
Slouching towards the Holy City: Some Weeds for Philip Allott

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*And what rough beast, its hour come at last,
Slouches towards Bethlehem to be born?*
W.B. Yeats, *The Second Coming* (1921)

In 1642, Grotius published *Florum sparsio in Jus Justineaneum*, *Flowers strewn on Justinian's law*, which I initially and mistakenly recalled as a recasting of Justinian's *Institutes* into Latin verse, and thought was meant as a *homage* to Justinian. *Florum sparsio* is, in fact, a prose work, a legal, historical and philological commentary on Justinian's *Institutes*, *Digests*, *Codex* and *Novellae*,¹ although Grotius had rendered chapters of Justinian into verse when he was younger.²

Be that as it may, this is meant as a *homage* to Philip Allott, but one which does not try to gloss his thoughts, nor attempts to restate them in a different form, but rather endeavours to explore some of his central ideas. It thus pays its compliments and respects to him by taking his work seriously. Unfortunately, all I can offer is weeds, not flowers: I am not Grotius; my ideas are still green; and I am assuredly not a poet, even though I sometimes harbour the ambition to rouse myself to become a Bad Poet. Apparently, however, Grotius was not much of a poet either:

¹ Dr Arthur Eyffinger, formerly the librarian of the International Court of Justice, kindly corrected me and prevented me from committing this error to print. He also informed me that *Florum sparsio* was meant to supplement earlier similar works, made by various authors over centuries, which in 1583 had been collected by the French lawyer Godofredus (Denis Godefroy). It was not intended to be a systematic commentary on Justinian, nor did Grotius think that it would have much relevance to practising lawyers, but Dr Eyffinger is of the opinion that it 'features some intriguing references and textual emendations, among others to his own *Laws of war and peace*'. I am also grateful to Judge Higgins for obtaining the correct information from Dr Eyffinger when she discovered that I was flailing about for confirmation of my initial recollection, having been unable to find anything of use in the standard commentaries and biographies of Grotius; and I thank John Tasioulas for his comments on and help with the final version of this paper. All errors remain mine.

² This is perhaps not the oddest of Grotius' poetical works. He also composed in Dutch verse 'a Proof of True Religion (*Bewys van den Waren Godtsdienst*), designed particularly for the use of seafaring folk, to relieve the tedium of long voyages, and to furnish them with controversial armour to repel the assaults of heathen, Jews, and Mohammedans' – R. W. Lee, *Hugo Grotius* (1930), at 35–36.

it will not be unfair to say that Grotius displays rather a talent for versification than poetical genius of a high order.³

This invocation of Grotius is not without point, as there is a tradition in Grotian scholarship that sets him in opposition to Vattel.⁴ This is apposite in the present context, as Philip Allott blames Vattel – one of the few, if not the only, author mentioned by name in *Eunomia*,⁵ and then only to receive something more than an intellectual spanking – for supplying the philosophical foundations of international unsociety, a world governed by and tailored to the interests of states rather than the interests of humanity. Vattel ‘made the myth of the state of nature into the metaphysics of the law of nations’,⁶ with the consequence that ‘Things fall apart; the centre cannot hold;/ Mere anarchy is loosed upon the world’.⁷ Nevertheless, humanity is strangely resilient:

It is remarkable that the human species has managed to survive for almost 250 years in the grip of the bizarre Vattelien legal world-view. In the twentieth century, the crazy idea that the human race might not survive was treated as a suitable topic for rational discussion and rational decision-making. People who are otherwise sane and sensible could talk about Mutually Assured Destruction and the End of Civilisation. People who are otherwise sane and sensible could make and manage total war, wars with no necessary geographical limit, no effective limit to the methods of death and destruction, no limit to the suffering to be endured by powerless and blameless human beings. In the twentieth century, people who are otherwise decent and caring could regard it as regrettable, but natural that countless millions of human beings should live in conditions of life which are a permanent insult to their humanity, or in chaotic societies dignified by the name of ‘state’, or in subjection to criminal conspiracies dignified by the name of ‘government’.⁸

Such is the power of an idea.

The essence of Allott’s vision for the reconstruction of world order is aspirational. He calls for a renewal of social and international relations, as the alternative is an apocalyptic spiral of human despair and destruction. This renewal is, indeed, a moral necessity:

how can any morally sensitive person, knowing what happened in the twentieth century and seeing the prospects of the twenty-first century, fail to recognise a heavy burden of moral responsibility to do whatever can be done to improve human reality? Must we deny our feelings of righteous *anger* at the social evil that plagues the human world, of *pity* for the immeasurable

³ Lee, *supra* note 2, at 7: Dr Eyffinger disagrees profoundly with Lee’s assessment of Grotius’ poetic accomplishments, arguing that he was an outstanding poet and recognized as such by 17th-century Dutch vernacular poets such as Vondel. On this, I can only plead ignorance.

⁴ See, for instance, C. van Vollenhoven, *Grotius and Geneva*, 6 Bibliotheca Visseriana 3 (1926); and Kooijmans, ‘How to Handle the Grotius Heritage: Grotius and van Vollenhoven’, 30 *Netherlands International Law Review* (1983) 1.

⁵ The text of the reprint (2001) usefully retains the pagination of the first edition, but is augmented by a lengthy new preface (vii–xl) which summarizes the core ideas of Allott’s thought and replies to the principal criticisms made to *Eunomia* on its first appearance. The preface constitutes both a restatement and defence of Allott’s vision.

⁶ Allott, ‘The Phenomenon of Law’, in *The Health of Nations*, 36 at 58.

⁷ Yeats *The Second Coming* again.

⁸ Allott, *supra* note 6, at 56–57.

suffering caused by the acts and omissions of holders of public power, of invincible *hope* that a better human world is possible?⁹

This philosophical orientation – the need for a better system of social ordering because the only other option is inescapable wreck and ruin – is reminiscent of the vision presented in Winthrop's Puritan vision of the model society of a 'City upon a Hill':

Now the onely way to avoyde this shipwracke and to provide for our posterity is . . . to doe Justly, to love mercy, to walke humbly with our God, for this end, wee must be knitt together in this worke as one man, wee must entertaine each other in brotherly Affeccion . . . wee shall be as a City upon a Hill, the eies of all people are uppon us.¹⁰

Both visions are reliant on a degree of social solidarity, some shared concept of the common good, and a desire to promote human flourishing rather than humanity's destruction. The future is contingent, but the good requires a common pursuit – 'tomorrow my love/ is a stolen kiss but we sail together/if we sail at all'.¹¹

1 *Eunomia*, the Antidote to Vattel's Perversion of Ideas

At the heart of Allott's vision for world order, because *Eunomia* is not merely a philosophical analysis of the structure of international relations and law but a call for the realization of its reconstruction, lies an elemental conviction in the power of ideas both to structure and to change – to restructure – the world:

We make the human world, including human institutions, through the power of the human mind. What we have made by thinking we can make new by new thinking.¹²

Consequently, the Vattelien legacy in international affairs is not confined to the history of ideas; it is not just a milestone (or footnote) in the unfolding of the European cultural comprehension of international law and its possibilities. Rather, as Allott argues:

The eventually dominant Vattel tradition is not merely a tradition of international law. It implies a pure theory of the whole nature of international society and hence of the whole nature of the human social condition; and it generates practical theories which rule the lives of all societies, of the whole human race. It is nothing but mere words, mere ideas, mere theory,

⁹ Allott, 'The Will to Know and the Will to Power: Theory and Moral Responsibility', in *The Health of Nations*, 3 at 33 (emphasis in original).

¹⁰ This extract is taken from John Winthrop's sermon, *A modell of Christian charity* (1630), delivered aboard the *Arabella* as Winthrop and his fellow Puritans were sailing to found the Massachusetts Bay Company. This was a colony to be used as a refuge for persecuted Puritans, in order to build a 'wilderness Zion' in America. Winthrop's image is, of course, biblical, derived from the Sermon on the Mount – 'Ye are the light of the world. A city that is set on a hill cannot be hid' (Matthew 5:14). A modern transliteration of the text quoted is: Now the only way to avoid this shipwreck and to provide for our posterity is . . . to do justly, to love mercy, to walk humbly with our God, for this end, we must knit together in this work as one man, we must entertain each other in brotherly affection . . . we shall be as a City upon a Hill, the eyes of all people are upon us.

The text of the sermon is available at <http://history.hanover.edu/texts/winthmod.html>.

¹¹ Monette, 40 (1985), in P. Monette, *West of Yesterday, East of Summer: New and Selected Poems* (1994).

¹² *Eunomia*, Preface to the 2001 edition, xxvii.

mere values – and yet war and peace, human happiness and human misery, human wealth and human want, human lives and human life have depended on them for two centuries and more.¹³

The Vattellic tradition, precisely because of its emphasis on the state as the primary actor and bearer of values in international relations is an anathema to Allott. This tradition has generated a wrong consciousness, a fundamental misconception about what matters: for Allott, what matters is humanity rather than a collection of states, the pursuit of whose interests has all too often harmed humans. The edifice of the state does not have its agenda set by the people of the society it encompasses, but rather by the much narrower class of politicians and officials.

The state (public realm under the authority of a government) having developed as a way of internally organizing a certain sort of society . . . came to be conceived also as the external manifestation of the given societies. The state was turned inside out, like a glove. The governments of the stately organizing societies recognize in each other that which is state, not that which is society.¹⁴

Just as the state is not coextensive with society, international unsociety (to use Allott's term), where states dominate, is markedly less representative of humanity. Allott sees this as an inevitable outcome of the reception of Vattellic thought, which came to structure the practice of international affairs:

It is a reality which was welcome to the ruling classes of western Europe, the classes who still had most control over social reality-forming, including the self-conceiving of society in theory and including reality forming far beyond the territorial limits of western Europe. It was most welcome of all to the political and administrative sections of those ruling classes, who could speak to each other and compete with each other across frontiers, safe in the fastnesses of their self-contained internal-external state-systems.¹⁵

Eunomia is an avowedly, uncompromisingly, and unashamedly idealist theory that aims at the realization for humanity of 'the natural human purpose of survival and prospering'.¹⁶ This is rooted in 'the wonderful capacity of human consciousness to make the future other than it has been . . . to choose its future from all the possibilities which imagination can conceive and which reason can order'.¹⁷ This requires humanity 'to take possession of the waste-land of international society in the name of the people and in the name of justice'¹⁸ as, in the contemporary situation of 'a semi-social international society, all the world is the Wild West'.¹⁹ Allott adheres to the fundamental belief that:

international society has the ultimate capacity to enable all societies to promote the ever-increasing well-being of themselves and their members, the ultimate responsibility to prevent societies from doing harm to themselves and to other societies. It is in international society

¹³ *Ibid.*, at 243.

¹⁴ *Ibid.*, at 243 (emphasis in original).

¹⁵ *Ibid.*, at 248–249.

¹⁶ *Ibid.*, at 387.

¹⁷ *Ibid.*, at 265.

¹⁸ *Ibid.*, at 254.

¹⁹ *Ibid.*, at 383.

that humanity's capacity to harm itself can achieve its most spectacular effects. And it is in international society that the ever-increasing well-being of the whole human race can, must, and will be promoted.²⁰

He seeks a 'revolution, not in the streets but in the mind'²¹ in order to achieve 'a social international society [where] the ideal of all ideals is *eunomia*, the good order of a self-ordering society'.²² Our ideas structure our world – 'The Lestrygonians and the Cyclops,/the fierce Poseidon you will never encounter,/if you do not carry them within your soul,/if your soul does not set them up before you'.²³

2 Thinking our World

So how is all this to be achieved? Allott places his faith in the power of the human mind to reform the future by imagining what that future should be, and then use reason to implement this idea: 'Societies live within the theories they make. A society generates a theory-filled reality which shapes its willed action which, in turn, shapes its actual everyday living'.²⁴ Human consciousness thus provides the template for human action and human reality. Ideas, however, are not self-executing as consciousness only 'enables us to present possibilities to ourselves before we take action'.²⁵ Action depends on choice, on an act of will, whose exercise depends on values to serve 'as a ground for choosing between possibilities'.²⁶ Further, '[a]mong the ideas which help constitute a society are ideas of a particular kind', namely ideals:

Our ideals allow us to say what is wrong with our world and to imagine ways in which it could be better, and they inspire us to want to make a better world. . . . A society which did not contain the idea of the ideal would be, at best, a static society or, more probably, a self-destroying society. It is for this reason that we look anxiously and hopefully for any signs of the idealizing of international society, a society whose long pre-history . . . has been filled with the follies and the evils perpetrated by holders of public power.²⁷

Allott diagnoses global malaise as an inevitable consequence of the absence of a true international society: the society of humanity has been excluded and perverted by the adoption and implementation of the Vattellian vision of a world of states. The result has been the creation of a wrong consciousness which favours the ideas and values of states rather than the ideals of humanity. Human society can place no checks on the asocial powers of, and the asocial exercise of those powers by, states as humanity is excluded from the ordering of international affairs. Without a root in human society, international law can only remain of marginal utility in the Wild West of international unsociety.

²⁰ *Ibid.*, at 180.

²¹ *Ibid.*, at 257.

²² *Ibid.*, at 404.

²³ C. Cavafy, *Ithaca* (1911).

²⁴ *Eunomia*, at 38.

²⁵ *Ibid.*, at 40–41.

²⁶ *Ibid.*, at 48.

²⁷ *Ibid.*, at, Preface to the 2001 edition, xxii.

The problem is sovereignty, whose adoption as the structural premise of international affairs, Allott claims, explains ‘the theoretical incoherence and the practical impotence of international law’.²⁸ Sovereignty is the preserve of states, the emergence of which superseded the nation as both a form of social organization and of individual and social self-identification. Sovereignty is, however, ‘an authority-based view of society’,²⁹ which ‘tended to make all society seem to be essentially a system of authority, and . . . to make societies incorporating systems of authority seem to be the most significant forms of society, at the expense of all other forms of society, including non-patriarchal families, at one extreme, and international society, at the other’.³⁰

Thus the notion of the state, organized as sovereign authority over specified territory, trumps membership of other possible societies which are not as exclusive, and whose consciousness and ideals may differ from those of the state. Moreover, the consciousness of the state is impoverished, concentrating on state rather than human interests, wielding a sovereignty that was not conferred by society but rather authoritatively imposed upon it. Subsequently, at least in some states, the notion of sovereignty has been surpassed by that of democracy, which relocates power in society rather than in the simple fiat of authority.³¹ This introduces a profound shift in social consciousness as democracy ‘seeks to make the individual society-member seek well-being in seeking the well-being of society. Democracy seeks to make society seek well-being in seeking the well-being of each individual society-member’.³²

International society, on the other hand, has chosen ‘to regard itself as the state externalized, undemocratized, and unsocialized’.³³ This was not inevitable:

It would have been possible for international society to develop a theory of *representation*, to articulate the way in which the state-societies aggregated the willing of their citizens in order to will and act internationally as the representatives of their citizens. Instead, the consciousness-controlling activities of government, and their supporters, ensured that sovereignty would be externalized into a society which was conceived as being a society containing only sovereigns, a society which would contain no theory of representation, which would leave obscure and unexplained the sense in which the people of the world might be virtually present in international society by reason of the participation of the state-societies.³⁴

This has given rise to the perception that domestic and international affairs are ‘intrinsically and radically separate’,³⁵ as citizens can only participate in international affairs through the mediation of their governments.

²⁸ *Ibid.*, at 302.

²⁹ *Ibid.*, at 199.

³⁰ *Ibid.*, at 200.

³¹ In elements of this aspect of Allott’s work – such as the primacy of imposed sovereignty over other forms of voluntary human association, and the corrective impulse provided by democracy – I find resonance with themes expounded by Thomas Franck, see in particular his *The Empowered Self: Law and Society in the Age of Individualism* (1999). An exploration of this point is, alas, well beyond the bounds of this paper.

³² *Eunomia*, at 217.

³³ *Ibid.*, at 240.

³⁴ *Ibid.*, at 303 (emphasis in original).

³⁵ *Ibid.*, at 243.

Further, as international society has been left undemocratized, the power exercised by states is not socially conferred but is simply 'energy applied for a purpose', and:

The purposes of the interstatal unsociety are simply the aggregated purposes conceived within the government-controlled public realms of the state-societies, purposes related to the survival and prospering of each of those state-societies rather than the survival and prospering of an international society of the whole human race.³⁶

This exacerbates the division between the domestic and international spheres, and entails the consequence that morality is discontinuous between the two. Accordingly,

governments, and the human beings who compose them, are able to will and act internationally in ways that they would be morally restrained from willing and acting internally, murdering human beings by the million in wars, tolerating oppression and starvation and disease and poverty, human cruelty and suffering, human misery and human indignity.³⁷

What we are left with is:

a world fit for governments. It is an unsociety ruled by a collective of self-conceived sovereigns whose authority is derived neither from the totality of international society nor from the people but from the inter-mediating state-systems.³⁸

The result, according to Allott, is that 'international law is left speaking to governments the words that governments want to hear'³⁹ and remains marginal in the international system: 'International law has been neither very threatening nor very useful to the politicians and the diplomats'.⁴⁰ This is not the way things should be: law is a core institution of society, 'an integral part of the whole activity of consciousness, individual and social'.⁴¹ Because the international system is denatured, focusing on a collection of states rather than a society that encompasses all of humanity, international law is 'a mystery to international society. The people of the world do not know themselves as participants in its making, only as participants in its effects. It seems to be the business of a foreign realm, another world, in which they play no personal part'.⁴² International law, accordingly, cannot be integrated into the social process of humanity and is 'doomed to be what it has been – marginal, residual, and intermittent'.⁴³ As things stand, international law cannot play its proper part in the realization of *eunomia* – 'Why is it that civilised humanity/Can make the world so wrong?/In this hurly-burly of humanity/Our dreams cannot last long'.⁴⁴

³⁶ *Ibid.*, at 246–247.

³⁷ *Ibid.*, at 248.

³⁸ *Ibid.*, at 249.

³⁹ *Ibid.*, at 296.

⁴⁰ *Ibid.*, at 297.

⁴¹ *Ibid.*, at 171.

⁴² *Ibid.*, at 298–299.

⁴³ *Ibid.*, at 304.

⁴⁴ N. Coward, *Twentieth Century Blues* (1931).

3 Slouching as a Legal Technique

But what role should international law play in all this? In many ways, Allott's *Eunomia* deals more with structural questions of international order than the specific techniques by which that order may be realized and maintained. Law has a pivotal role to play in this enterprise, as 'rules of law have causes in society':

very efficient causes in the world beyond the law, transforming the very non-hypothetical lives of very real citizens. The door of the prison-cell is bolted. The fine and the damages are paid. The keys of the house are handed over. The deceased person's property is distributed. The employee is dismissed. The child is taken from his parents. The convict is executed.⁴⁵

Allott's anxiety is that while law and social consciousness are sophisticated in the domestic sphere, the international arena remains akin to the Wild West – 'the human species lives in two separate mind-worlds, two forms of human reality, one societal and one pre-societal, one highly socialised and one barely socialised, one primitive and one sophisticated'.⁴⁶ A fatal disjunction exists between conceptions of domestic and international justice, morality and order. The inter-statal state of nature embedded in the Vattelian tradition of the conduct of international relations engendered 'a wilderness of ever-increasing unreality and endless danger'. Allott, however, sees glimmers of hope:

At the beginning of the twenty-first century, at long last, two centuries late, there is reason to think that we are witnessing the first stages of a great metamorphosis of the international system, a change in the metaphysical groundwork of international law, a beginning of the end of the Vattelian worldview. We are witnessing the emergence of a universal legal system.⁴⁷

In this transformation, although important as a social technique, law is *only* a social technique which retains a degree of autonomy, a degree of distance, from the greater social reality. Its specific content is determined by the ebb and flow of social ideas, but:

law does seem to persist by its own momentum regardless of the extraordinary conflicts and changes of the rest of society, as if it were a neutral arena for the social drama. Given the endlessly changing substance of law, experience does seem to suggest that law is a more or less empty framework capable of taking more or less any substantive content.⁴⁸

Law is simply one way of envisioning society and social relationships, where law-ideas shared by lawyers structure legal reality. This is merely one application of the notion of consciousness, which is at the core of Allott's work, namely the active power of the human mind to determine the course of human affairs – 'In forming our ideas we form our reality. In forming our reality we form our consciousness. In forming our consciousness we form ourselves'.⁴⁹

⁴⁵ Allott, *supra* note 46, at 44.

⁴⁶ *Ibid.*, at, 58–59.

⁴⁷ *Ibid.*, at 59.

⁴⁸ *Ibid.*, at 52.

⁴⁹ *Eunomia*, 28.

a society constitutes itself, not only in the form of law and legal institutions and not only in real-world struggles, political and economic and personal, of everyday life, but also in society's struggle about ideas.⁵⁰

This notion has obvious affinities with the Marxist theory of ideology, but Allott's version is neither determinist nor limited to manipulations of the economic base/superstructure relationship. For Allott, consciousness can critique and transcend social circumstances, but the implementation of that critique is a matter of choice rather than historical determinism. This seems to be more redolent of Kant's argument that theory guides practice⁵¹ than of Marx.

Legal reality provides a narrow perspective of social reality but, paradoxically, 'the lawyer knows that the law is not a thing that can be known. All the lawyer knows is forms of legal perception'. Law provides a refracted image of social reality: 'To be a lawyer is to live through a particular looking-glass, inside a law-world with its own law-mind and its own law-reality'.⁵² This, 'the strange inner world of the lawyer', provides a perspective, a reality, that is separate but parallel to social reality,⁵³ but one in which:

Nothing seems to be fixed or clear or final. Everything is open to further argument, reclassification, reconceptualisation, reinterpretation, re-evaluation. Everything is on a move from the past to the future (which will no doubt contain further, different decisions). What was seemingly the case at one time . . . is apparently not the case at another time.⁵⁴

For Allott, law is a permanent process of unfolding the perceived potentialities of the law which is realised in the application of law, and yet that application simultaneously provides future possibilities for its perceived development. Law is thus the progression of legal ideas in the social world which mediates between 'the social forces which generate the law and the social events which the law generates'.⁵⁵ Thus the business of the lawyer is that of slouching from perception to implementation which itself generates a new reformed perception which raises new possibilities for implementation:

From the existing possibilities of law the lawyer determines the future possibilities of law. The categories in which the lawyer knows the law-world are the forms of his perception of it and those forms of perception are themselves liable to be modified by the perceptions of the law which other lawyers have had. Statutory provisions and decisions of courts are mediating structures between the whole system of social causation which causes them and the lawyer who perceives them, but the lawyer also perceives the perceptions of those structures by other lawyers and their perceptions of those perceptions. In this way the multi-dimensional network of the law grows organically and exponentially in internal and self-organising complexity.⁵⁶

Lawyers can thus only aspire to an ideal which exists in their mind. Moreover, the ideal is expressed in natural language, but:

⁵⁰ *Ibid.*, Preface to the 2001 edition, xx.

⁵¹ I. Kant, *On the Common Saying: 'This May Be True in Theory, but It Does Not Apply in Practice'* (1793), in H. Reiss (ed.), *Kant's Political Writings* (transl. H. B. Nisbet, 1970) 61.

⁵² Allott, *supra* note 46, at 38.

⁵³ *Ibid.*, at 45.

⁵⁴ *Ibid.*, at 42–43.

⁵⁵ *Ibid.*, at 44–45.

⁵⁶ *Ibid.*, at 44.

The notion of a standard language . . . is delusive. It purports to be a neutral form of communication, mastery of which admits one to a linguistic community of equals; but in practice a standard language exists primarily as an ideal to which speakers approximate in varying degrees. The real standard language is constantly though unobtrusively changing and thus providing new criteria for excluding those less successful at speaking it . . . [But] those with a sharp ear can always detect linguistic differences . . .⁵⁷

Legal practice accordingly, and not surprisingly, depends on the skill of its participants to speak the language of the law. Good legal practice, for Allott, requires greater linguistic skills on the part of the lawyer: one which can unleash the possibilities of the law to attain its ideals and to slouch further towards the social realization of *eunomia*. The lawyer's concern is thus similar to, albeit more circumscribed than, that of the 'dead master', the 'composite ghost' of poets, in T. S. Eliot's *Little Gidding* – 'our concern was speech, and speech impelled us/To purify the dialect of the tribe/And urge the mind to aftersight and foresight'.⁵⁸

4 Slouching towards the Holy City

For Allott, law, as a social technique, is 'a more or less empty framework capable of taking more or less any substantive content'.⁵⁹ Allott's *Eunomia* is not programmatic about how that technique is to be used. It sets out a vision of difference, of how the world could be if 'the bizarre Vattelian legal world-view'⁶⁰ were discarded, but it does not detail the precepts that should be implemented to achieve that vision. The probability is that this vision can never be realized, but is rather an ideal, an aspiration, to which humanity should strive. It is the quest for a social Holy Grail, to discover the polity of a Holy City, to envision the construction of a City upon a Hill.

As such, Allott's vision of *Eunomia* is undoubtedly idealist, which some have criticized. Allott correctly rejects this criticism as unfounded: ideas are the basis for the understanding, structuring and restructuring of the world. This is apparent in any society as politics, the claims made about the way in which that society should develop, is manifestly the clash of ideas.⁶¹

Less easy to shrug off is the criticism of utopianism.⁶² Allott assumes that a fully socialized international society will be benevolent and eschew conflict, which he thinks arises from the competing interests of states. Refusing to be 'run down by the

⁵⁷ R. Robertson, *The 'Jewish Question' in German Literature 1749–1939: Emancipation and Its Discontents* (1999), at 260, note omitted.

⁵⁸ T. S. Eliot, *Little Gidding* (1942), from *Four quartets* (1943), lines 126–128.

⁵⁹ Allott, *supra* note 46, at 52.

⁶⁰ *Ibid.*, at 56.

⁶¹ See *Eunomia*, Preface to the 2001 edition, xxxi.

⁶² Strictly, Allott would categorize his vision as *eutopian*, rather than *utopian* as the 'word *eutopia* (good place) is used . . . in preference to the word *utopia* (no place), another invented word using Greek roots, to emphasise that the nature of the New Enlightenment challenge is to find and to enact the new ideals of a new human mind-world, rather than, as in Thomas More's *Utopia* (1516), to criticise the actual by reference to an imaginary alternative which, in More's own pessimistic words . . . he wished rather than expected to see realised' – Allott, 'New Enlightenment: The Public Mind of All Humanity', in *The Health of Nations*, 132 at 156, n. 30.

drunken taxicabs of Absolute Reality',⁶³ Allott denies that the criticism of utopianism has any force:

In response to this criticism, it is surely only necessary to say that our experience of the revolutionary transformation of national societies has been that the past conditions the future but that it does not finally and inescapably determine it. We have shown that we can think ourselves out of the social jungle.⁶⁴

Yet it is equally true that we can think ourselves into that jungle. Allott perhaps fails to give due weight to the possibility that social evil may emerge from idealistic or even (e)utopian intentions. The 1917 Russian revolution, and subsequent Stalinist terror, is perhaps a case in point. Allott notes that:

Mass democracy . . . in the paradoxical forms of fascism and Stalinist communism, certainly took a realistic view of the law. The law as an instrument of power, as the command of a sovereign, was an evident reality. It might have been expected that, after 1945, there would have been a surge of anti-positivism, a return to some form of idealism.⁶⁵

This misses the point. Idealism, and the search for a world transformed for the better, was inherent in popular support for the Stalinist agenda:

This was an age of utopianism. Political leaders had utopian visions, and so did many citizens, especially the younger generation. The spirit is hard to capture in an age of skepticism, since utopianism, like revolution, is so unreasonable. How could anyone have seriously believed in a radiant future, totally different from the miserable past and the chaotic present? The problem of understanding is all the greater because of the distance between the utopian vision and Soviet reality. It is tempting to dismiss the vision as simply deception and camouflage, especially since the utopian rhetoric actually did serve those purposes, among others, for the Soviet regime. But the vision . . . was [not only] a part of Stalinism, and an important one at that, but it was also a part of everyone's everyday experience in the 1930s. A Soviet citizen might believe or disbelieve in a radiant future, but could not be ignorant that one was promised.⁶⁶

Moreover, Allott's presupposition that humanity would develop a more just, loving and peaceful consciousness – and choose to implement this in its social reality were it allowed to do so – is difficult to accept without hesitation. His argument is predicated on the belief that bad or wicked choices have been made which have caused human misery. It might be that Allott does not believe in the possibility of 'pure' evil, of wicked acts done in and for themselves, as forming part of the human condition. For Allott, human evil might simply be a contingent possibility, the product of a corrupted consciousness arising, for instance, from the asocial conduct of international affairs. Accordingly, for Allott, evil might not be a necessary part of the human condition and

⁶³ A. Ginsberg, *Howl: For Carl Solomon* (1956), from A. Ginsberg, *Howl and Other Poems* (1956: edition used, City Lights Books: San Francisco: 1996). I am particularly pleased to be able to use a quotation from *Howl*, as Philip Allott's personal rectitude ensures that he is the person least likely to drag himself 'through the negro streets at dawn looking for an angry fix', far less indulge in the other activities that Ginsberg chronicles.

⁶⁴ *Eunomia*, Preface to the 2001 edition, xxxii.

⁶⁵ Allott, *supra* note 46, at 50.

⁶⁶ S. Fitzpatrick, *Everyday Stalinism. Ordinary Life in Extraordinary Times: Soviet Russia in the 1930s* (1999), at 67.

may be banished through the transformation of human consciousness in the strive for *eunomia*. This belief, nevertheless, appears to be more an act of faith than a demonstrable proposition. As St Augustine argued in *The City of God*, man's free will may be exercised perversely, to attain evil or sinful ends:

Accordingly God, as it is written, made man upright, and consequently with a good will. For if he had not had a good will, he could not have been upright. The good will, then, is the work of God; for God created him with it. But the first evil will, which preceded all man's evil acts, was rather a kind of falling away from the work of God to its own works than any positive work. And therefore the acts resulting were evil, not having God, but the will itself for their end; so that the will or the man himself, so far as his will is bad, was as it were the evil tree bringing forth evil fruit.⁶⁷

The possibility of evil perhaps has its wellspring beyond reason, before the formation of consciousness. Human consciousness is a product of the human mind – 'the possibilities which imagination can conceive and which reason can order'⁶⁸ – which:

enables us to present possibilities to ourselves before we take action. Before the future becomes actual in the world of physical reality, it may be present in the reality-made-by-consciousness as a possibility.⁶⁹

While bearing in mind the anthropomorphic fallacy, that the individuals constituting a collective body can have different motives when determining an action of that collectivity, it is nevertheless true that decisions to act taken by (one or more) individuals impel the deliberate actions of any collectivity.

As a hypothesis, let us suppose that David Hume's explanation of the psychology of action is fundamentally correct,⁷⁰ as this is summarized in his famous aphorism:

Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.⁷¹

This means 'first, that reason alone can never be a motive to any action of the will; and secondly, that it can never oppose passion in the direction of the will'.⁷² For Hume, reason is (morally) inert in the determination of action. It can only perform an ends-means calculation to determine which course of action can best achieve a desired end; or establish knowledge of causal connections, in particular regarding sources of pleasure and pain, which is at the root of Hume's psychology of action:

when we have the prospect of pain or pleasure from any object, we feel a consequent emotion of aversion or propensity, and are carry'd to avoid or embrace what will give us this uneasiness or satisfaction . . . 'Tis from the prospect of pain or pleasure that the aversion or propensity

⁶⁷ St Augustine, *The City of God* (c.413–426), Book XIV, Chapter 11; see Book V, Chapters 9–10 and Book XIV generally. Online edition available at <http://www.newadvent.org/fathers/1201.htm>.

⁶⁸ *Eunomia*, at 265.

⁶⁹ *Ibid.*, at 40–41.

⁷⁰ See D. Hume, *A Treatise of Human Nature* (1739–1740: edition used, L. A. Selby-Bigge and P. H. Nidditch, eds, 1978), at Book II, Part iii, Section 3. For a good critical commentary on Hume's psychology of action and its relationship to morality, see J. L. Mackie, *Hume's Moral Theory* (1980).

⁷¹ Hume, *supra* note 110, at 415.

⁷² *Ibid.*, at 413.

arises towards any object: And these emotions extend themselves to the causes and effects of that object, as they are pointed out to us by reason and experience.⁷³

'Passions', or emotions, are thus the operative cause of any decision to act, and reason is 'incapable of preventing volition, or of disputing the preference with any passion or emotion... Nothing can oppose or retard the impulse of passion, but a contrary impulse'.⁷⁴ It is true that Hume distinguishes between 'violent emotions', which have a great influence on the will, and 'calm desires and tendencies' which produce little emotion and are 'either certain instincts originally implanted in our natures... or the general appetite to good, and aversion to evil'.⁷⁵ Consequently, as morality can influence action, it cannot be derived from reason but rather arises from a moral sense.⁷⁶ Nevertheless, an impulse to act morally can be contradicted by a desire which the actor thinks will bring him greater pleasure. It might be as well if we were to remember 'that saying of Lenin when the shadow/Was already on his face: "The emotions are not skilled workers"'.⁷⁷

5 Philip Allott and the Summer of Love

On the other hand, one consequence of Allott's vision must surely be that of individuals and thus humanity taking responsibility for international society, and thus for international law. If Allott's inclusive international society were to be realized, international law would become a matter directly within individual consciousness. Accordingly, individuals (ultimately) rather than the state would determine and thus be responsible for the substantive content of international law. With that responsibility, Allott's hope is that morality would no longer be discontinuous between domestic and international society.

He does not see hope for this change lying in the emergence of 'international civil society', and argues that this notion must be treated with caution. The contemporary understanding of civil society Allott traces to Hegel, which contrasts civil society with the public power of the state. He notes that this contradicts orthodox views of liberal democracy which require that people should be able to govern themselves through representative institutions. Accordingly:

To introduce into international society the idea that governments and intergovernmental organization simply co-exist with a random collection ('civil society') of self-appointed and self-legitimizing, more or less institutionalized, representations of individual interests, special interests, and public interests is to condemn international society to be a pre-revolutionary or counter-revolutionary system, as seen from the point of view of at least one orthodox theory of liberal democracy.⁷⁸

⁷³ *Ibid.*, at 414.

⁷⁴ *Ibid.*, at 414–415.

⁷⁵ *Ibid.*, at 417–418.

⁷⁶ See *ibid.*, at 455 *et seq* (Book III, Part i, sections 1 and 2).

⁷⁷ Malley, *Colloquy with John Keats*, in E. Malley, *The Darkening Ecliptic* (1943); reprinted in M. Heyward, *The Ern Malley Affair* (1993, reprinted 2003) 325.

⁷⁸ *Eunomia*, Preface to the 2001 edition, xxi.

This seems to be an eminently sensible position to take. Apart from the democratic complications posed by non-governmental organizations, single issue groups sometimes tend not to see the bigger picture and are at times not touched by moderation. Nor need they be benign: organized criminal fraternities do not pursue socially benevolent ends.

Further, Allott's vision is dependent on the existence of a measure of social solidarity, if not on the inarticulate acceptance of objective or foundational values which underpin the realization of *eunomia*. Can a sufficient solidarity easily be assumed, or would the rejection of a Vattelian world-view risk the emergence of a (greater) world-anarchy? Even within territorial units, would social cohesion be maintained? For instance, in 1967, the cultural commentator Joan Didion spent some time in the Haight-Ashbury district of San Francisco, the epicentre of the Summer of Love. She did not find communitarian solidarity there but rather 'the evidence of atomization, the proof that things fall apart'.⁷⁹ She found:

the desperate attempt of a handful of pathetically unequipped children to create a community in a social vacuum . . . At some point between 1945 and 1967 we had somehow neglected to tell these children the rules of the game we happened to be playing. Maybe we had stopped believing in the rules ourselves, maybe we were having a failure of nerve about the game . . . They are less in rebellion against the society than ignorant of it, able only to feed back certain of its most publicized self-doubts . . . They feed back exactly what is given them. Because they do not believe in words . . . their only proficient vocabulary is in the society's platitudes. As it happens I am still committed to the idea that the ability to think for one's self depends on one's mastery of the language.⁸⁰

Allott would undoubtedly concur with Didion on the importance of language because, through language, we create the ideas which form social reality.

Further, Didion provides a contemporary example of the power of language in generating a way of seeing the world, although her example is not one of a 'theory-filled reality' but rather one which is denuded of reflection and analysis, where rationality has been replaced by sentiment and emotion. Discussing the 11 September 2001 attack on the World Trade Center, Didion observes that when she returned to Manhattan a few weeks later:

I had expected to find the annihilating economy of the event – the way in which it had concentrated the complicated arrangements and misarrangements of the last century into a single irreducible image – being explored, made legible. On the contrary, I found that what had happened was being processed, obscured, systematically leached of history and so of meaning, finally rendered less readable than on the morning it happened. As if overnight, the irreconcilable event had been made manageable, reduced to the sentimental, to protective talismans, totems, garlands of garlic, repeated pieties that would come to seem in some ways as destructive as the event itself. We now had 'the loved ones', we had 'the families', we had 'the heroes'.

In fact it was in the reflexive repetition of the word 'hero' that we began to hear what would become in the year that followed an entrenched preference for ignoring the meaning of the event in favor of an impenetrably flattening celebration of its victims, and a troublingly belligerent

⁷⁹ J. Didion, *Slouching towards Bethlehem* (1968: edition used, Flamingo: London 2001), Preface, xi.

⁸⁰ *Ibid.*, 72 at 105.

idealization of historical ignorance. ‘Taste’ and ‘sensitivity’, it was repeatedly suggested, demanded that we not examine what happened.⁸¹

‘Protective talismans, totems, garlands of garlic’ – Didion depicts a society living within the emotional response it has generated, cocooned by the words it employs which forestall rational understanding.

The question therefore revolves around whose language is used, which ideas are formulated, and which of these impact upon social reality. Yet this is unknowable – ‘For last year’s words belong to last year’s language/And next year’s words await another voice’.⁸²

6 On Being a Legless Giraffe

Philip Allott once described himself as a ‘legless giraffe’, tweaking Louis Sohn’s comment that international lawyers need to be giraffes, with their heads in the clouds but their feet on the ground. The vision Allott presents in *Eunomia* is a fundamental critique of the conduct of international affairs. It is, at the very least, a useful and profound corrective to the notion that international law is ultimately about states. States are neither conscious nor sentient. States neither bleed nor starve nor are forced to flee for their lives. This might seem to be simply a self-evident and perhaps mundane corrective, but Allott exposes the intellectual foundations of the centrality accorded to states and proposes a reformation.

The comprehensiveness of both this critique and Allott’s vision for reconstruction can only be admired and applauded. The realist, allegedly, tells us as it is but, as Gertrude Stein cautions us, ‘If you do write as you have heard it said then you have to change it’.⁸³ This is precisely the point of Philip Allott’s *Eunomia*. Having looked at the world and found it woefully wanting, *Eunomia* provides a blueprint for making it better. Its idealism is not about thinking the unthinkable, it is about thinking the unthought, and then grasping the challenge to put these thoughts into practice. Philip Allott presents us with a radically different view of how international society should be reconceived, and thus the chance to reflect and re-assess. He presents us with the challenge of an intellectual voyage so that:

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And to know the place for the first time.⁸⁴

⁸¹ J. Didion, *Fixed Ideas: America since 9.11* (2003), at 8–9.

⁸² Eliot, *Little Gidding*, *supra* note 98, lines 118–119.

⁸³ G. Stein, *The Geographical History of America or the Relation of Human Nature to the Human Mind* (1936), in *Gertrude Stein: Writings 1932–1946* (1998) 365, at 411.

⁸⁴ Eliot, *Little Gidding*, *supra* note 98, lines 239–242.

