Politics or Rule of Law: Deconstruction and Legitimacy in International Law *

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Recent scholarship,[1] which has undertaken to 'deconstruct'[2] international legal argumentation, has suggested that the ideal of an international rule of law is based on contradictory premises and is therefore incapable of providing a useful approach to structuring international society. Therefore, given that 'social conflict must still be solved by political means'[3] – a 'turn away from general principles and formal rules'[4] is advocated.

Such an attitude to international law, although developed on the basis of a new and intellectually fascinating analysis which reveals much of the internal contradiction in international law,[5] is not entirely novel. It is reminiscent of and similar to the attitude taken by the school of political realism within the discipline of international relations which perceives the role of international law as instrumental and subordinated to politics. If, as is claimed, international law is not independent from international politics and, having no substance of its own, must 'rely on essentially contested – political – principles',[6] then, of course, it would be meaningless to assert the need for establishing the primacy of international law over international politics.

However, in this paper I will argue, that, in spite of its indeterminacy, inconsistency and lack of coherence, international law has a distinct objective existence of its own

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1 Koskenniemi, 'The Politics of International Law', 1 *EJIL* (1990) 4-32.

2 M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (1989) XVII ff.

3 Koskenniemi, *supra* note 1, at 7.

4 Ibid., 31.

5 D. Kennedy, *International Legal Structures* (1987).

6 Koskenniemi, *supra* note 1, at 7.

and can thus serve as a basis for the rule of law in international relations. I will further argue that the concept of legitimacy can be useful for international legal theory because it takes into consideration the existing contradictions within international law, and at the same time gives indications for their solution.

I. The Objectivity of International Law

It has been maintained[7] that in order to show the independence of international law from international politics (i.e. its '*objectivity*' as a quality distinguishing it from political ideas, views, will or preferences which are regarded as subjective), it is necessary to demonstrate its 'concreteness' and its 'normativity'.

The *concreteness* of international law as an aspect of its objectivity is seen in the requirement that it should not be based on subjective and contested political values, opinions and views but on something 'actual' and 'verifiable', such as behaviour, will or interest. Thus, in striving to relate law to social phenomena and not to abstract principles of natural law or contested political views on justice, the requirement of concreteness is linked with the 'social conception of law' which views law as an artificial rather than natural phenomenon.[8]

The *normativity* of international law, on the other hand, is another requirement for its objectivity and means that its rules can be opposed to and applied against the subjective political will and behaviour of states.[9]

The key argument regarding the lack of objectivity of international law and the lack of distance from politics which Koskenniemi considers necessary for the rule of law is based on the contradiction between the requirements of 'concreteness' and 'normativity'. As he puts it:

> ... it is impossible to prove that a rule, principle or doctrine (in short, an argument) is both concrete and normative simultaneously. The two requirements *cancel each other*. An argument about concreteness is an argument about the closeness of a 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.[10]

It seems convincing that the rule of law implies objectivity in the sense that it is perceived as the opposite of arbitrary power and of the subjectivity of arbitrary rule. It

7 Ibid.
8 Ibid.
9 Ibid., 8.
10 Ibid.

is not clear, however, why and how the rule of law with its necessary objectivity should imply a general and unqualified 'distance' or 'independence' from politics.

Defined broadly as distance from state practice or total independence from politics, the concept of the rule of law would be possible only under a 'naturalist' but not under a 'social' conception of the rule of law. If law is man-made and artificial then, of course, it is permeated by politics, which is involved at least in its making. To define the rule of law under the 'social conception' of law as 'distance' and 'independence' from politics would actually involve a contradiction in terms. The impossibility of the rule of law thus conceived simply follows from its very definition; its internal contradictions are of an epistemological nature.

The rule of law could be conceived, however, as implying only the restraint of arbitrary power – which is a narrower and stricter requirement than the broader concepts of 'distance' or 'closeness' to state practice and 'independence' from politics. Similarly, one could define the requirements for concreteness and normativity also in a narrower sense which would allow for compatibility between them.

Thus 'concreteness' would not merely imply in a very general sense that law has to be 'close' to state practice and be based on actual behaviour, will or interest instead of on mere opinion. It would rather mean that law has to come into existence in accordance with certain procedures which are recognized as necessary for the generation of law and which provide the criterion for the verifiability of the validity of legal rules and hence for the existence or non-existence of law. Thus law is a result of social behaviour but its existence coincides only with its validity and not with that social behaviour itself.

Similarly, it is not very illuminating if the 'normativity' of law as a requirement for its objectivity is defined in a general way as 'independence' from the political will or the preferences of the subjects against which it is applied. Normativity should rather mean that once having come into existence legal rules remain valid and applicable not just until state practice, will or preferences have changed, but even until such time as the rules themselves have been changed in accordance with the necessary procedures.

Defined in this narrow way, the requirements for concreteness and normativity do not contradict or cancel each other. Indeed, rules of law can be both concrete and normative. They would be concrete if adopted through established procedures which would make it possible to verify their validity and to distinguish them from non-law – such as opinions, values, principles of justice. They would be normative because they can serve to assess state practice and state practice cannot abrogate their validity without following the necessary procedures.

It would not be convincing to regard 'shifts' of *argumentation* between normativity and concreteness as indicative of a theoretical inconsistency of international law itself. For the rule of law such shifts are *per se* not relevant. What is important is not whether argumentation is internally coherent and consistent and can thus serve as a basis for the rule of law, but whether international law itself complies with these qualities.

For the rule of law, the value of the objectivity of law lies not in its independence but in its distinctness from politics. The objectivity of law, as a requirement of the rule of law, does not have to imply independence from politics generally but only the theoretical and practical possibility of the separate existence of a set of obligatory rules – i.e. law – which is not mere political opinion and which could be applied against political behaviour. The interdependence of such rules and politics does not mean that they do not have a separate existence.

A narrower concept of the rule of law as distinct from arbitrary power, rather than from politics in general, would not diminish its significance. On the contrary, drawing its boundaries in a more precise way would make it more operational since the criteria of concreteness and normativity would serve not merely to establish the (im)possibility of the objectivity of law at the most abstract level, but also to apply them to specific legal rules, regimes, doctrines, etc., so as to see how they should be construed in order to be a suitable basis for the rule of law.

In spite of its limitations law remains a valuable and useful instrument for the ordering of society. It is valuable because it is preferable to sheer arbitrary power which knows no obligation and restraint. The ideal of the rule of law is useful because it is based on the idea of first making the law, i.e. first deciding what rules and what order are to be established and then following them. This way of establishing order by deciding on the obligations to be applied to future behaviour and conflict does not attempt or pretend to discover a set of pre-given rules which could help bring order into society. It is premised on the possibility of *making* obligations for future behaviour and thus avoiding or solving conflict.

The symbolic value of the ideal of the rule of law makes it worth preserving. The ideal itself cannot bring about international order but without it the concept of international order loses its attractive force. If and whenever this ideal is used to hide political arbitrariness and the reality of power relations then it is the use of the ideal and not the ideal itself that should be the object of deconstruction. Following Derrida one could even say that it is the ideal of the rule of law that makes the deconstruction of international law possible.[11]

II. The Existence of International Law

The idea of the objectivity of law thus conceived implies that law, including international law, can have an 'existence' of its own, which is identical with its validity and which can be verified. Validity is distinct both from political opinion, views or preferences, on the one hand, and from state practice, will, interests or behaviour, on the other. Rules of law can and do express political values, views and preferences, they

11 'Wenn es so etwas gibt wie die Gerechtigkeit als solche, eine Gerechtigkeit außerhalb oder jenseits des Rechts, so läßt sie sich nicht dekonstruieren. Ebensowenig wie die Dekonstruktion selbst, wenn es so etwas gibt. Die Dekonstruktion ist die Gerechtigkeit'. Jacques Derrida, *Gesetzeskraft. Der 'mystische Grund der Autorität'* (1991) 30.

are made as a result of political will and behaviour and serve political interests, but they are not identical with those values, views, will or interests. Once created, they acquire a separate existence and are no longer merely political opinions or social behaviour. Political opinions, interests, will and behaviour may change but the legal rules can only change in conformity with requirements which the law itself formulates 'autopoietically'[12] and which do not follow automatically the changes in politics and opinion.

The assumption of the existence of international law is based on the very recognition of such existence and not on the actual observation of its rules. An obligation arises because states *say* that they have undertaken it and international law exists because states and people believe and say so. The 'reality' of international law coincides with its 'magic'.[13]

Being social constructs, both international law and the theory of international law have an impact on actual behaviour. Theory, rules and behaviour are involved in mutually constitutive processes. Their 'existence' can be explained by reflexive reference to each other. So far, I have argued that the validity and the existence of law are constituted through 'concrete' behaviour. But when doctrine asserts, assumes or posits the existence of international law or, alternatively, rejects it as a 'phony' discourse about 'reified' abstract ideas,[14] then it can influence, shape and actually constitute diverse types of behaviour. Such assumptions or rejections have a self-fulfilling property which projects reality. Because doctrine, rules and behaviour are *mutually* constitutive it makes little sense to look for their 'reality' elsewhere – that is to say outside their mutual co-constitutive relationship. It makes much more sense to ask about their *mutual* significance. What matters then is whether there is any *value* attached to the possibility of international obligation and the international rule of law. Denying the possibility of their 'existence' in fact means nothing more than denying their value. Further, to say that international law and the idea of an international rule of law are intrinsically contradictory could merely mean that they have been socially constructed in that manner. It does not necessarily follow that they cannot be constructed differently.

The acquisition of legal validity – and hence of existence – by abstract rules through social behaviour is the condition for another form of their existence; they become 'real' also in the sense that they are observed by states. This, however, is not a process of 'reification', because through the concreteness of the law-making process

12 On the concept of 'autopoiesis' in law: G. Teubner, *Recht als autopoietisches System* (1989); Teubner, '"And God laughed...": Indeterminacy, Self-Reference and Paradox in Law', in C. Joerges (ed.), *Critical Legal Thought: An American-German Debate* (1989).

13 This brings to mind the invisible fairy Tinkerbell from J.M. Barrie's play *Peter Pan*. Tinkerbell is both a vulnerable and a powerful creature. Her very existence depends upon others believing in her and saying so. But when she is believed in, she can perform magic, even to the point of changing the course of the story. (My attention was drawn to Tinkerbell's magic by M. King, 'The Magic of Children's Rights', unpublished manuscript, 1992).

14 Carty, 'Critical International Law: Recent Trends in the Theory of International Law', 2 *EJIL* (1991) 67.

'abstract' rules acquire actual and not just imagined validity. Furthermore, the normal consequence of following legal rules through actual behaviour is also concrete and not imagined.[15]

An aspect of the separate existence of international law and its relative independence from states is that states may come and go but the very existence of international law is not influenced by this. New states usually accept the existing body of international law. The fact that some may want to change it or explicitly reject some of its rules means that they presume and accept the existence of international law as such. Since international law is not directly dependent on the arbitrary will of any single state, its stability across time is considerable.

If the assumption about the possibility of the 'existence' of international law and international obligation, which is identical with their validity, is rejected, then there can be no space for an international legal discourse distinct from politics. Then the behaviour of states which observe rules would be described either as following political coercion, pressure and necessity or as naively entertaining fictions such as international obligations. If, however, such political coercion, pressures or necessity include *other* states' beliefs or justifications based on international law, then the assumption of the existence of international law is reintroduced.

There has been an attempt to replace the existence 'of a central international legal order as an impartial point to which State actors can refer' with the existence of 'States as independent centres of legal culture and significance'[16] with their 'own distinct constellation of political values rooted in a specific political culture which defines what it regards as obligatory'.[17] Such a shift brings to mind the 19th century German perception of international law as 'external state law'. In the present case, the underlying assumption is the existence of national communities with their own legal cultures. It could be objected that national communities, which have been described as 'imagined communities',[18] are also social constructs, no less 'historical' than international law. What then are the criteria for the 'existence' of national political communities and cultures and who would or would not qualify to constitute such a community? Why should we assume the absence of an international political community and an international legal culture and why should national political communities be less fictional and more 'real' and capable of providing objectivity to international law? Can this reference to multiple legal cultures, in spite of the wish to

15 Carty, ibid., defines 'reification' as meaning 'simply to consider or to make an abstract idea or concept real or concrete'. There is, however, a difference between 'considering' and 'making' an abstract idea or concept real and concrete. An idea made real actually becomes real. An idea, opinion or doctrine is 'reified' if it is only 'considered' real, e.g. if a rule does not fulfil the requirements for legal validity but is nevertheless believed to exist – as *res* – independently of human behaviour, independently of whether it can be or has been 'made'. So the charge of 'reification' is inapplicable not only to the rules which are actually observed by states but also to all rules which have acquired validity through the relevant social processes.

16 Ibid.

17 Ibid., 94.

18 B. Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism* (1991).

'translate' them into each other provide the objectivity which is needed for the rule of law? Or, is it not simply a reference to different, possibly contradictory, political opinions, lacking the necessary 'concreteness'? Would it not amount to 'reification' to consider the 'reality' of international obligation as rooted in opinion – which in this case is shaped by national political culture?

The 'existence' of law does not necessarily imply its 'completeness' – that there is a ready-made set of rules 'out there' that can be applied to any situation and that may provide the solution to any social problem. It rather implies the idea that behaviour *can* be regulated by rules. If there are no such rules then they *should* be made. The ideal of the rule of law implies the *possibility* of the existence of law and the requirement that it should be made and applied to regulate political behaviour. Such a view follows from the 'social conception' of law which sees law not as an expression of natural justice but as a social construct. If law is man-made and if its making involves a *process* then necessarily its rules acquire their validity and begin their existence only after they are created. Before that moment and after their abolition they do not exist.

Similarly, the objectivity of law also does not imply that existing law offers the 'best' and the 'only correct' solution for any situation. Neither does it imply that law is a coherent set of rules which never contradict each other. Since law is a social phenomenon, its rules are as good as they were made to be and contradictions are possible and do occur. What matters for the rule of law is that there is a possibility of overcoming such contradictions – e.g. through procedures and other 'secondary' rules. Like completeness the internal coherence of law is not something pre-given but something which has to be continuously achieved.

III. Validity as the Objectivity of Sources

Thus far the argument has addressed the fundamental possibility of the rule of law. If the requirement of objectivity involves an inherent contradiction between the concreteness and the normativity of law, then this possibility is denied. But if we accept that the objectivity of law is conceivable we are assuming only the *possibility* of the rule of law. As a next step we would have to see whether existing law is *actually* objective – concrete and normative – and can therefore serve as a suitable basis for the rule of law.

The tension between concreteness and normativity within international law is most obvious between 'international custom, as evidence of a general practice accepted as law'[19] and 'the general principles of law recognized by civilized nations'[20]. Thus concreteness and normativity have found general and separate formal expressions within the system of recognized sources of international law.

19 Art. 38(1)b of the Statute of the ICJ.
20 Art. 38(1)c of the Statute of the ICJ.

The question must then be posed whether this makes the system of sources of international law contradictory and hence inadequate as a basis for the international rule of law? Is state practice not too 'apologetic' to correspond to the requirement of normativity and are not the general principles of law too 'utopian' to be 'concrete'? The answer given by sources doctrine is that: (1) mere state practice cannot create law unless it is 'general' and 'accepted' as law; and that (2) the general principles as well have to be 'recognized' as law.

Thus the concreteness of state practice can be seen as 'relying' on the normativity of *opinio iuris* in order to avoid apologism while the normativity of the general principles of law relies on the concreteness of the act of their recognition in order to avoid utopianism. This reliance on the 'opposite' requirement – on normativity by state practice and on concreteness by the general principles – cannot, from the point of view of the rule of law, be viewed as an unacceptable 'shift' or 'deferral', unless we make the unfounded assumption that sources have to be theoretically 'pure' and have to rely on only *one* of the two opposite requirements. Such theoretical purity is – by definition – incompatible with the rule of law, since 'pure' normativity as total distance from state behaviour would be utopian and the 'pure' concreteness of state will or behaviour would be apologetic.

If we take a closer look at the mutual 'reliance' of sources on the 'opposite' requirement we can see that they actually rely on the same thing: some form of what is ultimately consent. In Article 38(1) of the ICJ Statute, this is expressed through the requirements of 'acceptance' for custom and of 'recognition' for the general principles. In the first case it is the normativity of acceptance which is relied upon, whereas in the second it is the concreteness of recognition. The normativity of consent consists in its ability to create obligation and its concreteness in the very act of expressing it. Therefore, consent should not be identified with concreteness alone – with the social behaviour through which it is expressed, but also with normativity, i.e. with its capacity to create obligation that can be opposed to behaviour.

Thus consent emerges as the underlying principle of sources doctrine not only with respect to treaties but also to the other two types of sources – custom and general principles. It could be seen as the ultimate general criterion for the objective validity and, hence, existence of rules of international law.

So the 'objectivity' of the three traditionally accepted sources of international law can be established by doctrine on a most general level which means that these sources are *per se* not unsuitable for the rule of law.

The requirement of objectivity, however, has to be applied to specific legal rules as well in order to establish their specific appropriateness for the rule of law. From the analysis already undertaken it follows that rules can be considered as 'objective' – in the sense that they are both normative and concrete – only if they are valid, i.e. have come into existence through the right process of law-making.

IV. Determinacy and Coherence

Validity, although necessary, is not the only requirement which the rules of international law have to fulfil from the point of view of their aptitude for the rule of law. Valid rules may be, for example, quite inadequate to serve as a basis for the rule of law because they can be too general and indeterminate, thereby allowing different and contradictory interpretations and, hence political arbitrariness.

The requirement for determinacy, unlike that for validity, seems to be more a matter of degree. All rules of law are by definition to some extent general. So their determinacy – at least in theory – can never be absolute. Therefore this is another 'intrinsic' contradiction. The rule of law implies on the one hand the ordering of society by rules which are generally applicable and treating like cases alike and not by individual prescriptions which can be discriminatory and inequitable. On the other hand the more general the rule, the less clear and determinate it becomes, giving rise to different and even contradictory interpretations and the possibility of arbitrariness.

It could be argued that the generality of rules is a manifestation of their normativity while their determinacy is a function of their concreteness. In this case there seems to be no general theoretical solution capable of reconciling the contradiction. In practice, however, the fact that determinacy is a matter of degree also means that solutions can be sought which could strive for some optimal degree of determinacy.

Thomas Franck, analysing the determinacy of international legal rules, formulates what he calls 'the sophist rule – idiot rule paradox' and concludes that 'the problems arising from both idiot and sophist rules can be mitigated, if not altogether eliminated, if that is the desire of States.'[21] With regard to simple and straightforward (idiot) rules, which he finds are more determinate but lead to unexpected results, he proposes for example to 'de-construct the category of activity being regulated, prohibiting only narrow categories of acts as to which, by common agreement, no exculpation will be allowed'.[22] The 'calibrated' ('sophist') rules, which he finds less determinate because they allow for exceptions to an otherwise straightforward rule, require in his opinion an effective, credible, institutionalized interpreter of the rules' meaning in various instances.[23]

Another requirement that legal rules should fulfil in order to serve as a suitable basis for the rule of law is that they should not contradict each other. If legal rules offer

21 T. Franck, *The Power of Legitimacy among Nations* (1990) 90. Quoting Wittgenstein that no 'course of action should be determined by a rule because every course of action can be made out to accord with the rule', Thomas Franck says that although this 'may be true in theory, ... yet some rules are less malleable, less open to manipulation, than others. Although Wittgenstein's point has merit ... in practice determinacy is not an illusion. The degree of elasticity of words and texts varies and can be controlled as a deliberate strategy... While no word formulas are entirely without elasticity, yet some are more elastic than others.' (Ibid., at 56).

22 Ibid., 88.

23 Ibid., 81.

contradicting solutions then states can choose the one which would suit best the justification of their political arbitrariness. Contradictions between rules create an indeterminacy of the whole legal system.

Unlike determinacy, coherence may be theoretically conceivable but it is very difficult to achieve in practice. Since law is man-made and results from human will and conflicting interests, contradictions within the legal system can and do occur.

In international law one important instance of contradictions are those between its general principles which embody different potentially conflicting values. There can also be contradictions between the general principles of international law and its specific rules. So political values and principles of justice, incorporated as valid general rules into the body of international law, can be in conflict with its specific rules which have not been changed to correspond with a new general principle. Sometimes governments agree to recognize as legally valid new principles expressing politically attractive values only because principles, due to their generality and indeterminacy, cannot be effectively opposed to 'hard' specific rules which contradict them but which states nevertheless do not want to change. Or the indeterminacy of general principles requires the adoption of implementing rules and/or mechanisms which then never appear.

One quite obvious instance of contradiction, incoherence and indeterminacy in the formulation of a general principle of international law, expressing a politically attractive value, is the text on self-determination in the UN Declaration of Principles of International Law of 1970.[24] On the one hand the Declaration proclaims that by virtue of the principle of self-determination 'all' peoples 'have the right freely to determine, without external interference, their political status' and that the modes of implementing this right are the 'establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people'. On the other hand the declaration states that this shall not be construed 'as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'. Thus there is no clear, coherent and determinate solution to the contradiction between the value of self-determination of peoples, on the one hand, and that of territorial integrity and political unity of states – on the other. This contradiction is merely restated.

There are, as mentioned already, methods by which legal systems address contradictions and attempt to overcome them. These can be, for example, rules of interpretation which give precedence to certain categories of rules or establish

24 General Assembly of the United Nations. Declaration of Principles concerning Friendly Relations among States in accordance with the Charter of the United Nations. General Assembly of the United Nations, 24 October 1970. GAOR, Supp.28 (A/8028), 121.

hierarchies between them, e.g. *lex posterior derogat lege priori, lex specialis derogat lege generali.* In international law, rules of *ius cogens* cannot be overruled by contractual stipulations between states and have thus a higher place in the hierarchy of its norms. Another method of dealing with contradictions is to 'defer' them to procedures and institutions through which the law is applied.

The question remains, however, whether rules of interpretation, as well as procedures and especially institutions applying the law do not bring in an element of uncertainty and indeterminacy which is not easily compatible with the ideal of the rule of law.

V. Why Legitimacy?

So far I have tried to show, on the one hand, the 'existence' of law which makes the rule of law possible and, on the other hand, the contradictions within valid law, its indeterminacy and incoherence.

To this discrepancy legal theory can respond in different ways. It could conclude that the rule of law is not possible after all because legal rules are not able to provide a coherent, determinate and transparent standard. Another response would be to deny the contradictions within the legal system. This seems to be a frequent, almost intuitive, view. Legal doctrine tends to assume that law *is* a coherent standard possessing the necessary tools to deal satisfactorily with contradictions and to provide the only 'correct' answer to any legal problem. Contradictions are thus considered as merely apparent.

One of the particular forms of rejecting the existence of contradictions, especially in international law, is to deny the validity of general principles. If principles do not 'really' have a legally perfect validity, but are rather political values or 'soft' law, then a major source of indeterminacy and contradiction within the law, creating problems for the concept of the rule of law, seems eliminated. Here I will not discuss the question concerning which principles are legally valid and on what grounds, but would like to stress that denying the legal validity of a general principle only on account of its generality or its conflict with other principles or rules is not convincing. The validity of a rule, however general, indeterminate or incoherent, is a separate matter which depends on a different set of criteria.

I would like to propose another way of conceptualizing the contradictions within law which does not deny their existence and yet takes into consideration the need for overcoming them in order to meet the requirements of the rule of law.

A concept which seems capable of taking account of the existence of contradiction and indeterminacy within law is the concept of *legitimacy*.[25] Legitimacy in its simple

25 On legitimacy in international law see Franck, *supra* note 21; R.-J. Dupuy, 'Communauté internationale et disparités de développement. Cours général de droit international public', Deuxième partie,

original meaning implies conformity with law.[26] Unlike legality, however, it denotes accordance with basic *principles* of law, and not with all specific rules of law. Legitimacy has also the connotation of contestability: of a 'contestable validity claim', of a 'claim to be recognized as right and just', of 'worthiness' to be recognized.[27]

In order to outline the concept of legitimacy it may be useful to compare it to that of legality.[28]

The concept of legality refers to a static, one-dimensional vision of law in which the distinction legal-illegal is expected to give a definite, determinate answer about whether a given behaviour corresponds to it or not. This distinction cannot tolerate indeterminacy and contradiction, and has to assume that they do not exist, approaching them technically by applying certain rules and procedures in order to be able to present a non-conflictual picture of law. From the point of view of the distinction legal-illegal there can be only one 'correct' answer to any legal question. Something cannot be both legal and illegal, or legal in one respect and illegal in another. In the process of applying the law, courts have to find one single answer to the problem they have to solve and hence lawyers are predisposed to assume that it is the only possible and correct answer which they have to 'find'. Especially if law is defined as 'what the courts will do', it is understood as something one-dimensional which has to provide definite criteria for the distinction legal-illegal. Indeterminacy and contradictions are pushed away into the non-legal spheres: to the moral, the political, or to the category of utopian wishful thinking.

Legitimacy, on the other hand, having the connotation of the 'contestable validity claim', is capable of referring to something which has the potential of being 'legal' and yet is not, not yet, or not fully recognized as being 'legal'. It has the potential of being 'legal' because it corresponds to certain rules or principles which are perceived as basic but yet the claim, because of various circumstances, is not being recognized, so it does not have 'real' legality.

Legitimacy, unlike legality refers to the 'ought' and not just to the 'is' of law. Moreover, one could say that it incorporates the 'ought' into the 'is' of law. Legitimacy implies contradictions, tensions and unrealized potential which the distinction legal-illegal does not recognize as existing within the law.

Chapitre II: 'Légitimité et légalité', in Académie de droit international, 165 *Receuil de cours* (1979-IV) 135-187.

26 Among the meanings of legitimacy, given by *The Oxford English Dictionary* (2nd ed., Vol. VIII, 811) are: 'the condition of being in accordance with law or principle', 'conformity to rule or principle; lawfulness'.

27 'Legitimität bedeutet, daß der mit einer politischen Ordnung verbundene Anspruch, als richtig und gerecht anerkannt zu werden, gute Argumente für sich hat; eine legitime Ordnung verdient Anerkennung. *Legitimität bedeutet die Anerkennungswürdigkeit einer politischen Ordnung.* Mit dieser Definition wird hervorgehoben, daß Legitimität ein bestreitbarer Geltungsanspruch ist.' J. Habermas, *Zur Rekonstruktion des Historischen Materialismus* (1976) 271.

28 The difference between the two concepts has often attracted attention; see, e.g., C. Schmitt, *Legalität und Legitimität* (3rd ed. 1980); Habermas, 'Wie ist Legitimität durch Legalität möglich?', 20 *Kritische Justiz* (1987) 1-16.

From the point of view of legality, legitimacy itself is not a legal concept: if something is legitimate because it 'should' be legal, then it is 'in fact' not legal. Thus, legitimacy is seen as lying beyond, outside the law, even if it has the capacity of occasionally entering its sphere. It is not perceived as the lawyer's concern but as that of the politician, the legislator and the moralist.

The perception of legitimacy as something outside the sphere of law and the lack of interest on the part of legal doctrine in this concept is matched by the development in other social disciplines of concepts of legitimacy which do not expressly contain the idea of conformity with basic principles of law. Most often legitimacy is understood either quite abstractly as 'justification', or it is identified with popular acceptance of a political order, of political institutions and their activities. It could be argued of course that such a concept of *democratic* legitimacy is relevant for law as well because it contains basic requirements addressed to law: that it should be made by democratic institutions and by democratic methods. Although such a concept can be considered applicable to international law, here I would like to limit the discussion only to legitimacy in its simple initial sense, namely as implying conformity with basic principles of law.

This concept of legitimacy is concerned with the same issues as legality but offers a perspective from the point of view of the general principles of international law. Whereas legality tends to take them into consideration only in a subsidiary way, e.g. only if the specific rules do not offer an answer which would have precedence as *lex specialis*, legitimacy is primarily concerned with the conformity of the specific rules with the general principles. So from the point of view of legitimacy the principles of *jus cogens* and their relationship with other rules of international law are of special relevance and importance.

Legitimacy, understood as conformity with the general principles *of* law, is a concept which – I claim – addresses issues *within law*. If the general principles of international law are recognized as valid, albeit in some cases indeterminate, rules *of law* and not merely of justice or politics, their interrelations and their relations with other rules of international law are entirely in its own sphere and not somewhere outside it. States should be taken by their word and if they have recognized some standards as basic *legal* principles, then these standards should be accorded the significance they deserve *within* law. From the point of view of objectivity such principles are both concrete and normative insofar as they have come into existence through right process and have thus acquired validity.

Answering the question about the legitimacy of a rule or of behaviour will involve, however, making choices and constructing solutions which have to conform with contradicting and indeterminate principles. Therefore, these choices and solutions could be called 'political'. Even so, this would be politics *within law*, politics which would *not* be sheer unrestrained arbitrary power. It would not be 'subjective' politics destroying the 'objectivity' of international law but a process of 'politicisation' of law

(*and* perhaps of 'legalisation' of politics)[29] which aims at solving the contradictions within international law and enhancing its pertinence for an international rule of law.

So the turn to politics, including a turn to 'contextual equity' *within* the law,[30] for which the concept of legitimacy is relevant, does not, in my opinion, have to imply a 'turn away' from the idea of the *Rechtsstaat* and of the international rule of law.

By focusing on the tensions and contradictions within international law, the concept of legitimacy refers to its dynamic since it points to the possible directions of its development.

One of the ways to bring about change and development within international law is through the adoption of new principles which reflect new values. The more such new principles constitute significant changes of the international legal system as a whole, the more they will stand in contradiction with existing specific rules.[31] If the tension between such new principles and existing law is approached with the traditional attitude of legality, then the outcome will most likely tend to be conservative. It will favour the preservation of the specific rules and regard the new principles as 'soft law', as non-legal, 'political', utopian requirements, as principles of justice and morality, as inapplicable, indeterminate formulations of the 'ought' but not of the 'hard', 'positive' 'is' of the law. So argumentation from the point of view of legality will tend to deny the applicability of the general principles by putting into doubt their validity.

If, however, the validity of principles is taken seriously and becomes the starting point of the examination of law, the outcome is likely to be different.

To illustrate the point with an example from domestic law, one might ask whether it was legal or illegal and legitimate or illegitimate to deny black children, prior to the US Supreme Court decision against school segregation, access to white schools. What should the practicing lawyer have advised his client? Segregation was probably not considered 'illegal' by most lawyers before the Supreme Court decision. But what did the court do? Did it *change the law?* Or did it rather *apply* the already existing constitutional principle? The decision may be considered 'political' but it was not taken 'outside' the law but within it. It was *through* the law, by legal *means* that the change came about.

The concept of legitimacy addresses a possibility of changing and developing law. Unlike the concept of legality, it does not only reflect the consequences of change but provides a theoretical point of departure helping to carry out change. If life involves contradiction and change and if we can say that international law has not only an 'existence' but also a 'life' of its own, then the notion of legitimacy can certainly be of significance for it.

29 Koskenniemi, *supra* note 2, at XXII.

30 Koskenniemi, *supra* note 1, at 31-32.

31 See Georgiev, 'Letter to the Editor in Chief', in 83 *American Journal of International Law* (1989) 554-556.