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# Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL

Jason A. Beckett\*

## Abstract

*Despite Franck's claim that public international law (PIL) has moved into its 'post-ontological state', where controversy no longer surrounds its status as law, controversies over the ontology of PIL, and especially of customary international law (CIL) remain endemic. These controversies fuel the attack by Critical Legal Studies (CLS), and New Approaches to International Law (NAIL), scholars against a liberal-legal order all too easily portrayed as fundamentally indeterminate, a cover for its subjects' political interests. These critiques cannot be simply ignored, but neither can they be met easily, nor without cost. While CLS, and other critical discourses, seek to 'uncover' and 'explode' the ideologies and biases of law to demonstrate its inability to fulfil its promises, the present paper is intended to initiate the task of demanding that law, and especially CIL, live up to these very promises. But first, the nature of these promises, and the structure and purpose of law must be examined, analysed, and where necessary contested and decided; or rather, defined. In this regard, the hidden assumptions of legal theory must be uncovered and problematized; the debates over law must be disaggregated, before law itself can be properly determined. Only after these tasks have been completed can the nihilist challenges of NAIL be met.*

\* Lecturer in Law, University of Newcastle. Email: Jason.Beckett@newcastle.ac.uk. This paper is both a synopsis of my ongoing PhD thesis and an expansion of an Agora paper I delivered at the Inaugural ESIL Conference in Florence. As such, it owes its current form to the comments and contributions of several people. I should like to thank, in particular, my supervisors Iain Scobbie and Scott Veitch for believing in me, and allowing me to develop these ideas, as well, of course, as for their constant support and advice. I would also like to thank Grietje Baars for comment and support. I am, however, especially indebted to Akbar Rasulov and Jörg Kammerhofer for their detailed and erudite comments on various drafts during the evolution of this paper. It would also be remiss not to acknowledge the improvements resultant upon the comments and questions of those who attended the Legal Theory Agora session in Florence, and those who commented after the paper's second outing, at the Critical Legal Conference in Westminster, contributions which greatly sharpened the focus of the paper. Finally, I should like to thank the EJIL's constructively critical, and supportive, reviewers. Needless to say, all errors of content or style remain mine alone.

## 1 Introduction: The Nature of the Dispute

In considering the ‘beginnings’, or origin, of law, Willem Witteveen has recently observed that:

The question of Law’s beginning is a complicated one. Logically speaking, there must be some origin, some moment in time when the law came into being. After a certain date it must have started functioning, and then law was socially recognised for what it is. But for no established legal culture can we say in retrospect exactly when this origin occurred, at what time it must be dated.<sup>1</sup>

In other words, questions surrounding the beginnings, the coming into being of law, are questions beyond, and separate from, the discourses of legal history. They are questions which can only be answered logically, analytically, hypothetically, and thus contingently. They are questions of theory, not of fact, empirical reality, or history; and it is as *questions of theory* that I propose to engage with them here.

Moreover, questions regarding the origins of law are linked to, even parasitic on, questions regarding the meaning of law. For law to have a meaningful existence it must have distinguishing characteristics, identifying marks. Law must be socially differentiated, in the sense that it can be understood and observed as distinct from other phenomena, other social practices, and other normative orders. It would be at the point where these (proto-legal) phenomena first appeared as a synthetic whole that we could talk of the origins of law: of law’s beginning.

This entails that law has no natural existence, no set form, and no fixed ontology; law has no natural role, because law is *not* a brute fact.<sup>2</sup> Rather, law is a ‘thought object’.<sup>3</sup> Law exists *because we believe in it*; we do not believe in it because it exists. This is because law does not pre-exist our observation (as a new species of tree or insect, or an unexplored territory, might do) but is *constituted* in that original decision (now become an unarticulated and hazy assumption) to designate a specific constellation (configuration) of phenomena as law: law is constituted as an object of observation by the very act of observation itself. In other words, it is in designating a certain, specific, array of phenomena as law (and then ascribing power, and influence to this) that we create an ‘observable’ phenomenon called law. Therefore, law has no existence at all until we decide (and define) it to *be*. This entails, *inter alia*, that law is not a direct (objective) object of observation.<sup>4</sup> And *that* entails that we cannot determine what the

<sup>1</sup> Witteveen, ‘Law’s Beginning’, in F. M. J. Feldbrugge (ed.), *The Law’s Beginning* (2004), 221 at 221.

<sup>2</sup> MacCormick, ‘The Ethics of Legalism’, 2 *Ratio Juris* (1989) 184, at 191. However, this idea, the ‘thought-object’ or ‘institutional fact’ (the two do to some degree differ, but may, for present purposes, be understood as essentially synonymous) is itself drawn from Searle’s concept of a ‘social fact’, understood as an object created at least in part by the commitment and belief of those who observe and use it. Searle gives a short, comprehensive, but comprehensible exposition of the idea, and functioning, of social facts (and their relationship to the slightly more complex category of ‘institutional facts’) in J.R. Searle, *The Construction of Social Reality* (1995), Ch. 2, esp. at 31–57.

<sup>3</sup> MacCormick, *supra* note 2.

<sup>4</sup> I believe it is the confusion over this issue, the false belief that law has a real existence, a natural state which can be observed, which CLS/NAIL has pejoratively classified, and condemned, as reification; or rather as a primary example of reification, and the source for a general reification (juridification) of social life and patterns.

legal rules (comprising any given legal system, or governing any particular course of action) are until we define (decide) what law *is*.

We have the ability to make this choice, precisely because law is a thought object; were law a brute fact, we could not re-imagine it as other. Put more simply, humanity has control over the definition, and so the form of law. As law is *not* a brute fact, but rather a thought object, we – humankind – must have decided to create it, to believe in it, to effect the *existence* of law.<sup>5</sup> Thus law has no existence outside human agency, and so can be altered by the collective will of human agency. Only through human agency can the specifically legal form be defined and thus identified. The primary task of theory from this perspective is to determine *which* ascriptions of power (or the potential ascription of power to *which* constellation of phenomena) should be classified as law.

Originally then, law must have had a purpose, a reason for humankind to turn to it; in that sense then, law is a *tool*, this is the object (law) to which power and influence were ascribed; but the ascription of power is a *use* of the tool, it cannot therefore, be part of the tool itself. And yet, the tool must have displayed great utility to be used so often, and to be granted the force (power and influence) it now yields. Thus attention must focus on the possibilities of the tool itself, on *why* it gained such importance, and on what can be done to retain (or regain) its original utility. However, it must also be realized that this is an exercise in rational reconstruction, in analytic justification for, and understanding of, the phenomenon of law; it is neither a socio-empirical, nor a historical, claim.

Therefore, from an analytic perspective, law's force must be explained, understood, and legitimated. This would entail that, at some point, law must have gained a position of social centrality; law (as such) became equated with the Rule of Law (the *use* of the tool was conflated with the definition of the tool). At that point, law could no longer be differentiated according to the specifically legal (the tool itself), but only by its use (the observation of centralized authority). One pathological result of this was that the form of law was diffused, even abandoned, in the pursuit of the maintenance of social centrality. To keep law socially central (or definitionally authoritative), anything that could command the power of the Sovereign became understood as law. In this way, law lost its form, and became confused with any exercise of authoritative power. Moreover, as law lost its form, so its function altered; from regulatory code to institutionalized, enforced, *control*; regardless of means.<sup>6</sup> As this evolution has progressed, law has lost first its form, and then the reason for its form; form and function have suffered diffusion together.

<sup>5</sup> This forms one central theme of my current PhD research, and the research is on file with me, and available to anyone who wishes to see it.

<sup>6</sup> This opens up a string of questions, but two of especial importance are: *whose* control? Which necessitates a need for neutrality, so as to be *law's* control. And judgement against *which/whose* values; in attempting to sketch an ideal form of PIL in the concluding section of this article, I shall suggest that the values of the international community can be articulated with sufficient neutrality and determinacy to be considered the 'neutral' values from which law's neutral control can be structured.

Law has moved from being a specific mechanism (designed for particular purposes) to an amorphous blob, capable of anything, but not specialist at anything. From a delicate scalpel to a Swiss Army knife. What this entails is that there is no longer a core agreement on what law is – the ‘essence’ of law (as such) has been lost; or at least replaced with institutional enforcement. The impact, or consequence, of this is that legal theory has moved from the purposive to the descriptive. This, it will be suggested, is an error.

For legal theory to be a descriptive discourse (i.e. for legal theories to be evaluable according to the empirical accuracy of their observations, descriptions and predictions) law must be understood as a real object of observation, as something with a *direct* effect on the world. This, ultimately, entails that law be elided with enforced command or institutionalized legal order; so that either the enforcement/obedience of norms can be observed, or the functioning of an institution can be. This is a focus shared by *inter alia* Hartians,<sup>7</sup> Dworkinians,<sup>8</sup> and Legal Realists;<sup>9</sup> but conceptually opposed by Kelsen,<sup>10</sup> Austin,<sup>11</sup> and Fuller.<sup>12</sup> Where the former focus on the rhetoric or actions of legal institutions, the latter embrace law as ‘counter-factual’; as a thought object with defined empirical identifiers, rather than a brute fact, with real empirical effect and so existence.

In public international law (PIL) this divergence (and further divergences within each grouping) has its most extreme repercussions, in that it actually precludes ‘objective’ analysis of what the law says. Hart was in fact strictly correct *within his own methodology* to conclude that PIL was not a legal system;<sup>13</sup> but this can be used to demonstrate either of two *conflicting* conclusions. Either, PIL is *not* a legal system (but a mere primitive set of laws, some sort of Hartian normative primate awaiting evolution), or Hart’s *definition* of a legal system is wrong, or at least incomplete. The application of PIL *cannot*, in many cases, be observed through the (consistent) rhetoric or actions of official institutions. This, for those wishing to preserve the understanding of PIL *as a legal system*, should create a presumption in favour of perceiving law counter-factually, as a thought object.

However, this leads to a second set of complications: to perceive law (as a thought object) at all, we must determine which configuration of phenomena to designate as law (we must define the empirical identifiers of law). As it is only in this way that we can define a norm as part of the legal system at all. But the definition chosen will

<sup>7</sup> H. L. A. Hart, *The Concept of Law* (1st edn., 1961), at p. vii.

<sup>8</sup> Raban, ‘Dworkin’s “Best Light” Requirement and the Proper Methodology of Legal Theory’, 23 *OJLS* (2003) 243, at 261–262.

<sup>9</sup> See, e.g., Teubner, ‘Regulatory Law: Chronicle of a Death Foretold’, 1 *Social and Legal Studies* (1992) 451, at 460: ‘[a]nd if as good legal realists we are interested in law not as it appears in books but law in action . . .’.

<sup>10</sup> *General Theory of Norms* (1979), Ch. 1, V (at 2). However, Kelsen, like Austin, did then simultaneously simplify and complicate matters, by designating institutional enforcement as the *definition* of the specifically legal.

<sup>11</sup> J. Austin, *The Province of Jurisprudence Determined* (1995), at 18.

<sup>12</sup> L. Fuller, *The Morality of Law* (1964), at 41.

<sup>13</sup> See *supra* note 7, at Ch. 10.

determine which norms form part of the legal system. These arguments have not, to date, been authoritatively resolved in PIL.

For example, take this question: Was the recent invasion of Iraq illegal? I have heard many and varied responses to this, my favourite was the potentially contradictory Yes, the invasion was illegal, *but* the doctrine of precautionary self-defence is part of PIL. But, of course, it is the status of that doctrine as valid law which would frame the whole question of legality; especially at the point when it was (at least tenuously) arguable that Iraq did possess 'Weapons of Mass Destruction'. It is the existence, or not, of a norm permitting 'precautionary self defence' (or another permitting 'humanitarian intervention' for that matter) which is at the crux of the question of legality.

But, are these doctrines part of customary international law (CIL)? *That* is the question which I contend cannot be answered, *until* we can sort out the *theoretical arguments* over the nature of CIL. In other words, because the form we ascribe to CIL dictates the empirical identifiers we seek in the identification, or recognition, of the individual norms of CIL, we need a theory to determine what *constitutes a norm of CIL* in the first place. At present, a multiplicity of theories compete for our attention, and each defines, identifies, and recognizes the norms of CIL differently. That is, each theory is likely to conclude that different norms constitute the corpus of (the relevant part of) the system; each theory reports, in effect, upon a different system of CIL. This means, analytically, that we must choose a theory first (and defend that choice successfully) before we can use that theory to identify individual norms. The recognition of *legal* norms is impossible without a definition of law.

However, it should always be borne in mind that these arguments must *not* be confused with arguments over what a particular rule means, or over when it applies; on the contrary these are arguments over which rules exist, what constitutes a rule of CIL, and over how we can identify the rules of CIL.<sup>14</sup> The sheer scale, and the implications, of this question come into clearer relief when we take seriously Raz's observation that theories of law are really (or also) theories of legal systems.<sup>15</sup> The question of the ontology of CIL reflects disputes over *which system* of CIL to apply.

To put the matter less profoundly, but probably more controversially, in their impact upon the practice or argumentation of law, legal theories are ultimately tools or suggestions for the identification of valid legal norms.<sup>16</sup> In telling us what law is,

<sup>14</sup> The confusions and disputes lying at the heart of CIL, and causing its inexorable indeterminacy, are explored in some considerable depth by Jörg Kammerhofer: see 'The Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15 *EJIL* (2004) 523. In many respects, I would hope the present article can be understood as building upon, but also attempting to respond to (and begin to resolve), the issues raised by, Kammerhofer's analysis. It is not sufficient simply to identify indeterminacy; instead solutions to the problem of indeterminacy must be developed and offered for consideration. It is to the commencement of *that* task that the present article is aimed.

<sup>15</sup> J. Raz, *The Concept of a Legal System* (1980), esp. at 1–4.

<sup>16</sup> I should imagine any natural lawyer worth his or her salt would take great exception to this ridiculously reductive, *positivist*, analysis of the purpose and operation of legal theory. It is fair to say that many natural law theories do go far beyond this simple task, into profound speculation on the nature and fate of Man. Nonetheless, to have any real life impact, such theories must use their abstract speculation, ultimately, in order to identify legal norms, to tell us what the law does (or should) have to say on whichever substantive matter is being debated.

what it does, and why it does so, legal theories simply set the ground for their primary functional purpose: the identification of the legal norms applicable to the instant dispute, or the legal evaluation of particular (presumably contested) actions. All of this means that we must choose the orthodox theory (i.e. the theory to become, or to be considered, orthodox) *before* we can identify, analyse, or discuss the applicable legal rules.

Unfortunately, the above analysis notwithstanding, the problems of CIL's structural indeterminacy have still not been fully articulated. Even to frame a debate over which system of CIL to apply in itself *assumes* that law is a system of rules (not a process,<sup>17</sup> a search for 'true' 'justice', nor a sham), it further *assumes* that these rules are socially differentiated from other rules; and that they are distinguished by their 'legality', their specifically legal quality (not their effect, compliance pull, legitimacy, or substantive content). Moreover, and possibly finally, it *assumes* two functions of law, to provide objective answers through consistent rule application, and to provide formal equality by applying the same rules equally to all.<sup>18</sup> Naturally those (e.g. Slaughter, Bayefsky, Teson, Reisman, the late Myers MacDougal) pursuing the 'Liberal Alliance', would not endorse *either* of these goals, especially the second. Law in their lens is *not* blind or impartial, it is evaluative and judgemental – partisan, not equal.

To render it susceptible to (even quasi-)objective resolution, the debate over what the law *is*, the necessary prerequisite to the debate over what law *says*, must itself be disaggregated. In order to facilitate this, an evaluative system must be postulated to allow us firstly to understand, and to accurately (and fairly) frame, the debate. And secondly to find (designate) an agreed, quasi-impartial, perspective from which to analyse the debate and choose sides. There are no Archimedean points in social science, nor in observation, yet it is from the perspective of such observation that law must be identified and evaluated. I will briefly expound and defend the suggestion that *purpose*, the purpose of law or legal regulation (as such<sup>19</sup>), provides such a neutral perspective; a perspective which we could term an *artificial outside*.

However, for now, the important thing to realize is that, even for a positivist, PIL (in fact, 'law' as such) cannot be 'objective' in the classic sense of impartially observing

<sup>17</sup> This is *not* to say that that process is unimportant to the positivist understanding of law. Positivists necessarily rely on processes of normative evolution to create new rules; however, the processes are then valued only to the extent that they *do* create new rules. Thus it is the outcome of the process (the rule or non-rule) which is decisive to the positivist analysis; only this outcome counts as law; the process itself is a prerequisite of law, but *therefore* is not part of (the) law.

<sup>18</sup> Which, of course, in and of itself *assumes* law to be a functional object, and not a brute fact. This is because there is no purpose to arguing about the most desirable structure for law *unless* law is an object capable of constitution, and so alteration, by definition and agreement. These debates would be simply meaningless if law – like gravity, or that unexplored territory – were a truly extant object of observation, a brute fact awaiting only identification and description.

<sup>19</sup> Here, another fine distinction must be introduced; that between the purpose of law and the purpose(s) pursued by any given legal system, or embodied in any given norm. My argument here is that a purpose must be ascribed to law as such to give law *form* (i.e. a purpose which will effect the ontology of law), and this is both more formal and more abstract than the purposes pursued by specific legal systems or norms (which give law content, and so operate at the *deontological* level). The former tell us about the nature of the 'tool', law; the latter about its deployment.

a body of norms and identifying its content (the norm on point). Legal theory does not describe a ‘true reality’ consensually agreed as law, we cannot empirically identify the rules, but must (first) normatively argue for them. In other words, positivist objectivity, like natural law morality, must be the *conclusion*, not the premise, of debate. Before we can employ any ‘objective’ analysis of the law, we must first show *why* our favoured theory should be adopted (generally or for this subject matter), as only then can we (consistently intersubjectively) identify the legal rules.

Of course, we could reverse this process. We could choose the ‘appropriate’ conclusions first and *then* choose the theory which provides the ‘best’ conclusion and adopt and apply *that* theory ‘as law’. However, this would not, to me at least, be law (it would be devastated by Koskeniemi’s critique, to which we shall return); but would be ‘total justice’; it would be rule scepticism. Moreover, it would be impossible to apply when there is no correct answer; as Neil MacCormick noted, the need for law is greatest when moral agreement is absent.<sup>20</sup> To ignore this would be to adopt the rule of man, not of law.

## 2 False Agreement, and the Theoretical Options

It is also important to realize, however, that arguments over the ontology of law are disguised by apparent agreements, particularly in the sphere of CIL. Disputes over which rules exist are thus completely elided with disputes over the content, meaning and applicability of rules (already *presumed* to exist). This confusion occurs because the external dispute over the nature of law has been transposed into an internal plurality of articulated and unarticulated theories of Customary International Law. Once again, these issues must be separated. CIL must be accurately defined, before it can be observed; or have its rules evaluated for content, meaning and applicability.

This is not an easy task. In fact, even *if* (on top of all the assumptions we made earlier) we also assume a two-element theory of custom formation (and, of course, Kelsen<sup>21</sup> and Cheng<sup>22</sup> have both disputed this) and even *if* we assume the two elements to be *opinio iuris* and state practice,<sup>23</sup> we have still not reached any real agreement. More must be done: we must agree on the *relationship between* state practice and *opinio*, and then we must agree on a *definition* of each concept.

<sup>20</sup> MacCormick, ‘The *Concept of Law* and the *Concept of Law*’, 14 *OJLS* (1994) 1 at 6.

<sup>21</sup> Kelsen, ‘Théorie du droit international coutumier’, 1 *Revue Internationale de la Théorie du Droit* (1939) 253–274. However, Kelsen subsequently abandoned this position: see *The Pure Theory of Law* (2nd edn., 1960), at Ch. 35.

<sup>22</sup> Cheng, ‘United Nations Resolutions on Outer Space: “Instant” International Customary Law?’, 5 *Indian J Int’l L* (1965) 23–48.

<sup>23</sup> And, of course, D’Amato, at least, has rejected this claim: see A. D’Amato, *The Concept of Custom in International Law* (2003), at 73–86. Moreover, Mendelson appears to agree with D’Amato: see Mendelson, ‘The Subjective Element in Customary International Law’, 66 *BYBIL* (1985) 177; an article characterized by Thirlway as ‘an eloquent plea for the abandonment of the concept of *opinio iuris*’: see ‘The Sources of International Law’, in M.G. Evans (ed.), *International Law* (2003), at 117 and 143.

### 3 A Schematic Overview of the Theoretical Possibilities

Roughly speaking, the options for the relationship between practice and *opinio* are that they could create CIL as *either* an aggregate or a synthesis. But this shifts the question immediately onto the definition of each part. To provide a synthesis, the two parts would have to be part of the same thing, reflections of each other; inexorably bound and inseparable. To be an aggregate, the opposite must be assumed, that the two elements are radically separate from one another, each enjoying an atomistic existence. These options reflect, summarize and encapsulate the classic and the modern theories of custom respectively. As should be apparent, they *cannot* be reconciled – I shall return to Anthea Roberts' suggestions to the opposite effect<sup>24</sup> later.

There are two central options for state practice, either it is *everything* that states do, or it is *some of what* states do. After this choice is made – or perhaps before this choice is made – we must decide how to decide which of the things which states do should count as state practice. This question has been answered in different ways: for a classic natural lawyer, like Teson,<sup>25</sup> it is the congruence of the action with a posited ethical order (deemed self-evidently timeless and correct) which separates practice from mere conduct; for a classic positivist it is *opinio* which differentiates practice from conduct.<sup>26</sup> Brownlie at some points seems to suggest legality serves this function.<sup>27</sup> Those following D'Amato,<sup>28</sup> New Haven, or a Dworkinian approach<sup>29</sup> must, I believe, assume all state actions to be state practice.

*Opinio iuris* too is a term of many meanings: it could be about the nature of the *claim* to act, or about the reception of this claim. Alternatively, it could be wider, covering all that states say (normative *opinio*); or, again, it could be some of what states say – e.g. that sufficiently congruent with world order values. Then again *opinio* may be a 'state of mind' imputed onto states. Within this latter perspective, *opinio* could be understood as a belief in legality, a consent to be bound, or a simple normative claim for legality.

It is already almost impossible to track the potential permutations available between state practice and *opinio iuris*, the 'agreed elements' of CIL. However, all that must be stressed for now is that each permutation will focus on different data; each perceives rule formation differently, and so each will return different rules. Moreover, these differences are largely masked by the apparent agreements over the structure and elements of CIL; and by their elision or confusion with those disputes over the content and meaning of rules; disputes which are endemic to the practice of law. It is the combination of all of this which leaves CIL wide open to the nihilist critiques of NAIL. Law is not an application of rules, it is an act of choice; justified *ex post facto* by

<sup>24</sup> Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* 757.

<sup>25</sup> F. Teson, *Humanitarian Intervention* (1997), at 11–15.

<sup>26</sup> The classic exposition is from the *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, at 43.

<sup>27</sup> Brownlie, 'Humanitarian Intervention', in J.N. Moore (ed.), *Law and Civil War in the Modern World* (1974), at 219 and 221.

<sup>28</sup> *Supra* note 23, at 87–98.

<sup>29</sup> See, e.g. Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the *Nicaragua Case*', 16 *OJLS* (1996) 85.



reference to rules: come back Llewellyn, Holmes, Hutchison – you were right all along.

#### 4 CLS – A Labour of Love

But, and here is a curious point, none of these theorists *wanted* to be right.<sup>30</sup> The same is true of CLS/NAIL. Peter Goodrich, following Teubner, terms it ‘the Crits secret love of the law’;<sup>31</sup> this is a negative love, a hard love; but it is a love nonetheless: an ‘epistemically hidden . . . desire for a return to legal idealism’.<sup>32</sup> We could almost see Crits as frustrated formalists (this is certainly how Higgins portrays Koskenniemi<sup>33</sup>), throwing a tantrum because the legal system doesn’t live up to its promise. But, of course, that assumes the system has a promise; moreover, it also assumes that we all agree on that promise – on the purpose of the system; on *what law is for*.

This becomes clearer if we think broadly<sup>34</sup> about Koskenniemi’s critique, as formulated in the destructive dialectic between Apology to Utopia. The power of this critique, its emotive purchase, lies in the dream it posits: good law – and especially good PIL – cannot be *either* apologetic or utopian. Law *should* be impartial, objective, formally equal, and representative of the values and desires of all. That is the *positivist* dream. For a consistent natural lawyer, *of course* the law should be utopian, provided only that it chooses the correct Utopia.<sup>35</sup>

In essence Koskenniemi is arguing that as PIL is based on the consent of states, it cannot provide an external *constraint* on state behaviour. Moreover, even insofar as states do accept the obligations of CIL, they simply agree to conduct themselves as they would have anyway: in effect, CIL still provides no *external* constraint on state behaviour; CIL remains Apologetic. The only alternative to this, according to Koskenniemi, is to *impose* rules on states based on something *other than* (and indeed in opposition to) state conduct: but this would be unrealistic, manipulable, Utopian. Thus, CIL cannot but be utopian or apologist, or oscillate between the two poles: to that extent, CIL is therefore *not* (*good/acceptable*) law:

<sup>30</sup> See e.g. MacCormick, ‘Reconstruction After Deconstruction: A Response to CLS’, 10 *OJLS* (1990) 539, at 541–547, especially n. 13.

<sup>31</sup> Goodrich, ‘The Critics Love of the Law: Intimate Observations on an Insular Jurisdiction’, 10 *Law and Critique* (1999) 343, at 344.

<sup>32</sup> *Ibid.*

<sup>33</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 14–16.

<sup>34</sup> I shall expand on this point subsequently, but for now it suffices to consider again the works of Fenando

<sup>35</sup> Teson. Teson does not seek a neutral law, but a *liberal* law, and a substantively liberal law at that. His argument is predicated on the genius of Immanuel Kant, on the claim that obeying (substantivized) reason as suggested by (Teson’s reading of) Kant is in itself *freedom*. We do not need to seek the values of all if certain values are *objectively correct*. In other words, Teson’s theory is openly and unapologetically Utopian; in that sense then it becomes immune to Koskenniemi’s critique (though it may, of course, fall to the second aspect of Koskenniemi’s critique of Utopia which claims the level of abstraction at which a political theory must operate actively precludes the theory from producing determinate concrete results, see, e.g., Koskenniemi, ‘The Politics of International Law’, 1 *EJIL* (1990) 4, at 8).

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.<sup>36</sup>

The demands of concreteness and normativity simply *cannot* be reconciled within Koskenniemi's bleak schema of intelligibility; a neutral, *and determinate* CIL is simply an unattainable fantasy. This will primarily result in the law providing indeterminate and/or conflicting norms *at both ends of the spectrum*. Once we add in the manipulability of the poles themselves (the potential for oscillation between the two) indeterminacy becomes endemic and inexorable: CIL, for Koskenniemi, is ultimately contentless (or saturated with conflicting content, which is, to all intents and purposes, the same thing<sup>37</sup>). CIL is not law, as it emanates from state will, and so cannot constrain state behaviour:

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 content 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.<sup>38</sup>

Ultimately then, Koskenniemi's critique, and concern, revolves around a lack of distance, an absence of *alienation of power*, the absence of a Sovereign to *decide*<sup>39</sup> on the content of the law: the absence of a Sovereign to *impose* its will as law. Lurking behind Koskenniemi's pessimism is a desire for sovereignty, an implicit recognition of a

<sup>36</sup> *Ibid.* It should be noted that this critique is really an elision of several distinct points. It is an assertion of the impossibility of impartial norm *formation*, at least at the international level, rather than a critique of the possibility of impartial norm identification or application, such as is more commonly associated with the domestic CLS projects. Moreover, the feeling that the critique is specific to PIL and not an attack on the possibility of law generally (as, perhaps, David Kennedy's work is) is reinforced by the Utopian section of the attack, as surely imposing a political vision is one of the primary *purposes* of a municipal legal system, most especially a system commanding democratic legitimacy, and so (in theory) its subjects' mandate for the political vision to be imposed. The critical question for PIL, then, is can norm *formation* – which cannot be either objective or value-neutral – be rendered politically unobjectionable? I believe this question can be answered affirmatively, but only by a theory of *legal* positivism; and this becomes clearer as we realize that Koskenniemi never really had PIL as such in his critical sights.

<sup>37</sup> See Cover, 'Nomos and Narrative', 97 *Harvard LR* (1983) 4, at 53; T. Hobbes, *Leviathan* (R. Tuck (ed.), 1991), at 88–91.

<sup>38</sup> Koskenniemi, *supra* note 35, at 8. However, 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.

<sup>39</sup> In this sense, I believe Koskenniemi's critique is essentially Schmittian in nature. It is a critique of liberal methodology; the deployment of which is presupposed by the agreed adoption of the liberal elision of law and the rule of law. It is thus a critique of the inability to agree on a (substantive) justification for the legitimacy of (the centrality of) law; and consequently on the form and content of that law.

necessary link between sovereignty and law. These concerns, *per se*, are not misplaced. There is a connection between sovereignty and law, law should not be apologist (at least in the sense of descriptive<sup>40</sup>) and PIL should not be utopian (although municipal law perhaps ought to be utopian in at least one sense<sup>41</sup>). In other words, the *premises* of Koskenniemi's critique are apposite; but only as a consequence of our having made certain decisions, or *assumptions*, about the nature of law.

Furthermore, under the present condition of CIL, Koskenniemi's critique gains force because of the endemic confusion (outlined above) between debates concerning what the law *is* and those over what the law *says*. However, having adopted the premises of the critique (i.e. that law/PIL *should not be either apologetic or utopian, much less oscillate between the two*), I believe an immanent response is viable. But first the two levels of critique germane to the present task must be separated.

I believe Koskenniemi's critique in fact works on, at least, *five* separate levels:

- (1) the *ontology* of 'Law';
- (2) the legitimacy/obligatoriness of 'Law';
- (3) the identification of the applicable legal rules;
- (4) conflicting substantive rules;
- (5) conflicting methods of interpretation.

These arguments must be separated and analysed, and reconstituted and evaluated: we must choose *between* theories of CIL in order to answer questions 1 and 3; because it is only when these issues have been resolved that the other questions lend themselves to framing and resolution; i.e. such framing and resolution can only be 'objective' *within* the confines of a *single*, chosen, theory. Yet, of course, *how* we wish to resolve the latter questions will impact decisively upon how we answer the former.

Thus, for example but also especially, the relationship between our answers to questions 1 and 2 will be primarily determined by our commitments in regard to 2. If we perceive law as *always* and/or *necessarily* obligatory (and/or legitimate), legal theory takes on a specific task: 'to make . . . the reach of legal authority co-extensive with the reach of law', as Dyzenhaus suggests we should.<sup>42</sup> This directs the ontology of law,

<sup>40</sup> The poles of Koskenniemi's critique are themselves open to multiple interpretations, with Apology bearing at least three *different* meanings, though only two are relevant for present purposes. Laws can be apologetic *either* because they alter at the moment of application (they become descriptive) *or* because they embody the values of their subjects. In relation to CIL, *only* the former critique is damaging; the latter in fact should be best perceived as a form of praise, not critique; as an achievement, not a failing.

<sup>41</sup> The Utopian pole of Koskenniemi's critique also bears two meanings. Laws can be Utopian by reflecting *either* a determinate or an indeterminate political theory. The latter is uniformly bad, and in effect elides with the first understanding of Apology, *supra*. The former, the imposition of a determinate political theory is negative only in so far as (a) it is anti-pluralistic, *and* (b) anti-pluralism is itself bad. Condition (b) is present in CIL, but is assuaged in municipal law, where the very function of government is to impose (at some level) a unifying political theory. These points, and those in the preceding footnote, are developed in the elucidation of Koskenniemi's critique *infra*.

<sup>42</sup> See Dyzenhaus, 'Positivism's Stagnant Research Proposal', 20 *OJLS* (2000) 703.

necessitating reflexive, detailed, *indeterminate* rules,<sup>43</sup> and fixed external values to bring determinacy to rule application.

Similarly, if we root the authority of law, as many positivists are wont to do, in the threat of force entailed by disobedience, then the ontology of law (the definition of the phenomena to be understood as law) must also be rooted in force. Thus ultimately, any identification of law with force, although in reality a *political* (normative) response to question 2, becomes the data for question 1, and therefore *determines* the ontology of law. None of this is necessary if we abandon the absolute commitment to obligatoriness, or reconceptualize the nature, and/or role, of obligation within law.

However, interesting though these debates may be, they lie beyond the scope of this short paper. What is important for now is the fact that it is in conflating the five levels of debate that CIL leaves itself totally exposed to the force of Koskenniemi's critique – the debates are not objectively resolvable in aggregate. As a result of this elision, debates over the legal regulation of contemporary international life are characterized by confusion, oscillation, manipulation, utopian dreams, and an apologist deference to power. To repeat, we simply cannot (determinately, objectively or authoritatively) answer the question of what law *says* until we have answered the question of what law *is*; or rather, of which theory should (does) constitute the orthodox position.

Therefore, I contend that to answer Koskenniemi's critique we must first resolve the debates over the nature of CIL, and then defend our (single) chosen favourite theory. To carry out this defence we must first locate, and then fully articulate Koskenniemi's charge. To do so we must consider the powerful ambiguities at the heart of the critique; we must deconstruct the deconstructionist's apparent nihilism, bring out the critique's contradictions, and display our capacity to respond to the whole (properly understood). But, before that, we must consider the theoretical options available to us, and evaluate these in relation to, *inter alia*, Koskenniemi's critique.

## 5 Theoretical Divergencies and Options

To recapitulate briefly, we cannot objectively identify the content of legal rules in any given area of regulation unless and until we have established the orthodox legal theory through which the rules themselves are to be defined; and so by which the rules are to be identified. It is by adopting this methodology that we are able to separate arguments over what the law says from arguments over what the law is. Only after the latter arguments have been resolved can the former be rationally formulated.

Obviously, I cannot begin to synopsise the various candidates for a theory of CIL; instead I wish to focus on a claim made by Roscoe Pound many years ago, a claim picked up and amplified by Fuller. Pound said, 'ideas of what law is for are . . . largely implicit in ideas of what law is'.<sup>44</sup> Fuller premised his entire theory on this claim that law *necessarily* had a purpose, and thus law must be restricted to forms and techniques

<sup>43</sup> If adopted, these would be akin to what Tom Franck has termed 'sophist rules': see T. Franck, *The Power of Legitimacy Among Nations* (1990), at 52–55.

<sup>44</sup> R. Pound, *An Introduction to the Philosophy of Law* (1999), at 46.

*appropriate* to the realization of this purpose; he called this essentialism. Fuller claimed that any object which had a purpose also had an essence,<sup>45</sup> a minimum concentration of properties allowing it to serve its function and be recognized as an object of its type. Fuller's argument, which I crudely articulated in my opening, is that this essentialism has been lost in regard to law – primarily because we no longer think about what law is for. Yet we all have views on this, whether we articulate them or not.

It is in disguising these divergences, these disagreements, behind the word 'law' (and/or the phrase Customary International Law) that we court confusion, and commence that oh so regular jurists' habit of caricaturing one another, while talking past each other to our own echoes – then pretending we've 'won' the 'debate' (each and every one of us). The debate, tragically, has never so much as been framed, let alone initiated, and much less resolved. I would suggest, schematically, that theorists, black letter academics, and practitioners of international law, transpose – or probably more accurately transplant<sup>46</sup> – assumptions about the 'nature of law', from the theory and practice of municipal law; to the alien environment of international society. Two problems arise as a result: first municipal law is not, itself, a coherent, nor an unproblematic, concept; and second PIL is *not municipal law*.

However, once again, the disaggregation of debates may prove of great utility here. I believe that the 'concept of municipal law' can itself be subdivided into the necessary presence of four (or possibly five) key components, or central features. Municipal law – and thus, for the unreflexive, law as such – is:

- socially central (law has *an* answer to *all* questions);
- enforced (law must be enforced and thus law *is* what is enforced; Hart, or American Legal Realism);
- impartial (the same laws apply, in the same way, to all subjects<sup>47</sup>);
- determinate (we can identify the laws quasi-objectively);
- (possibly) in some form congruent with a posited moral demand (Finnis).

The most interesting questions are which, if any, of these characteristics is truly necessary, definitional or paradigmatic? Alternatively, which syntheses of the available elements can be created; how does privileging or concretizing some (groups of) features, while excluding or marginalizing others, affect/effect our understanding of law? In this regard, there seems to me to be an undeclared, but generally observed, convention that enforcement and centrality are the paradigmatic features of law,<sup>48</sup> with the corollary

<sup>45</sup> Fuller, *supra* note 12, at 145–151.

<sup>46</sup> The, very useful, distinction between transplanting and transposition was developed, and is nicely elucidated, by Esin Özüçü: see her 'Law as Transposition', 51 *ICLQ* (2002) 205.

<sup>47</sup> Or, more precisely, to all subjects within a given (specified) class; however, within PIL (if we take sovereign equality seriously, even at the formal level) then there is only one primary class of subjects; the sovereign states.

<sup>48</sup> Even Fuller, despite railing against the confusion of 'deference to constituted authority with fidelity to law', acknowledged the need to enforce law, and indeed even incorporated that need, implicitly, into his (wrongly) fixed enunciation of the purpose of law: 'to *subject* human conduct to the *governance* of rules' (see *supra* note 12, at 106). Thus, enforcement – while generally considered insufficient for a definition of law – is nonetheless an agreed element in almost every theoretical analysis of law. The necessity for an enforced order is legal common sense.

that the others can be marginalized as needs be. That is, following the elision of law and Rule of Law mentioned earlier, institutional enforcement, and the description of institutional techniques has become the principal focus of a largely descriptive legal theory.<sup>49</sup> Within an institutionalized municipal legal order this may make sense, though even here it must be open to normative or political challenge, simply because it implicitly posits a brutally Hobbesian purpose (the imposition and maintenance of order) to law as such. Certainly Fuller openly objected to this privileging of power over the specifically legal.<sup>50</sup>

However, given our immediate focus, the most important questions reside in the transposition of law from the municipal to the international sphere. In working out which features, or syntheses of features, could be most fruitfully developed to create, define and identify PIL or CIL. My argument is that, ultimately, the debate revolves – and must be *resolved* – around the purpose of law. It is only once we have agreed on a purpose for law (or more precisely, for the specific legal system under consideration) that we can identify and articulate law's ontology; and only *then* can we 'objectively determine' the content (the norms) of the given legal system. Moreover, at least in relation to PIL, I fully believe that only a well articulated, and carefully delimited, *positivist* theory can provide a satisfactory mechanism for the implementation of a coherent and acceptable purpose.

There are, to my mind, and excluding radical scepticism, only three generic options for theories of law:<sup>51</sup> Classic natural law;<sup>52</sup> Modern natural law;<sup>53</sup> and Positivism.<sup>54</sup> Classic natural law understands law as something analogous to a brute fact, law from this perspective has a fixed ontology and fixed limits, it is defined and identified through reference to its necessary congruence with a given ethical order, itself postulated as timelessly, universally, and self-evidently, correct. Modern natural law must also understand the formation and identification of legal norms as a value-centric process; the central difference being that the values are no longer postulated as self-evident or timeless, but merely as contingently correct for now. Positivist theories are united in the claim that the identification of legal norms should, and can, be a value-free process.

## 6 Choosing Theories, or toward a Topography of Critique

At its very simplest and starkest, a legal theory is the exposition and justification of a technique (or method) for identifying, interpreting and applying the norms of a given legal system, or of Law generally. Different theories make more or less

<sup>49</sup> To some extent at least, I agree with Dyzenhaus in apportioning a large share of the blame for this to H. L. A. Hart, and his peculiar understanding of the real ontology of law: see *supra* note 42.

<sup>50</sup> Fuller, *supra* note 12, at 41.

<sup>51</sup> This is intended in the restricted sense of theories of what law *is*; not theories of what law does, or theories of how law is manipulated, or critiques of the contents and biases of law, etc. I see these other kinds of theorizing as extremely important, but, following Kelsen, I also see them as derivative of, or even parasitic to, the fundamental debate over what law is, without which none of the other lines of enquiry would make sense.

<sup>52</sup> Exemplified by the works of Teson, Hall, and Finnis.

<sup>53</sup> Exemplified by the works of Tasioulas, D'Amato, Kirgis, and possibly Roberts.

<sup>54</sup> I take no particular theorist as an exemplar of ideal positivist theory in CIL, and thus shall attempt a sketched exposition of how positivism *could be*, in response to Koskeniemi's critique.

grand claims beyond this, but ultimately, all must fulfil this basic function in order to operate; and to maintain any relevance whatsoever to the practice of law. A direct, but often overlooked – ignored, disguised or even denied – corollary of this is that all law, even the blackest of black letter law, is always already the application of a theory of law: law does not *and cannot* have (nor maintain) an a-theoretical existence. Therefore, because the theory we adopt will determine how we perceive law, what is then required is a *technique* for choosing a preferred theory.

There are several ways in which disagreement with, and critique of, extant theories can be structured, and several sources from which it can flow. Therefore, it is advisable to clarify the nature of one's disagreement with any given theory, rather than confusing (mistaking the target of) or eliding dislikes. To do so, however, some form of topography, or typology, of critique must be assumed or stated. If we adopt the Fullerian position, that law is a purposive enterprise,<sup>55</sup> and that Law takes its form from the concretization of its purpose, as outlined above, then the structure of a topography of critique becomes apparent.

In order to elaborate, or fully articulate, a preferred theory we must go through several steps, which will also serve as our means of justifying and defending that theory. First we must postulate the precise (formal) purpose of the given legal system. Then we must expound and clarify our assumptions about the present nature of society (in this case international society), and any other empirical presuppositions necessitated by our preferred theory. Then we must offer an exposition of the theory itself, the ontology of law it embodies, and how this operates. Finally, we must demonstrate the effectiveness of our chosen means (theory of law/legal system) in linking the empirical presuppositions with the desired ends (purpose). A topography of critique simply focuses on each of these steps in the negative.

What is important to realize is that the steps must be disaggregated, and that it is this which gives rise to the varying levels of critique. Composite critique of whole theories is simply impossible, because no objective, nor even consistently intersubjective, frame of reference can be created. Therefore any critique of alternative theories must focus on their component parts in isolation. At the simplest level, disagreement can be normative or analytic and can be focused on either means or ends, or more often on the inter-relation between the two. Disagreement could also focus on the accuracy, or desirability, of the presuppositions of the challenged theory. This is simply the reverse abstract perspective of what makes a theory good, or of what law is for. *If* law is a tool, then surely the purpose of law is to provide utility, to be a useful tool; to facilitate desired ends by efficacious and acceptable means. In that case, the evaluation of law, or rather of any given legal theory,

<sup>55</sup> For the avoidance of doubt, I am adopting Fuller's position only at its most abstract. I do *not* agree with Fuller that law must be unitary, and thus must have only one purpose. Nor do I necessarily agree with the specific purpose which he allotted to law as being the best available. In fact I would contend (but shall not elaborate here) that Fuller's deeply Anglo-American Liberal perspective on human agency is in fact the driving force of his work, which in result – though not in methodology – is far more classically natural law than is generally realized.

must focus on: the empirical conditions; the means; the ends; and the inter-relations of the three.

This may become a little clearer with reference to some brief, relatively concrete, examples:

- (1) Empirical conditions (presuppositions): liberal imperialism, in setting domestic tolerance of international actions as the test of legality,<sup>56</sup> assumes an educated, informed, concerned *demos*; this presupposition is manifestly unfounded.<sup>57</sup>
- (2) Means: classic natural law *assumes* that law is for the imposition of morality, and that the chosen morality is objectively correct; both assumptions can be attacked.
- (3) Ends (purposes): liberal imperialism, or modern natural law, theories can become concrete and determinate, but only at the expense of pluralism; the theories must seek to impose a *specific* (e.g. Anglo-American) World-View; the desirability of this end can be problematized.
- (4) Inter-relation of means and ends: Dworkinianism *assumes* authoritative-decision-makers will act consistently, and in the general interest;<sup>58</sup> again this assumption can be problematized.

What must be remembered, at the risk of repetition, is that these arguments must be separated: a good theory must be defensible at each level *independently* of its desirability in other regards. This is because it is *only* by separating the debates that we can formulate them in a manner conducive to rational argumentation. Until the ends (purposes) of law have been established, it is simply *pointless* to debate over which theories will best advance the purpose of law; the very question makes no sense, especially as different theories pursue conflicting purposes.

## 7 Locating Koskenniemi's Critique within the Topography

Koskenniemi's critique becomes the analytic *litmus test* within the topography of critique as outlined above. Passing this test is a necessary, but never a sufficient, condition for the acceptability of a theory of CIL. This is because, as noted, Koskenniemi's critique can be 'side-stepped' by those willing to endorse *either* Apology or Utopia, and thus substantivize their imposed morality, or leave law as a descriptive justification of the actions of, e.g., the Liberal Alliance. Either of these responses must be met at the *normative*, rather than the analytical, level. A successful theory must be defensible at all levels, the *best* theory preferable at all levels.

In other words, Koskenniemi's critique only works against those who assume certain purposes or characteristics to be innate to the law as such: consistency, impartiality, objectivity. It is a critique fashioned out of love. It is an important critique, but one which can be met. But, what is the critique? Koskenniemi claims two related points

<sup>56</sup> Teson, *supra* note 25, at 81–101.

<sup>57</sup> See, e.g., E. Herman and N. Chomsky, *Manufacturing Consent* (1988). See also current opinion polls demonstrating that up to two thirds of the US population *still* believes Iraq and/or Saddam Hussein was responsible for the Sept. 11 Attacks on the Twin Towers.

<sup>58</sup> Tasioulas states this clearly: Tasioulas, *supra* note 29, at 104, n. 95.



and a dialectic conclusion: PIL can admit to being neither apologetic nor utopian, yet PIL cannot help but be one or the other. *Therefore* PIL exists in a permanent and manipulable oscillation between the two.

Before responding to this critique, we must understand the poles themselves. Koskenniemi's critique can be read in either of two ways: we can understand the critique as truly deconstructionist in as much as its own polar dichotomy has always already been deconstructed: the poles are so reliant on one another as to conceptually meet. Perceived in this way, Apology relies on and contains Utopia, and vice-versa. Alternatively, we can adopt a more rigorously analytic model and examine the elemental components of each pole in isolation.

Viewed from this latter perspective (which shall be adopted for the remainder of the present paper) Apology has three distinct meanings:

- (1) CIL is descriptive of what states do (law must be normative)
- (2) CIL reflects the wishes of its subjects (and therefore cannot be normative)
- (3) CIL reflects only the wishes of states (and they are not very nice)

Utopia, on the other hand, has two contradictory meanings:

- (4) CIL reflects a consistently imposed political theory (this is anti-pluralistic)
- (5) CIL reflects an indeterminate political theory (and is therefore open to manipulation at the point of application)

In my opinion, only points 1, 4, and 5 are genuinely critiques, which require refutation. Points 2 and 3 are different. Point 2 should be a source of pride – to everyone from Kantians to Anarchists, and certainly to anyone who believes in the idea of democracy. Point 3 is a political (not a legal) critique; the question of the goodness or badness of states is radically separate from the question of the conceptual validity or practicability of CIL. So, the real question is, can we construct a theory of CIL which encapsulates point 2 (and probably, at least in the interim 3) and uses these to ward off critiques 1, 4, and 5? The answer, of course, is yes.

## 8 Law and Values: A Vexed Question?

The relationship between law and values is often perceived (and/or portrayed) as the Achilles' Heel of legal positivism,<sup>59</sup> but this is based on a misunderstanding, on a false belief that positivism seeks after a value-free process of law creation, and a value-free law. Positivism, in reality, need not, and should not, pursue this aim. In a very important, but greatly under-emphasized, passage in *Legal Reasoning and Legal Theory*, Neil MacCormick noted that:

[T]here is nothing antipositivistic about saying that law is not value-free. Nobody in their right mind – and there are at least some positivists who are in their right mind – has ever suggested or would ever suggest that the law itself is value-free.<sup>60</sup>

<sup>59</sup> Gardner, 'Legal Positivism: 5½ Myths', 46 *Am J Jurisprudence* (2001) 199, at 223–224.

<sup>60</sup> N. MacCormick, *Legal Reasoning and Legal Theory* (1978), at 233.

Law *cannot be* value free; laws (like all other norms and rules) by their very nature embody, universalize, and then impose, *particular* (or *specific*) values.<sup>61</sup> Law, in Kadar Asmal's memorable phrase, is a 'congealed politics';<sup>62</sup> a (momentarily) closed and fixed set of values, generalized to set the standards for all, and then insulated in their application from direct political critique or manipulation. Thus the search for a value free, or neutral, law is misguided, and more importantly directs attention away from more fruitful lines of inquiry. The *real* question is: How do we decide which values to universalize? How do we choose which values to embody in the law, and thus to universalize as the ground rules for all?

In a similar, but more radical vein, Michel Foucault inverted Carl von Clausewitz's famous aphorism 'War is the continuation of politics by other means',<sup>63</sup> to read 'Politics is the continuation of war by other means'.<sup>64</sup> And law, of course, is the congealed, the frozen, outcome of political struggle; thus law is, ultimately, the result of war; laws are not true universals, but rather, *particular* values *universalized*. The immediate question then turns to the *form*, the specific identifying marks, of law, or more precisely of CIL. That is, the question is how do we decide which values to incorporate, or, how do we define the existence of a norm of customary international law? This sets up the constructive dialectic between the purpose and the form of law (in a specific societal setting).

This allows the question to be narrowed down, and precisely focused. What must be attempted, accepting that law is a congealed politics, and that politics is war continued by other means, is to turn that politics into one of negotiation, compromise and accommodation (a politics of peace) rather than defeat, imposition and victory (a politics of war). The aim must be to articulate a theory of law which recognizes, and *agitates* for, (but does not impose) commonality and agreement; not a theory which legitimates the imposition of values and a forced homogeneity passed off as commonality. Thus the purpose of CIL ought to be the distillation into legal rules of the common values of its subjects. Therefore, the structure of CIL must be understood as facilitative of this *specific* (if formal) purpose. My contention is that, properly understood, at least in the realm of the ideal, a traditional (classical) positivist theory of CIL can perform exactly that task. My corollary point would be to claim that *no other theory of CIL* could do so.

## 9 Theories of Custom: The Classic, the Modern, and the Impossibility of Reconciliation

As noted above, the central distinction between modern and traditional theories of custom lies in the relationship they posit as existing between (and thus defining) state

<sup>61</sup> Positivism claims only that the identification (and possibly interpretation) of law can and should be value-free; and even then only in the limited sense of the observer or theorist refusing to bring their personal values, biases, and prejudices to the analysis.

<sup>62</sup> Asmal, 'Truth Reconciliation and Justice: The South African Perspective', 63 *MLR* (2000) 1, at 15, n. 72.

<sup>63</sup> C. von Clausewitz, *On War* (1976), Bk 1, Ch. 1, sect. 23.

<sup>64</sup> M. Foucault, *Society Must be Defended* (2003), at 16.

practice and *opinio iuris*. Modern theories adopt ‘Anthony D’Amato’s distinction between action (State Practice) and statements (*opinio iuris*).’<sup>65</sup> Thus the key question for these theories is which of *opinio iuris* and state practice – which are always already separated – should predominate in the formation of customary law.<sup>66</sup> All state actions are deemed state practice and the font of *opinio iuris* is sought outside observable activity. At this point, from the traditional perspective, the debate is already lost.<sup>67</sup>

Classic theories of custom do not and cannot accept this separation. For a classic positivist it is anathema. Following on the exposition of the *North Sea Continental Shelf* cases, state practice and *opinio iuris* are mutually constitutive. They are not discrete entities to be weighed one against the other, nor cumulatively; neither can exist without the other.<sup>68</sup> The key question, the key difference between the two sides, is not ‘what does *opinio iuris* do?’ but ‘what is *opinio iuris* and where does it come from?’ This is mirrored in the question of what constitutes state practice. That is, the central argument between traditional and modern understandings of custom is not primarily what *opinio* does, but what constitutes *opinio*, and *mutatis mutandis* state practice, in the first place.

Modern theories are aggregationist in the sense that they perceive the two elements as radically separate, and as combining in aggregate (where one element may be given preferential treatment, or each may receive identical weighting) at a certain (generally unannounced) threshold level to create CIL. Classic theories do not see the elements as separable at all; it is the existence of *opinio* which transforms *mere action* into state practice. However, classic theories do not agree upon, nor consistently – let alone persuasively – articulate the nature of *opinio*, nor its effects on state practice.

What is required to meet Koskenniemi’s critique head on is a theory which *idealizes* state practice (using *opinio*), and thus insulates it onto an *ontologically* separate plane, which (following Kelsen<sup>69</sup>) we could call normativity. This can (I think) only be achieved using a *synthesist* theory of CIL. Aggregationist theories must ultimately privilege what states say or what they do. This is necessarily problematic because *opinio* in such a theory is ultimately identified by moral congruence; and everything states do (including the act now to be evaluated for legality) constitutes state practice. This means that *opinio* represents Utopia, state practice represents Apology. One must be privileged over the other: Koskenniemi’s point precisely.

<sup>65</sup> Roberts, *supra* note 24, at 757.

<sup>66</sup> Compare, e.g., Kirgis, ‘Custom on a Sliding Scale’, 81 *AJIL* (1987) 146, and D’Amato, ‘Trashing Customary Law’, 81 *AJIL* (1987) 101.

<sup>67</sup> It is worth noting that this technique of recuperating and reconstructing opposition arguments is a favoured tactic – or perhaps endemic blindspot – of liberal argumentative strategy. The opposing case is explained in liberal terms, and this new version is then either integrated into, or dismissed from, the liberal perspective.

<sup>68</sup> Even Tasioulas expressly acknowledges this distinction, which is easier for him to do, as, despite his claims (at 85) to ‘sketch a dialectical route’, he is not interested in reconciliation or synthesis, but in proof of the anti-thesis (in this case neo-Dworkinite natural law as a reliable foundation for relative normativity); see Tasioulas, *supra* note 29, at 96.

<sup>69</sup> See, e.g., *Pure Theory*, *supra* note 21, at 10: ‘[b]y the word “validity” we designate the specific existence of a norm’. Thus norms do not exist outside their own normativity.

The alternative (within aggregationist theories) is reconciliation, as attempted by Anthea Roberts. Adopting that peculiar budget dialectics which John Rawls christened ‘reflexive equilibrium’, Roberts (who had already explicitly adopted aggregationist presumptions)<sup>70</sup> sets out to reconcile the impact of the always already separated state practice and *opinio* – to move between, and gradually reduce the distance between, Apology and Utopia, to temper each with the demands of the other. This may help to reconcile the theories of D’Amato and Kirgis, maybe even Tasioulas too. It does not reconcile traditional and modern: it does, however, prove Koskenniemi’s secondary (Schmittian) claim that PIL will degenerate into manipulable oscillation, simply in order to avoid the unpalatable choice – choice itself!

There is, thus, from the perspective of Koskenniemi’s critique, an inexorable pathology about aggregationist theories of custom, they are a crisis in disguise, always requiring the sovereign act of choice to substantiate them. That is, in every given application of the law, a concrete decision (which will determine the outcome of the case) must be made *at the point of law application*. Which should prevail, practice or *opinio*? Which moral theory should apply? What does that theory demand *in concreto*? None of this can be determined in advance; in effect, the rules must be *created* at the point of application – the sovereign decision (the creation of law) is displaced to the judicial act, *and* removed from its institutional constraints.

Truly traditional natural law theories do avoid this point; for them God, Human Nature, or Reason play the role of sovereign, and thus (at least in theory) lend determinate character to law. Moreover, modern theories can be rescued (insulated from Koskenniemi’s critique) in the very same way; by imposing upon them a fixed, determinate (though not necessarily timeless) moral order. However, both sets of theories are then open to strong complaints at the normative levels of presuppositions (that such a universal, objective, and determinate ethics exists) and purposes (that the World should be homogenized into a Pax-Americana, or Holy Roman Empire, or free-market (democratic?) economy).<sup>71</sup>

The only viable alternative then is a classic synthesist theory; but one which is precisely defined and fully articulated. In other words, we cannot just adopt ‘Positivism’ any more than we could just adopt ‘natural law’; rather we must determine *which* theory of positivism to adopt, *and* demonstrate its theoretical superiority, its desirability. Positivist theories of CIL agree on the relationship between state practice and *opinio* (a synthesis, in the sense that neither can exist without the other), and on the meaning of state practice (that which states do ‘with the requisite *opinio iuris*’). However, there is *not* the same consistent agreement on the nature, or *definition*, of *opinio iuris*. The two classic candidates for the definition of *opinio* – belief in legality and consent to

<sup>70</sup> See *supra* note 65.

<sup>71</sup> It should also be noted that the theories would actually remain open to Koskenniemi’s primary analytic claim of necessary indeterminacy; because the formulation of objective morality (in whatever guise) must, in order to gain consensus, be constructed at such a high level of abstraction, that its potential concretization into specific demands is open to multiple interpretations and the legitimation of conflicting norms.

legality – are both flawed. However, and interestingly, these flaws are mirror images of one another.

If *opinio* is reduced to the consent of individual states to be bound by the law, then that consent may (conceptually) be withdrawn with the same ease with which it was given.<sup>72</sup> Taken to extremes, this simply robs CIL of normativity. A state wishing to act contrary to the rules of the (momentary<sup>73</sup>) legal system, withdraws consent, acts (this cannot be a breach, as the rule no longer binds that state) and moves on. Consent theory privileges change over stability.

Alternatively, if *opinio* is defined as a belief in legality then change, normative evolution, the move from one momentary system to another, becomes impossible. Thirlway captured this perfectly when he noted that defining *opinio* as belief:

[n]ecessarily implies a vicious circle in the logical analysis of the creation of custom. As a usage appears and develops, States may come to consider the practice to be required by law before this is in fact the case; but if the practice cannot become law until States follow it in the *correct* belief that it is required by law, no practice can ever become law, because this is an impossible condition.<sup>74</sup>

Belief theory privileges stability over change. Thus, neither consent nor belief theories can adequately explain the psychological element of CIL; neither is acceptable as a *definition of opinio iuris*. This necessitates the articulation of an alternative definition of *opinio*.

The evolution of the law, and the stability of its historical narrative, form a key tension in any living legal system. Law must be stable if it is to be normative, and to form a basis of action and source of expectation; yet it must also be dynamic if it is to keep pace with any contemporary society. Therefore, a legal system must have the ability to recognize and incorporate change, but must simultaneously be immune from instant change in the face of breach; i.e. breach must be distinguishable from evolution.

In a centralized legal system, this tension is easily dissolved, or at least hidden, as there is a clear demarcation between the officials and the subjects of the legal system, albeit a demarcation which is then, often, hidden behind the fiction of democratic identity ('we the people' who make and obey the laws, do not actually exist as the singular univocal entity democracy portrays, despite democracy's conceptual dependence upon us. This leads to the requirement that 'we the people' be created as a fiction, the fiction of democratic identity) in some form. The demarcation remains important as officials *qua* officials effect evolution and change, while subjects provide obedience or breach. In other words, the roles, and the effects of the actions, of each are clearly defined and distinguished.

The difference in PIL is that democratic identity is a fact, not a fiction, and the demarcation between official and subject is far more fluid, if not absent altogether.<sup>75</sup>

<sup>72</sup> Mendelson, *supra* note 23, at 184–194.

<sup>73</sup> Raz, *supra* note 15, at 34–35.

<sup>74</sup> H.W.A. Thirlway, *International Customary Law and Codification* (1972), at 47.

<sup>75</sup> Generally the demarcation is fluid, the state *qua* state is a subject, but *qua* member of the International Community is an official; however, it may be entirely absent when the individual state acts as a persistent objector.

In other words this dual role is mediated *internally* rather than externally, the duality is *real*, but the ‘modern’ tendency<sup>76</sup> to physically separate the roles (and then subsume this separation under an evolving fiction) – transcendentalism in Negri’s sense<sup>77</sup> – is *not* necessary. This is because, within the formal structure of PIL, all states are, *and should be*, viewed as formally equal; as enjoying sovereign equality. This means that PIL does not have a structure which could support the sort of subject official dichotomy which would allow certain states to assume the additional powers and duties of system officials, without the consent of the other states.<sup>78</sup>

However, this actual identity of sovereign and subject creates difficulty in the identification and elucidation of the rules of PIL, as these must be allowed to evolve, but at the same time must incorporate mechanisms to identify and react to breaches; yet the activities of the same actors both define or evolve *and* breach the rules.<sup>79</sup> That is, the key problematic of customary international law is that an act can be *at the same time* both a breach of extant customary rules, *and* the foundation of a new customary rule. The key is to construct a rule of recognition capable of recognizing this possibility, *and* distinguishing situations of norm evolution from those of (mere) transgression.

The mechanism deployed by PIL to manage these tensions in customary law is *opinio iuris*, but the meaning of this concept, let alone the role it plays, is far from clear. There is a core of agreement that *opinio iuris* is a manifestation of normative intent, and that it emanates from states; it is the normative intent of states, their belief in the bindingness (or ‘legalness’) of rules. There is, however, less agreement on how *opinio iuris* is formed or manifested. Customary PIL is formed by the mixture of state practice and *opinio iuris*, it is evolved by the actions of states, and yet it can be breached by the actions of states. For this to succeed in CIL, the definition of *opinio* must be amended.

This can be done by blending the two accepted definitions into a synthesis which allows each to compensate for the failings of the other. Theories along these lines have already been suggested by (at least) Thirlway,<sup>80</sup> van Hoof,<sup>81</sup> and Walden.<sup>82</sup> For this theory to function, *opinio* must be understood as both:

<sup>76</sup> M. Hardt and A. Negri, *Empire* (2001), at 74–78, especially at 76.

<sup>77</sup> *Ibid.*

<sup>78</sup> There is, however, a sovereign, or supreme system official of sorts, in the form of the UN Security Council. This body can, in effect, act like a fully Schmittian sovereign, deciding on the exception and suspending the formal system accordingly, e.g., by authorizing force beyond self-defence, and by named states only. However, this power is both within and beyond the formal structure of the international legal system; the question whether the system (as norm) can contain the exception (UNSC) seems as yet unresolved, as it must ultimately hinge on the issue of whether or not the UNSC is subject to judicial review.

<sup>79</sup> It is an asserted conceptual inability to cope with this collapse of the distinction between system official (sovereign) and subject which lies at the heart of Koskeniemi’s pessimistic analysis of the possibilities of an effective PIL. A similar proposition – this time drawn *inter alia* from Hobbes and Sieyes – forms the cornerstone of Martin Loughlin’s recent work on the necessarily *representative* (rather than *direct*) nature of democracy.

<sup>80</sup> *Supra* note 74, at 55.

<sup>81</sup> G. J. H. van Hoof, *Rethinking the Sources of International Law* (1983).

<sup>82</sup> Walden, ‘Customary International Law: A Jurisprudential Analysis’, 13 *Israel LR* (1978) 86, at 87. I owe the preceding three citations to Jörg Kammerhofer’s excellent exposition of current confusions in CIL, see *supra* note 14.

- (1) the normative intent of/imputed to the actor; *and*
- (2) the response of the international community.

It is in bringing these two elements together, that we can outline the international community as a 'virtual sovereign' within a fully reflexive<sup>83</sup> system of law creation. This allows us to meet Koskeniemi's critique to the extent that that critique is a disguised plea for sovereignty; or rather it allows us to accept a necessary relationship between law and sovereignty, and then to provide an appropriate sovereign for the plurality of sovereign states: that very plurality itself. 'A plurality which does not destroy or subsume the singularity of its members'.<sup>84</sup>

## 10 A Schematic Overview of the Operation of the Classic Theory

Modern, and indeed all value-centric, theories of CIL (and, in fact of law as such) are predicated on what could be termed a temporal collapse; they do not take the temporal dimensions of law creation sufficiently seriously. That is why all such theories tend toward the creation of law at the point of its application. Classic, or positivist, theories generally abhor that outcome. Thus the temporal axis in the analysis of law must be emphasized. This axis has (at least) three distinct stages: the period of law creation; the period of *potential* normative evolution; and the period of law application. These must be held rigidly separate; and more importantly, the role of values at each stage must be distinguished.

Stage one, law creation, should, and must, be value-centric, this ought to be beyond dispute. The only question here is to determine *how* to recognize particular values as legally relevant (as the basis of norms). At this stage, law, or at least CIL, *ought to be apologetic*. That is, good law *ought* to reflect the values of its subjects *at the point at which it is created*. However, the other two stages of the temporal axis ought to be value neutral. This is what allows a law to reflect state will and interest at the point it is formed, and yet ignore state will and interest at the moment of application. The middle stage is the most awkward, and the central question is whether *at the moment of application* the norm has evolved or not. If it has, then in effect stage one is repeated; if not attention moves automatically to stage three.

Bearing this in mind, it becomes apparent that when a state acts in such a way that a claim may be imputed that the action is open for emulation by all (not unlike a Kantian categorical imperative test), then the norm creation/evolution process is *initiated*, but is in no sense completed; this is the first element of *opinio* as defined above. Therefore, because the state acts with *opinio*, and is thus acting as a system official, at the specific

<sup>83</sup> This word (reflexive) seems singularly apposite to the description of the system of CIL advocated here. This is because it resonates with *both* the reflex nature of the system, beyond individual control, almost organic in nature, *and* the way in which this system *reflects* the common desires of its (perhaps unfortunately only) immediate subjects.

<sup>84</sup> See G. Deleuze and F. Guattari, *A Thousand Plateaus* (1998), Ch. 1 'The Rhizome'.

level that the CIL system recognizes as normatively relevant, the action is represented within the insulated (ontologically separate) sphere of state practice.

In its turn, the international community responds, either through rejection, emulation or acquiescence. If the response (over time) is positive (and the action is, non-identically, repeated and approved) a rule is formed or amended; this is the second element of *opinio*. Repetition then confirms the state practice as having reached a level to activate change (normative evolution) in the substantive content of CIL. Non-identical practice delimits – i.e. tolerance of certain non-identical repetition implicitly articulates – the boundaries of the new rule; and also serves to distinguish CIL from mere estoppel.<sup>85</sup>

Therefore, state action gives rise to the reflexive movement which validates, and in doing so *constitutes*, state practice. This reflexive movement consists of the purposive activation of the rule of recognition (or at least the implicit questioning and/or rescision of the ‘duty’ to enforce the law under the old law (i.e. the immediately preceding ‘momentary legal system’,<sup>86</sup> or body of norms)), and therefore state practice and *opinio iuris* are mutually constitutive and *together*, at a certain threshold level, create customary PIL. In other words, state action becomes *state practice* through contextual endorsement, as it is precisely this contextual endorsement which creates the *opinio iuris* which transforms the former into the latter. It is only in the synthesis of the two elements of *opinio* that the process reaches fruition: and ‘*opinio juris*... the philosophers’ stone... transmutes the inert mass of accumulated usage into the gold of binding legal rules’;<sup>87</sup> as first state practice, and then (ultimately) a new norm of CIL, are constituted.

This is because, although a normative intent is imputed to the original state, due simply to the potential legality of its claim (the fact that the claim *could* be universalized), that intent merely *initiates* the norm formation process. Instead of the consent of the individual state, it is the response of the international community – the other states – which actually constitutes the *opinio iuris*, and thus indirectly and retrospectively constitutes both the initial action and the emulations as *state practice*. Once this process has occurred, there is a new rule in which states believe, and that rule is fixed, until the process is repeated; and another new rule formed. In the final analysis, neither the belief, nor the consent of individual states determines the process.

In this way, the classic theory can differentiate breaches of the law from moments of normative evolution; it does not trap the law in perpetual stasis; but nor does it deprive the law of normativity. At least at the level of ideal, such a theory *successfully* negotiates the tension between stability and change. Both the vicious circle of stasis, and the elimination of normativity are overcome by understanding the formation of CIL as a reflexive process (but, one which generates momentarily fixed and determinate rules) in which the law-maker is the International Community as a whole, understood as a virtual Sovereign.

<sup>85</sup> Cf. Mendelson, *supra* note 23, at 192–194.

<sup>86</sup> J. Raz, *Concept of a Legal System* (1980), at 34–35.

<sup>87</sup> Thirlway, *supra* note 74, at 47.



The international community becomes a virtual sovereign in the sense that it is always there, but not always actual. The community as a whole is the sovereign entity, and its values are reflected in the rules. Deleuzian ontology – from which the idea of the international community (as what Deleuze would call a rhizome) articulated above is developed – postulates a doubling of the Platonic categories of the Potential<sup>88</sup> and the Real to incorporate also the Virtual and the Actual.<sup>89</sup> This is a profound alteration in the conceptual terrain, but one which must be accurately understood *before* the virtual presence of the (sovereign) international community can be properly appreciated.

The potential is *not* real, but contains the seeds of many incipient realities. However, once realized the potential loses its potential to be other, it becomes fully real. For example, a block of stone has the potential to be crafted into part of a building, or carved into many different types of statue, *but* once this potential is realized (the block is carved into a particular statue) it is also lost (the block cannot then be crafted into a building, nor used to create one of the other statues it had the potential to become).

The virtual is different, because the virtual *is* part of the real.<sup>90</sup> This means that in being real, the virtual does not lose its potential, it is (in a sense) real and more than real. The virtual is counterpoised to the actual, but it is not so much a virtual reality as a real virtuality. What this means is that the virtual has a real presence (rather than a virtual presence masquerading as real, as virtual reality might) but that this presence is generally ephemeral. The virtual always (really) exists, but comes into perception (or tangible being) only as it is actualized. Deleuze and Guattari offer the rhizome of the wasp and the orchid as their primary example.<sup>91</sup> The wasp and orchid exist as a symbiotic entity *always*, but this relationship is only *actualized* at the points of contact, here the wasp feeds and the orchid pollinates. However, the rhizome thus formed does not lose its potentiality during its actualization, the wasp could (and can still) pollinate other orchids, and the orchid can feed other wasps.

So, the virtual loses nothing in its actualization – in a sense it retains its potential (to be other) – and continues to exist, even when it is not (currently) actualized. This is how the ‘international community’ exists and operates. The community is the collective of states, and it always exists as such. However, the community is generally virtual, and is actualized only at the points when it is required, e.g. to legislate. It is in this sense that the international community can be understood as a virtual sovereign. The authority of the law is rooted in the actual sovereignty of the international community. However, the power to legislate is held exclusively by the community itself – rather than the states of which it is comprised. Only at the moments where the community is actualized does sovereignty become active. Only at these moments can the sovereign create new law.

Metaphorically then, we could see state action (if motivated toward normative change) as (virtually) summoning, and hence (re)constituting the international community in its law constitutive role. The system then functions by the community calling

<sup>88</sup> Which Deleuze terms the ‘possible’.

<sup>89</sup> See, e.g., G. Deleuze, *Difference and Repetition* (1994), at 208–214.

<sup>90</sup> *Ibid.*, at 208.

<sup>91</sup> Deleuze and Guattari, *supra* note 84, at 9–10.

itself into existence when it is needed – the plurality existing over the singularities – to act as a system official, effectively at the behest of a system subject, and thus subject and official are separated and the system can work without paradox.<sup>92</sup> This can happen because the community is real, it is always in existence, rather than being mere potential(ity), yet the community is *not* always actual, but rather virtual. It is the virtual presence of the community which must be actualized (as opposed to a potential which would be realized) which allows the community, in effect, to flit in and out of ‘physical’ (in the sense of ontological, actual) existence, and normative activity.

This means that individual states are no longer law-makers, their *individual* consent to the rules is no longer required; consequently it cannot effectively be unilaterally withdrawn: as a result, the system is not apologetic in the important sense of descriptive. Moreover, *opinio* can be fully divorced from morality, and it need not differ between classes of states. Because *opinio* is returned to the realm of factual observation the system is not utopian in either sense.

The law does, however, remain apologetic in senses 2 and 3; it is based, *at the point of its creation*, on the (collective) desires of its subjects, and the class of subjects whose desires may directly affect the system is defined and strictly limited. However, this is not as problematic as it may first appear. Laws by their very nature *must* be value-centric. No law could ever be value free, certainly no legal system could be. Laws are ‘congealed politics’, there are particular values universalized to provide the standards against which the conduct of all subjects is to be evaluated, *judged*.

So, law must contain values, why then not seek to make law contain the values *agreed* upon by its subjects; let law reflect the *congruence of their interests*. This, in the ideal, is exactly what the classic theory does. Critique 2 is simply not a critique at all. However, in demonstrating this, we lay the ground for an open debate over, and political critique of, the state-centric nature of PIL. But, we must not throw the baby out with the bath water; even if the state form is ultimately determined to be evil, the norm-creating process of CIL (as ideal) is not implicated in this.

<sup>92</sup> It is worth noting that this is not at all the same as saying that the system can *exist* without paradox, but only that it can work on a day-to-day basis by hiding and evading its ordinary paradox: the creation of legality as a category with the initial claim ‘I am legal’ and legal is good. The legality of the legal system cannot subsequently be evaluated, nor indeed the legality of the legal/illegal divide. But, as Luhmann observes, all systems are based on (and productive because of) such an original paradox: see Luhmann, ‘The Third Question: The Creative Use of Paradoxes in Law and Legal History’, 15 *J Law and Soc* (1988) 153.