

Review Essay

Ulrich Fastenrath, *Lücken im Völkerrecht. Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts*, Duncker & Humblot. Berlin (1991) 299 pages (incl. English summary), list of sources and index.

I

Aside from its obsession for detail, the scientific mind also seeks to comprehend an object under study as an entire system, rather than a mere totality of individual instances. Law is no exception. On the contrary, the quest for systemic relations between individual norms (rules, principles) as well as between norms and behaviour has been central to the law: if not so much with regard to the application of the law, but to its doctrine. What else is doctrine but an explanation of detail by reference to the whole, or the whole by reference to its individual parts?

But systems can only be comprehended – or at least argued – by means of a paradox: by directing attention to that which does not belong, which is outside and against which the system has a distinct identity. The idea of a legal system – in any of its numerous senses – is premised upon a delimitation between that which is and that which is not law. In this primal sense, as Ulrich Fastenrath shows in his *Lücken im Völkerrecht*, legal systems are dependent on theories of law, not *vice versa*. What one understands as a ‘gap’ in law is dependent on what one’s theory of law is. For a strict positivist, gaps tend to become identified with areas where legislation is absent. For a Dworkian naturalist, there really are no proper gaps at all: even in what first appear to be cases where no legal rules are applicable, a right legal answer can always be found by extrapolating it from the system’s background principles.

Fastenrath’s approach to the problem of *lacunae* differs from the classical treatments of the topic by Lauterpacht,¹ Stone² and Siorat³ in that his concern is not primarily that of the judge facing a hard case. Fastenrath looks at gaps from an external, systemic perspective, aiming to throw light on their character and function within the legal system as a whole, or what from his hermeneutical standpoint seems to amount to the same, the legal systems proposed by various authors. Nonetheless, the topic has a practical import. The approaches employed have a bearing on whether it is possible to accept that international law has universal application, and what should be seen as its proper legal sources, the political points of entry for the legal argument.

Such an approach aims to vindicate the fundamental character of legal theory for international law as social practice. One may disagree with such a programme and continue

1 See especially H. Lauterpacht, *The Function of Law in the International Community* (1933).

2 Cf. Stone, ‘Non-Liquet and the Function of Law in the International Community’, 35 *BYBIL* (1959) 124.

3 L. Siorat, *Le problème des lacunes en droit international* (1959).

to stress, as I do, the primacy of law as practice as opposed to law as doctrine and theory, and at the same time applaud the elegance of Fastenrath's demonstration that views regarding the mechanistic, non-political, value-free character of the international lawyer's job are completely unfounded. Certainly, even our most routine legal practices rely upon (and need constant backing from) unstated theories of law and its place in human society.

But I have two comments on this overall programme. First, is this demonstration really needed? The mainstream international lawyer is probably not an 'unreflective positivist' as theorists have the habit of assuming but rather a pragmatic problem solver for whom Fastenrath's analysis only provides a complicated vocabulary for something that they have known all along: namely, that particular theories, principles and interpretations of the law always refer back to larger world-views and prejudices.⁴ To stop there, however, as Fastenrath does, and to declare all these world-views and prejudices as simply *verschiedene Dimensionen* of the law, is surely an anti-climatic conclusion. The interesting follow-up question about the relative merits of the various prejudices is neither raised nor answered. Nor can it be, if, as Fastenrath assumes (though he is not absolutely clear on this point) there is no way of surpassing, even momentarily, the interpreter's own prejudices.

Second, why these legal prejudices, this *Vorwissen*, would be adequately reflected in a limited number of classical positivist/naturalist/hermeneutic/Marxist *legal* theories remains unclear. A more broadly cultural, or anthropological approach might have produced a more exciting legal subconscious, and a more realistic basis for linking decision making in hard cases into the general patterns of legitimation of authority in the international society. This might have provided a sharper and more evidently political contrast between the various 'legal' theories and approaches.

With these general caveats, however, the book provides a welcome *tour d'horizon* of conventional international legal theories and proposed systems through the idiosyncratic style of the German academic tradition: full of analytic rigour and interesting notation. The introduction of certain classics of German hermeneutic legal theory (Alexy, Esser, Larenz, Viehweg) into a text on international law is particularly welcome. Compared with certain recent Central European dabblings in legal method and international law (e.g. Bleckmann, Bos⁵), this book is simply a pearl.

II

A study of gaps is meaningful only in the presence of something in which 'gaps' can appear. Hence Fastenrath's first question, 'does an international legal system exist?', a question burdened with the profound ambiguity of the notion of 'existence' in connection with norms. The first half of the book explores the theories about (international) law and the different conceptions of 'sources' and systemic character which they spawn.

Most modern theories are willing to concede that an international legal system does have existence. Therefore, Fastenrath can safely conclude that a basis for a study of gaps also exists (at least for those theories). As the law is what lawyers come up with, no further enquiry is needed into whether the lawyers in fact are right.

Differing theories of law give rise to different understandings of the character of the legal system. These theories describe the law alternatively in terms of its relation to will,

4 I use the word here in its positive sense, a sense 'that was driven out of our linguistic usage by the French and the English Enlightenment', H. Gadamer, *Philosophical Hermeneutics* (1976, translated and edited by D. Lange) 9.

5 A. Bleckmann, *Grundprobleme und Methoden des Völkerrechts* (1982); M. Bos, *A Methodology of International Law* (1984).

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psychological sense of justice, some social fact or pattern of behaviour, a hierarchical relationship between norms within a system, or to what courts decide. However, such theories are vulnerable to well-rehearsed objections. Linguistic theories have sought to bypass the question of abstract validity and concentrate on elucidating the meanings of legal utterances as they occur in legal practice. Nonetheless, Fastenrath takes an eclectic view: these theories are not mutually exclusive but provide different perspectives on the law:

Sie stellen nur jeweils verschiedene Momente des Rechts besonders heraus: ... sie sich nicht gegenseitig ausschließen, sondern vielmehr in vielfacher Wechselwirkung untereinander stehen.⁶

Fastenrath's perspective is strictly external: it does not provide a basis for choosing what one should do (or how one should understand the law) – it only describes what is being done by legal theorists. Although the author's wish to remain descriptive may be understood in terms of his total project, one is also disappointed by his modesty: surely some of these theories have more intrinsic merit than others, surely it would have been worthwhile to say something of their acceptability in terms of their probable consequences in international life, particularly at a time of such significant (real or imagined) changes in international life as are occurring today.

Theory and system are linked through doctrines about *sources*. Different legal theories provide different enumerations (and conceptions) of legal sources, and thereby inevitably also normative systems with differing substance. Fastenrath's discussion proceeds through lengthy listings of opinions and doctrines about sources, again from an external observer's, not a participant's perspective. It ends with a listing of four notions of international law as a 'system' implied in the theories of sources. International law appears as (1) a system of normative relations (of delegation), (2) an organic participant in international life, (3) a system of values and purposes, (4) a rational system of social organization. Again, these notions are, for Fastenrath, complementary, not exclusive, although they compete with each other for prevalence. The notion of international law as a reflexion of bilateral relations sets itself in political contrast to the idea of the law as upholding human rights or obligations owed to mankind as a whole; voluntarism fights against organic conceptions of customary law that would allow the *opinio iuris* of a large majority to emerge as generally binding law.

III

Gaps, then, are places in which the system is absent, in which it finds no application. A study of gaps is thus simultaneously a study of the limits of the system. The second part of the book is an enquiry into those limits from Fastenrath's linguistic perspective. For it seems that the law's limit is a changing one, changes reflecting interpretative difficulties in the delineation of the meaning of legal utterances. The perspective now is language. As communication, all law – and not only written law – is language:

jede komplexe Ordnung aber ist auf die Sprache und die schriftliche Fixierung des Normen angewiesen ... auch Gewohnheitsrecht und allgemeine Rechtsgrundsätze müssen in Rechtssätzen formuliert sein.⁷

For Fastenrath, law is the meaning of legal words and the problem of law's limits is essentially the semantic problem of how to reach those meanings.

6 At pages 81-2.

7 At page 156.

This is not a common perspective for international legal theory – although since Kratochwil's work, it is not a unique one either.⁸ Fastenrath's arguments for the usefulness of a turn to hermeneutics and interpretation for international lawyers is, however, a readable introduction to linguistic analysis of law. After laying down the problem: how to find the way from the legal utterance to the norm as the sense of that utterance, an excursion is given into the various theories of the production of meaning (semantic, pragmatic and hermeneutic theories).⁹ But the meaning of legal rules cannot be ascertained by linguistic criteria alone. The classical canons of legal interpretation (grammatical, systemic, historical, teleological, voluntaristic, etc. 'methods') are surveyed – with the (predictable) result that although they may be helpful, they do not provide one unique answer to interpretative controversies. The canons refer back to legal (or more adequately, political) theories, to a *Vorverständnis* (pre-knowledge) which is constituted by interpreting a person's horizon of understanding. Not even the special technical language of the law is free from interpretative uncertainty. But there is no need for concern: uncertainty is even desirable in as much as it allows the incorporation of social change into the legal system.

The limits of the law are thus coextensive with the limits of the acceptability of interpretative acts. No single limit exist: legal utterances have a core of relatively settled and uncontroversial meanings and a penumbra of contested meanings. But no fixed boundary between core and penumbra exists. Fastenrath writes that 'Recht ist ein Ordnungsinstrument in einer sich wandelnden Welt...'¹⁰ The meanings of words change with the changes in the social world. The legal craft seeks ultimately to link its normative propositions into requirements of particular interpretative contexts. In terms of common values or interests, however, international contexts are much less cohesive than the domestic one. Hence the reluctance to accept the extension of judicial competence into wider fields of international conduct. In practice, the acceptability of an interpretation often remains dependent on the authority of the interpreting organ – this authority, being a factor that is *internal* to the law, and providing the measure by which particular interpretative acts may work as precedent.¹¹

IV

Once we know the law's limits, we also know its gaps. The third part – the only one specifically devoted to gaps – may thus be seen as the reverse of the second. Gaps are what is left when the various linguistic operations are completed through which the limits for existing law have been set.

The final section of the book examines the effects and functions of gaps for the law. Fastenrath's message here is that attempts to 'close' the system with the help of meta-principles (for example, the so-called Lotus principle – i.e. the principle that in the absence of a clear prohibition, States must always be presumed to be free to act), will inevitably fail.

Such attempts will fail, in the first place, as the legal system cannot provide guidance in new situations and future cases. A hiatus necessarily exists between the society's present and the substance of the law as it was enacted in the past. In fact, from an anthropological perspective, it suffices that the law determines general orientations while the specifics can be left to *ad hoc* decision. It suffices that the law reduces societal complexity and creates broad patterns of thought and orientation – it cannot, and should not, do away with plurality and conflict altogether.

8 F. Kratochwil, *Rules Norms and Decisions. On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989).

9 At pages 167-176.

10 At page 192.

11 At pages 194-199.

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But attempts to close the legal system by adopting the postulate of freedom are also useless because the freedoms of several States will inevitably conflict, and by mere reliance on 'freedom' we are at a loss about who's freedom should be given precedence. The social problem is not an abstract issue about 'freedom' but how to set priorities in a situation where every State assumes that it is acting within the limits of its freedom. Freedom of action, writes Fastenrath, is anthropologically useless. It gives no orientation and thus ultimately no protection for any State's legitimate sphere of self-determination.

Gaps are useful in that they allow other normative systems – morality and politics – to have an influence within the law. They give room for politics in a way that works towards guaranteeing the law's general acceptability for the members of the society as a whole.

V

The book provides a comprehensive overview of doctrines dealing with the basis of international law and, especially, of the various listings and understanding of its sources and interpretative methods. Like many legal treatises about methodology, the book feels sometimes like a train ride through nostalgic country landscape. The traveller encounters names – Hegel, Kelsen, Verdross, Lauterpacht, Dupuy, McDougal – and ideas – natural law, coercive theories, positivism, voluntarism, empiricism – like names of rural stations viewed from a fast train travelling towards the city. The stations are only glimpsed and we never set foot on the platform, and never meet anyone living there, and one is left in some doubt about whether it is all just a *picturesque* facade constructed by architects from the city to brighten the dullness of the journey. No reason is given to understand why anyone would wish to remain on the platform. But we need not worry, as in any case, already early during the ride, the word 'modern' appeared¹² to announce the approaching city of linguistic (hermeneutic) and political theories. At that point, we were in effect called on to forget about the old stations as real life worlds, and their names as meanings.

And as we sit down at our modern clip-board in the city office, the names we saw during the ride remain with us, as advertisements, or signs, flat as the facades which we always expected they were, with no relation to the passion or the politics of the times in which they participated. We organize them as geographers situate spots on a map: link them in formal relations on a flat surface. We then hang the map on the wall as an amateur anthropologist might display the diary of his first exploration.

Fastenrath's external perspective has produced a static, aesthetic vision on fragments of past thought. The *Erkenntnisinteresse* remains taxonomic, antiquarian. This is paradoxical, for the treatment of gaps, particularly in the closing chapter, is thoroughly functional: gaps serve purposes, ensure the law's dynamism, its capacity to reflect the social context. The almost total absence of such context – of diplomacy, institutions, treaties and cases – from the book itself produces a strange perspective on that functionalism. Perhaps it is appropriate to end with a generalizing, even if tentative suggestion. Can it be that the more we speak about politics, balancing and the entry into social decision of the widest possible range of 'world-views', the less we actually participate in this process ourselves? Chetnik and Ustasha may have interesting 'perspectives' on the system of international humanitarian law. Is there nothing more to say about them?

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¹² At page 71.