Introduction: images of law

Images of law

Writing a book about the *Status of Law in World Society* inevitably conjures up certain associations. One is, of course, the perhaps subconscious reference to Richard's Falk *The Status of Law in International Society*,[1] which in turn took its cue from Hersh Lauterpacht's earlier treatise.[2] The other is to the concept of "world society," which could be used analogously to the term "world politics" that once established the research program of one of the first journals in the field, but which consciously adopted a program for analysing both international and comparative politics. Or we could take it in the sense in which Niklas Luhmann and his school are using the term.[3]

It would be tempting to connect the first and the last version and take them as points of reference, thereby constructing a coherent narrative in which the international has been replaced by the global, the state by "society," and international law, formerly merely an adjunct to diplomacy and perhaps of relevance to "international organizations," has finally become one of the main drivers shaping world politics. I shall resist that temptation and stay much closer to the second option, without wanting to deny the impact of globalization on states and societies and the fact that, for better or for worse, "law" and its "lawyers" have arrived as part of the professional class that manages our affairs. To that extent law now provides in large part the vocabulary for contemporary politics. Whether we discuss the "legality" of the second Gulf War, address human rights, the (in)admissibility of certain means of "enhanced interrogation," or trade and development issues, legal concepts figure prominently in all arguments and are made by all sorts of people, be they decision-makers, journalists, public intellectuals, or the proverbial men (and women) in the street.

But if law has become in a way "triumphant," why is it that we do not seem to have realized the "progressive" promise we so ardently hoped for? In a way we seem to experience the same disappointments at the level of public

[1] Richard Falk, *The Status of Law in International Society* (Princeton University Press, 1970).
[2] Sir Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon, 1933).
[3] Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, 2 vols. (Frankfurt: Suhrkamp, 1998).

(international) law as we did domestically, when Watergate exposed the seamier side of the legal "profession," or when, more recently, with the law of "standardized contracts" (contracts of adhesion), which have morphed from an instrument of autonomous agents who freely made agreements into something else. Here not a "few rotten apples" or a specific misuse but the law itself has become problematic. Suddenly, "boilerplate" and "fine print" supersede individual rights and any meaningful concept of "consent" (by "informing" the contracting party e.g. only *ex post* of the "terms and conditions"). "The law" instead protects often questionable business practices through exculpatory clauses and through restrictions on available remedies.[4] Similarly, now that international law has finally emerged from the closet of the state system, not all might have been lost (to paraphrase Kant), but the triumph seems rather stale. True, while it was formerly generals and defence ministers who might have only occasionally paid lip service to the law while ignoring it in practice, now legal professionals[5] decide on retaliatory measures, pinpointing houses in Afghanistan, or persons in Yemen or Gaza,[6] or they give the "go ahead" for striking targets in the former Yugoslavia. The former reasonably clear anti-torture norm, frequently ignored by governments even though its existence was hardly ever doubted, is now being artfully dismantled by inventing new categories, such as "unlawful combatant," and by invoking supreme necessity in the war on terror. Thus the suspicion arises that "law" might have become part of the problem rather than the solution, and this problem requires further analysis

Evidence from other areas reinforces this perception. The continuing global financial crisis had not only to do with the dismantling of a regulatory structure that was derided as an outmoded "control and command" system. While strict supervision certainly has its disadvantages, as it puts high demands on regulators and might create inefficiencies and resistance, the reliance on broad principles in the so-called PBR (principle-based regulation while "deputizing" the institutions to regulate themselves) is unavailable if, in the words of one of the chief regulators in the UK, we deal "with people who have no principles."[7] It made possible the excesses of the "socialization of risk" while privatizing the profits since it was powerfully supported by the intellectual hegemony of

[4] See the indictment of the practice of standardized contracts by Margaret Jane Radin, *The Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2012).

[5] For an incisive analysis of the changing practices see David Kennedy, *Of War and Law* (Princeton University Press, 2006).

[6] On the problems with long-distance "targeted killings" see Nils Melzer, *Targeted Killings in International Law* (Oxford University Press, 2008).

[7] As quoted in Julia Black, "Paradoxes and Failure: New Governance Techniques and the Financial," *The Modern Law Review*, vol. 75 no. 6 (2012), 1037–63, at 42; see also Kenneth W. Dahm, "The Subprime Crisis and Financial Regulation: International and Comparative Perspectives," *Chicago Journal of International Law*, vol. 10 (2009–2010), 581–638.

certain doctrines about the efficiency of markets. In making "law" the facilitator of market efficiency and in buying into the belief that all risks are calculable, even systemic ones, law seems to have been colonized as exemplified by the "law and economics" or governance approaches that espouse "meta regulation" by relying on the self-regulation of firms and on the "market" itself. Ironically, the inroads into law came at a point when many economists had already abandoned the idea of efficient markets – given the susceptibility of the latter to informational asymmetries and panic reactions. But the "legal professionals" who had been exposed to some "cross-fertilization" by another discipline had participated wholeheartedly in the destruction of the few existing firewalls, with the predictable perverse effects. This is not to say that we can or even should go back to the status quo ante, but it does mean that politics and law will have to find new instruments, instead of treating the market as the ultimate authority.

Finally, the prospects of a global society that moves from segmentary (territorial) to functional differentiation might be good news for law students as more and more specialized services are needed, but not necessarily for the rest of us. Forum shopping, representing clients worldwide, and submitting essentially the same cases to different dispute resolution mechanisms, thereby circumventing the *res judicata* principle, offers the prospect of ever increasing job opportunities. It should not come as a great surprise that these trends are less enticing for those who do not think that the rule of law and the rule of lawyers amount to the same thing.

Although the alternative interpretation sketched here casts a gloomier spell on contemporary developments than we encounter in the usual triumphalist account of progress and cosmopolitan justice, it is not so much at odds with our highly ambivalent attitude towards "the law." This ambivalence becomes visible in a variety of images that we connect with law's "darker" side, serving as an instrument of *dominium*, even repression. I will leave aside in the following the "deeper" psychological interpretations we find, for example in Freud[8] and Lacan,[9] and concentrate more on the images and metaphors by which we commonly capture (some) characteristics of law. Below I inductively listed some typical images and common sayings – some paraphrased for brevity's sake – about the law:

(1) Law is Justice – see the representation of the Goddess of Justice on many court buildings.
(2) An unjust law is no law (Antigone).

[8] Sigmund Freud, *Group Psychology and the Analysis of the Ego*, transl. by James Strachey (London: Hogarth Press, 1945). See also his *Civilization and its Discontent*, transl. by Joan Riviere (London: Hogarth Press, 1946).
[9] Jacques Lacan, *Ecrits*, rev. edn., transl. by Bruce Fink (New York: Norton 2002).

(3) As in nature law is the right of the stronger (Gorgias, Greek sophists).
(4) Among us nobody rules but the law/ The government of … is one of laws and not of men (Aristotle, Madison-Adams).
(5) It is the law, stupid (American popular saying).
(6) Law is the command of the sovereign (Hobbes, Austin).
(7) The law is an ass (English proverb).
(8) *Summum ius, summa iniuria* (highest law, highest injustice) (Roman proverb quoted by Cicero in *De officiis* Bk. I, 10, 30).
(9) Law and lawyers are hired guns (American proverb).
(10) Law is reason (Cicero).
(11) Law is like a door in an open field. Why would you go through the door? (Bulgarian saying, possibly apocryphal).
(12) Law is what the courts will do (Holmes).
(13) Men are bad and made good by laws (Machiavelli).
(14) Law is a system of norms (rules) (Kelsen, Hart).
(15) Law is the art of the good and the equitable (Celsus).

Let us begin with the image of Justitia, the goddess of justice. She is blindfolded, carrying some scales in one hand while holding a sword in the other. I vividly remember my first encounter with her in a court building in Bavaria when I, as a pre-school kid, accompanied my father to a court. I asked him (a lawyer and soon-to-be judge) who that lady was and why she was blindfolded. He answered that it was the figure of Justice and that she was weighing, for example, the – guilt or innocence – of an accused while not wanting to be distracted. The sword then symbolized the power of punishing wrongdoers. I was impressed and kept silent for quite some time (not my usual behaviour at that age). When we finally left the courthouse, I asked my father how Justitia could know how the weighing came out, since she could not see. My father laughed without giving me an answer and, I guess, that was one of the reasons I tried to find out later how "judging" actually occurs.

But besides inducing my irreverent question, this example also shows the polyvalence of the symbol and the ambivalence of law mediating between opposites. Thus the "equality" of the parties or subjects is created by elevating the law to a goddess "above" the contending parties. The close attention to the facts of the case and their "weight" is paired with keeping other distractions at a distance, symbolized by the blindfold. This impartiality is then linked to "supremacy," symbolized by the sword "besides" the law. But this "blindness" of Justitia also gives rise to the complaint in the Roman saying that "the highest law is the highest injustice," or in the English saw that "the law is an ass." Both complaints are not so much directed against the blindness or bias of a court in appreciating the facts as they are concerned with the construction of the law itself, that is its interpretation, the *callida iuris interpretatio* that Cicero

mentions,[10] and that blindly deciding by rules instead of tempering their application with equity leads to absurdities.

Utilizing the disjuncture between foreground and background is another way of resolving the tensions within "the law," as can be seen from the Antigone vs. Gorgias argument about "nature" lending validity to law. The tangible law can then only be understood as a reflection of a deeper order that can be somehow intuited and that serves as its ultimate foundation. It is the "facticity" of the ontological order that permeates the cosmos (as in Antigone) and it is the naturalness of desires (Gorgias) that leads to the opposite conclusion of what "nature" commands. On the one hand we arrive at "natural law" and a notion of law as universal reason, exemplified by the Stoic teachings. On the other hand we encounter here the "realist" position that law is command, either by nature or by public authority, and is not rooted in some universal conception of "justice." "*Ius*" derives from "*iussum*" (the commanded), not from *iustum* (the just), that is Hobbes, Austin's command theory of law. Aristotle and Machiavelli provide some important variations on these positions.

Aristotle points to the importance of practical reason in buttressing arguments when dealing with particular cases. They cannot adduce universality and necessity as guarantors for the validity claims underlying the arguments. Aristotle also "solves" the problem of the inevitably coercive dimension of law by hiding it behind his new version of the traditional topos of *nomos basileus* (the law is king), which in republican thought[11] became the "rule of law" trope, invoked in *Marbury* v. *Madison*.[12] The difference between the ruler and the ruled is effaced by making the law the ruler, rather than any particular person or faction. Instead of "custom," law "rules" now and does so in a different fashion, as we shall see.

Machiavelli – deeply pessimistic about human nature, especially in the absence of functioning political structures which allow for the development of stable expectations – counsels the prince to err on the side of *oderint dum metuant* (they might hate me as long as they fear me), but does not exclude that civic virtues and obedience might develop by contrivance. Men are bad by nature but can be made to act properly by effective laws. In a way, Aristotle and Machiavelli, despite their many differences, develop a distinct political approach to law and legislation.

[10] Cicero, *De officiis*, Bk 1, 33.

[11] For a good discussion especially about the contribution of republican theory to the project of modernity, see Nicholas Onuf, *The Republican Legacy in International Thought* (Cambridge University Press, 1998). For an imaginative use of republican theorizing see Daniel Deudney, *Bounding Power* (Princeton University Press, 2007).

[12] See the interesting discussion in Paul Kahn, *The Reign of Law* (New Haven: Yale University Press, 1997).

The saying "it is the law, stupid" calls attention to the fact that law always attempts to internalize the criterion of its validity, although it can do so only after certain "social facts" are in place that recognize its autonomy. At a minimum, a list of authoritative "sources" becomes necessary, or we assume a normative "system" that allows us to interpret the question of validity as one of the genesis of norm creation. Kelsen's construction of law, as a system derived from a basic norm (*Grundnorm*) that is beyond the law, presupposes the state, not only as a normative idea but also as a "social fact." Hart's somewhat more flexible version of law as a system of primary and secondary rules – also sometimes possessing a "rule of recognition" – follows the same logic. Finally, the notion of law as an autopoietic system (Luhmann, Teubner) based on the code of legal/illegal dispenses with the notion of a "state" as the ultimate source of law. Instead, it focuses on *functionally* organized (rather than segmentary) systems that autonomously create their elements through autopoiesis. Law has now lost much of its power to steer *ex ante* through expectations, but the important sites where law now does its work are the various dispute resolution mechanisms that are part of increasingly "free standing" regimes, particularly in the international arena.

The focus on adjudication and courts as creators of law rather than mere norm appliers has, of course, been an old theme of legal realism. It was reflected in Justice Holmes' dictum that the "law is what the courts will do." It addresses not only the problem of the open texture of rules – and the later controversy concerning rules vs. principles that it spawned – it also radically reduces the notion of legal reasoning to a "theory" of the motivation of judges. While in the former version of reasoning law could still be understood as a craft or "art" – eschewing the hypertrophic pretence of "theory" – in Holmes' realism law's mission is increasingly reduced to a "prediction" of the choices of certain persons in privileged positions sitting in high courts. Thus realism raises questions as to whether issues of interpretation can be reduced without further ado to idiosyncratic psychological factors. After all, Supreme Court judges deciding a case have to argue *the law* in order to get a coalition together, rather than to make wagers on how a bad breakfast or a quarrel at home might influence a judge's vote.

The open texture of legal rules and principles is of course an important issue, particularly when combined with Holmes' "bad man" walking the line. The statements, such as "law being a door in an open field" and of 'law and lawyers being hired guns," belong here. The former is a (probably) apocryphal Bulgarian saying; the latter addresses the perhaps too easily assumed identification of law with justice, returning us to law's "darker" side.

Especially in international relations, many hopes were placed on the "further development" of law that would cure the imperfections of the existing international order. But often the only explanation came from some bad philosophy of history, making short shrift of analysing the possibilities and limitations of

law. Now that human rights and the worldwide offering of legal services have become one of the last growth industries of post-modernity, the pious hopes of law "finally" speaking "truth to power" have turned out to be like the former prophesies of communist leaders concerning the date when socialism will mutate into the secular paradise of communism. While we of course hope for the best, we ought to be a bit more attentive to the dangers that the future could resemble more a Foucauldian nightmare than the happy utopia where the lawyer (environmental lawyer, or human rights lawyer, of course) has replaced the businessman as the successful professional, which once was the storyline in American sitcoms.

The allure of "professionalism"

Lawyers are now everywhere, such as in advocacy networks, or in the "disaggregated" networks of states. They even serve as legal counsellors designing policies, circumventing elementary safeguards of the rule of law, as the US "torture memoranda" show.[13] Thus law and its practitioners have arrived and it therefore seems cold comfort to argue, as David Kennedy does, that they should be less defensive but take responsibility for their actions,[14] given the fact that professionals in positions of public power have to contend in an arena in which survival is secured largely through cunning, coalition building, and manipulation.[15] These tendencies are exacerbated by:

> four management practices, which Gabris identifies as a functional organization design, hierarchical authority systems, defensive routines, and socializing forces. To overcome these obstacles the public manager faces formidable risks.[16]

Experiences with whistleblowers have not been too encouraging and even engineers who possessed highly valued technical knowledge had a tough time getting a hearing, as the Columbia Shuttle disaster showed.[17] Besides, as practitioners of law, which is an adversarial system, lawyers can "contribute" only

[13] See the collection of essays by Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press, 2010).

[14] David Kennedy: "Reassessing International Humanitarianism" in Ann Orford (ed.), *International Law and Its Others* (Cambridge University Press, 2006), 131–55. See also David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004), Chapter 4.

[15] G. T. Gabris, "Beyond Conventional Management Practices: Shifting Organizational Values," in J. S. Bowman (ed.), *Ethical Frontiers in Public Management* (San Francisco: Jossey Bass 1991), 205–24.

[16] April Hajka-Ekins, "Ethics in In-service Training," in Terry Cooper, *Handbook of Administrative Ethics*, 2nd edn. (New York: Marcel Dekker, 2001), 79–103, at 87.

[17] Columbia Accident Investigation Board, *Final Report on the Columbia Space Shuttle Accident* (Washington DC: Government Printing Office, 2003).

according to the "standards" of their profession, which are likely to conflict with their mission as public servants. This means they "contribute" by doing "their job," that is to more or less aggressively manipulate "the facts and the law to suit their clients' purposes."[18] We may well not agree with Lord Brougham's famous remark that a "lawyer by the sacred duty which he owes to his client … knows in the discharge of that office only one person in the world – that client and none other." His interest he must pursue "by all expedient means and reckless of the consequences."[19] Surprisingly, however, there is scant attention paid to this and other "structural" problems in most discussions, which often engage in a nostalgic view of times past[20] despite an ample literature on the problems of the "professions,"[21] some exceptions notwithstanding.[22] Thus, Bruce Ackerman has recently pointed to the rapid growth of the Office of Legal Council in the Justice Department and of the Office of Counsel to the President in the White House and considered it one of the factors that is cutting the US presidency loose from its constitutional moorings and subverting the rule of law by questionable uses of constitutional and international law, bending both to the wishes of the client.[23]

Since judges or juries are of course not constrained in the same way, high hopes were therefore pinned on international tribunals to sort out "who did what to whom," particularly in cases of mass atrocities. But even here the assessment is now, after the experience with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Milosevic trial, much less optimistic. Even the hope for establishing at least a reliable historical record through court proceedings is no longer a safe assumption, after Nancy Combs'[24] scathing attack on the fact-finding processes of the Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the East Timor Special Panels for Serious Crimes. Some of the deeply flawed procedures reported by Combs would be laughable, were they not tragic subversions of elemental procedural justice. Combs still supports international tribunals and "explains" the acceptance

[18] Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press, 2008), 3.

[19] As quoted in *ibid*., at 7.

[20] See the interesting "Memoirs" of Sol Linowitz, *The Betrayed Profession: Lawyering at the End of the 20th Century* (New York: Charles Scribner's Sons, 1994).

[21] See Andrew Abbot's pathbreaking study, *The Systems of Professions* (University of Chicago Press, 1988). See also Eliot Freidson, *Professionalism* (University of Chicago Press, 2001).

[22] See e.g. Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis of the Legal Profession is Transforming American Society* (New York: Farrar, Straus, Giroux, 1994).

[23] Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2010), particularly Chapter 4, also calling attention to the dubious practices of "signing statements" and memoranda produced by the Office of Legal Counsel (OLC) of which the torture memoranda became infamous.

[24] Nancy Combs, *Fact Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010).

of flawed evidence with the continued popularity of the "collective" criminal liability, a notion that was purportedly discredited by the Nuremberg tribunal. But given its powerful hold on our political and legal imagination, what we are likely to get is retribution, but retribution at the price of defeating essential elements of the rule of law.

Besides, "the law," even when applied to less controversial problems, is hardly a neutral tool, as it ensconces specific interests and endows them with privileged status. When, for example, the rule of law is "operationalized" as protection of private property, contract enforcement, and functioning markets, attention is diverted from the "planned misery" of the "business as usual" visited on populations by domestic and international institutions. Naomi Klein has described this phenomenon in the case of Argentina and Chile during the military juntas.[25] Worse still, many of those practices are cemented in the charters of global institutions and imposed on "unruly" subjects, be they failed states, recalcitrant firms, or traditional social arrangements.[26]

By "naturalizing" the ensuing malaise and treating it as "normal" or just like a natural event – such as a catastrophic earthquake rather than a man-made disaster – law and "best practices" become endowed with the aura of universality and necessity. Here the smug accommodation of the "facts" is powerfully reinforced by some theoretical pretences of social science. Both then work as if hand in glove with legal expertise when drafting the proper "policy responses." In this context Susan Marks aptly remarked in regard to human rights: "For all the insistence that human rights abuses and vulnerabilities … are man-made disasters, the drift of our analysis is that natural disaster is the model on which the explanatory effort is imaginatively constructed."[27] This leads not only to a misdiagnosis and policy failure, it also systematically undercuts our ability to "learn." It is indeed cold comfort that legal professionals show only the same pathologies with which other members of the "helping professions," such as administrators, economic advisers (particularly in economic development), and members of humanitarian intervention had to struggle.[28]

[25] Naomi Klein, *The Shock Doctrine* (London: Penguin, 2007).

[26] Thus the tiger states, which were treated nearly as poster children for economic development – and with which "liberal" states like the USA did brisk business – become nearly overnight exemplars of crony capitalism when they refused to open their markets for certain financial instruments. See Rodney Hall, "The Discursive Demolition of the Asian Development Model," *International Studies Quarterly*, vol. 47 no. 1 (2003), 71–99.

[27] Susan Marks, "Human Rights and Root Causes," *Modern Law Review*, vol. 74, no. 1 (2011): 57–78, at 78.

[28] See e.g. Laura Zanotti (who had been part of several UN operations), "Imagining Democracy, Building Unsustainable Institutions: the UN Peace Keeping Operation in Haiti," *Security Dialogue*, vol. 39, no. 5 (2008): 539–61.

A more critical approach – rather than just reiterating the "pure" motives of the humanitarians[29] – involves us in difficult assessments of how action and knowledge interact, how knowledge is produced and separated from the "irrelevant" or even from "non-sense," and how the boundaries of the "known" and the "unknown," the "false" and the "true," of the "mistake," of the "misrepresentation," or of a "lie" are drawn. These distinctions are particularly difficult in the practical world where we do not deal with a fixed reality but with a *World of our Making*.[30] In this world the usual risk models and management practices quickly lose their purchase, because the boundaries between risk assessment and risk management become frequently unclear and interact in complex ways, as the discussions about genetically modified foods before the World Trade Organization (WTO) show.[31] Even more importantly, certain things cannot be known, as Keynes argued in regard to genuine uncertainty, such as the stock prices of one year hence, for example. Nevertheless, the common practice has been to treat uncertainty analogously to natural, but extremely rare events for which nevertheless some distribution exists, or we simply rely on mystic charts and trends. Thus, a probability can be assigned and a specifiable "risk" can be hedged.

If the above thumbnail sketch of some root images and conceptualization of law has shown anything, it is the complexity of the legal *problematique*, which cuts across various disciplinary understandings. Furthermore, given these difficulties, we cannot just clear the ground by some definitional fiat, as all the images are suggestive and necessitate further inquiry. Since neither a Procrustean solution is available, nor a mode of inquiry seems promising that leaves the explication of the concept solely within the remit of "law," we have to face up to this difficulty and opt for a broader interdisciplinary approach, which is admittedly a tricky undertaking.

The second lesson seems to be that we must not err on the other side either, by believing that a new "theory," satisfying the traditional epistemological criteria, will be of much help in understanding the distinct problems of praxis. Here traditional jurisprudence has insisted on both the contextual, contingent nature of action, and on certain important aspects of praxis, such as the ascription of responsibility, and the distinct mode of reasoning arising out of the need to move back and forth between facts and norms. This mode of thinking does not fit the template of either deductive or inductive inferences, but

[29] For a critical assessment of humanitarianism as an ideology, see Janice Stein, "Background and Knowledge in the Foreground: Conversations about Competent Practice in 'Sacred Space,'" in Emmanuel Adler and Vincent Pouliot (eds.), *International Practices* (Cambridge University Press, 2011), 87–107.

[30] Nicholas Onuf, *World of Our Making* (Columbia: University of South Carolina Press, 1989).

[31] See e.g. the interesting account by Mark Pollack and Gregory Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press, 2009).