not only dissolved but in fact revealed to support fully the point he attempts to deny.

7 Conclusions

Weil and Tasioulas must agree that the apposite question for international law is which decisions and actions should be endowed with normative force or significance. Positivists base this decision on form; significance is attributed to certain types/manifestations of decisions, and normative force to sequences of these. Relative

⁷⁸ This is what was meant by the ICJ in *Nicaragua* when they spoke of inconsistent conduct being 'treated as breaches of that rule'. ICJ Reports (1986) 14, at para. 186; quoted, and misinterpreted, by Tasioulas, *supra* note 3, at 97. See *supra* note 72 and the accompanying text.

⁷⁹ Though not, of course, absolute conformity, as law is a normative, not a natural, science. On this distinction, and its consequences, see Lauterpacht, 'Kelsen's Pure Science of Law', in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, vol. 2 (1975) 404–409.

normativists seek to attribute significance, and normativity, to the resonance of the content of a rule with their abstract values of world order.

The positivist decision to endow only certain forms of decision with normative force is, itself, a normative one, promoting control and predictability to achieve the values of cooperation and co-existence. Relative normativity offers no surrogate for these controls.

Of course sitting back and watching ‘bad things’ happen is not good, but neither is acting unilaterally, against the will of sovereign states, and in breach, or worse through manipulation, of the law on one’s own perception of the facts, and belief of right and wrong.⁸⁰ This is a negation of law, and forms a bad precedent. Law is after all universal, and a source for one law is a source for another. In a Hartian analysis,⁸¹ the rule of recognition in PIL distinguishes forms of law (rather than law creating organs); this is heavily mediated by procedures for differentiating laws from other social actions.⁸² Yet the relativist position purports to deny a role to procedure, and recognizes laws solely on the basis of substantive content.

In this sense, the rule of recognition advocated by Tasioulas amounts in effect to the following:

Those rules which possess sufficient consonance with the undeclared and evolving values of world order are laws of the system.

That this is an unstable rule is readily apparent, but relative normativity can offer no stabilizing factor. In moving from a true (classical) natural law position to one reliant on a common consensus on evolving values, Tasioulas eliminates the possibility (perhaps open to theorists like Finnis⁸³) of regulating values by reference to a fixed list. Thus identification of the common consensus could only be regulated by procedure, but to accept this is to return to the very theories Tasioulas sets out to criticize. Relative normativity then can offer no safeguards apart from the good faith of the very states it appears to mistrust; and no way even of evaluating this good faith.

Relative normativity allows the strong to prey on the weak, while the righteous are estopped to silence; if one state can act on its values under the system, so can another, especially when the legitimate values are neither defined nor constrained. The only way this can be avoided is through the deployment of a centralized control/checking mechanism, but to take this route is to work within the present positivist system, and

⁸⁰ Weil, *supra* note 2, at 433, makes a very similar observation with characteristic eloquence: ‘Any state, in the name of higher values determined by itself, could appoint itself the avenger of the international community. Thus, under the banner of law, chaos and violence would come to reign among states, and international law would turn on and rend itself with the loftiest of intentions.’

⁸¹ Which, as noted by Bos, is far less inapplicable than Hart himself postulated. See Bos, ‘Will and Order in the Nation-State System: Observations on Positivism and International Law’, in R. McDonald and D. Johnston (eds), *The Structure and Process of International Law* (1983) 51, at 71–72.

⁸² It is perhaps worth considering the role of procedure in the domestic rule of recognition upon which Hart concentrated, as not every pronouncement emanating from Whitehall or a court amounts to a rule of the system but only those which are procedurally valid; in this sense the difference between international and domestic law is more apparently one of degree than of kind.

⁸³ Finnis, *supra*, note 26, at 59–97.

to accept the redundancy of relative normativity. This point was forcefully, and accurately, made by Weil:

Without this positivistic approach, the neutrality so essential to international law *qua* coordinator between equal, but disparate, entities would remain in continual jeopardy.⁸⁴

Tasioulas' ineffective controls do little or nothing to prevent the value imposition or indeterminacy dialectic he seeks to bring to PIL from heightening this ongoing jeopardy.

In a similar vein, it could be argued that relative normativity is predicated on Russian weakness and Chinese isolationism, that in fact WOVs are *Western Order Values*. The choice which remains is to concede the point on the systemic embodiment of true World Order Values and accept that relative normativity has nothing to offer, or use the theory of relative normativity to impose a theory of justice upon the weaker states, as a first step towards world homogeneity.⁸⁵

Tasioulas contends that, ultimately, Weil's critique:

is a plea for the priority of a statist conception of international society and predictability in norm-formation over the communal consensus for a just world order.⁸⁶

Should the word 'predictability' be replaced by determinacy, and the divergence of this 'consensus' from that already embodied in the normative system be highlighted, it would not appear unreasonable to assume that Weil would agree. Moreover, it is this (self-defeating) utopian conception of a 'communal consensus for a just world order' which appears to have spurred Weil to write in the first place. In the absence of a centralized and hierarchically superior adjudicator, it is difficult to determine who decides the content of this consensus. In reality, this power of decision remains with the states, and it is only through its own stability and predictability — i.e. its determinacy — that the law can preserve itself. Thus Weil is actually attempting to *protect* the law and its influence over states, not to empower states against all others: as the well-intentioned exhortations of the normativists would do.

However, there is more to Weil's position, and to positivism generally, than the (very necessary) conservative functionalism on which Tasioulas concentrates his energies. Positivism, and Weil's thesis in particular, has an ethical slant, a desire to protect the weak against the strong, and a belief that the law is best positioned to do this.⁸⁷ This counters the suggestion that positivism and statism are necessarily co-terminus; or the accusation that positivists seek simply to reify the current institutional settlement. Some may, others may not, but what is being protected is the autonomy of law itself, and what is being promoted is the idea that law is an effective force (for good) even on its own. This may be an uneasy contention for a normative system as decentred as PIL, but remains worthy of consideration.

An ethical defence of positivism can be multi-faceted, but essentially seeks to add weight to legal considerations in social decision-making by endowing the law with

⁸⁴ Weil, *supra* note 2, at 421.

⁸⁵ In this vein, see *ibid.*, at 441.

⁸⁶ Tasioulas, *supra* note 3, at 123.

⁸⁷ Weil, *supra* note 2, at 442; see also at 427 and 433.

certainty. Moreover, only the separation of law and value can facilitate value judgments of the law; this is important given the radical de-centring of law and consequent re-centring of non-legal considerations in the international order. Viewed systemically, the absolutely voluntary nature of international adjudication (as opposed even to opposability⁸⁸) could be perceived as an invitation to break the law (not follow the rules) when utility or morality hold greater weight.

However, acceptance of such an analysis demands that the law retain weight as a consideration on action. This is perhaps best guaranteed by the rhetorical force of law, as it is a far more extreme position to assert ‘the law is wrong here, and we are not following it’, than ‘our conduct does not really break the law, which values allow us to interpret as . . .’. This in turn requires the conservative or reductionist features of law which provide certainty and stability in the normative order. Such stability, and therefore the authority, indeed the very role, of law itself is sacrificed in a fluid, value-driven, system. Thus, PIL has already removed the need for a value-oriented approach to law, while simultaneously endorsing a value-neutral approach.

⁸⁸ PIL has in fact three levels of norms — norms of the system, norms opposable to the given state, and norms admissible in adjudication against the given state — the applicability of which is increasingly dependent on their acceptance by states. Thus Tasioulas in fact conflates not just two, but three, separate questions through the use of a theory of adjudication to answer a question of norm formation.