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LOST IN TECHNOLOGY

Towards a Critique of Repugnant Rights

Toni Selkälä

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ABSTRACT

Modern law is founded on an idea of justice that is made felt through rights and entitlements legal subjects enjoy. As such, for law and its idea of justice, rights are inherently good and therefore abundant. On encounter with injustice, it has become commonplace to inquire what laws and rights have been flouted, as if injustice would disappear in encounter with rights that encode justice. But what if no number of laws and rights – even with faultless execution – is up for the task of upholding what we deem just? In this dissertation, I look at the heart of this question, and find the law's answer not simply wanting but repugnant.

The research is animated by interaction of three topoi: personhood, technology, and international law. The first part concerns how these concepts are perceived in law and by those working with laws. As part of the unearthing of the conceptual ground rules, a trilemma between effectiveness, responsiveness, and coherence familiar from regulatory research and international law rears its head. I show how setting the priority on effective and responsive solutions has amounted to derogation of justice and diminishment of law's foundational entity, a natural person. I explore whether these outcomes could be avoided within liberal international law and answer my own question on the negative. I title this systematic outcome a theory of repugnant rights.

The latter part of the dissertation concerns technology, its regulation, and tendency to produce repugnant outcomes in international law. I focus on bio- and information technologies and their legal coding as tools to dismantle legal protection provided by our quality of being human. I will show how intricate legal norms break and remake us in ways that blur the boundaries between persons and things. Once something falls beyond or below the category of a person, its legal status can be warped, twisted, and turned – all while remaining at arm's length from the person it was once legally part of. Technological intervention to such things allows for effective circumvention of legal shelter provided by human rights, as I show through example of regulation of surrogacy and data storage.

To come to terms with the repugnancy, I seek shelter from anger as a transitory category that would enable us to move across the present impasse with rights. I suggest that at the very least international lawyers ought to be angry at quotidian horrors international law upholds. And through such anger overcome the misery and repugnancy of international law.

KEYWORDS: International law; law and technology; legal theory; medical law and ethics; Ehendis ipsa ipidendam laut ut autem re optis eatur seque occab ipicia quatur sam alignim exceaqu aerum, co

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TIIVISTELMÄ

Moderni oikeus pohjaa ajatukseen oikeudenmukaisuudesta, joka ilmenee oikeussubjektien nauttimien ja käyttämien oikeuksien välityksellä. Näin ymmärrettynä oikeuden ja sen omaaman oikeudenmukaisuuden käsityksen kannalta oikeudet ovat itseisarvoisesti hyviä, mikä selittää niiden suuren määrän. Kun kohtaamme epäoikeudenmukaisuutta tapaamme kysyä, mitä lakeja ja oikeuksia on loukattu, ikään kuin epäoikeudenmukaisuus kaikkoaisi sen kohdatessa oikeuden sisältämän oikeudenmukaisuuden idean. Mutta entä jos mikään määrä lakeja ja oikeuksia – edes täydellisesti täytäntöönpantuna – ei riitä puolustamaan oikeudenmukaisena pitämäämme? Väitöskirjassani kurkistan tämän kysymyksen ytimeen ja löydän vastauksen, joka ei ole ainoastaan riittämätön vaan myös vastenmielinen.

Väitöksessäni operoin oikeushenkilön, teknologian ja kansainvälisen oikeuden rajapinnoilla. Väitökseni ensimmäinen osa koskee sitä, kuinka oikeuden ja lakien parissa työskentelevät mieltävät nämä käsitteet. Näiden käsitteiden tarkastelun yhteydessä havaitsen sääntelytutkimuksesta ja kansainvälisestä oikeudesta tutun tehokkuuden, responsiivisuuden ja johdonmukaisuuden välisen trilemman. Osoitan, miten tehokkaiden ja responsiivisten ratkaisujen asettaminen etusijalle on merkinnyt lipeämistä oikeudenmukaisuudesta ja samalla oikeuden keskeisen subjektin, luonnollisen henkilön, merkityksen pienentymistä. Tutkin, voitaisiinko tämä trilemma välttää liberaalin kansainvälisen oikeuden puitteissa, ja vastaan omaan kysymykseeni kielteisesti. Nimeän tämän tuloksen vastenmielisten oikeuksien teoriaksi.

Väitöskirjan jälkimmäinen osa käsittelee teknologiaa, sen säätelyä ja sen taipumusta tuottaa vastenmielisiä lopputuloksia kansainvälisessä oikeudessa. Tarkastelen lähemmin bio- ja informaatioteknologioita ja niiden oikeudellista sääntelyä, sekä sitä millaisia välineitä ne tarjoavat ihmisyyden tarjoaman oikeudellisen suojan purkamiseen. Osoitan kuinka monimutkaiset oikeudelliset normit rikkovat ja muokkaavat meitä tavoilla, jotka hämärtävät ihmisten ja asioiden välisiä rajoja. Kun jokin ei ole enää henkilö, sen oikeudellista asemaa voidaan vääristää, vääntää ja kääntää. Teknologinen puuttuminen tällaisiin esineisiin ja asioihin mahdollistaa ihmisoikeuksien tarjoaman laillisen suojan tehokkaan kiertämisen, kuten osoitan sijaissynnytyksen ja datan tallennuksen sääntelyn kautta.

Vastauksena oikeuden vastenmielisyydelle haen suojaa vihasta. Viha tarjoaa sellaisen tilapäisen kategorian, jonka avulla voimme välttää havaitsemani oikeuksien

umpikujan. Katson, että kansainvälisen oikeuden harjoittajien olisi vähintäänkin oltava vihaisia kohdatessaan kansainvälisen oikeuden synnyttämiä ja mahdollistamia jokapäiväisiä kauhuja. Turvautumalla vihaan, jonka voimme myöhemmin asettaa sivuun, voisimme selättää kansainvälisen oikeuden surkeuden ja sen vastenmielisyyden.

ASIASANAT: Kansainvälinen oikeus; oikeus ja teknologia; oikeusfilosofia; lääkintäoikeus; transnationaalinen oikeus; globaali oikeus

Acknowledgements

I started to scribble down these lines in what feels like eons ago. I thought of writing something elevating, noble, and illuminating. Touching the elusive reader to their very core, cleansing their soul, and enlightening their mind. But I felt that the words failed me. After writing the four hundred odd pages that constitute the body of this book, it felt like there would be no more words. As if the fountainhead had dried up, and the whole village that had raised this dissertation was left thirsty. How to say "Thank you" when it feels so enormously inadequate?

Would thank you really suffice to carry the feeling of gratitude towards my parents for providing me with sticks and stones, clothes and computers, care and comfort, and most importantly space to grow into being me? A muffled thank you in pages you sadly don't know how to read surely isn't much for making me me, and yet it is all I can muster, so, *kiitos äiti ja isä, isä ja äiti*. Equally thankful I am to those who had no choice but to stand in the way of me hurling those sticks and stones (and computers), and later hearing out all those adventures and worries I could never share with parents. I proudly carry with me parts of you and your passions, and I can't ever thank you enough for letting me be part of them. Thank you, Tatu and Teemu.

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Humble pie is often the hardest to swallow, but even in provision of that bitterest but most rewarding of academic delicacies I can count my blessings. My pre-examiners have slough through this tome and pierced through its meek defence with

encouragement and kindness it has not always warranted. I want to thank Mireille for telling me frankly that it is not good enough. You were right, and I have never found the courage to thank you for saying that. Thank you for the pie, Mireille. I have never felt happiness in academia quite like I felt when I was crying in the crowded bus and reading with a vision clouded by tears your kind words of critique, Martti. I preach for anger as an antidote, but you have shown that only kindness and compassion can cure the world. Thank you. And Fleur, I still don't understand how you do it. You dissect my argument from the first page to the last and summarise it with clarity I am certain does not reside in my writing. You have shown me repeatedly what is best in academia and I can never thank you enough for that. Thanks.

But doing research is more than sticks and books. I have relied on care work of countless others to buy me time to write and think, among others, these lines. Today alone Helka, Sirke, Pasi, Pasi, Jerna, Titta, Pirjo, Sanni, Saga, Greta and Svetlana make sure that I can do my research without a heavy heart. You teach, care, and support my children with love and dedication I am eternally thankful for. Thank you. Thank you also to Jaana, Essi, Mari, Aino, Teemu, Pipa, Jaime, Kimmo, and all the rest for doing the same in the past. Without you these pages would remain blank or beautifully coloured with crayons.

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Then for the harder part. Camaraderie, friendship, whatchamacallit. Here as well I have been fortunate without ever fully vocalising it. So, before thankyous, I am sorry for my silence. You all mean a world to me. Mikko, you made me believe that I can do research, and showed the way with your own brilliant example. Thanks, and sorry. Ville, you introduced me to a whole new world of international relations and its importance to the things I was doing. Thank you. Johannes and Mira, you were always the more senior and thoughtful doctoral candidates I aspired to become. Thank you. Matilda, you showed me how to be brilliant while juggling many balls.

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On the last days of summer
Toni Selkälä

Table of Contents

1 Aims of the Study

International law is quaint—its place taken by studies more attuned to the -ises of the modern world. It has been transnationalised, globalised, privatised, and humanised, but more than anything, it has been codified. Writing in 1911, a Belgian internationalist Ernest Nys proclaimed that '[j]urists sufficiently wedded to the idea of progress will always be found to favor reforms, correct abuses, and to constitute themselves the apostles of revision.'[1] For over a century, international lawyers have acted as diligent apostles of revision. Every new generation of international lawyers has realised that 'once we approach at close quarters practically any branch of international law […] there is no semblance of agreement in relation to specific rules and problems.'[2] There are twenty-one pages of multilateral treaties deposited with the Secretary-General of the United Nations,[3] there are some 2,500 bilateral investment treaties,[4] almost 25,000 international standards,[5] more than 37,000

[1] Nys, Ernest, 'Codification of International Law' (1911) 5 American Journal of International Law 871, 900.

[2] Hersch Lauterpacht, 'Codification and Development of International Law' (1955) 49 American Journal of International Law 16, 18.When typing this sentence, I am reading a blog post on most recent research on nature of customary international law (CIL), ending with a declaration that '[t]he reports of CIL's death have indeed been greatly exaggerated – but so have reports of the death of its conceptual and theoretical problems.' See Kammerhofer, Jörg and Panos Merkouris, 'What is the Point of The Theory, Practice, and Interpretation of Customary International Law?' (no date) <https://cil.nus.edu.sg/blogs/what-is-the-point-of-the-theory-practice-and-interpretation-of-customary-international-law/> accessed 11 August 2023.

[3] Multilateral treaties deposited with the Secretary-General (as of 31 May 2019), available at https://treaties.un.org/doc/source/titles/english.pdf.

[4] See, OECD, 'The Future of Investment Treaties', available at https://www.oecd.org/investment/investment-policy/investment-treaties.htm.

[5] The number refers to standards published by International Organization for Standardization (ISO) that at the time of writing was 24,578. The data is provided on https://www.iso.org/about-us.html. There are significantly more standards in use with varying pedigree. Standards and their origin will be dealt in more detail throughout the dissertation.

species of animals and plants provided with varying degrees of protection.[6] And a definition for canned salmon.[7]

Codification of international law has been extensive and exhaustive. There are international rules governing virtually all aspects of life. Writing at the beginning of the new millennium, John Braithwaite and Peter Drahos provided a detailed charting of these new international rules and their origin in international organisations sporting abbreviations unfamiliar to most of those whose lives they were governing.[8] The new global rulers for a new world order.[9] At around the same time, the documents codifying rules of international cooperation were no longer called treaties, covenants, or charters, but rather standards, guidelines, or memoranda of understanding. It was around the time when international law became quaint. International replaced first by transnational, later by global. Yet, the ground rules persisted. The system on which the new rules emerged relied on a set of prior international law, giving credence to arguments on emerging global constitutional order geared towards humanity with rule of law and human rights as its beacons.[10]

Inasmuch as codification of international law has progressed, it has been found wanting in correcting abuses. Where the generation of scholars to which Nys belonged were concerned over peace in Europe, that of Hersch Lauterpacht on importance of rights when the peace project of the past generation had failed, the present generation of international lawyers is mired with questions of perpetual war and planetary boundaries. War's demurral with international law is an apt example. It was Nys's generation of international lawyers who devised and codified the idea of illegality of warfare. There were no just wars.[11] War refused to obey. It was Lauterpacht's generation, accepting unruliness of war, that sought to actively shape the future conduct of warfare.[12] And it is the present generation of international

[6] See, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the documents provided by its committees. The number is provided in https://cites.org/eng/disc/what.php.

[7] Canned salmon is one of thousands of foodstuffs that have been defined by Codex Alimentarius Commission. The definition is provided in CXS 3-1981 available at https://www.fao.org/fao-who-codexalimentarius/sh-proxy/en/?lnk=1&url=https%253A%252F%252Fworkspace.fao.org%252Fsites%252Fcodex%252FStandards%252FCXS%2B3-1981%252FCXS_003e.pdf.

[8] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press 2000).

[9] See, Tim Büthe and Walter Mattli, *The New Global Rulers* (Princeton University Press 2011); Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004).

[10] Anthony Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017); Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 European Journal of International Law 513.

[11] Oona Hathaway and Scott Shapiro, *The Internationalists* (Simon & Schuster 2017).

[12] Boyd van Dijk, *Preparing for War* (Oxford University Press 2022).

lawyers who have come to realise that by humanising warfare, it is possible to uphold a perpetual warfare.[13] Rather than leading to end of illegality, the codification of international law has commonly amounted to intensification of illegality. It has led to repugnant outcomes.

It is with these unforeseen, repugnant outcomes of good intentions of codifiers that the present work deals with. But before I venture forth, there is an origin story of a sort for this dissertation. It begins with me sitting on top of a wall or maybe a tool shack, idly throwing small stones. One of them lands on the rear window of my aunt's car, shattering its smooth surface with co-centric swirls of destruction. I panic. I run to a nearby forest and hide, maybe behind a big rock or a tree. I do recall concerned voices shouting my name, placing a call I refuse to answer. I am maybe four, and I enter this world of mine through a sense of shame of my destructive forces. Throughout the process of writing this dissertation I have felt comfortable affinity to this, most likely, made-up story of my childhood of which I am the sole author. The contours of my becoming a person with a distinct identity and memories is, to this day, shrouded with equal mystery as is law's concept of a person that triggered this work. There was little in terms of technology and international law that I could perceive then or then.

The primitive technological apparatuses with which I started both journeys have grown in sophistication as they have grown in maturity. From stones to sticks to joysticks to flickering screens, my life's journey has been animated by growingly more sophisticated technological apparatuses, even if in recent years I have settled down and grown old together with the gadgets surrounding me. The story of my research is much livelier and more anchored in technology more advanced than I could ever afford. I have stepped from amniocentesis and DNA tests to CRISPR and beyond, from mobile phone metadata to big data and artificial intelligence. In this and in countless other ways, me and this text that stands as my dissertation are cut from the same cloth. It would be foolish of me to claim anything less, yet magnanimous to suggest something as grand.

I claim on the following pages that personhood, technology, and international law intertwine in untold ways producing thickets of law. Midst these thickets reside humans who, despite all those countless rights, are rightless. In a word, this is research on ways technology mediates rightlessness. I call this the repugnancy of rights or simply repugnant rights. The term is borrowed from Derek Parfit, whose formulation of a repugnant conclusion acts as a basis to my own formulation of repugnant rights. According to Parfit's original formulation for repugnant conclusion

[13] Samuel Moyn, *Humane* (Verso 2022).

> [f]or any possible population of at least ten billion people, all with a very high quality of life, there must be some much larger imaginable population whose existence, if other things are equal, would be better even though its members have lives that are barely worth living.[14]

I suggest that with some modifications the same applies for rights. The juridification of society at large has inflated the number of rights, often leaving us to wonder what to do with all of them. I argue that especially in the domain of international law, the rights accumulate in a way that has adverse impact for the well-being of the least well-off. Central for the argument is an interplay of the three key concepts of this dissertation: personhood, technology, and international law. I will briefly describe these three concepts in what follows before I turn to map more clearly the contours of my argument as well as its blind spots and fault lines along with some initial remarks on the methodological choices.

In this dissertation, there will be many references to persons and personhood. At first sight this nomenclature is straight-forward. A person is someone you meet in the coffee room or at the grocery store. In a word, *a human being*. This is the common-sense and everyday use of the concept. But relatively soon, the limitations of this lay definition of a person emerge as we move closer to its fuzzy borders. The notion of person is subject to same conceptual fuzziness as every other word in our natural languages. Do we define personhood as a membership in the species of *homo sapiens* that seems to be implicitly assumed in equation of person with a fellow human being? If so, when does a personhood begin and when it ends? Providing an answer to these questions appears eminently more difficult and controversial. A testament of this difficulty is the debate on foetal rights and abortion and/or alternatively of posthumous rights and brain death. For example, in Finland, as in many other states, the exact borders of personhood remain also legally fuzzy. A right to abortion exists till twenty-four weeks of pregnancy, but even after that point there is no legally recognised person before the child is born. And if a child is born on 24th gestational week, every attempt is made to resuscitate the child and make it survive, even if it would be legal to abort the foetus were it still *en ventre sa mere*. Here the personhood appears relational and contextual, in contrast to atomistic and analytical definition provided at first. On this light, personhood appears not be an essential feature of an entity but closer to a phenomenological category.

But it might be that I simply did attribute wrong essential quality for personhood. It might not be 'human being' that I had in mind, but some other quality, such as, sentience. I can repeat the analysis and note that this time around the problems

[14] Derek Parfit, *Reasons and Persons* (Clarendon Press 1984) 388.

emerged elsewhere, but they did not disappear. With sentience I would end up questioning status of a comatose or a neonate, but also whether animals or artificial intelligence ought to have a status of a person as well. This intuitive grasping in the relative darkness of personhood forms the first part of my conceptual apparatus. I will return to it in a later chapter. Yet, from a legal perspective often the most obvious quality of personhood remains unarticulated: personhood is to a great extent matter of national law. Even if much of the theory of personhood operates at the universal plane, legally persons emerge because of (non-)articulated rules of each and every state. This seems to hold true even in regions of the world with close regulatory co-operation, such as the European Union. It is this nationally anchored quality of personhood that renders it susceptible to regulatory arbitrage mediated by both technology and international law.

The second core concept of the present work is technology. Quite alike personhood, also technology seems immediately obvious: it is the laptop of mine or the humming fridge. Despite my capacity to enumerate instances of technology, such enumeration hardly constitutes a definition. As I will explore in more detail below, law is surprisingly silent on technology *tout court*. There are rules for technology transfer, a duty to use sustainable technology, or there might be attempts to harmonise a technology through standards, but none of these define what they mean by 'technology'. In this sense, technology as a category is mythical providing often little else than a tautological definition: 'technology is what technology is.' I argue that for law the most foundational category of technology resides in patents, but even there the scholarly literature employs interchangeably concepts as widely different as 'patent', 'innovation', and 'technology'. Starting from the dictionary definition of technology, one that underlines its nature as practical application of knowledge, tends to transform all material objects into technological objects. Understanding technology in such a wide perspective is also the way many philosophers of technology see it. For example, Don Idhe argues that there is little chance for us to live in this world at present without having that experience mediated by technology (apart from unmediated contact with nature, say, with our bare feet).[15]

Somewhere in between everything and nothing lies the technology as it is perceived in the present study. I suggest that technology in its legal articulation functions as an instrument to mediate publicly outlined goals of a legal regime wherein technology is embedded. Thus, in standardisation technology serves as a ritual that promotes safety even in the face of a wholesale collapse of safety. Or, in the development law – whether of regular or sustainable kin – technology and technology transfer carry over the underlying politico-economical order, often

[15] Don Ihde, *Technology and the Lifeworld* (Indiana University Press 1990).

pregnant with insignia of colonialism. The power of technology on these and other regimes lies in its apparent universality and neutrality. By analysing the urform of technology as it manifests through patent law, I suggest that while patent law remains receptive to the idea of contextual and locally defined technology, this meaning disappears on the long process where patents transform into global vessels for trade. The global administrative networks shaped by dominance of a select few locales and the increasing demands of 'efficacy' in granting patents *qua* technology iron out differences in practices of patenting. Thus, patents in their drive to become increasingly global to enable trade are transformed into universal technology whose contours is defined in network meetings of five largest patent offices. This pragmatic understanding of technology as a medium to promote law's instrumental logic forms the basis of what is meant by technology in this dissertation.

The third and final concept that dominates this work is that of international law. It is *the* law in this work, even if its law-like character is under constant doubt, not the least among its practitioners. If personhood is a local phenomenon, rooted in soil of a nation state, international law is circulating globally. It seeks to penetrate inside the regulatory systems of states and often accomplishes that. As such, international law is first and foremost seen as a tool to condition the sovereign or the state to emerge in a striking image of whatever spirit animates international law. The power of international law to condition a state is a function of the perceived precarity of a state. The annals of international law are brimming with examples of reforming, reshaping, and restructuring a state. Yet, how international law accomplishes these goals has remained a subject of some controversy, driving international law to a permanent state of crisis.

The image of international law I employ is a short film of three crises renewing and repeating. I see the crises of international law often as internal affairs of international legal scholarship much more than notable changes in the status of international law itself. Always a reaction to an excess of some kind, a crisis that follows when the internal illusions of scholarship are shattered—when it becomes impossible to entertain the myths that kept the past generation of scholars busy. Thus, the crisis of structure is a response to decolonisation and a problem of law that could no longer be upheld among a small group of European states, a family feud of a sort. But only with the crisis of subject did the newcomers gain a voice to articulate their presence and show that it was not enough simply to open structures: the structures themselves were a testament of the long-standing oppression of everyone considered subaltern from a markedly white, male, and affluent cadre of international lawyers. A wider spectrum of subjects triggers then again, the crisis of object. When international law was perceived from female or Third World perspective, the law itself appeared different. All the sudden, international law did not know anymore what international law stood for, or at the very least, it did not like the image staring

at it from the mirror. This is the crisis of object. In this process of introspection, international law reproduces itself, leaving new rights and laws at its peripheries. It is international law as a constantly expanding and thickening network of norms that will be the predominant frame of international law in the present work.

The dissertation will consist of two parts, first of which will focus on its three animating notions. In the end of the first part, I take first steps in development of a theory of repugnant rights. I step back from the concrete legislation and look more closely on theoretical underpinnings that seem to lead with some certainty to repugnant outcomes. As the focus with the dissertation is on international law, I argue that international law has an axiomatic or a paradigmatic form that requires the presence of three ideas: sovereignty, rights, and property. The presence of these three is constitutive for the generative process that ultimately leads to repugnancy. To perceive this process from a wider angle, I formulate a paradox of repugnant rights: there are more rights than ever, yet there are growingly numerous accounts of rightlessness—of people without any rights. I then employ three markedly different theoretical lenses on this paradox to illustrate its intractable and insoluble nature. In short, I argue that for as long as international law is perceived through what I title a liberal lens, there is no way to avoid the conclusion that further codification of international law will lead to worsening rather than improving the status of those most marginalised.

In the second part of my dissertation, I provide an illustration of repugnancy in action by using technology law as a vessel. I suggest that as an object and a process, technology carries rights that can break and remake persons. The breaking reduces the human or a person to increasingly small constitutive parts that, at a sufficient distance from the human body, loses its connection to personhood. This allows for commodification of parts of humanity. It is this process from human body to ever smaller segments that transforms parts of the human from legal ends to legal means, from *persona* to *res*. Simultaneously, an opposite movement takes place where bits of human agency are reconstructed into a synthetic being that once more can be owned. I investigate these processes through biotechnology and information technology respectively. From turning humans into ‘machine-readable bodies’ and returning them again as ‘machine-made bodies’ is bound to lose some pieces on the way. These pieces are the rightless, both *de facto* and *de jure*, that are subjects of what I call repugnant rights.

Hence despite a universal claim for certain repugnancy of rights, the present work remains captive of the limited number of personhoods, technologies, and international laws it explores. Moreover, it is a partisan treatise. There are ways of seeing that remain elusive to me, like my understanding of the destructive force of my primitive means. In the process of writing this, I admit of hearing many voices in the secluded corridors of the academe that would have merited my answer. I

remain ignorant and have not therefore entertained a sustained discussion with law and economics despite its prevalence and potency; I have decidedly steered away from the strictly normative dimensions of personhood—in my writing I seek to be nonchalant to abortion, animal rights, or robot personhood in ways that betray my personal opinions on these matters;[16] and despite my best intentions, I am oblivious for much of the subaltern that animates parts of my analysis. *Au contraire*, I found a small colonial administrator in me when I first visited the home country of my wife, attributing all the social ills there to their laziness, lack of organisation, and general lack of Western ways as I imagined those. All the barely concealed anger and frustration on the pages to follow is, then, equally much animated by the very position I occupy. I don't think it matters all that much to the final analysis, but I think you, my reader, have a right to know of these omissions.

These omissions also guide the method with which the materials, cases, and literature of the present treatise are chosen. While there are countless ways to describe the diverse selection of materials that make up this research, there are two that guided my choice. The first, and the more significant, was related to an ideology of international law as properly international. Reading most any treatise of international law, it is apparent that international is a circumspect category, implying a relatively limited set of scholarship from American and European authors who employ chiefly cases, literature, and political events on those regions as a steppingstone for their argument. And further still, even within this limited space, not all scholarship counts as international despite its direct anchoring to international law. Thus, an author writing in Swedish, Bulgarian, or Portuguese is unlikely to surface in any treatise on international law. Thus, there is a methodological affinity to Nordic international law as that is where I locate myself, but also to places far away from the customary centres of international law. This choice of sources and places amounts to an overlapping and cacophonic order as the narrative travels from 21st century Indonesia trash piles to Finnish state bonds of early 20th century and from Australian plumbers to Georgian gas cylinders. Hand-in-hand with the expansion of the 'international' in terms of law I perceive, I have sought more modestly to expand the list of sources that spark our imagination as scholars. While it has been commonplace to see international law's paradoxes through the lens of Greek dramas and canonical literature of yore, I employ literary sources that are more attuned to the diversity of international law I seek to analyse.

As a consequence of the plurality of times and spaces covered in the chosen materials, my other methodological choice is to alternate between systematic reviews of literature and closer analyses on more concrete cases. This use of two different

[16] I am in favour of late term abortion, I support a limited set of animal rights, and I am against robot personhood if my betrayal betrays me.

levels of abstraction calls for different methodological choices as well. The more systemic review remains descriptive and to an extent exhaustive summary of the relevant positions, whereas the closer analyses lean towards more critical reading in the vein of critical discourse analysis. The *topoi* chosen for such closer analyses are each illustrative of a wider framework of this research or aspect thereof. Thus, a choice to look at regulation of medical gases stems from its intimate connection to regulation of technology, international law, and their impact on lives of individuals. Beyond such connection, the choices are driven by areas that have remained to a lesser or greater extent underanalysed within the legal scholarship. The intention of such choice has been to indicate the systemic presence of repugnancy at the core of the liberal rights paradigm, while illustrating that this effect reaches places that appear at first sight distant or disconnected with the gradual expansion of rights.

First Part:
Towards a Theory of Repugnant Rights

1 Introduction

This first part of the dissertation provides a groundwork for the critique of the legal order presented in the second part of the dissertation. It is found on a hypothesis that legal rules on personhood, technology, and international law jointly create a complex network of norms that leads to *de facto* and *de jure* rightlessness of some human beings. To develop this hypothesis, I first summarise what is commonly understood by these concepts in law. After introducing these three concepts, I develop what I title a theory of repugnant rights. I seek to elucidate with this theory how and why the practical application of law appears to recurrently mask some violations of rights up to a point where individuals commanding those rights end up rightless. The critique of the present legal order in the second part will be provided through the lens of this theory.

There are some remarks on background assumptions that are integral for the understanding of the chapters to follow before venturing forth with three animating concepts of this first part of the dissertation. The most important of these assumptions is how law is perceived. After all, at the first sight, these three concepts operate at different levels of abstraction and are anchored to law with differing intimacy. Technology appears eminently more material than international law. And while it would be safe to say that a concept of a person would exist without law, the same does not hold true for international law. To make these concepts commensurate, the following chapters all initiate their inquiry with a semantic question: 'What does X mean in law?'[17] Answering this initial question requires first a clarification on what is meant by law. I do not intend to propose an answer to the question 'what is law?' – that is, the ontological question that has produced voluminous debate among legal scholars. Rather, I embrace a more pragmatic and situated understanding of law, one that I clarify below in more detail.

It nonetheless bears to note that it is not entirely possible to disconnect the ontological question from the semantic question. What is perceived as 'law' or 'legal' in the following is, even if non-theorised, deeply tied to my understanding for

[17] I borrow the concept of semantic question from Gabriel Abend, 'The Meaning of "Theory"' (2008) 26 Sociology Theory 173.

what counts as law in contrast to non-law. As with most essentially contested concepts, debate on the true nature of law is interminable.[18] It may reveal reasons and functions different interlocutors have differing understandings on law without getting us any closer to a conclusion. Thus, what may appear a triumphant argument for a hard legal positivist is unlikely to convince a supporter of modern natural law, quite as little as any normative or analytical legal argument about the true nature of law will sway anyone approaching law as a social concept. Any insistence on turning personhood, technology, and international law commensurate by using 'law' as a lens is apt to clarify and confuse in equal measures if and when law itself remains a contested concept.

To alleviate the problem, I employ law in what follows to signal two partly different ideas or conceptualisations. For the most part, as with the formulation of the semantic question above, law connotes an enumeration of instances that their respective authors have considered legal or law-like. These enumerations are not exhaustive and reflect a claim to an intellectual poaching license within the blurred boundaries of law.[19] Each different concept and theoretical account addressed provides a layer to my narrative and my attempt to trace the general contours of the three animating concepts of this dissertation.[20] The presented ideas are but a limited selection of the bountiful game an intellectual poacher could set their eyes on. As such, I make no claim to comprehensiveness. Instead of providing a grand narrative of 'person', 'technology', and 'international law' in law, I present an interlocked set of narratives that weave together a net, where the theory of repugnant rights operates. For example, addressing the concept of person in law, I begin with a normative account to chart attempts of theories seeking to provide an explanation of what law and lawyers truly mean when they use 'person' and continue with an array of empirical or more broadly understood sociological accounts of 'person' in law. Arguably, these different understandings do not share a concept of either person or law, yet I argue they are layers of a thick understanding of the concept many lawyers and legal scholars would recognise part of the field. In short, I am not convinced that law, interpretation, adjudication, or any other concept widely employed by legal scholars would be subject to such confusion that all discussion on their relative merits would be impossible without prior conceptual analysis. The other way 'law'

[18] WB Gallie, 'Essentially Contested Concepts' (1955) 56 Proceedings of the Aristotelian Society 167.

[19] The concept here is borrowed from Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books 1983) ch 1. Geertz attributes the concept to Clyde Kluckhohn, see ibid ch 21.

[20] I am here being influenced by Günter Frankenberg, 'Comparing Constitutions: Ideas, Ideals, and Ideology - Toward a Layered Narrative' (2006) 4 International Journal of Constitutional Law 439.

is employed is more particular and accounts for how I see law's operation in these fields. I turn now to that in more detail.

1.1 A pragmatic reading of law

There are many ways to understand law pragmatically and a pragmatic attitude towards law has in history of legal scholarship carried many different monikers. It can be traced, for example, to German and French legal theories during the late 19th and early 20th century or to the Scandinavian realism of the 20th century as well as to the American legal (proto-)realists' work in the late 19th century and the first half of the 20th century.[21] What these disparate scholarly monikers share is an epistemological view that law ought to be perceived through agency or experience in the world. Rather than looking at the laws passed by legislators or analysing law conceptually, the pragmatic accounts have in the past, as they do in the present, looked how law is acted upon. In short, for the early pragmatic interpretations of law, law was understood in its unique context of application, which denied the possibility of a universal law. The idea of a complete legal system or objective concepts of law has remained to this day the central focus of pragmatist critique. Instead of a universal law, for the early pragmatists there were norms used by officials to create a complex mosaic of responses to legally sanctioned actions. In short, whatever content law has, emerges first in the context of its application.

Despite a shared understanding of realism as a movement against too rigorous reading of formalism, there are notable differences among realists as well as obvious difficulties in defining what realism or pragmatism stands for. Realisms of different kind sprouted all over Europe and the United States, yet only a few of those realist traditions developed into any sustained theoretical insights on nature of law. This leads one to ask to what extent realism or pragmatism towards law can be expanded beyond the specific setting(s) where they first emerged and were developed. Why German *Freirechtsbewegung* – or the early French sociological jurisprudence – faded away in a decade and left little in terms of immediate legacy to the German jurisprudence, while the American Legal Realism it inspired came to redefine the

[21] See, for example, Mathias Reimann, 'Nineteenth Century German Legal Science' (1990) 31 Boston College Law Review 837; Jean Cruet, *La Vie Du Droit et l'impuissance Des Lois* (Flammarion 1908); Jes Bjarup, 'The Philosophy of Scandinavian Legal Realism' (2005) 18 Ratio Juris 1; Oliver Wendell Holmes, *The Common Law* (Macmillan 1882).

whole of American jurisprudence up till present?[22] Heikki Pihlajamäki argues that the differing historical understandings of law and legal profession and the role of laypersons in administering law might provide an explanation why the American and Scandinavian realisms turned out to have such a long-lasting impact.[23] Thus, while the impetus to look for a change was, what Katharina Isabel Schmidt calls time-symptomatic, the sway realism had as an alternative to more universalistic visions of law, hang on the prior professionalism of lawyers and the prevalence of academic lawyers seeking to systematise law.[24] If law is a context-dependent and a situated practice, what promise does such a vision of law provide beyond the auditorium of the sole author of the analysis?

This is the precise question many of the early critics of pragmatism posed. The lack of a yardstick to measure what counts as law deprives law its stability and certainty. In the 1920s, Walter Kennedy noted in his critique of Roscoe Pound's pragmatism how,

> [p]rinciples and precedents can be carried too far […, b]ut this provides no reason for lifting them out of the law in their entirety. […] The ipse dixit of the judge working under a formula that invites him to "secure all social interest so far as he may" is not free from grave dangers of abuse.[25]

A law without foundations and fully anchored to the individual context of its application, with only a vague general articulation of the aims law seeks to serve, is like a rudderless ship out in the ocean. In the United States from mid-to-late 1930s and 1940s, Brian Tamanaha suggests, '[t]he Legal Realists were roundly chastised for suggesting that law was a matter of power, with no integrity unto itself.'[26] These realisations, according to Tamanaha, led to increased instrumentalism of law in the

[22] An early English account of German Free Law School is Albert S Foulkes, 'On the German Free Law School (Freirechtsschule)' (1969) 55 Archiv für Rechts- und Sozialphilosophie 367; on different eras of French socio-legal thought Mauricio García Villegas and Aude Lejeune, 'La Sociologie Du Droit En France: De Deux Sociologies à La Création d'un Project Pluridisciplinaire ?' (2011) 66 Revue interdisciplinaire d'études juridiques 1.

[23] Heikki Pihlajamaki, 'Against Metaphysics in Law: The Historical Background of American and Scandinavian Legal Realism Compared' (2004) 52 American Journal of Comparative Law 469.

[24] Katharina Isabel Schmidt, 'Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to "Life," 1903-1933' (2016) 39 German Studies Review 121.

[25] Walter B Kennedy, 'Pragmatism as a Philosophy of Law' (1925) 9 Marquette Law Review 63, 71.

[26] Brian Tamanaha, *The Perils of Pervasive Legal Instrumentalism* (Wolf Legal Publishers 2006) 33.

United States and to an image of law as an empty vessel only intent to serve client's interests.[27] To what extent this outcome is a consequence of the uniquely American constellation of highly politicised judicial nominations and a divisive two-party system is beyond the point here, but the risk portrayed by Tamanaha is real. If the category and understanding of law I employ has no other foundations than my personal, often tacit beliefs and preferences, then the interpretation of law provided on such a pragmatist key is only valid for those who share those preferences.

Yet, as Tamanaha readily recognises, there is nothing in and of itself in realism and pragmatism that automatically leads into vacuous law that serves only instrumental needs. The mainstream realism has always been mindful of the import of rules and their system as a way to make sense of confusion. For example, according to John Dewey the legal thought process on a concrete situation starts from a state of confusion 'and that the formation of both major premise and minor proceed tentatively and correlatively in the course of analysis of this situation and of *prior rules*.'[28] A similar moderate position towards the import of context in defining law is a hallmark of the most noted representatives of American Legal Realism and Scandinavian Legal Realism respectively; Alf Ross opposes the more radical views of Vilhelm Lundstedt and Karl Llewellyn's realism is certainly not that of Jerome Frank's.[29] What constructive doctrinal realism, to borrow a concept from Roger Cotterrell, proposes is not a revolution but a revision of the old.[30] Llewellyn notes '[t]he rebelling indicates inadequacy in the old. It does not indicate that the old did not have much solid basis,'[31] and Ross suggests that '[o]ne can readily agree with' Lundstedt that 'situations of rights consists in the function of the machinery of law' while vehemently disagree with Lundstedt's 'peculiar twist' that rights do not exist at all.[32] Realism and pragmatism with all its insistence on liberating law from

[27] ibid 43ff.

[28] John Dewey, 'Logical Method and Law' (1924) 10 Cornell Law Quarterly 17, 23 (emphasis added).

[29] For an example of Lundstedt's work see, for example, AV Lundstedt, 'The Responsibility of Legal Science for the Fate of Man and Nations' (1932) 10 New York University Law Quarterly Review 326. An analysis of his contribution to jurisprudence more in general, TT Arvind, 'Vilhelm Lundstedt and the Social Function of Legislation' (2013) 1 Theory and Practice of Legislation 33. For Frank's approach to realism, see, for example, Jerome Frank, 'Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle: II' (1950) 25 Notre Dame Law Review 460. An analysis of his contribution to American legal realism, see Charles L Barzun, 'Jerome Frank and the Modern Mind' (2010) 58 Buffalo Law Review 1127.

[30] Cotterrell refers to Llewellyn's legal realism, see Roger Cotterrell, *The Politics of Jurisprudence* (Butterworths 1989) 194ff.

[31] Karl N Llewellyn, 'A Realistic Jurisprudence – The Next Step' (1930) 30 Columbia Law Review 431, 462.

[32] Alf Ross, 'Tû-Tû' (1957) 1 Scandinavian Studies in Law 139, 145.

formalism has but seldom signalled a wholesale denial of doctrinal analysis of law. Rules, principles, and norms matter but they are not the whole picture. Law is not solely an instrument of power capable of both good and evil, but also an internalised behaviour of its practitioners.

The glue that holds together freedom of realism and pragmatism as methods is the old edifice of law they seek to replace. They argue that it is impossible to conceive law as separate from ideology or morals, while upholding its distance from natural law by insisting that there is no metaphysical or transcendent morality.[33] Thus, rather than denying importance of the doctrinal analysis, pragmatism challenges the sharp distinction between law and non-law, between law and ideology. This is also its main theoretical weakness as—unlike supporters of positive or natural law—a pragmatist has to accept that there is no overarching, universal guideline to steer law. There is no rule of recognition, sovereign will, or divine ordinance that would ultimately stop the quest. Seen as embracing a position where everything goes, the American Legal Realism as well as the authors of the otherwise forgotten *Freirechtsbewegung* were accused during and after the Second World War from moral relativism that paved the way for rise of totalitarianism, fascism, and communism. However, as Judith Shklar argues, stating that law is ideological as pragmatism does, merely makes apparent what positivism seeks to conceal and natural law makes its sole function.[34] According to Shklar, there is no 'there' for law, but rather it appears as a consequence of the very choices of considering something a fact.[35]

Inasmuch as other ways of understanding law are subject to similar problems, it is not sufficient to merely state that law and ideology or law and politics are inseparable. There is a clear telos for a legal project launched under auspices of natural law or positive law, which is to systematise answers and indicate where they deviate from or congregate with the standard chosen for law. For a pragmatic understanding, the telos cannot be shared before the event, but is construed as an explanation *ex post facto*. Any prescriptive value the project has is in finding permanence in the behaviour, ideologies, or politics of lawyers and legal scholars. Whether these are bound to space or time—as above suggested with regard to realist movements—is difficult to know in advance. As Shklar notes, law ought to be seen 'as part of a social continuum,' which would account for

[33] These differences have become less contrasted in recent years as also positive and natural law scholars have found more common ground, see John Tasioulas, 'Introduction' in John Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020).

[34] Judith N Shklar, *Legalism* (Harvard University Press 1964).

[35] See also Ross (n 32) for similar analysis.

> law as an historical phenomenon, and would replace the sterile game of defining law, morals, and politics in order to separate them as concepts both "pure" and empty, divorced from each other and from their common historical past and contemporary setting.[36]

Obviously, this amounts to relatively little in terms of a concrete outlook for legal research, but these problems are not unique to pragmatism as Shklar painstakingly illustrates. Reference to 'common good' or a legal concept, say, 'claim' serves often as much purpose as *tû-tû* does in the example Alf Ross employs. The legal outcome does not follow because we recognise something as a 'claim' or as a general reflection of 'common good,' but due to the chosen structure of syllogism. This does not imply that these words are meaningless, but the import they have is tied to the effect they have as justifications for law as a historical phenomenon, or as Ross concludes

> concept of rights is a tool for the technique of presentations, serving exclusively systematic ends […] the concept of rights can lead to errors and dogmatic postulates if it is wrongly taken not merely as being the systematic unit in a set of legal rules, but as being an independent "substance".[37]

Invocations of ownership might originate from magical incantations as Ross suggests, but those incantations have long been proper to law.

This modifies the question for a legal systematisation or analysis. Instead of posing a question 'what is law' one is to seek an answer to question 'why is law' and what explains its relative stability and permanence if there is no independent material substance for law. According to Shklar, the stability stems from the way lawyers perceive their role. She suggests that Alexis de Tocqueville's description of the legal ethos is as current now as it was at the time with '[o]rder and formality being the marks of the legal mind.'[38] A fact, Shklar notes, verified a century later in writings of Max Weber with the sole difference that '[w]hat de Tocqueville called aristocratic habits of thought, Weber believed (rightly) to be more a matter of "internal professional ideology."'[39] Society and law might change, but the lawyers' professional ideology persists. As an argument charting the meaning of law, the persistent conservativism at the heart of legal professional cadre that Shklar notes,

[36] Shklar (n 34) 3.
[37] Ross (n 32) 153. Shklar refers through her concept of legalism partly to the same insistence on an independent 'substance' of law.
[38] Shklar (n 34) 14.
[39] ibid 16.

provides permanence also to contextual interpretation provided to law. This has a direct bearing on how law is perceived to operate when a need to interpret its letter emerges. How facts are chosen or how general term implied by a concept is defined is an interpretative act that seeks to provide a legally conclusive solution to the vagueness associated with concept of rights. An illustrative and influential example of this basic interpretative position is provided by H. L. A. Hart in his *Concept of Law*.[40]

Hart explains the problem of vagueness by using the example of rule, 'no vehicles in the park.' According to Hart, the paradigmatic (or core) meaning of the vehicle for the purpose of the rule is a car. To what extent it also covers tractors, mopeds, bicycles, etc. is evaluated by assessing how similar they are to the paradigmatic meaning of a vehicle. The further one moves from the core towards the penumbra, the more there is vagueness in attributing the vehicle in question within the remit of the rule. This is the 'open texture' of rules; we encounter a scenario we did not foresee when enacting the rule and now we need to decide whether the vehicle we see in the park is a vehicle forbidden by the rule.[41] Hart continues that due to inherent complexity of social life, there is no possibility to weed out this vagueness. While Hart himself used the example to defend judicial discretion, it also allows to exemplify why 'professional ideology' of lawyerly corps matters. I exemplify this problem by using an actual case where the nebulous nature of 'vehicle' was at the heart of interpretation.

The case in question is one decided by the Finnish Supreme Court in 2011.[42] According to the description of facts provided in the Court's decision, a person was stopped by a police officer while driving a motored vehicle seriously intoxicated. At first sight, the case appears non-controversial. The reason why the Supreme Court decides a case of drunken driving was the motored vehicle in use. The vehicle in question was a Segway, a two-wheeled motorised vehicle. At the heart of the matter was precisely what is meant by a rule preventing operation of a motored vehicle while intoxicated. If a Segway is not a motor-driven vehicle according to the Criminal Code a person driving one may not be found in violation of rules forbidding driving while intoxicated. Segway is clearly motor driven, yet according to the Finnish Criminal Code (39/1889) Chapter 23, Section 12

[40] HLA Hart, *The Concept of Law* (Clarendon Press 1961).

[41] ibid 120–32. For a more nuanced analysis of 'open texture' in Hart's work, see Brian Bix, 'H. L. A. Hart and the "Open Texture" of Language' (1991) 10 Law and Philosophy 51.

[42] KKO:2011:28. I thank Tuomas Mylly for bringing this case to my attention.

> motor-driven vehicle refers to a vehicle propelled by engine power, motor vehicles, motor scooters, motorcycles, three- and four-wheeled vehicles, light four-wheeled vehicles, tractors, self-propelled machinery and off-road vehicles are motor-driven vehicles.

The English translation does not carry over particularly well the Finnish original, which, instead of 'motor vehicle' refers to 'auto', that is a car, and instead of broader 'motor scooters' refers to 'mopo', that is a moped. Nonetheless, the main problem for the Court was that the list appears inclusive, and within this inclusive list nothing refers to anything resembling a Segway. A district court and a court of appeal had decided the case by analogy and a reference to other legislation, but these solutions appeared to violate the principle of legality. The Court had to tackle the question does an inclusive list mean that the legislator had imposed limits for the legal discretion of judges. It found that it did not. Rather than relying on the list of motor-driven vehicles provided by the Criminal Code, the Court declared that the intention of rules stipulating driving while intoxicated is to prevent accidents and reduce the risk to life and limb.

Seen through a lens of professional ideology the Court appears torn between conflicting demands of order and formality. On the one hand, it does not want to appear to be making law. Rather it wants to be seen applying it. This is the formality-embracing part of the professional ideology: there is a formal norm to solve all problems. On the other hand, courts are afraid to impose seeds of uncertainty or chaos through their decisions. This is the order part of the professional ideology. Most of the time order and formality can be accommodated through the sage figure of judge, providing an interpretation of law that stems from a rule and increases order in the society. In the Finnish Supreme Court's case, it was not possible to uphold both form and order. The Court had to choose. Had it chosen the formal letter of the law, it would have concluded that there is a seed of confusion at the heart of the definition of motor-driven vehicle and any future technologies may amount to a situation where persons escape the intended legal consequences of their ill-deeds. If, as it did in the case, it chose order over form, it must shed the image of neutrality as a law-applying institution.[43] Why the Court chose one over the other would require a closer scrutiny, but that is beside the point argued here. My argument is simply that the choices which appear possible for a legal decision are intimately bound with the

[43] Alternatively, the same critique could be mounted using the interpretative or hermeneutic model provided by Ronald Dworkin and suggest that the problem is essentially of theoretical disagreement, which would suggest that there is ultimately a solution to be found. See, Ronald Dworkin, *Law's Empire* (Fontana 1986).

ways with which lawyers perceive their professional role, which, unlike law, has both substance and permanence.[44]

To pull the strings together a bit, I have so far suggested that law in and of itself has no substance that we could discern without commitment to a wider context wherein it is applied or interpreted. This does not imply that the concept of rights and therewith law would be meaningless or that disagreement on law's letter would be merely semantic. Rather, law and its concepts serve a function by diverting our attention to patterns of recurrent behaviour. An important factor in upholding this systemic feature of rights and of law is tied to the way lawyers themselves perceive their professional ethos or internal professional ideology. The features of this professional image have shown remarkable stability. Next, I look more closely to what extent it is possible to rely on such monolithic professional image to indicate some sources where lawyers might draw content to their insistence on order and formality.

While the Second World War signalled a death knell to much early pragmatism, by the 1970s there was already a notable undercurrent of new pragmatism that sought to anchor behavioural analysis of law to wider systems of knowledge. Throughout Western Europe and in North America, new socio-legal and empirical methods to assess law gained ground. From German autopoiesis systems theory to British socio-legal studies, from law and economics to critical legal studies there were attempts to conceptualise law anew. All these movements shared a view that it was not enough to assess law, even on a theoretical level, solely through concepts. Rather, law should be amenable to wider contextual understanding and what could be widely called empirical methods. A closer look on law through these theoretical lenses unearthed many concerns related to law, justice, and legality that had concerned the scholars at around turn of the century. There were those who longed for legal 'science' by adopting theories from elsewhere, most notably from economics; there were those who saw law increasingly as a struggle, employing either Marxist thought or continental sociology for analysis; and there were those who sought to employ systematic quantitative and qualitative methods to concretise the behavioural models that were subsumed to work behind legal decision-making. And all the sudden, law's facade seemed to be different.

This had an obvious impact to the way theoretical accounts of law were written. Where Austin strived to systematise the legal thinking and legal positivists of the

[44] An example from the permanence of this view, especially in international law, see Jack Taylor, 'Inside the International Court of Justice: An Interview with Judge James Crawford' (*Harvard Political Review*, 11 May 2020) <https://harvardpolitics.com/interview-with-judge-james-crawford/> accessed 11 August 2023.

early 20th century still described their method as one seeking to deduct rules from precedent, likes of Hart and Kelsen turned the tables. It was no longer about learning from the cases, but rather placing the theory of law as first art, one necessary to talk and decide legal matters. For them, only those wedded in law could command an internal view to it, which remained decisive for proper understanding of law. As new theories to explain law mushroomed, their explanations diverged further afield from one another. Legal positivism decided to steer away from application of law, natural law moved away from God towards self-evidently good goals as a moral basis for law, leaving empirical approaches alone in the field where law is applied.[45] Legal positivism was interested on theoretical relationships between legal rules, natural law was interested of what law should be, isolating them effectively from any critique raising from the empirical manifestations of their theories. All parties resorted to simplification of the position of others, employing isolated quotes from the bulk of scholarship to question those who perceived law in a fundamentally different way. Even though these theories and the moats separating them remain academically significant to this day, they have had arguably little effect on the perception of law of professional lawyers.

Before I venture to assess the bountiful theoretical harvest of empirical legal research, I find this last point worthwhile to stress. Much of the theoretical debate that is developed here and throughout my dissertation remains at arm's length from quotidian lawyering, whatever that may connote. Arguably, the theories developed in academic research have an impact on image of law on some level, but professional lawyers remain steadfast in their dedication to form and order. Even though past half a century of legal theory has shown that much of what passes as form and order is anything but, it is commonplace to find a defence of practices just and unjust alike in the letter of the law. It is one thing to say that order is particular and form is contingent, an entirely other thing to act upon that realisation. An immediate hindrance in translating these insights into action is that knowledge alone does not provide meaningful pathways to change. Many lawyers are fully cognisant of the theoretical hurdles associated with reliance to formalism and the image of order. Yet, when encountering a precise rule or a contract in their daily work they fall back to form and order. Whether this is a sign of a social role, or a professional ideology is a theoretically interesting question, but it bears limited significance in the production

[45] For positivism see, for example, John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 American Journal of Jurisprudence 199. For natural law see, for example, John Finnis, *Natural Law and Natural Rights* (2nd edition, Oxford University Press 2011).

of legally sanctioned outcomes.[46] There are professional and legal reasons for that. My understanding of law as a pragmatic tool of analysis then remains at some distance from that of professional lawyers. This has significant ramifications for the analysis that ensues. With the widening of the gulf between practice and research of that practice, there are two narratives of law as it is. On the one hand, there is law as it is as a practice with maintenance of order and form, and, on the other hand, there is law as it is in light of research on that practice. I seek to balance between the two, indicating at times that this is the legally sanctioned outcome even though it is not necessarily 'legal' in any meaningful way described by theory or even by the very urform of 'form' lawyers commonly rely—an enacted piece of legislation.

To illustrate the point, I draw another example from Finland related to technological regulation. In early April 2020, the Finnish authority responsible for monitoring the ePrivacy Directive of the European Union (2002/58/EC) passed a decision concerning required consent from an end user to cookies installed on terminal equipment of a visitor to a website.[47] The decision refers widely to laws, guidelines, and recommendations to justify its position. It is true to form and a central justification for the provided interpretation is the maintenance of order; the decision declares it cumbersome to demand consent on all occasions and for each specific purpose, for this would achieve little beyond clutter. The problem with the decision is that it is simply wrong in terms of European Union law. At least since the Court of Justice of the European Union issued its judgment in *Planet49* case in late 2019, cookie consent has had to abide the requirements of the General Data Protection Regulation (2016/679/EU). The GDPR calls for informed consent, which the Finnish authority considered too cumbersome.[48] The decision was appealed, and, with some likelihood, the Finnish guidelines will eventually come to reflect the new interpretation of the European Union law. But for the time being, the two practices diverge.

It is possible to describe the situation in Finland as an illegal legal practice. Any researcher on the European Union law and the GDPR would consider it such. Yet, that does not come to change the fact that at present that illegal status persists as law

[46] Arguably, professional ideology and social role reflect to the same phenomenon but from a different vantage point. Yet, as e.g. John Noonan illustrates, even professed professional ideology may diverge from behaviour in a social role of a judge. See John Noonan, *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Whyte as Makers of the Masks* (University of California Press 2002).

[47] Traficom, 'Liikenne- ja viestintäviraston päätös käyttäjän informoimisesta ja suostumuksesta evästeiden käytölle liikennefakta.fi ja traficom.fi -sivustoilla', Dnro Traficom/682/09.09/2019, 3 April 2020.

[48] Case C-673/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH* [2019]

for the foreseeable future. The practice of law and the research on that practice of law diverge in their assessment of what the law is, and while both may rely in their interpretation to forms and order, only one of these practices is the present status of rights. Throughout this dissertation I encounter similar situations of divergence, most of them not as blatant as the case of the Finnish cookie consent. To declare one right and the other wrong is not only to suggest that there exists *the* correct understanding of law, but also to argue that these 'wrong' decisions have no practical meaning. I argue throughout that 'right' or 'wrong', the practice of law unlike the practice of research of said practice accumulates in piles of positive law, concealing violations of rights whether they are infinitesimally minute or blatantly obvious. These illegal legalities matter in sleepless nights, fears of reprisal, unforeseen economic burden, anxiety, and hopelessness that are powerfully captured in the trials of Josef K.[49] An argument from 'correct' interpretation of law might be too little too late if the professional ethos' steadfast commitment to form and order manages to uphold or conserve the 'incorrect' interpretation for sufficient time. That is why it is important to keep in mind this relatively modest distinction between law as it is for a lawyer practicing law, and a law as it is as seen from the lofty distance of the Ivory Tower I occupy. My analysis operates often on this second-order practice while I elucidate the impact of the first-order practice.

I now return briefly for the more contemporary forms of pragmatism that my view of law associates itself with. Arguably the most important change from the move from concept and ideals to the concrete application of law theoretically has been the realisation of the abundance of law and the loss of belief in law's essence. This did not emerge first at around mid-20th century, as it was also a driving force behind legal realist critique towards Langdellian method of categorisation of cases half a century earlier. The emergence of administrative state and growing number of regulatory agencies participating in administration of law, revealed to many lawyers the complexity of social ordering that had in the past either been left aside or solved *ad hoc* employing general principles. These ideas were pushed further by the emergent new public management of the 1970s and 1980s. Analysing these changes at the turn of the millennium, Costas Douzinas and Ronnie Warrington declared the audit-heavy expert-driven regulatory state one of law's 'periodic crises' that impacted both law and jurisprudence, but rather than a crisis as a 'pending and prophesied catastrophe' this was a crisis as a critical turning point, a *krinein*.[50] At this turning point, law took or had already taken a turn towards ethics, which seemed

[49] Franz Kafka, *The Trial* (Schocken Books 1998).

[50] Costas Douzinas and Ronnie Warrington, *Justice Miscarried* (Harvester Wheatsheaf 1994) 1. For this and other meanings of crisis, see Reinhart Koselleck and Michaela W Richter, 'Crisis' (2006) 67 Journal of the History of Ideas 357.

to provide an immediate escape from growing complexity of regulation and management. At precise the moment when law in practice transformed into technical regulation, law in academia became a realm of right and wrong.

The predominant narrative in the Anglo-American academia for the turn to values in law goes through the work of John Rawls. As he writes, his is a 'theory of the moral sentiments setting out the principles governing our moral powers, or, more specifically, our sense of justice.'[51] Rawls's *Theory of Justice*, originally published in 1971, marked a new era for political philosophy in the English-speaking academe, one that forced everyone to at very least comment why they do not rely on Rawls' ideas as a foundation for their own political philosophy.[52] While the impact of Rawls's work is widely recognised, the precise content of his theory has proven remarkably difficult to pin down. The foundational pillars Rawls employed are well-known, but their impact on his overall theory and the consensus it relied have remained contested. A veil of ignorance clouding everyone from their position in a society is the apparatus most widely recognised as proper to Rawls.[53] Fully behind the veil, representatives of a society negotiate a basic constitution. As they gradually move from the constitution to more detailed legislative and administrative measures, more and more from society resting behind the veil is revealed.[54] Through this partly iterative process, where legislative process feeds back to constitutive process, a society is able to create basic institutions that will ensure justice and equality – the footholds of liberal political philosophy. According to Rawls, two ideal and universal principles of justice emerge from the process:

> First Principle
>
> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> Second Principle
>
> Social and economic inequalities are to be arranged so that they are both:

[51] John Rawls, *A Theory of Justice* (Revised edition, Belknap Press 1999) 44.
[52] See, for example, Robert Nozick, *Anarchy, State, and Utopia* (Blackwell 1974) 183. Nozick writes: 'Political philosophers now must either work within Rawls' theory or explain why not.'
[53] Rawls, *A Theory of Justice* (n 51) 11.
[54] ibid 16–18.

> to the greatest benefit of the least advantaged, consistent with the just savings principle, and
>
> attached to offices and positions open to all under conditions of fair equality of opportunity.[55]

The latter principle consists of two parts, and according to what Rawls titles 'lexical order',[56] the first principle must be satisfied before consideration moves to second and so forth. Thus, justice requires first and foremost equal liberties and once those liberties are set, a keen eye to curtailment of social and economic inequalities.

To reach these principles of justice, there is a set of underlying assumptions about the original contract position that the veil of ignorance reflects. One of the foremost tools Rawls employs is the idea of a rational person whose actions is modelled after rational choice theory popular in economics at the time. According to the rational choice theory, an individual seeks their own best interests, which leads Rawls to deny utilitarianism as a moral code for justice: no one would accept the growth in welfare of others, if they would have to reduce their own welfare to achieve such growth. As the original position of an individual is not known behind the veil of ignorance, a rational actor cannot align with utilitarianism, Rawls argues. This leads him to formulate the first part of the second principle as a tool to assure that any gains in welfare is just only for as long as they ensure greatest gains for the least advantaged. He calls this the difference principle. I will return time and time again throughout the analysis in this dissertation to different legal enactments of these underlying ideas of Rawlsian thought; from its most obvious embodiments in Ronald Dworkin's law as integrity to more remote corners of Rawlsian influence.[57] This is not to suggest that all lawyers or legislators would adhere to Rawls's theory, but rather to the shadow Rawls's theory cast on virtually all liberal political philosophy that gained mainstream support in the Anglo-American academia.[58]

But a turn to values meant a reduction of complexity to abstract, rationally defensible positions that the authors of theories could foresee. The removal of contingent and commonly parochial conditions of decision-making from the realm

[55] ibid 266.
[56] ibid 37–38.
[57] For law as integrity, see Dworkin, *Law's empire* (n 43) 176–275. In general from Dworkin's legal interpretivist theory, Nicos Stavropoulos, 'Legal Interpretivism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2021, Metaphysics Research Lab, Stanford University 2021).
[58] For a recent account of this influence, see Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton University Press 2019).

of liberal political philosophy, allowed a formulation of ideal of justice without addressing the possibility of its adherence. In legal theory, this led to primacy of legal practitioners' understanding of law. The wider, external ramifications of law were set aside as research interests for sociologists or historians, but not of legal theory properly so.[59] In short, the turn to values meant a concealment of technical to promote 'big', 'hard', or 'important' questions. On this level, all law and justice appear contingent and mutative, which, on a closer analysis, transforms the technical and detailed the decisive matter as they are the only legally solid ground upon which to uphold legal form. At the turning point of Douzinas and Warrington, principles and values were in much of Anglo-American scholarship promoted over technical.

A different solution with different universals to the emergent complexity of society was provided in sociology of Niklas Luhmann. Luhmann was convinced that the choices made by Rawls are untenable, for Rawls 'posits individuals without individuality[, which] is merely another way of obscuring the paradox of every return to origins.'[60] To understand what the latter part of Luhmann's critique suggests, calls for some clarification on the specific way Luhmann understood paradox and society.[61] At the heart of Luhmannian system is communication. Not all that we utter or do is communication, as, according to Luhmann, communication necessitates a shared frame of reference where participants share, or at the very least are presumably sharing, the contingent content of the communication. This communicative setting at its widest is what Luhmann refers as 'society'.

Luhmann's vision for society manifests through communication or, more pertinently, society is communication. The individuals are not what constitute society unlike for Rawls. Instead, society is a relation between individuals communicating, leaving all non-communicated (or non-communicable) outside of society. Decentring humans, Luhmann's theory foregrounds things and their historical relations. For example, law (or legal subsystem) is not made of those in legal profession, but of communications past, present, and future within the legal system. Luhmann employs a *reductio ad absurdum* argument to make the point:

Society does not weigh exactly as much as all human beings taken together, nor does its weight change with every birth and death. It is not reproduced, for example, by an exchange of macromolecules in the individual cells of a person or by the exchange of cells in the organisms of individual human beings. It is therefore not

[59] See e.g. Dworkin, *Law's empire* (n 43) 13ff.
[60] Niklas Luhmann, *Theory of Society. Volume 1* (Stanford University Press 2012) 8.
[61] I have used throughout this section in addition to quoted sources Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan 2003) and; Daniel Lee, 'The Society of Society: The Grand Finale of Niklas Luhmann' (2000) 18 Sociological Theory 320 to guide me through Luhmann's texts

alive. Nor would anyone seriously regard neurophysiological processes in the brain inaccessible to consciousness as societal processes, and the same is true of all perceptions and trains of thought occupying the attention of the individual consciousness at a given time.[62]

The specific choices in terms of communications develop over time to tackle the growing complexity of society, creating social subsystems such as law. This reduction of complexity through specialisation allows us to understand better one another. Therefore, Luhmann suggests, any communication that we initiate can only occur on a single system at a time, even if the same object can readily be part of communication in several different subsystems. A statute can be a political topic, a matter for art discussion, or subject of lawyerly analysis, but we can communicate it only using one system at a time.[63] Even though we can argue within the legal system that a piece of legislation is aesthetically pleasing or tainted by parochial political interests, the communication is subject to the code and programming of the legal system—not that of art or politics.

This feature of communication, which draws a boundary between a 'marked' and 'unmarked' state is at the heart of Luhmann's theory.[64] It is possible for us to speak in a different way from law and therewith change law, but the weight of past communication directs us along pre-defined, marked paths. These specialised patterns of communication separates system from its environment; society from nature, law from society, and so forth. Once the separation has occurred, there is a systemic closure, which prevents communication participating simultaneously on several systems. Inside the closure, the system develops a self-referential or self-generative way of producing new communications using its internal logics. This process of self-generation Luhmann titles autopoiesis. Each autopoietic system begins to create complexity anew, leading into a state of 'hypercomplexity', where grounds for failure in communication multiply and become more common. Due to inherent complexity of modern society and its subsystems, Luhmann focuses on universal aspects of system and leaves the more detailed research for those applying his theory to concrete examples.

But what of the paradox Luhmann refers to in his terse commentary on Rawls cited above? According to Andreas Philippopoulos-Mihalopoulos's verbose exposé on Luhmann's paradox, the former finds the latter declaring paradoxes as glimpses

[62] Luhmann, *Theory of Society Volume 1* (n 60) 6.
[63] ibid 22ff.
[64] Luhmann is influenced by George Spencer-Brown's work with his distinction. For a brief introduction to both, see e.g. Michael Schiltz and Gert Verschraegen, 'Spencer-Brown, Luhmann and Autology' (2002) 9 Cybernetics & Human Knowing 55.

to impossible.[65] This is a play with Luhmann's marked/unmarked distinction: a paradox is a way to communicate that which has no meaning within the system. As Stephan Fuchs notes, Luhmann provides two general forms to describe society: tautological and paradoxical.[66] When society is seen solely as the marked side (i.e. 'law is what law is'), Luhmann speaks of tautological and inherently conservative form, while a speak from the unmarked side (i.e. 'law is what it is not') is progressive or revolutionary form of description. Thus, when Luhmann calls out Rawls for obscuring the paradox, he suggests an ultimately creative process with a goal to conceal the unresolvable paradox at the heart of Rawls's idea of a society. As Luhmann writes elsewhere,

> [t]he paradox itself turns unwittingly into a creative principle because one has to try so hard to avoid and to conceal it. One is forced to implement the distinction between legal and illegal through further distinctions.[67]

Thus, when Rawls imposes his veil of ignorance to cover the initial position, he, according to Luhmann, conceals the discord or improbability of consensus at the heart of society. Individual 'black boxes' as Luhmann describes others, remain for Rawls inherently rational (or Kantian) whereas for Luhmann individuals are much more tightly connected to the practice where reasons and morals remain much more confused. In a sense, the infinite possibilities for communication between self and other turns everything contingent. The permanence emerges through the past choices of meaning, which shape the actuality wherein future choices are made. Yet, as meaning never fully closes the unmarked state for Luhmann, no permanent permanence exists, but a constant self-generative process within a system.[68] This is the process that creates complexity as the line of actuality presumed by meaning extends. This paradoxical nature of meaning as a fundamental concept together with world and time in Luhmann's theory is central to its generative power. Like with Rawls, I will return to these themes of complexity directly through works of those

[65] Andreas Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice, Society* (Routledge 2010) 63.

[66] Stephan Fuchs, 'Tautology and Paradox in the Self-Descriptions of Modern Society: Translation and Introduction' (1988) 6 Sociological Theory 21, 25. Tautology and paradox are more systematically treated in the text that follows Fuchs's introduction, Niklas Luhmann, 'Tautology and Paradox in the Self-Descriptions of Modern Society' (1988) 6 Sociological Theory 26.

[67] Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004) 177.

[68] For a use of 'meaning' in Luhmann's theory, see Urs Stäheli, 'The Hegemony of Meaning: Is There an Exit to Meaning in Niklas Luhmann's Systems Theory' (2012) 259 Revue internationale de philosophie 105.

who have come to employ Luhmann in their legal research as well as an undercurrent in much legal theory set into transnational setting.

Rawls and Luhmann then provide two different solutions to growing complexity of law. Rawls's answer goes through an ideal theory that posits justice as a foundational value for society. There are universal features of the ideal state of justice that allow assessment of law through the prism of Rawls's principles. Luhmann's solution is to avoid universal content but rather focus on universal processes. A society stands out from the environment in a very precise way to communicate what matters (marked state) and what does not (unmarked state). This simple heuristic is then rendered more complex to serve a growingly complex society. While Rawls's theory is closely anchored to a society modelled after the values of 'Western' polity, Luhmann's theory remains agnostic to the form of the society itself. Luhmann's theory is, as such, more attuned to globalisation of law than Rawls's, but as it lacks any normative guidance, its application is more likely to lead into a description of existing complexity than any assessment of such complexity's merits. This provides space on the international plane for Rawlsian arguments, such as references to the dictates of humanity or avoidance of injustice, as they allow authors to instate a single lens through which complexity ought to make sense.[69] I will remain noncommitted to the merits or weaknesses of these theories at large. Rather, my focus is to understand articulation of law from the vantage point of these 'master narratives' linked to values and complexity. To illustrate the point, I will in the following briefly outline some of the numerous neopragmatist understandings of law to indicate how they relate to these master narratives.[70]

I understand with neopragmatism widely those currents in legal academia that came to fore starting from the early 1970s and that captured most of the American jurisprudence by 1990s.[71] My particular focus on these American debates stems from the centrality of the United States in forming the liberal international world order

[69] See, for example, Sionaidh Douglas-Scott, *Law after Modernity* (Hart 2013); Ruti Teitel, *Humanity's Law* (Oxford University Press 2011).

[70] I will use neopragmatism liberally. The nomenclature is commonly attached to the philosophical pursuit, which modified the first-generation pragmatism of Peirce, James, and Dewey. I employ it to signal the new kind of pragmatism that emerged starting from the 1960s onwards in the legal thought, even if there is no direct reference to any of the pragmatist philosophers or even a nomination of the idea as pragmatism. As such, the pragmatism referred by 'neopragmatism' in what follows resembles closely the way many employ legal realism; a more of a short-hand for a set of ways of thinking that commonly draws influence from a number of canonical sources

[71] Brian Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Clarendon Press 1997) 7.

that is behind much of the 'law' of this dissertation.[72] Many of the currents of thought from the U.S. legal debates found their way across the Atlantic and they became important lenses through which law was perceived during the last decades of 20th century and early 21st century. This is not to suggest that the ideas presented by these neopragmatists would have been novel or even originating from the U.S.; rather, their influence was bound to the institutional positions of those who presented them and the currency they gained as associated policy goals. American civil rights movement and emergence of human rights NGOs in the 1960s consolidated also these neopragmatist visions as a global calling beyond the state.[73] Many neopragmatist positions employ a lens through which the society and law is reflected to illustrate manifold realities of persons that encounter law. But more than anything, neopragmatism signals an attempt to navigate between alleged formalism of legal positivism and presumed blunt instrumentalism of legal realism.

In a symposium issue on legal pragmatism published in Southern California Law Review in 1990, most authors positioned their work through the critique provided by Ronald Dworkin a couple of years before in *Law's Empire*. Richard Rorty, for one, noted that the fact that it is easy to accommodate under a single rubric of 'pragmatism' such diverse authors as Dworkin, Roberto Unger, and Richard Posner 'illustrates the banality of pragmatism. Pragmatism was reasonably shocking seventy years ago, but in the ensuing decades it has gradually been absorbed into American common sense.'[74] Despite modest internal criticism, the American legal academia had learned to embrace pragmatism. The pragmatism of the 1990s was however different from the one formulated by Peirce, James, and Dewey years before. The new pragmatism was formulated from the 1970s onwards most notably in the works of Richard Rorty, Hilary Putnam, and Cornel West. According to Rorty, the differences between the new and the old pragmatism are modest – a weeding out of underbrush 'which sprang up during a thirty-year spell of wet philosophical weather'[75] – and mostly related to lack of objectivity attributed to science by the later pragmatists. It is also relatively effortless to see similarities with both Rawlsian and Luhmannian thought in Rorty's pragmatism. Quite like Rawls, 'Rorty is committed to the "manifest image of man," namely a conception of human beings as normative,

[72] There is sizeable research on the rise (and fall) of the liberal international order. For a relatively recent short summary, see John Ikenberry, 'The End of Liberal International Order' (2018) 94 International Affairs 7.

[73] The argument for the emergence of human rights as we understand them at present during the late 1960s and early 1970s is most forcefully argued by Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press 2010).

[74] Richard Rorty, 'The Banality of Pragmatism and the Poetry of Justice' (1990) 63 Southern California Law Review 1811, 1813.

[75] ibid 1815.

self-reflective discursive agents,'[76] where individuals and their liberties are central to formulation of values. On the other hand, he readily admits the contingency of knowledge, or at the very least that of legal theory, stepping close to Luhmannian marked/unmarked distinction.

> I can share Dworkin's and Ely's concerns over the "unprincipled" character of [egalitarian] decisions—their concern at the possibility that equally romantic and visionary, yet morally appalling, decisions may be made by pragmatist judges whose dreams are Eliotic or Heideggerian rather than Emersonian or Keatsian. But as a pragmatist, I do not believe that legal theory offers us a defense against such judges—that it can do much to prevent another *Dred Scott* decision.[77]

This ambivalence between a quasi-metaphysical, rational 'individual without individuality' and permanent, self-generative contingency is reflective of much legal theory that sought to embed Rorty's vision in their work.

The more critical variants of pragmatist legal theory challenged the paradoxical unitary individual at the heart of the pragmatic use of language. A steppingstone for many critical accounts of theory in pragmatist vein was the American critical legal school ('CLS') that employed an eclectic theoretical armature to challenge the perceived orthodoxy of American law. A good illustration of the style of CLS argument is provided by Duncan Kennedy in many of his early writings.[78] At the heart of Kennedy's writing is a contradiction or indeterminacy of legal language, be it about human nature or of individualism and altruism in private law. These diametrically opposite positions are perceived in perpetual conflict with one another, while the actor using law or perceiving its use, does not conceptualise this conflict. On these early accounts, Kennedy remained convinced that these conceptualisations serve a function and allow for a greater mobilisation for salutary causes. This is a sort of rudderless pragmatism steered by underlying morality of a legal actor, who would, once they would realise their conceptual moorings, navigate towards 'better society' whose qualities are left unarticulated. At this point Kennedy's argument can be perceived to have been closest to that of Rawls. Fairly soon, however, Kennedy retracted from these philosophical constructions in favour of a series of highly situated retorts that could not be captured by the Eliotic or Heideggerian judges Rorty

[76] Paul Giladi, 'A Critique of Rorty's Conception of Pragmatism' (2015) VII European Journal of Pragmatism and American Philosophy 1, 9.
[77] Rorty (n 74) 1818.
[78] See, for example, Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review 1685; Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 Buffalo Law Review 205.

perceived as a threat for all legal theory.[79] Later, Kennedy turned to a more contextualised understanding of the law's subject.[80] Where the earlier analyses of Kennedy can be considered highly depersonalised or individuated without individuality, the latter ones reintroduce systematic rigidity to legal theory through the figure of the disenfranchised. In a sense, Kennedy's work covers the space reserved for paradox at the heart of law: outlining its manifestation at the level of communication (early period), as unarticulated potentiality (nominalism), and, ultimately, as highly contingent yet history-bound actuality where another possible world might be unlikely.

These Kennedian themes are amply spread around various later critical law movements from critical race theory to queer law to intersectionality analyses. They share what Justin Desautels-Stein places at the heart of the modern pragmatism more generally, namely, a position 'on the edge of a blade, looking nostalgically back at Dewey's moral ambition, yet constantly keeping itself from indulging a normative stance.'[81] A response to standing on the edge of a blade for many legal theorists of critical kin has been to deconstruct the concepts of others to indicate their flaws without providing any details for a move forward; in Mari Matsuda's words, the pragmatism of CLS amounts to being '[l]ike a pack of super-termites, [… eating] away at the trees of legal doctrine and liberal ideals, leaving sawdust in their paths. […] Never mind that no one knows what to do with all the sawdust.'[82] To support the movement with robustness, critical race theorists like Matsuda, feminist legal theorists like Margaret Radin,[83] and promoters of intersectionality like Kimberlé Crenshaw[84] have sought to fill in 'an empty slot and a formal legal device'[85] that is legal person at the heart of all legal activity. Building on the experiences of those not normally heard in the formulation of legal theory, these phenomenological accounts have sought to fill in the void of normativity in pragmatism through an expansion of

[79] This is particularly his position in Peter Gabel and Duncan Kennedy, 'Roll Over Beethoven' (1984) 36 Stanford Law Review 1.

[80] An example of such account, see, for example, Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault' (1991) 15 Legal Studies Forum 327.

[81] Justin Desautels-Stein, 'At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis' (2007) 2007 Michigan State Law Review 565, 585.

[82] Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 323, 330.

[83] Margaret Jane Radin, 'The Pragmatist and the Feminist' (1990) 63 Southern California Law Review 1699; Margaret Jane Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957.

[84] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241.

[85] Anu Pylkkänen, *Trapped in Equality* (Suomalaisen kirjallisuuden seura 2009) 12.

the communicative scope of inquiry. In short, they have veered towards pluralism of viewpoints that jointly ought to construe the legal fabric.

The critical accounts of law have sought to dissect in ever finer slices the factors contributing to legal/illegal distinction that constitutes, to employ Luhmann's language, the code of the system. The growing attention to the foundational, unsolvable paradox has spurred new paradoxes (e.g., indeterminacy, reparations, or intersectionality) that on their part have produced more law. The resulting complexity has made standing on the edge of a blade increasingly difficult. It has led many to embrace the values shown during the earlier 'thrashing' of the CLS to be inconsistent and unstable tools waiting for the capture by the powerful. For example, Matsuda seeks justice although she is fully aware that burying such metaphysical baggage is foundational for pragmatism leaning CLS theory, and her critique of Rawls can equally well be mounted against her own formulation of reparations and morality stemming from 'alliance with the bottom.'[86] The other option is to produce more sawdust to conceal the paradox without much in terms of purpose for all the accumulated sawdust in the end. With a post-modern loss of belief in grand narratives, the sawdust has no and cannot have a place. It cannot be turned into grist to the mill for there is no project to fight for that could be justified beyond personal preferences, for there is no standard of good.

In this sense, the tautological process trying to define law through what law is, has turned out, in retrospect, the more influential one in practice if not in theory. Where the critical side was taken by the research of likes of Ludwig Wittgenstein, Thomas Kuhn, and Paul Feyerabend and their denouncement of scientific quest for truth, the tautological side of legal neopragmatism willingly embraced scientific truths produced outside law. The most prominent tautological pragmatist movement was and is new law and economics that came to prominence through prolific writings of Richard Posner.[87] If much of the critical scholarship associated with the CLS had to struggle with challenges of relativism and cynicism, law and economics seemed to provide an escape that maintained American pragmatism's committal against metaphysics. Much like Rawls, Posner built his theory on abstracted or ideal

[86] Matsuda (n 82) 361. She provides her insightful feminist critique of Rawls in Mari Matsuda, 'Liberal Jurisprudence an Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 New Mexico Law Review 613.

[87] For a brief summary of earlier forms of law and economics as well as Posner's influence in developing the new law and economics movement, see, for example, Sophie Harnay and Alain Marciano, 'Posner, Economics and the Law: From "Law and Economics" to an Economic Analysis of Law' (2009) 31 Journal of the History of Economic Thought 215.

conditions of decision-making,[88] which then justified down the stream assessment of (especially) courts' decision-making using economics.[89] By attributing no value to economics in and of itself, but rather perceiving it a tool with which to observe law, Posner was able to explain legal phenomena with a single, even if mutable, explanation. And this explanation worked from abortion to free speech, from antitrust to tort: there was no paradox at the heart of law but employing the lens of economics would provide better explanation to already extant case law. To quote Luhmann,

> [i]f society is supposed to be what it is, then the problem can only be to conserve society, to continue solving its problems, and possibly to improve problem solving and to overcome unexpected difficulties.[90]

It is precisely towards these ultimately conservative goals that Posner's decades-long work on pragmatism and law and economics aims. For example, in a reply to a review of his book *Law, Pragmatism, and Democracy*, Posner re-iterates his belief 'that deciding common law cases in a way that will promote economic efficiency is the right way for judges to go; it is also the pragmatic way.'[91] Any difficulties can be ultimately solved through recourse to economic efficiency without a need to suggest any fundamental paradox at the heart of law. For as long as cooler heads prevail even the most repugnant analysis is possible, if we allow the transformation of, at first sight, moral question into one of economic efficiency.[92]

To conclude, the American neopragmatism that overtook legal theory by the 1990s, runs into two opposite directions. When veering towards tautological explanations, law is seen as fully capable to provide answers to all challenges ahead. On the other hand, leaning towards paradoxical explanations, and law loses most of its explanatory power as a system. Law still accomplishes many things, but what interests it serves and how it should operate are questions that are pushed perpetually towards the future. These both responses are argued against the backdrop of Rawlsian idea of justice as fairness for which they seek to provide a challenge. Many

[88] See, for example, Richard A Posner, 'The Law and Economic Movement' (1987) 77 American Economic Review 1, 5.

[89] See, for example, William Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987).

[90] Luhmann, 'Tautology and Paradox in the Self-Descriptions of Modern Society' (n 66) 28.

[91] Richard A Posner, 'Legal Pragmatism Defended' (2004) 71 University of Chicago Law Review 683, 685.

[92] An example of such calculus for Covid-19 response, Ian Ayres and others, 'Should We Really Have Shut Down a Week Earlier?' (*Balkinization*, 3 June 2020) <https://balkin.blogspot.com/2020/06/should-we-really-have-shut-down-week.html> accessed 11 August 2023.

of these debates will be revisited throughout the dissertation as generative *topoi* for law also on transnational or global setting. The use of these differing understandings of pragmatism in what follows is not to argue anything about nature of law or to suggest that these would be the sole lenses through which the law is perceived. The claim is much more modest. The brief period of international institution-making after the end of Cold War is contemporary to many of these debates. Even though most of the institutions and regulatory instruments that I will explore are older, they are networked with material impact at around the time. The piling sawdust from well-intentioned regulatory agendas often conceals the economic efficiency conserving the repugnant calculus.

1.2 Structure of argument in first part

The argument in this first part of the dissertation builds on the three interlinked concepts of person, technology, and international law. While each concept is treated independently, the chapters build on previous ones. Thus, the concept of person is treated as the most autonomous upon which technology and international law rely. This does not suggest that technology and international law would have no bearing on concepts of person, rather examples of these impacts are reserved for the second part of the thesis. In a nutshell, the order of presentation should not be understood as a Rawlsian 'lexical order', but simply a mnemonic tool to support linear storytelling.

Each chapter devoted to an individual concept is divided into two. The first part is of each chapter focuses on narrowly defined semantic question outlined above, namely, 'what does X mean in law'. For the concept of person law refers to theoretical writings, while with the concept of technology the focus is more directly on positive law. As international law is presumed to be law for the purpose of the present dissertation, there the focus is more directly on the legal consciousness of international lawyers and its peering of its own boundaries. These are not, as such, commensurate conceptual developments, wherefore I rely on models (or theories) developed above in Chapter 1.1. to make them appear so.

The second part of each chapter sets to analyse the concept more widely in law. These parts expand the analyses beyond strictly semantic concerns, but they also provide thicker understanding of tensions within concepts as well as illustrate how they operate within the wider framework of the present dissertation. These latter parts also house first formulations of these concepts as they will be employed in development of the theory of repugnant rights in the last chapter of this first part. With the concept of person, this involves looking past the presumed universalism of the analytic concept to its apparent paradoxes, with technology the focus turns towards contingency that commonly is lost in technical enumeration of technological

specifications. And with international law, the emphasis is on the international law itself and its craving for form after persistent criticism of its structure and subjects.

After introduction of the animating concepts and their basic tensions, I formulate the theory of repugnant rights that will function as a lens for the second part of the thesis. This last chapter draws together all three concepts and sets them into the realm of global or transnational law. I will develop the theory through a set of concrete examples that point to de facto and de jure rightlessness of individuals encountering grievous violations of their basic rights. I argue that this rightlessness is a consequence from three interlinked developments that affect legal person, technology, and international law:

1) There is an increase in amount of (international) law as a consequence of technological development;
2) there is a growing number of technologies that directly impact and/or imitate a person. These technologies shake the foundations of anthropocentric concept of person, and;
3) international law transmits technologies globally, forcing states to react on technological challenges to the concept of person.

Simultaneous legal response from numerous different jurisdictions to 'same' material technologies, leads to great variation in the scope of protection provided to persons. This variation in the scope of protection amounts, on occasion, to rightlessness. In the last chapter of this first part, I outline processes as well as provide more nuanced understanding of the repugnancy at the heart of the international trade of technology before moving to test this understanding in the second part of the dissertation.

2 The ‘Person’ in Law

Person and personhood have been foundational building blocks of European legal imagination for millennia. Traditionally dated back to the Roman law bifurcation between persons (*persona*) and things (*res*),[93] personhood is as contested as it is ancient. While there is a relatively widely felt agreement that person serves an important role as a fiction that pulls together ideas of our own making,[94] the precise shape and form of that fiction remains a source of much confusion. We might agree that the concept of person in law has been naturalised in the language of law, while the fiction itself has become dead in the sense suggested by Lon Fuller; the language of law has seen a change in the meaning of ‘person’ to align more closely with that of reality.[95] Despite this rapprochement, the content of the concept of person in law has remained elusive beyond ‘the one who can be endowed with rights and duties.’[96] In this chapter, I will look more closely whos, whys, and hows behind this formal description.

To chart the contours of a legal fiction, it is opportune to begin with a challenge to traditional notion of anthropocentric person provided in literary fiction. For more than hundred years, science fiction has produced visions of future where intelligent and human-like creatures mass-produced into the image of human have come to challenge our own humanity.[97] Robots, first appearing in Karel Čapek’s play from 1920, have since served as a mirror to personhood in literature, games, movies, and other forms of popular culture.[98] In Čapek’s *R.U.R.*, themes later explored through

[93] Michael Carrithers and others (eds), *The Category of the Person: Anthropology, Philosophy, History* (Cambridge University Press 1985).

[94] See in general, H Vaihinger, *The Philosophy of ‘As If’* (Harcourt, Brace & Company 1925) 86–88.

[95] Lon Fuller, *Legal Fictions* (Stanford University Press 1967) 14ff.

[96] See, Richard Tur, ‘The “Person” in Law’ in AR Peacocke and Grant Gillett (eds), *Persons and Personality* (Blackwell 1987) for an entertaining account on personhood based on this minimal definition.

[97] On history of erasure of human agency more widely, see Edward Jones-Imhotep, ‘The Ghost Factories: Histories of Automata and Artificial Life’ (2020) 36 History and Technology 3.

[98] Karel Capek, *R.U.R.* (Dover Publications 2001).

robots are met and to this day it remains a touchstone for much of our discussion on robots.[99] The play centres on the morality of subjecting industrial products resembling humans to inhuman treatment. Robots act like humans, look like humans, but they lack consciousness and feelings associated to humans, although they are intelligent. Čapek also weaves the human side of the equation into his play. He charts, even if in passing, what happens to indolent humans when robots replace them in all manual labour. And finally, Čapek plays on the Promethean fear of robots turning violent and destroying the whole of humanity. Thus, in the epilogue when all of humanity, save for a mason Mr. Alquist, has been killed, the robots find love, laughter, and aesthetics and come to replace humans *qua* new humanity. The curtain falls on Alquists words, 'Go, Adam, go, Eve. The world is yours.'

The Promethean narrative of the play, of humans standing against gods, captures much of what law has come to classify as a distinction between persons and things and the role of science or technology therein. On the one side, rests a human being or humanity as a measure to compare to. This is what the Western legal tradition at large would consider the side of person (or *persona* to allude its Roman origins) that is in its everyday—both legal and lay—meaning equated to living human beings. On the other side resides an unsorted array of things (or *res* to accommodate common origins in Roman law), whose thingness is a function of their lacking personness.[100] Personhood presumes universality for the category of persons, while leaving the condition of thingness mutable to contingent events in law's development. In other words, there does not seem to be a subjective assessment on the empirical question of whether someone is a human being entitled to recognition of their personhood. The same does not appear to hold true, for example, when we are to verify the existence of an invention and its industrial exploitation in process of conferring rights attached to a patent. We might readily ascertain that there is something without granting it a status of a legal thing called patent, while *mutatis mutandis* the same would not hold true about a human being and personhood.[101]

But the play also reveals an equally common-sense criticism for limiting our concern of personhood solely to presently living community of *homo sapiens*. What

[99] I am here referring only to the Western or European-centric image of robots as the concept explored here is proper to that thought. The wider conceptual understanding of robots will be dealt in the latter part of the present chapter.

[100] A recent charting of this origin and reflection in present is provided in Roberto Esposito, *Persons and Things* (Polity 2015).

[101] Obviously, a document seeking to claim a patent would still lead to a legally regulated process even if the outcome would amount to no change in the realm of law. No new things emerge. Nonetheless, for example the paper used in the process could in myriad other ways constitute an object or thing for law (e.g. as a recyclable waste). The expansive network of regulation makes it relatively difficult to perceive anything, material or immaterial, that could not be an object of law—a legal thing.

if there were others quite like us in all but appearance or bodily constitution? Ought they not carry a similar esteem in the eyes of society and of law as we endow to human beings? And while art remains to this day a powerful tool and a meaningful interlocutor in any attempt to expose our preconceived ideas over contours of personhood, there is a millennial tradition of scholarship addressing the question what makes a human a human or a person a person. This tradition has sought to explicate why we are ready to attribute personhood to some, while denying it for others. Much like Čapek's play, the scholarly tradition commonly commences with a presumption that we command knowledge over a paradigmatic representative of personhood. But unlike the seemingly universalistic equation of living human beings with that of persons, the attributes for what constitute a paradigmatic representative of personhood have proven to be highly contingent—and not an empirically or logically attestable truth—throughout history. Thus, in Gaius' *Institutes* it is entirely seemly to address the question of human slaves through the status of things (*res*) because a paradigmatic bearer of legal personhood (*persona*) was a paterfamilias who per definition was a relatively affluent Roman man.[102] At present, few would attribute gender or citizenship as a necessary condition for personhood. In a word, it is important to understand the attributes attributed to a 'common person,' as it is through the changes in what we expect persons to share that allows to understand the highly contingent character of our seemingly natural notion of personhood.[103]

These more mutable traits of personhood are easy to perceive through history of civil rights domestically and human rights internationally.[104] The oft-repeated expansion of rights from *ancien régime* through French revolution and the Constitution of the United States to abolishment of slavery and women's rights movements and so forth are the narrative undercurrent of rights as significant symbols of recognition of a person's justifiable claims to be heard in societal matters.[105] This is capsulated for example in a *Black's Law Dictionary* entry for 'person':

> A human being. […]

[102] Gaius, *Institutes* (Les belles lettres 1950).

[103] An argument suggesting influence of artificial persons to that of natural persons and vice versa has been advanced in Andrew Fitzmaurice, *King Leopold's Ghostwriter* (Princeton University Press 2022).

[104] In Capek's R.U.R as well, Helena is provided with a right to 'preach to [robots] about human rights,' as everyone considers speaking to them futile for they lack emotions and soul.

[105] An accessible critical introduction to the genealogy of human rights in Western thought is Costas Douzinas, *The End of Human Rights* (Hart 2000) pt I.

> An entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being.
>
> 'So far as legal person is concerned, a person is any being whom the law regards as capable of rights and duties. […] Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance.'[106]

According to Black's, without rights and duties the substance of a legal person is vacuous—an empty container not tractable for the legal gaze. Therefore, call for rights for slaves, women, sexual minorities, immigrants, and children were calls for recognition of their full status as persons. Still, it remains a modest clarification on what we mean with personhood if all it stands for is a substance to which rights and duties can anchor. After all, there seems to be nothing to prevent us attributing rights and duties to a wide range of entities that we would be reluctant to nominate persons. For long, the status of foetus has been at the forefront of personhood debate, whilst more recently fertilised human embryos, animals, and intelligent machines have become part of a legal quagmire that is personhood, while none of them can easily claim to be capable of actively exercising any of their rights or duties.

There is an additional source of confusion for much debate about personhood that derives chiefly from the wide range of different uses of 'person.' A person in its everyday use connotes a human being as an individual; person is someone you meet at the coffee room or in a grocery store. In everyday language use we do not refer to a robot as a person or an animal as a person, irrespective of our attribution of qualities, such as, intelligence, care, love, or sentience to them.[107] In terms of law, as well, the primary meaning of a 'person' is a human being, but there is a wide range of other uses for 'person' that are a source of some confusion. First, there is a long-standing distinction between what are regularly referred as 'natural persons' and 'juristic' or 'artificial persons.' The natural persons are commonly defined as living human beings, thus, nearly synonymous with the everyday usage of the term. The juristic or artificial persons are then diverse corporate bodies that are granted with independent rights and duties, separable from those of the natural persons who direct or participate in their actions. Second, and more pertinent for the debate below, is a

[106] Henry Campbell Black and Bryan A Garner (eds), *Black's Law Dictionary* (10th edition, Thomson Reuters 2014) 1324. The direct inline quotation is from JW Salmond and GL Williams, *Jurisprudence* (10th edition, Sweet and Maxwell 1947) 318.

[107] It could be argued that the decade long obsession of Silicon Valley companies to provide a (female) name to digital assistants is an attempt to alter this distinction, but, then again, we have been providing names for household animals much longer without a change in the semantic scope of 'person.'

distinction drawn between a 'legal person' and a 'moral person.' A legal person, whether natural or juristic, is defined as an entity capable of holding rights and duties whereas requirements for moral personhood have traditionally been much more stringent, necessitating wilfulness and intentionality of actions and a fuller understanding of possible consequences of those actions.

Further, the 'moral person' has often been used to find limits of legal personhood, as for example Kate Greasley argues.

> [T]here are still some clear limits on what sensibly can or cannot be deemed a person—rocks are certainly not people, and normal, mature human beings certainly are. Perceiving those limits and extrapolating from them can be the first step in arguing intelligibly about the concept of person. One would simply be wrong to think that there are no convictions about personhood that we share. There are.[108]

Used as an argument for common sense, Greasley endorses some characteristic features of personhood that stem from the realm of moral philosophy rather than law. After all, in the 1920s, a court in the United Kingdom upheld legal personhood of an idol,[109] which, arguably, was nothing but a rock.[110] Thus, our shared convictions of personhood allude a shared value basis from where we can start searching for a suitable understanding to our legal concept of 'person.' This practice tends to sediment a moral standard as the foundation for a legal concept, making it difficult to discern which parts of the argument are of legal origin and which of moral. A conflation of the two—intentional or accidental—is a common feature of much of the literature on legal personhood.

The following excurses into the nature of legal personhood is divided into two categories that dominate the scholarly debate, both of which provide an answer to the semantic question formulated above, namely, 'what does person mean in law.' On the one hand, a doctrinal or analytical tradition stemming from the work of John

[108] Kate Greasley, *Arguments about Abortion: Personhood, Morality, and Law* (Oxford University Press 2017) 28.

[109] *Pramatha Nath Mullick v Pradyumna Kumar Mullick* (1925) L.R. 52 Ind. App. 245. Privy Council decision is commented in PW Duff, 'The Personality of an Idol' (1927) 3 Cambridge Law Journal 42.

[110] Similarly, early accounts of personhood in the analytical tradition commonly list ecclesial properties and divinities as examples of 'supranatural personhood,' see, for example, John Chipman Gray, *The Nature and Sources of the Law* (2nd edition, Beacon Press 1963) ch 2.. Also, in anthropological theories it is common to see animation as a cultural process rather than a quality inherent to object's nature. See, for example, Guido Sprenger, 'Communicated into Being: Systems Theory and the Shifting of Ontological Status' (2017) 17 Anthropological Theory 108, 109.

Austin and Jeremy Bentham, with a goal to clarify legal concepts as ideas in distinction to law as a practice.[111] Such a quest for conceptual clarity is often described by its proponents as an attempt to reach out a universal core meaning for the concept of person that would then enable us to recognise genuine rights provided to diverse entities from illusory ones. The main mode of argumentation employs hypotheticals, which attempt to peel layers of confusion from everyday use of legal concepts, such as 'person', with an intent to either include or exclude a particular category of entities from the realm of personhood. On the other hand, an empirical tradition seeking to explain law predominantly as a practice. Unlike the works belonging to the analytical tradition, the empirical inquiries of person seldom seek to provide a crystallisation of the concept of person as such. Rather, the concept of person is employed to illustrate its limits often paired with a call to expand personhood to cover the scenario(s) explored. In many ways, these two ways of employing personhood commence from opposite ends of legal argumentation: the doctrinal asks what is minimally required from a concept of person in law, while the empirical asks why personhood functions or fails to function in each setting.

A closer analysis of these two traditions reveals that they share much in common, but due to their diametrically opposite initial positions often end up discussing past one another. Scholars providing empirical analysis commonly argue that any attempts towards universalism are bound to fail and therefore the doctrinal scholarship is not only misguided but apologetic of the present powers-to-be. As such, an empirical account of personhood would state, the doctrinal personhood debate contributes to the present misery of the marginalised to establish conceptual clarity where none is needed. A doctrinal answer to this is to accept the critique to an extent, while argue that without a common nomenclature there is nothing to discuss on and about personhood. If personhood is reduced to a simple moniker for rights claims, then it serves no particular function; rather than talk about personhood one should speak of rights. In recent years, I argue these traditions have sought settlement of a sort without much success. To suggest on a global scale that de facto rightlessness is not a concern of personhood properly so understood, as many doctrinal scholars of personhood would suggest, while at the same time suggesting that it would not be a category error to entertain ideas of personhood for robots and animals ignores entirely the argumentative thrust of more empirical personhood scholarship. Likewise, a suggestion that all the diverse violations of rights could meaningfully be interpreted as undignified treatment of persons does invest too little to any intrinsic worth personhood as a concept might carry for legal argumentation. If nothing separates the concept of rights from that of persons, then maintaining and

[111] For an argumentative introduction to analytical legal theory, see, for example, Scott Shapiro, *Legality* (Belknap Press 2011).

underlining personhood seems futile. This might be well and truly so, but there are few accounts that would promote such an understanding of personhood, despite at times staunch critique against its current function.

In what follows, I outline how these two distinct positions understand 'person' in law. Once I have provided a rudimentary answer to the semantic question, I develop an account that seeks to take seriously core tenets of both. There is something rotten at the core of the universalistic concept of person, if on a transnational setting many paradigmatic representatives of such supposedly universal concept are left without rights. Yet, this does not have to imply a need for expansion of the scope of the concept of person in law to more fully account for those whose rights are trampled. Rather, following a line of argument most forcefully presented by Paul Riceour, I outline a concept of person that is 'readable when [it is] interpreted in function of the stories people tell about themselves.'[112] I argue that a key part for the law's concept of person are the (hi)stories of exclusion and of expansion and adjoined narratives of progress.[113] For the purpose of the present dissertation, I divide these stories into two adjoined yet separate narratives: the 'global' person embodied in international human rights and humanitarian law, and the multitude of persons construed in national legal orders. I suggest that at the international level the image of person is highly idealised. The stories that international legal community tells are enforcing a frame of reference for what the 'person' or individual stands for in international law with a 'liberal' person of the Occident as its model. Any mismatch between this highly idealised notion and the locally grounded account of personhood is the space where technological narratives treated in the next chapter target themselves. In all simplicity, I argue that the humanity's law that has formed internationally since the Second World War is premised on different narrative undercurrents and therefore to different ways of making personhood readable than most domestic formulations thereof. If international understanding of humanity does not cover person's claim for rights and respect, treatment of individuals becomes subject to international freedoms rather than of duties. To what extent contingent local narratives of personhood curtail these freedoms forms a core question for the second part of this dissertation.

[112] Paul Ricoeur, 'Narrative Identity' (1991) 35 Philosophy Today 73, 73.

[113] A good example of such narrative construction of personhood is provided in Pylkkänen (n 85). The story of 'almost being there in terms of equality' in Finland obscures the fact that Finland remains a country where e.g. domestic violence encountered by women is commonplace.

2.1 Analytical (Legal) Philosophy & Legal Personhood

A tradition of analytical legal philosophy has dominated much of the common law jurisprudence since the early 1800s. According to one of its early proponents it seeks 'to know the meaning of the legal terms which a lawyer constantly uses,' and through this quest 'contribute towards understanding the law.'[114] It has been instrumental in shaping how law and legal concepts are perceived in the common law world and beyond. While originally adopted from continental legal theory, for long the doctrinal analysis of law has been steered chiefly by Anglo-American authors.[115] A pursuit for conceptual clarity of foundational legal concepts that presumably are found in all legal systems (i.e. are universal) at first sight seems to provide the foremost tool to understand a contested concept such as 'person' in law. This pursuit should weed out 'digressions upon questions, such as the psychology of the will, codification, and utilitarianism,'[116] according to an early attempt towards purity of the analytical tradition. While such purity is no longer strictly maintained, there is much in the analytical tradition that perceives law and its concepts as a systematic whole whose principles can be withdrawn from a great body of cases decided in the past or a prior authority that are apparent to an analytic mind.[117] In the words of Thomas Holland, '[j]urisprudence is not a science of legal relations *a priori*, […] but is abstracted *a posteriori* from such relations as have been clothed with a legal character in actual systems.'[118]

The early analytical tradition equated the concept of law with its embodiment in handful of legal systems its proponents explored.[119] The modernity of the analytical

[114] AV Dicey, 'The Study of Jurisprudence' (1880) 5 Law Magazine and Review: A Quarterly Review of Jurisprudence, and Quarterly Digest of All Reported Cases 382, 382.

[115] See in general from Savigny's impact Michael Hoeflich, 'Savigny and His Anglo-American Disciples' (1989) 37 American Journal of Comparative Law 17.

[116] Dicey (n 114) 387.

[117] See e.g. John Chipman Gray, *The Nature and Sources of the Law* (Roland Gray ed, 2. ed., Beacon press 1963) 3., 'The task of an analytic student of the Law is the task of classification, and, included in this, of definition. It has been truly said that he who could perfectly classify the Law would have a perfect knowledge of the Law.' There can be seen a direct continuation of this tradition in Dworkin's Hercules Judge, see Dworkin, *Law's empire* (n 43).

[118] Thomas Erskine Holland, *The Elements of Jurisprudence* (Clarendon Press 1916) 9.

[119] Traditional areas of legal interest were those of common law generally, most notably within the British Empire and in the United States, but also the Roman law as embodied in the works of von Savigny. A first notable expansion of this scope beyond the 'Western' systems was Henry Maine's *Ancient Law* originally published in 1861, see Henry Maine, *Ancient Law* (10th edition, Henry Holt and Company 1906).

tradition was contrasted to the concept of 'primitive' law elsewhere.[120] Thus, the universal concept of law sought by analytical method was to highlight positive qualities of modernity vis-à-vis the primitive ways of systems the scholars understood little and analysed even less. First as an argument, and later as a common sense, legal personality was suffused with interests and wills of human beings, which gradually denigrated all non-Western notions of personhood as simply not reflective of the reality of law.[121] Reading the debate on legal personality within the analytical strain, dominated by Anglo-American authors, is in important ways reading justifications seen at present for excluding some legal fictions from the realm of legal personhood. For my later analysis, this debate clearly illustrates the pitfalls that the conceptual rigour promoted by analytical legal philosophers carries with it; it is all too easy to abstract away rights of those who do not fit the mould as it is to deny apparent rightlessness of those similar to the universal concept as deviations from the rule rather than the rule itself. Whether task of legal theory is to describe law's concepts or provide an interpretation for their emergence, it does not seem to mitigate the fact that much of the positive law explored in debates surrounding personhood within the analytical tradition derives from a handful of communities. Thus, when presented with a case or a statute enshrining personhood to rivers, idols, animals, or environment (to name a few), a relatively common rebuttal runs along the lines that they are not persons properly so, as they fail the universal standard of personhood constituted through a matrix of substance holding attributes of rights and duties.

It is commonplace to begin an analysis of personhood with a recent case that in one way or another highlights legal use of this contested concept.[122] An account of animal personhood starts with a case where a court has encountered the question and one on relevance of personhood in abortion outlines court's opinion in *Roe v Wade*[123]

[120] Coel Kirkby, 'Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law 1861-1961' (2018) 58 American Journal of Legal History 535.

[121] This development is apparent in the 50 years that separates Duff (n 109) from; Christopher Stone, *Should Trees Have Standing?* (W Kaufmann 1974). Where Duff veers towards caution and finding no harm in allowing idols to have rights, even if only through proxy of *shebait*, for Stone and his audience fifty years later, the idea of trees having standing is nothing short of an audacious proposal.

[122] It bears to note that for early proponents of the analytical tradition, the notion of person was chiefly derived from the Roman law authorities rather than from any common law tradition, with notable exception of Blackstone's rendition of foetus *en vantre sa mere*. Yet, in Blackstone's Commentaries the concept of person itself is not seen anyhow problematic, rather it is a God's creation who commands certain rights and duties.

[123] *Roe v Wade*, 410 U.S. 113 (1973).

or some other seminal case.[124] On most of these accounts, a law dictionary definition of a person is provided: a person is an entity capable of rights and duties. This leads authors to consider first the necessity of personhood for the present case, as for example illustrated by Ronald Dworkin in his account of abortion.[125] Dworkin establishes two different versions of the argument – derivative and detached – where only the former necessitates personhood in a legal sense of commanding a capacity for rights and duties. Then he concludes that neither opponents nor supporters of abortion rely on rights and duties of a foetus to establish their claims, wherefore a detached version of his argument stemming from life's sanctity ought to be preferred. Dworkin's strategy is to veer off from the contested concept of personhood. Instead of relying on personhood, he establishes his interpretation on abortion on an antecedent moral commitment to humanity that does not find its manifestation in legal parlance of rights and duties. On the other hand, those in support of personhood as an illuminating concept for establishing a legal argument within the analytical tradition ordinarily dwell deeper into the question what is meant by capacity to hold rights and duties. These accounts normally seek to clarify who can hold rights; what it means to hold rights; how to conceptualise duties; and a range of other questions that take as granted the provided concept of personhood while arguing for a different interpretation of its possible scope.

The intimate connection of rights and duties to persons occupies a central position in virtually all analytical concepts of personhood. Even those who oppose the definition within the tradition of doctrinal legal theory are bound to argue their position through the lens of rights theory. But rather than focusing on rights (and duties) as they manifest in a society, the focus is on rights as abstract legal relations. This is a double-edged sword. On the one hand, the reliance on an ideal theory frees authors from often contradictory manifestations of personhood encountered in any given legal system. On the other hand, it can be readily asked what is abstracted away to reach the ideal position and whether those acts of abstraction are as neutral as they are purported to be.[126] The chosen argumentative strategy has created a whole body of scholarship around single-feature explanations for personhood. Absence or

[124] There is already a sizeable literature to comment the fall of *Roe v Wade* in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. (2022), suggesting that also personhood debate will be updated to employ this supposed new standard. See, for example, Flora Renz and Marian Duggan, 'How Can Feminists Respond to the Decision in Dobbs v. Jackson Women's Health Organization?' (2022) 11 feminists@law 1.

[125] Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Vintage 1994).

[126] Matsuda (n 86). At a more general level, a similar criticism from within the tradition of philosophical neopragmatism, see Hilary Putnam, *Reason, Truth and History* (Cambridge University Press 1981) 1–21.

presence of will, interest, sentience, agency, and so forth act as a shorthand for endowing a personhood to an entity. The most enduring of these debates within analytical scholarship on personhood has been the one between will and interest theory. In short, the debate is about requirements set for someone or something to have rights. A concept of person built on will theoretical model presumes intentional agency before anyone or anything can be considered a person, while one found on interest theoretical model suggests that a duty correlative to right normatively protects interests of purported person. It is apparent that the questions of agency and sentience are second-order concerns that build on these first-order models of rights. In the following, I briefly outline the basic arguments employed on the rights-qua-personhood debate before looking more closely at a pair of recent full-bodied theories of personhood proposed within the analytical legal theory.

As with most discussion over foundational concepts of law, there are several schools of thought competing. For 'legal personhood' within the analytical tradition these schools derive from theory of rights, thus, in general, discussion on legal personhood can be understood through two dominant theories of rights, namely, the will theory and the interest theory.[127] The interest theory, according to Matthew Kramer, 'articulate[s] the basis for the directionality of any legal duty. In other words, it recounts the general considerations that determine to whom any legal duty is owed.'[128] He further suggests that there are two propositions that clarify how such determination can be achieved. They are:

> Necessary though insufficient for the holding of a legal right by X is that the duty correlative to the right, when actual, normatively protects some aspect of X's situation that on balance is typically beneficial for a being like X
>
> Neither necessary nor sufficient for the holding of some specific legal right by X is that X is competent and authorized to demand or waive the enforcement of the duty that is correlative to the right.[129]

A will theory, on the other hand, according to Adina Preda claims that 'somebody possesses a right if and only if they have control over performance of the corresponding duty, that is, if they can enforce or waive that duty. It is generally

[127] There are deviations from this pattern that I will briefly treat below through a more direct encounter with the position held in Visa Kurki, 'A Theory of Legal Personality' (Dissertation, University of Cambridge 2017).

[128] Matthew Kramer, 'Some Doubts about Alternatives to the Interest Theory of Rights' (2013) 123 Ethics 245, 245–46.

[129] ibid 246.

thought that only moral agents have the capacity to exercise the requisite control.'[130] Thus, the main difference between these theories lies in the relationship the rights have to a person. Whereas for an interest theory a right only exists insofar as it is beneficial for a being holding the right, for will theory a right only exists insofar as the right-holder commands sufficient faculty to control formation of their desires and will.

At the outset it is apparent that a will theory accommodates more limited range of right-holders, and, consequently, of persons in the paradigmatic model of person-as-a-right-and-duty-bearing-entity. Due to a prerequisite demand for agency, many human beings and all animals as well as groups are commonly considered outside the scope of legal personhood for supporters of will theories.[131] On the other hand, an interest theory presumes prior knowledge of the right-holder to assess whether an interest exists and therewith a right, but as such it does not presume that right-holder is an autonomous moral agent in the sense required by all formulations of the will theory. For an interest theory, it suffices that a right-holder is minimally sentient to command interests, which would then entail most animals and groups, but exclude embryos, robots, and currently existing artificial intelligence as well as rivers, environment, and idols. Thus, while both theories seek to reflect the actual and not an eternal law, they fail to accommodate a wide range of persons so recognised and are thus required to explain why attribution of personhood (or right-holding) to those entities does not issue them with rights properly so. It suffices to say that the breadth and technical intricacy of these arguments about rights and right-holders would merit a fuller analysis, but the following will briefly introduce some of the paradigmatic arguments and conceptualisations of personhood from both lines of thought at present.

The origin for the contemporary will theory of rights is commonly attributed to H.L.A. Hart and his formulation of a right-holder as a small-scale sovereign, whose autonomous freedom to choose whether to uphold his rights shall not be impugned.[132] There are, however, theories of personhood that rely on a fiction of 'will' or 'choice' that predate Hart. For example, Gray considered will a necessary condition for a right to exist, while holding that for a legal duty a person does not

[130] Adina Preda, 'Group Rights and Group Agency' (2012) 9 Journal of Moral Philosophy 229, 230.

[131] This does not mean that a will theorist would not endorse legal protection for these and other entities, merely that they are not right-holders properly so, a fact admitted even by staunch critics of Will theory. See, for example, Matthew Kramer, 'Do Animals and Dead People Have Legal Rights?' (2001) 14 Canadian Journal of Law and Jurisprudence 29, 30.

[132] HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford University Press 1982) 183.

need to have a will, 'therefore, so far as the exercise of legal rights is concerned, a person must have a will.'[133] The use of rights and duties in Gray differ however notably from that employed by authors arguing in present for personhood, which allowed him to establish personhood on willing, while accepting a wide range of persons from 'normal' persons to 'abnormal' persons (e.g. infants and idiots), and 'supranatural' persons (i.e. deities of different kinds). Most authors at present employ Wesley Newcomb Hohfeld's relational theory of rights, which precludes, at the very least, the possibility of supranatural persons.[134] The rest of the Gray's categories are still being actively debated with different theories of rights demarcating realm of persons in a notably different ways. These differences also illustrate clearly the possible pitfalls associated with both main variants of the analytical rights theory.

A will theory imposes stringent requirements for right-holding. Consequently, the main criticism against will theory has focused on the scope of right-holders being too limited and not reflective of the legal reality.[135] Thus, it is common for will theoretical scholarship to seek to expand its scope while holding true to the foundational premise that rights meaningfully stem from intentionality. In this sense, Adina Preda's article on group rights is a normal will theoretical text where she seeks to expand what is commonly understood by 'willing'. Her core argument seeks to re-define requirements imposed for agency to have a capacity of intention and, through such a definition, expand the realm of entities capable of choosing to also entail groups. She presumes that her work on will theory of rights by extension clarifies an important account of legal reality that is constituted by corporate bodies, such as, corporations and states. For Preda, there is a clear lexical order with rights and duties and personhood, where theories of rights first 'concern[] the pairing of duties – legal or moral – with rights and consequently *the identity of right-holders*.'[136] For Preda, the necessary step to achieve her goal is to lower the threshold

[133] Gray (n 117) 27.

[134] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal 710. For prevalence of Hohfeld on analysis of personhood, see, for example, Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy and Public Affairs 233; Visa Kurki, 'Why Things Can Hold Rights: Reconceptualizing the Legal Person' in Visa Kurki and Tomasz Pietrzykowski (eds), *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer 2017); Matthew Kramer, 'Rights Without Trimmings' in Matthew Kramer and others (eds), *A Debate over Rights: Philosophical Enquiries* (Oxford University Press 1998).

[135] Of other challenges, see Kramer, 'Some Doubts about Alternatives to the Interest Theory of Rights' (n 128).

[136] Preda (n 130) 231 (emphasis added).

of agency.[137] At first, she draws a distinction between agency for moral responsibility and holding a duty, where the latter signals correct standard for requisite agency to possess claim-rights:

> The crucial point to take from this discussion is that the necessary conditions for holding rights are not necessarily the same as those for moral responsibility. Thus, we have corrected the assumption that only full-blown agents can have rights and found that the only conceptual requirement for ascribing rights to groups is a capacity for acting and making choices.[138]

This leads Preda to the next step of her argument, namely, clarifying whether groups can fulfil this more limited requirement for agency. This, she argues, is done by showing that a group has intentions that are not reducible to those of its members.

On her analysis of groups, Preda provides another bifurcation that allows her to argue for coherence of a group. She maintains that 'the sceptics are concerned that accepting group agency entails the thesis that groups have ontological status,'[139] an argument that she suggests can be construed in two different ways. A 'weak ontological claim' states that a group is simply more than a sum of its parts,[140] whereas 'strong ontological claim' would consider groups as organisms or metaphysical substances on their own right. Preda's solution between Scylla of ontological emergence and Charybdis of ontological metaphysics is to embrace an intermediate position, where 'only human beings have ontological status, and are the only full-blown agents, but groups can also have a degree of agency.'[141] Through such a degree of agency we can properly ascribe intentions to corporations, even though those intentions clearly derive from 'individuals' intentions and choices.'[142] However, possession of intentions and a capacity to act are not sufficient condition to be recognised as a possible right-holder according to will theory, as intentions can exist without a choice. Thus, the last task Preda assigns to herself is to show that there exist at least some groups that make genuinely collective decision. As a condition for a group to make a genuine choice it needs to command a decision-

[137] Most notably she compares her own account with that of Carl Wellman, *Real Rights* (Oxford University Press 1995) and; Peter French, *Collective and Corporate Responsibility* (Columbia University Press 1984).
[138] Preda (n 130) 238.
[139] ibid 240.
[140] In philosophy this has proven to be anything but innocuous claim. See Timothy O'Connor, 'Emergent Properties' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2021, Metaphysics Research Lab, Stanford University 2021).
[141] Preda (n 130) 241.
[142] ibid 242.

making procedure that welds together differing choices of its individual members. In short, a group as a right holder must have some institutionalised procedures to reach a decision.

This brief and superfluous account of Preda's nuanced position is simply to highlight some of the paradigmatic positions that analytical legal philosophy occupies when trying to say something about the identity of a right-holder and of a person in law. It is apparent at the onset that legal person is a corollary of the primary discussion that focuses on rights and duties, quite like Preda herself outlines. This renders the whole notion of a 'legal person' ephemeral and uninteresting. Every new account of rights and duties of liminal or borderline entities—such as animals, foetuses, or robots—will ultimately affect the extension of such a theory to the group of legal persons.[143] At the same time, a detailed conceptual analysis as of what we entail when we argue that a group has rights, allows for a more perceptive commentary or criticism of a normative system upholding their status as persons. But such a conceptual clarity is an outcome of analysis of rights and duties. It does not necessitate any discussion of personhood. A paradigmatic model of a (moral) person is employed in these debates to recognise conditions for holding rights, such as intention, agency, and choosing in case of Preda. This reliance to a paradigmatic personhood does not seek to entreat why we consider those to be salient conditions for legal personhood: we simply advance from what we consider to be in moral philosophy a non-controversial person (i.e. a non-disabled adult with full mental acuity) to argue something about rights and duties of other possible right-holders. In a different moral order, the whole justification for the initial presumption entertained collapses. In a sense, the choice on paradigmatic person sediments a narrowly defined Western ideal of moral person at the foundations of a 'person' in law: first as a moral philosophical ideal originating in the Enlightenment thought, second as a legal idea seeking to instil essential features of those ideals in language of law.

In this regard, the mere possibility of a wider set of right-holders the interest theory permits, seems to escape imposing the ideal of a moral person on the legal realm. After all, the interest theory 'leaves open the possibility of ascribing legal rights to animals and dead people and mentally incapacitated people.'[144] The crux of the argument for an interest theorist resides in 'normative protection of some aspect(s) of the right-holder's well-being,' which remains neutral to the identity of a

[143] A case in point is the robot rights discussion of the past few years. For a defence of robot rights, see, for example, Visa Kurki, 'Voiko Tekoäly Olla Oikeussubjekti' [2018] Lakimies 820; David Gunkel, *Robot Rights* (MIT Press 2018). For a critique of perceiving robots as persons with rights, Abeba Birhane and Jelle van Dijk, 'Robot Rights?' in *Proceedings of the AAAI/ACM Conference on AI, Ethics, and Society* (ACM 2020).

[144] Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 131) 30.

right-holder (i.e. plants, animals, and inanimate objects as much as human beings). Yet, such a neutrality of interest theory on conceptual level belies the fact that it, nonetheless, grounds its estimate on potential right-holders to the idea of moral, deriving chiefly from the same paradigmatic model as the will theory.[145] The paradigmatic right-holder (i.e. a moral person[146])for the will theory signals the sole category of persons, whereas for the interest theory question revolves around the perceived morally significant independent interests. A task of an interest theory, then, is to 'draw lines between beings capable of holding rights and beings not so capable' and as a compass for such an endeavour is some moral philosophical stance. In this sense, the points of depart for the two dominant theories of rights are opposite; will theory seeks to expand scope of right-holders to appear more in line with prevailing moral view (e.g. through inclusion of groups, comatose, etc.), while interest theory needs to weed out 'claims [that] cut profound and widespread moral convictions that are of long standing in Western culture.'[147] Apart from the shared paradigmatic model of person, there appears to be little shared on these two accounts of personhood.

Yet, precisely through the shared concept of a paradigmatic person, both models are closely connected to a strain of Western moral philosophy that dates to early Enlightenment, while seemingly remaining disinterested on such morality. For example, Matthew Kramer concludes his article on rights of animals and of dead people by suggesting that '[w]hether any such interests should be so shielded is a moral/political question on which this essay can remain noncommittal.'[148] The conditions of possibility of having rights that stem from a thoroughly moral account of person from which they are deduced (i.e. a person as an adult, competent human being) is painstakingly divorced from the subsequent analysis on both dominant accounts of rights in the analytical tradition. The moral argument is then re-introduced at the end of the argument to justify conclusions which are, at this point, deemed non-controversial and widely shared. Thus, the ultimately moral argument for inclusion of certain categories to be titled right-holders seeks to conceal the very

[145] ibid 36.

[146] It bears to note that a moral person for a will theoretical model can be other than a human being if, for example, humanity would contact an alien civilization with comparable capacities to those of a presently held model for a paradigmatic right-holder.

[147] Matthew Kramer, *Rights, Wrongs and Responsibilities* (Palgrave Macmillan 2001) 38.

[148] Kramer, 'Do Animals and Dead People Have Legal Rights?' (n 131) 54. From a will theoretical account of the same, Preda (n 130) 251.: 'But this argument should not be taken to imply that any such group actually has moral rights. All I have argued so far is that any organised group is a potential candidate.'

fact that the outcome of the analysis is little apart from that morality.[149] The analytical and disinterested analysis of rights then falls into applying a veneer of rights parlance on top of moral argument to neutralise the value choices inherent to perceiving legal personhood in a certain way. To escape such a base outcome, both Preda and Kramer refer to more thorough analysis of rights conducted elsewhere, where such considerations of morality could be taken more fully into consideration.

There is a more charitable case to be made about these limitations to rights. It is plausible to argue as reasoned opinions that we reach through determination among available values. This position, defended by likes of Hart and Finnis, would contend that the extensional beliefs portrayed in the value choices of Preda and Kramer have been drawn after due attention has been paid to different alternatives. Their decision to embrace a given paradigmatic model of person does not stem from malice but rather discretion between competing options endorsed within a given society and then aligning, with after due consideration, to one of those options. Such a choice is mandatory in any legal decision and, therefore, it is informed with sound judgment. Hence, despite the fact of the model of legal person inheriting a truly Western ideal of a moral person, there is nothing wrong with such a decision for as long as this position can be shown to be a reasonable choice after due consideration. If, on the other hand, we were to find that there is no longer a basis to uphold such a standard of personhood, we ought to modify our notion of paradigmatic person and, therewith, our notion of legal person.[150] I now turn to two accounts of personhood from analytical tradition that seek to overcome this criticism of being simply morality in disguise.

Two accounts chosen here to illustrate work in analytic tradition on legal personhood are Kate Greasley's *Arguments about Abortion* and Visa Kurki's *A Theory of Legal Personality*.[151] Greasley's essay is a defence of personhood as a central conceptual category to understand regulation of abortion, while Kurki's seeks primarily to answer what it means to be a legal person. Their tangent to the problem of personhood differs notably even though they draw from similar influences. Greasley provides first a defence for centrality of foetal personhood for regulation of abortion against criticism mounted by likes of Dworkin and Judith Jarvis

[149] Another possible interpretation is to argue that provided accounts of rights and personhood are analytically right but are inconsequential for our understanding of law-in-practice. I presume this to be an ideological stance many analytical legal philosophers would be more willing to sign (see *infra*).

[150] This is an argument proposed by Gregoire Webber in Grégoire Webber and others, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press 2018) ch 2.

[151] Greasley (n 108); Kurki, 'A Theory of Legal Personality' (n 127).

Thomson.[152] Once she has established her case for the significance of foetal personhood in the first part of her book, she pursues in the second part a concept of a person that, while focusing on foetus, 'will probably have implications for a number of problems outside of the abortion debate,' i.e., her argument is about general contours of personhood rather than an account limited on foetus's status. In distinction, Kurki begins his dissertation from that what is shared in analytical discussion on legal personhood by highlighting centrality of 'rights and duties' formulation for understanding of what is a person. He follows this with a historical account followed by a Hohfeldian analysis on what we mean when we argue someone, or something has rights and duties. Based on Hohfeldian analysis, Kurki goes on to argue that our present account of legal personhood is inconsistent and in need of clarification.

What are then the two models of personhood proposed by Greasley and Kurki? They are surprisingly similar. Both models suggest that personhood is commonly seen as a too precise a phenomenon and their respective accounts will allow the perceived fuzziness of personhood materialise meaningfully also on the conceptual plane. They also derive their initial insights from employing a paradigmatic or archetypal person as an uncontested source to understand what we truly mean with person in law. On Greasley's account this derives from a notion of a moral person, while for Kurki personhood is more a legal matter, yet they converge one another as they approach pragmatic law-application or enactment. As the arguments move in opposite directions (i.e. Greasley from normative to legal and Kurki from legal to normative) they highlight unique difficulties that analytical legal theory encounters moving from plane of theory to its application. Kurki's choice of starting from 'extensional beliefs' of what we suppose when we talk of legal person leads him to suggest a concept-of-person as a cluster with passive and active incidents of rights, a combination whereof is *grosso modo* what we mean when we talk about legal person. This allows him to defend his position concerning idols, rivers, and corporations, yet it leads him to remain silent as of why it is relatively simple to remove a paradigmatic person of all the passive and active incidents of rights without these persons supposedly losing their personhood. Their rightless personhood is personhood nonetheless. Even if one were to maintain that slaves in Northern Africa,[153] immigrants at sea,[154] prisoners in Guantanamo Bay,[155] terrorist suspects of

[152] Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (n 125); Judith Jarvis Thomson, 'A Defense of Abortion' (1971) 1 Philosophy and Public Affairs 47.
[153] Lucas Mafu, 'The Libyan/Trans-Mediterranean Slave Trade, the African Union, and the Failure of Human Morality' (2019) 9 SAGE Open 1.
[154] Itamar Mann, *Humanity at Sea* (Cambridge University Press 2016).
[155] Colin Dayan, 'With Law at the Edge of Life' (2014) 113 South Atlantic Quarterly 629.

signature drone strikes,[156] and a myriad other examples of denial of even the most basic rights are aberrations as much as an act of murder is to criminal law, their systematic targeting of similar populations poses a much more thoroughgoing undermining of Kurki's account of personhood than rivers in New Zealand. After all, these examples target the underlying presumption of his whole model as they cast in doubt his choice of what rights a paradigmatic right-holder carries.

Alternatively, Kurki could escape such a critique by embracing a position propounded for example by Grégoire Webber and Paul Yowell.[157] According to them, our legal analysis ought to establish itself on central cases to which e.g. the rightlessness of immigrants at sea constitute an exception. Thus, rather than suggesting that our notion of person is ill-equipped to answer those rightless persons, Kurki could argue that these instances mark a failure of various legal systems to live up to expectations we set for them. In short, he could argue that while there certainly are instances that treat paradigmatic persons as chattel, these can readily be accepted as failures and nothing else. It should not have any bearing on our idea of how we truly perceive personhood in law. While this line of argumentation is eloquent, it stems from a rather similar basis of assumed universality as Kurki's thesis more in general. In order to accept what Webber and Yowell suggest, one needs to endorse an idea of a common vision fuelling our notions of justice and of legality.[158] It is difficult to attest whether such a commonality exists beyond the boundaries of what Webber and Yowell title a community towards which we have duties. Kurki does not limit his analysis to such a confined community but rather to whole of the West. Hence, Kurki could resort to the arguments of Webber and Yowell if he would not seek to argue for universality of a concept of person in law, but on that instance it would be meaningless to argue something concerning New Zealandese rivers, Indian waterfalls, and British idols in the same key.[159]

Greasley, commencing from the idea of a moral person excludes such concerns of 'sociological or doctrinal legal questions,' allowing her to ignore, for example, apparent inconsistencies of English law regarding the status of foetal person.[160]

[156] Grégoire Chamayou, *Drone Theory* (Penguin Press 2015).
[157] Webber and others (n 150) 27ff.
[158] Here Webber and Yowell are influenced by the work of John Finnis.
[159] Obviously, there are attempts to expand justice beyond borders within the ideal tradition, most notably one proposed by John Rawls himself, see John Rawls, *The Law of Peoples* (Harvard University Press 1999). A critique of the proposed globalization of liberal justice and its possibility for success, see John Tasioulas, 'From Utopia to Kazanistan: John Rawls and the Law of Peoples' (2002) 22 Oxford Journal of Legal Studies 367.
[160] I will return to these later, but what I have in mind are cases, such as, differing treatment of self-induced abortion and refusal to save life of a foetus *en ventre sa mere*. See e.g. *St George's Healthcare NHS Trust v. S* [1998] 3 All ER 673 for a very narrow

Those instances have no direct bearing on the moral status of a foetus, despite their conflicting views on personhood. For Greasley '[n]o proposal will last long unless it is accompanied by an account of what confers or constitutes philosophical personhood in universal terms,' yet she readily accepts that any such condition will appear arbitrary and, what she titles, sorites susceptible (i.e. incapable to pinpoint why chosen threshold is better than its imminently precedent or antecedent moment). While we can, according to Greasley, agree that any developmental criteria, including conception, does not constitute an 'existential pop,' we ought to agree that a gradually developing personhood is a better alternative than relying on a punctual point of emergence for personhood. This leads her to rely on a modification of Mary Anne Warren's personhood as a cluster concept with five characteristics none of which is an essential condition, but if none of them are present we are safe to conclude that there is no person.[161] To justify further the apparent moral consensus of import of later stage foetuses over earlier stages that are not bound to any developmental criterion (in order to avoid discrimination based on e.g. brain development of a foetus), Greasley supports this clustered concept of personhood with an additional importance of human embodiment—of resembling a fellow human being. This leads Greasley to approach a speciest argument she earlier denounced on moral grounds based on doctrinal and sociological reasons she said her argument would not rely on. She argues that embodiment is essential for 'shared human culture in which personhood as we know it is expressed.' The closer Greasley arrives to practice, the more she has to explain law in terms that derive from sociological rather than moral reasons, even if one is to charitably accept her divorcing of the two as a plausible to begin with.

While both accounts in their attempt to universalise personhood ultimately need to resort to that what they initially exclude—Kurki to theories of rights and non-paradigmatic paradigm person, Greasley to doctrinal and sociological theories—the merit of the analytical thinking remains obvious; it allows its proponents to dissect with ever-greater precision concepts that are part and parcel of law. Yet, the move from analysis of law's conceptual apparatus to understanding its application proves often insurmountable. The presumed universality of its language can but fail to account for plurality of moral and legal orders. It often also remains incapable to notice its own blind spots that are embedded within its abstracted ideals. I think it is in this light that one should read both Greasley and Kurki. They attempt to overcome

understanding of a late-term foetus's rights and compare with *R v Sarah Louise Catt*, 17 September 2012 Crown Court with an expansive reading of foetal rights.

[161] Greasley (n 108) 162. Mary Anne Warren introduced first her thesis for five constitutive characteristics of a person in 'On the Moral and Legal Status of Abortion' (1973) 57 The Monist 43, s II.

problems associated with claims of universality by softening the borders of personhood and turning it from a binary notion to a gradient concept with a whole bundle of attributes applying with differing intensity. This allows Greasley to uphold salience of foetal personhood while limiting its reach and Kurki to provide a closer fit of a concept of person with that of 'common understanding' unlike overly inclusive interest theory or too narrow will theory. The conceptual fit that this grants to their accounts amounts, nonetheless, to a sop to Cerberus as the multi-variate concept of personhood appears little else than accounts deriving from a more empirical tradition of personhood, they both seek to distance themselves of. To say, as Kurki does, that it would be strange to argue that one given right to women would have transformed them from legal things to legal persons, is every bit the argument of feminist legal theory from 1960s onwards. The hard cases, even after their analysis, will remain such and the marginal instances are likely even more contested as there is no standard to more-or-less balancing that would not be susceptible to moral arguments against and in favour.[162]

In the end, the choice of preferred method of analysis seems to fall squarely to what Duncan Kennedy titles ideological bouts.[163] The way we decide to understand law and its working in a society is a deep down an ideological commitment. To rely on analysis of law's concepts as a preferred means to understand law's role in a society and using those as building blocks to explain the multifarious legal relations is, to me, a gargantuan task that is bound to fail. To formulate the matter differently, I am not certain whether impact of science and technology that has been central to our perception of personhood of embryos, foetuses, and animals (e.g. through advances in biotechnology and medicine as well as zoology) can be fully grasped through law's internal analysis of its conceptual apparatus. Likewise, I remain at doubt whether demarcating boundaries of personhood through a concept of moral person deriving from the European Enlightenment allows us to understand Japanese technoanimism or Javanese spirits that provide a different moral understanding for what it means to be a person.[164] And while international law is still chiefly a Western

[162] This is the reason why Grégoire Webber and others, *Legislated Rights: Securing Human Rights through Legislation* (Legislated Rights: Securing Human Rights Through Legislation, Cambridge University Press 2018) rely on moral community. It allows them to avoid the inherent problems related to proportionality or balancing that stem from collision of foundational norms, but obviously reaches that through a relatively high cost of relying on a unified moral community at national level.

[163] See in general, Duncan Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Harvard University Press 1997).

[164] Of these alternate worldviews see, for example, Casper Bruun Jensen and Anders Blok, 'Techno-Animism in Japan: Shinto Cosmograms, Actor-Network Theory, and the Enabling Powers of Non-Human Agencies' (2013) 30 Theory, Culture & Society 84; Sprenger (n 110).

affaire, it often remains silent how persons are to be understood within a domestic legal order, allowing this moral plurality to be used and abused by actors seeking to circumvent limits of their domestic understanding of a person. In a word, the analytical legal thought, despite its pedigree and centrality to much of the Western understanding of law, does not provide with explanations to the problems I consider to be salient. What it does provide is an impetus to take seriously the import of concepts and their capacity to mould law and interaction more generally, even if such discursive construction of personhood would be precisely the danger of relativism against which analytical legal philosophy has built its impressive armature.

2.2 From concepts to world: pragmatic approaches to personhood

In the preceding section I argued that a commitment for law's conceptual apparatus in terms of personhood supported by the analytical legal philosophy provides but a limited reach to understand personhood due to the focus of analytical philosophy on universality and internal conceptual consistency. I am hardly alone in finding analytical philosophy's account insufficient. It has been subject to sustained criticism on its perceived remoteness to 'real-world' concerns and its keen interest to focus on 'ideal' situations.[165] This, like all forms of criticism, has seldom amounted to a full-fledged negation of the criticised position.[166] Arguments for a complete denial of universality of some parts of what we imply with personhood, especially within the realm of law, do not exist and there is a simple reason for that: A radically nominalist account denouncing all general concepts in favour of a local and particular explanation fares no better than purportedly universal one. Not every use of legal personhood merits similar attention, nor should highlighting the importance of experienced lack of legitimacy of a notion lead to an argument that the notion itself would have changed. Legal history provides ample support for remarkable resilience of many contested legal concepts, even in the face of far-reaching criticism.

The criticism against 'ideal' theory is likely a motivating reason why both Greasley and Kurki—and to a lesser extent Kramer and Preda—veer towards what Jonathan Wolff calls 'real-world political philosophy.' They strive to navigate space between ideal world of political philosophy and an often distinctly murky real-world.[167] Yet, there is a clear distinction with Wolff's project and that of analytical legal philosophers considered above. Wolff summarises his search for a real-world political philosophy as one that 'start[s] from problems with the actual world rather than a depiction of an ideal world.'[168] The direction of analysis for the likes of

[165][165] These concerns are commonly recognised by the proponents of the tradition, see for example Shapiro (n 111) ch 1; John Gardner, *Law as a Leap of Faith and Other Essays on Law in General* (Oxford University Press 2012) chs 2, 11.

[166] I employ criticism and critique throughout the thesis to imply a slight difference in meaning. The former provides an external benchmark against which the assessed quality, idea, or object is seen as lacking whereas the latter articulates from within the quality, idea, or object assessed. In general, see Seyla Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (Columbia University Press 1986).

[167] Jonathan Wolff, 'Social Equality, Relative Poverty, and Marginalised Groups' in George Hull (ed), *The Equal Society* (Lexington 2015) 21–22.

[168] ibid 24.

Greasley and Kurki starts from within the perimeters of the analytical legal and moral philosophy with often but a token interest to 'the actual world'—whatever that then entails—before the latter parts of the analysis. Traditionally for analytical legal philosophy, an analysis of hard cases acts as a testing ground for thesis initially defended on philosophical or theoretical level. Within this framework of analysis, real world does not justify an account of personhood, but a greater fit with that perceived real world might be considered a merit of one.

In the following, I summarise some of the key points of the other traditions seeking to come in terms with the concept of person in law. I intend to clear somewhat the muddy waters of 'real world' personhood that the analytical legal philosophy commonly refrains from. While at first sight the more hands-on approach to personhood appears preferable to the idealised image provided by the analytical tradition, the sheer plurality of diverse accounts sets into question whether there is a reason to speak of personhood as a legally relevant notion to begin with. To push against such relativism, I first look at some of the main empirical explanations provided for understanding personhood in law. While none of them provides a final explanation for the phenomenon, they allow me to classify a set of master narratives that scholarship has found pertinent in describing personhood. These scholarly narratives grant form and substance for the creation of personhood as a legal concept through much of the Global North. This view, normally associated with equality, autonomy, and non-discrimination, acts also as a foundation for the concept of person in international law. This idea of personhood is manifest in international human rights and humanitarian law discussions as the 'humanity' that is being sheltered from violations. In the end of the chapter, I briefly illustrate the interaction of this internationalised personhood concept and its local variants to indicate the fault lines that emerge between domestic and international narratives of personhood.

While analytical legal tradition in its treatment of person in law might fall short of commitment to problems with the actual world, there is voluminous research on these more pragmatic aspects of personhood within the wider 'realist', 'phenomenological', or 'socio-legal' modes of enquiry. Unlike with analytical tradition, there is not a single moniker that could catch the plurality of approaches and methodologies employed, but they often start their inquiry into personhood from perceived problems with the prevailing notion. Here the ideological contestation over 'real' turf is as livid as within the analytical tradition. Thus, when Herbert Smith in the early 20th century claimed that there is a rampant confusion on the true question of (corporate) personhood, he was hardly saying anything novel.[169] For him the proper question called for clear distinction 'between the legal and the philosophical,

[169] An early historical account within the continental tradition is provided in Niilo Mannio, 'Yhteisöllisestä Juridisesta Henkilöstä' (1918) 16 Lakimies 1.

or the legal and the historical, aspects of the matter.'[170] A position like Smith's remains a relatively common one up to present; the remit of law does not touch upon all social ills. Rather, concerns over systematic wrongs emerging from law's application ought to be addressed through other social movements, moral education, or economic re-distribution of means. Law is a closed system that formulates its own concepts and whether those are philosophically, economically, or sociologically sound ought not to concern law. But such an endogenous account concern both too little and too much for law's self-standing power. Law simply emerges, and we cannot understand its appearance or disappearance as it is purely a synchronous event, nor can we come in terms why, for example, a given corporate form has become prevalent as popularity is not a legal norm imposed but apparently an external concern to law.

A strict understanding of a legal person as a useful legal fiction with no contact to any other system apart that of law makes all discussion on legal personhood futile. On the one hand, the definition of person is rendered tautological: law's person is what law within its system considers a person to be. This answer leads to further questions of system up till the point where, sooner or later, the legal scholar must succumb to incubus of theory.[171] On the other hand, if law's internal logic is at liberty to endow personhood to anything, all things, or no things there cannot exist criteria to assess such decision. Rights and personhood to idols, wind, and air is sensible in the same way as tying rights to human beings. But such fluidity of the concept fails to account for the origin of many of those reasons users of law consider it prudent to grant personhood to a disorderly group of entities. After all, there are idols with personhood,[172] embryos with dignity,[173] foetuses with sanctity,[174] machines with

[170] Herbert Smith, 'The Persona Ficta' (1914) 34 Canadian Law Times 566, 566.

[171] A mirror image of this argument is employed by H. L. A. Hart in his inaugural lecture as a professor of jurisprudence at the University of Oxford. He argues that American legal realists as well as the Scandinavian jurists and, in general, the great number of irreconcilable theories 'suggests that something is wrong with the approach to definition; can we really not elucidate the meaning of words […] without assuming this incubus of theory,' HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 23.

[172] Duff (n 109).

[173] Ciara Staunton, 'Brustle v Greenpeace, Embryonic Stem Cell Research and the European Court of Justice's New Found Morality' (2013) 21 Medical Law Review 310.

[174] Reva Siegel, 'Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart' (2008) 117 Yale Law Journal 1694.

agency,[175] and environment with rights.[176] Whether or not they are truly so in any meaningful fashion is beyond the simple argument made here: all of these entities have merited a legal response that attributes them with an independent character that has a direct bearing on the legal position of more paradigmatic persons of law. Even if a legal person is perceived as a tool of trade for legal professionals operating within a hermetically sealed legal system, operators of that system slip occasionally from the legal realm. It is this contamination of a pure legal mind that opens the backdoor for worldviews to enter conceptual apparatus. Thus, when the Court of Justice of the European Union articulates through dignity the potentiality for life in a parthenogenetically fertilised human embryo, it is not acting *ultra vires* or powerlessly before the incubus of metaphysics.[177] The court simply fulfils its legal duty to define concepts and terms of European Union law. But this legalism is informed by a theological understanding of a human as an image of god with innate worth, which we cannot explicate through simple reference to law's language.[178] Judges are operating within the perimeters of law and provide dignity with a very distinct legal meaning, but to speak of dignity without a reference to 'worth' or 'rank' seems inconceivable if dignity is to signify anything at all.[179]

To know the limits of personhood is, according to Ngaire Naffine, exploring the contours to who law belongs, to who it is for?[180] Declaring like Smith that it remains

[175] This is an area that is most fraught with controversy at present, even if most would agree that machines are doing something they would not attribute them with agency. It might be better to describe the machines with communication in Luhmannian sense, but this would require an even more extensive addendum. An early example of 'machine agency' with significant impact in society at large, see for example Frank Pasquale, 'Law's Acceleration of Finance: Redefining the Problem of High-Frequency Trading' (2015) 36 Cardozo Law Review 2085.

[176] Cletus Gregor Barié, 'Nuevas Narrativas Constitucionales En Bolivia y Ecuador' (2014) 59 Latinoamérica Revista de Estudios Latinoamericanos 9.

[177] Case C-34/10 *Oliver Brüstle v Greenpeace eV.* [2011] ECR I-9821.

[178] There is a complex history in embedding 'dignity' within the European Union's Charter of Human Rights. Most attribute it to the influence of the German Basic Law's first article. The genealogy of that article is contested within the German constitutional scholarship. The earlier accounts tied the formulation to Christian democrats and the influential papal circular from 1942, while more recent scholarship has contested that interpretation and suggested that *Würde* (or dignity) was added without any reference to the theological ideas. Yet, even the secular formulations of dignity are heavily influenced by the Christian tradition. See e.g. Jocasta Gardner, 'The Public Debate about the Formulation of the Basic Law of the Federal Republic of Germany' (Dissertation, University of Oxford 2004) ch 5; Samuel Moyn, *Christian Human Rights* (University of Pennsylvania Press 2015).

[179] Dignity in law has during the past decade produced sizable literature, see e.g. Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford University Press 2012); Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press 2013).

[180] Ngaire Naffine, *Law's Meaning of Life* (Hart 2009).

for law to decide its persons is incompatible with John Dewey's pragmatist claim 'that before anything can be a jural person it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person.'[181] Smith's *persona ficta* and Dewey's corporations are in many ways the same entity, yet who gets to decide why and how law ought to be concerned of them differs drastically. This is to do 'with the presence within law of coexisting, competing and shifting understandings of human nature and human value,' suggests Naffine.[182] If personhood is chiefly an internal question for law, solutions and problems posed by personhood are addressed differently than if we perceive personhood as a slow sedimentation of more general cultural processes.[183] These concerns are – in analytical philosophical sense – 'non-ideal' or 'real-world' provisos motivated by a preconceived idea of personhood. The contestation is not whether there is a sense in understanding person in law in a certain way, but which construction of the sense is to be privileged.[184] Ultimately, this prevents concluding with a non-committal to moral and political manifestations of personhood. Rather, the question of law's person 'obliges us to consider law's basic values,'[185] a consideration which cannot remain neutral to those values—it is an act of positioning values at the centre of inquiry.

Much of what passes as a person in law remains largely unarticulated, a fiction that has ossified into a legal fact. The danger rests in the commonly shared belief that there is some truth in the present account of personhood that it is of factual rather than of fictive sort. Say, a commitment to a view that a human being commands a full range of rights through fiat of universal moral consensus encoded in the Universal Declaration of Human Rights.[186] Thus, when we encounter law that confiscates property of immigrants or prevents habeas corpus claims from prisoners held in special state-run detention centres, these practices seem to deviate from the universal standard of personhood in ways that ought to amount to reinforcement of personhood through acts of legislation or those of courts. Yet, often these acts are in

[181] John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 Yale Law Journal 655, 658.

[182] Naffine, *Law's Meaning of Life* (n 180) 6.

[183] On this occasion, lawyers who have learned their craft in Finland have a habit to refer to Kaarlo Tuori, *Kriittinen Oikeuspositivismi* (Werner Söderström Lakitieto 2000). To an extent I must have inherited these views from him or those instructing me to read his works.

[184] Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law* (Verso 2017) 7.

[185] Naffine, *Law's Meaning of Life* (n 180) 14.

[186] For an Arendtian critique of this position, see Ayten Gundogdu, *Rightlessness in the Age of Rights* (Oxford University Press 2015).

accordance with the law.[187] It is common for a 'critical' account of personhood to begin with one such event as a signal for a more foundational criticism of law's perception of its subjects. In one form or another this argument has been used by champions of women's rights, foetal rights, or robot rights. Their respective authors posit a value or a political vision—say, equality or non-discrimination—at the core of law they claim is flouted by or insufficiently considered in present state of law. This core acts as a fountainhead to justify expansion or contraction of the realm of persons. The construction of core that is a genesis in analytical tradition of personhood, is what a critical account of personhood seeks to solve. Why we confine immigrants to a small island perpetually, if we are committed to an idea of human rights or why we remain legally disinterested of deaths of thousands of migrants at sea?[188] How do we come to define confined agency of high-frequency algorithmic trading and algorithms' capacity to make valid transactions, without admitting to an independent algorithmic agent at the heart of the system?[189] These are, ultimately, questions to who law belongs to, of what we should be interested of.

There is a wide variety of lenses that are commonly applied as master signifiers to explicate law's omissions that are deemed by their respective authors in little need of justification. One cannot avoid reading of neoliberalism, sexism, racism, or imperialism as predetermined explanations for an abusive treatment of someone or something. For example, life of 120,000 people was lost in the United Kingdom to economy due to austerity supported by neoliberal economic elite.[190] Similarly, in the

[187] For the Danish practice of confiscating assets of asylum seekers, see L 87 Forslag til lov om ændring af udlændingeloven that passed on 26 January 2016. For a denial of the habeas corpus claims by the Guantanamo detainees, see e.g. *Abdul Ali v. Donald Trump*, 18-5297 (D.C. Cir. 2020)

[188] A good illustration of the practice of placing the onus to other organisations or bodies internationally is the letter sent by the Office of the Prosecutor of the International Criminal Court concerning detainment of immigrants in islands of Nauru and Manus by Australia. See, *Letter from Phakiso Mochochoko to Kate Allingham*, Ref. OTP-CR-322/14/001 of 12 February 2020. For the European Union practice of externalising the border control to, for example, Libya, see European Commission, 'Support to Integrated border and migration management in Libya – Second phase', T05-EUTF-NOA-LY-07 of December 2018 with which the EU provides 45 M€ to catch immigrants before they reach European shores.

[189] These and associated problems of legal coding of capital, which rests at the heart of the high-frequency trading, see Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

[190] See e.g. titles in newspapers around the United Kingdom suggesting that economy did the killing; Sara Sjolin, '"Economic Murder": Study Links U.K. Austerity to 120,000 Deaths' (*MarketWatch*, 16 November 2017) <https://www.marketwatch.com/story/uk-austerity-linked-to-120000-deaths-in-economic-murder-landmark-study-finds-2017-11-16> accessed 13 August 2023. These and other similar titles were used to report

United States social movements, such as, #Blacklivesmatter, have cast the denial of personhood in racial terms: '[h]ere in America, many [are] awaiting glory and dignity for people who have long been denied.'[191] While these certainly are clear indications of denial of rights and of full personhood locally, their explanatory power for the reasons why these social powers functioned as effective levers to curtail rights remains modest. Therefore, many master signifiers are often seen to interact simultaneously; due to economic precarity of many people of colour, their person is not of similar stature as that of the perceived paradigm person construed as a negation to what the oppressed stand for (i.e. most commonly white, affluent male). The logic of human rights has been to dictate preferential treatment or at the very least a prevention of discrimination on these grounds, whenever these concerns are sufficiently accentuated. Internationally these can be perceived in waves of treaties providing protection to difference that ought to have no bearing for the fulfilment of rights, while remaining centrally so. From universal human rights to elimination of all forms of racial discrimination, to women's rights, to children's rights, and so on and so forth.

A consequence of this has been twofold. On the one hand, there has been a near ceaseless expansion of rights. On the other hand, the enactment of the necessary preferential treatment has made the 'person' at the core of the entire endeavour very specific. Each successive wave of rights has carved out from the universal mould of common humanity ever clearer picture. From one humanity to one white humanity, to one white male humanity, to one white adult male humanity, to one white adult able-bodied male humanity, etc. This constantly expanding list of attributes one needs to grant to signal the distinction with the formative fiction of personhood leads, ultimately, close to what Kurki considered to be extensional beliefs of personhood, without ever tackling this highly problematic core. While, in the words of Hilary Charlesworth, it is opportune for us to wage guerrilla warfare in terms of rights – to limit our fights to locales of greatest weakness in the prevailing conception – constructing endless detours around the core does not in any conceivable way lead to that core.[192] And if, as the critical accounts on personhood suggest, the core values of the system enable generation of new norms, these new norms remain to be a striking image of that ossified person of the 1940s that they employ as a generative

Johnathan Watkins and others, 'Effects of Health and Social Care Spending Constraints on Mortality in England: A Time Trend Analysis' (2017) 7 BMJ Open e017722.

[191] Bahar Davary, '#Black Lives Matter' (2017) 37–38 Ethnic Studies Review 11, 13.

[192] Hilary Charlesworth, 'Feminists Critiques of International Law and Their Critics' (1995) 13 Third World Legal Studies 1, 4. Charlesworth is referring to work of Elizabeth Gross as a source of the idea.

basis. I briefly look into this generative process and, therewith, to the way international law codifies personhood.

A point of depart for most treatments of personhood in international law is the Article 6 of the Universal Declaration of Human Rights (UDHR), which reads:

> Everyone has the right of recognition everywhere as a person before the law.

It is commonly seen a legal enactment of what Hannah Arendt at the time described as 'right to have rights'.[193] No one can be cast beyond the remit of law and everyone deserves to be treated without discrimination, as enacted in the Article 2 of the UDHR. The problem posed by this universal formulation is the virtual disappearance of personhood; nothing meaningful can be said about personhood as its basic definition is all-encompassing. Yet, as Luhmann's work clearly indicates, there is no complete capture of communication: the actuality can only emerge out from the backdrop of an environment that is not fully captured. This has two somewhat divergent implications for the concept of person. First, 'everyone' despite its universality calls for further definition. A European international lawyer would certainly oppose an idea of everyone including the ancestral spirits or animals, which has led 'everyone' to be curtailed to mean 'a community of living human beings' or some variation thereof. Second, even with such limitations to its scope, 'everyone' is not the same for everyone. Considering personhood or personality as a concept with history reveals this immediately—with all simplicity, 'everyone' is contingent. Therefore, what a Sudanese international lawyer implies by 'everyone' might not be shared with what a Nepalese one suggests with 'everyone', even though they both readily share the starting point found from the Article 6 of the UDHR. How, then, to come in terms with personhood?

The first step is the one described above. It is to declare that we certainly cannot mean this and that with 'person'. This resembles the choice for paradigmatic person in analytical tradition, but rather than a quest for common denominators internationally, the international personhood has become defined chiefly in terms of the Western values.[194] Hence, a person of international humanity's law, to borrow a

[193] Hannah Arendt, *The Origins of Totalitarianism* (World Publishing Company 1958) 267ff. The formulation appeared originally in Arendt's 1946 article according to Werner Hamacher and Ronald Mendoza-de Jesús, 'On the Right to Have Rights: Human Rights; Marx and Arendt' (2014) 14 CR: The New Centennial Review 169.

[194] There is an obvious problem with West and global North as indicators of anything. The West (or the global North) does not include e.g. Latin America but it does include Australia and to an extent Japan. This confusing line of demarcation has many origins, but an influential one is found from Brandt Commission, *Common Crisis North-South: Cooperation for World Recovery* (MIT Press 1983).

concept from Ruti Teitel,[195] looks remarkably like the one found from most European and American jurisdictions. This has an impact on possible formulations of personhood locally, as alternate forms of personhood cannot limit the rights granted to persons internationally. For example, a local personhood for ancestral spirits or nature cannot be seen to infringe rights of women, children, or elderly. As Ratna Kapur has explored in her research, such understanding of international personality can hinder independent agency of the individuals it seeks to shelter from abuse.[196] And as Sally Engle Merry illustrates, also the measurements used to assess realisation of rights and the fullness of personhood enjoyed around the globe is subject to metrics developed in but a handful of developed countries.[197] This results into a tension between 'everyone' embodied internationally and the local variants of personhood. In short, the Western image and metrics are employed to assess personhood and any deviations thereof, which leads into a global 'ceiling' for personhood without securing a 'floor'.[198] Therefore, only some forms of divergence from the global standard of personhood are acceptable, most notably those that seem to extend perceived free agency of everyone irrespective of their gender, sexuality, or race.

An important outcome of this initial charting of 'everyone' to entail only living human beings was the subsequent path-dependency. Alternate understandings of 'everyone' were no longer as readily available as they were before encoding of 'everyone' as 'every living human being'. Anglo-American political philosophers in the early 1970s were acutely aware of the impact the wording of human rights had, as the following from Lawrence Becker's charting of the concept of human being of the era indicates:

> The importance of these definitional questions for moral philosophy is obvious. Human beings protect themselves with a thicket of rights they do not grant to other beings, and some of these rights are said to be human rights—rights one has simply by virtue of being human.[199]

[195] Teitel (n 69).

[196] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Routledge 2005); Ratna Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28 Sydney Law Review 665; Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Elgar 2018).

[197] Sally Engle Merry, *Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (University of Chicago Press 2016).

[198] This is also foundational for a more profound critique of human rights as in Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press 2018).

[199] Lawrence Becker, 'Human Being: The Boundaries of the Concept' (1975) 4 Philosophy and Public Affairs 334, 334–35.

Being a human made someone part of 'everyone' with significant distributive effects, but more than anything the chosen lens on personality transformed the human rights chiefly into debate over rights of individual. While at present the choice might appear obvious, when the Universal Declaration was first formulated, perceiving human rights through the concepts of duty and community was equally widely shared. In a UNESCO publication from 1948, charting the philosophy of human rights, community and duties appear in responses of many authors.[200] Thus, one can find Mahatma Gandhi learning 'from [his] illiterate but wise mother that all rights to be deserved and preserved came from duty well done'[201] as much as Simone Weil arguing that '[t]he notion of obligations comes before that of rights [… a] man left alone in the universe would have no rights whatever, but he would have obligations.'[202] The value of a community stemmed from duties (or obligations) as it provided a venue to fulfil the duties and reach, what at the time, many considered higher aspirations of humans. This communal vision of human rights never prevailed internationally.[203]

The ascendance of individuality and of rights called for a basis of equality upon which the inclusion into the group of 'everyone' was endowed. An idea of basic equality or of egalitarianism rests at the heart of Rawlsian political philosophy as it does with most liberal political philosophy. As Jeremy Waldron notes it is 'characteristic of basic egalitarianism […to] den[y] the existence of major discontinuities in the human realm' that would justify moral distinctions to be drawn.[204] Yet, the answer on what grounds we ought to assess equality has commonly been left wanting, even by those who have proposed there to exist a standard for such an assessment.[205] The lack of currency for assessment of everyone's recognition as a person in the name of equality was intensely felt in many jurisdictions with the advancement of science and technology. Becker was charting

[200] In addition to Mahatma Gandhi referred to below, see for example contributions of Luc Somerhausen and Don Salvador de Madariaga UNESCO (ed), *Human Rights: Comments and Interpretations* (UNESCO 1948) 19–22, 35–42.

[201] ibid 3.

[202] Simone Weil, *The Need for Roots: Prelude to a Declaration of Duties Towards Mankind* (Routledge 1952).

[203] Arguably, the common heritage of mankind formulation found from a range of treaties starting from 1960s onwards could be considered such, yet where it is used the common heritage serves chiefly economic interests. A more holistic communal treaties have first emerged internationally during the 21st century, see e.g. United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295).

[204] Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Harvard University Press 2017) 30.

[205] Ronald Dworkin, 'What is Equality? Part 2: Equality of Resources' (1981) 10 Philosophy and Public Affairs 283.

the concept of human being to assess whether braindead and, to lesser extent, foetuses were within that realm—both related to developed capacity to observe and maintain life better.[206] At the same time, Mary Midgley employed new insights from diverse fields of zoology to suggest that the distinction drawn between humans and other animals were artificial at best, if not downright misleading. All attributes of humanity that supposedly justified distinction between us and other animals were, in the light of this research, mostly non-existing: there was simply no beastliness in the way it had been employed in moral philosophy.[207] While Midgley did not formulate her position as a normative demand for recognition as right-holders, others at the time did.[208] Although animals and braindead humans might have captured the imagination of many Western political and moral philosophers at the time, the more acutely felt definitional questions in the realm of rights internationally were related to basic equality that many liberal philosophers and theorists considered already settled.

Internationally, the concerns over racial and gender equality were hardly a foregone conclusion at the time.[209] The racist minority governments in South Africa and Southern Rhodesia were condemned, but especially with South Africa the United States, the United Kingdom, and France for long refused to pass Security Council resolutions that would have imposed notable sanctions to the South African government.[210] According to Daniel Magaziner, the period from 1968 till 1977

> opened the intellectual space for a new generation of South African thinkers to explore the possibility that superficially simple statements—"I am Black," "I am

[206] Becker, 'Human Being: The Boundaries of the Concept' (n 199).

[207] Mary Midgley, 'The Concept of Beastliness: Philosophy, Ethics and Animal Behaviour' (1973) 48 Philosophy 111.

[208] Jan Narveson, 'Animal Rights' (1977) 7 Canadian Journal of Philosophy 161. Narveson like many at the time refers to works of Peter Singer and Tom Regan.

[209] A good example of the apparent discontent of many a newly independent African state to the apartheid regime of South Africa is *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa); Second Phase*, International Court of Justice, 18 July 1966. For the little value of 'moral' rights, see in particular paras. 49-54.

[210] For a contemporary account on international legal status of Southern Rhodesia, Myres McDougal and Michael Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern' (1968) 62 American Journal of International Law 1. For the slow uptake, yet eventual impact of economic sanctions to South Africa, Audie Klotz, 'Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions against South Africa' (1995) 49 International Organization 451.

> a Man," "I have dignity," "I am the image of God"—might be profoundly potent.[211]

They were not only potent for the South Africans, but more widely to the racialised non-white people. Thus, with the raise of non-aligned movement and the growing number of states emerging through decolonisation, the 'everyone' of the UDHR was reinforced for the first time through the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in mid-1960s. Rather than simply everyone, the Article 5 of ICERD further qualified it with 'without distinction as to race, colour, or national or ethnic origin.' The apartheid and racial segregation had shown that the equality of everyone was for many not as all-inclusive as the basic equality at the heart of liberalism seemed to suggest.

The same model was followed later with the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[212], the Convention on the Rights of the Child (CRC)[213], and the Convention on the Rights of Persons with Disabilities[214]. There are many ways one can read these conventions. Arguably, the most common understanding is to perceive these and other human rights conventions as a sign of progress of international law; there are more rights and rights in and of themself provide an important leverage to promote change. Alternatively, the codification can be read as a sign of instrumentalist capture of the emancipatory narrative to push through changes that only tangentially serve the interests of the disenfranchised and the disempowered.[215] Regardless of the view endorsed, the later conventions mark a rapture to the vision of one humanity declared in the UDHR. Whether seen as a salutary departure from an idealistic—or even utopian—vision of

[211] Daniel R Magaziner, *The Law and the Prophets Black Consciousness in South Africa, 1968-1977* (Ohio University Press 2010) 3.

[212] United Nations (1979), UNTS 1249, 13. Article 1. 'For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

[213] United Nations (1989), UNTS 1577, 3. Article 2.1. 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind.'

[214] United Nations (2006), UNTS 2515, 3. Article 5.2. 'States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.'

[215] These two modes at work within the framework of CEDAW, see Dianne Otto, 'The Exile of Inclusion: Reflections on Gender Issue in International Law over the Last Decade' (2009) 10 Melbourne Journal of International Law 11.

justice on a global scale or a marginalisation of human rights into shrinking concentric concerns with little institutional power, is not the concern of my thesis.[216] The focus in what follows is on proliferation of norms and the consequent impact on the idea and concept of person and personality in more narrowly defined legal terms. Yet, as the example of expansive codification of human rights illustrates, the inherent dialectic between inclusion and exclusion at the heart of personhood is what animates many critical accounts of personhood.

I briefly turn to three traditional sources for claims over common humanity: theology, philosophy, and biology.[217] They have acted all as criteria for both inclusion and exclusion, which challenges explanations basing their view on a single criterium of personhood. The treatment of these traditional sources of 'humanity' act as a foundation for the more robust accounts of personhood grounded in the experience and perception of social justice. Although none of the criterium in and of itself explicates the plurality of conceptualisation of personhood even at the international level, they all in their part contribute to formulation of the narrative undercurrents that make personhood appear sensible for a range of stakeholders. These narrative cues will be employed in the last segment of the present chapter to chart out how I perceive interaction of international and domestic accounts of personhood.

At the heart of the three traditional sources for inclusion and exclusion from the perimeters of personhood is the capacity to construe a narrative that stresses (dis)similarity with already existing persons. As such, many who argue in favour of inclusion or exclusion of a given entity from the realm of full personhood sets at the foundation of their idea an Aristotelian formulation of formal equality: 'treat like cases alike.'[218] Despite its apparent simplicity, the problem posed by equality boils down to what constitutes likeness, a suitable *tertium comparationis* to which the mean is to be found.[219] A choice of a basis for comparison is always arbitrary; that

[216] On the bountiful harvest of global justice literature from past decades, see e.g. Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004); Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2nd edition, Polity 2008); Mathias Risse, *On Global Justice* (Princeton University Press 2012).

[217] This list of traditional sources for personhood is on loan from Naffine, *Law's Meaning of Life* (n 180). Naffine employs relatively similar classification already in Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 Modern Law Review 346.

[218] There are many legal texts referring to this as a foundational precept of law, see e.g. Hart's chapter on justice where he lifts it to 'leading precept' of justice, HLA Hart, *The Concept of Law* (Clarendon law series, Clarendon Press 1961) 149. For a view from natural law, see e.g. John Finnis, 'Equality and Difference' (2012) 2 Solidarity 1.

[219] Ernest Weinrib, 'Corrective Justice' (1992) 403 Iowa Law Review 403.

the colour of the hair or length of the toenails is not a condition to establish inclusion indicates more from the particular narratives that are considered to be salient for personhood than their inherent unsuitability for the task of measuring equality.[220] The anthropological studies on personhood clearly indicate the varied criteria for personhood that are equally coherent than the predominantly European definition of personhood current in international law.[221] Thus, the amount of attention devoted, for example, to rationality, moral agency, or personal autonomy when charting the contours of personhood can more readily be addressed through the sources of inspiration used in the past to justify inclusion along chosen criteria than due to their eminent suitability for the task.

Two of the three traditional sources for personhood – philosophy and theology – share much. The predominant streams of both traditions stress the importance of non-material or metaphysical attributes for definition of personhood. Thus, a person is one who has soul, reason, or moral agency not the one who has money, good looks, or physical power. The moulding of metaphysical as an untainted domain of ideas, associated with purity in contrast to baseness of bodily desires and functions was a millennial work of European church fathers, theologians, and philosophers. It is hardly surprising that legal entitlements in a community were defined using the perceived standards of worth, which had a direct bearing on the perception of person in more legal terms. Despite, or maybe because of, immateriality of the criteria for personhood, they have functioned as effective means to exclude based on material differences of creed, gender, race, and so forth. The same theology that understood everyone to belong to a common humanity would endorse crusades, colonialism, and racial segregation as well as oppose all those practices. Although one would follow the lead of Alain Badiou in attributing the birth of universalism to Saint Paul or celebrating the philosophical rejection of discrimination based on creed by Thomas Aquinas, it is easy to agree with T. Brian Mooney that this 'intellectual side of things, vitally important as is so often the case when *realpolitik* intervenes not enough to stem either missionary zeal or rapacious greed.'[222] Thus, while the Pope Innocent IV could expand natural law to provide shelter to Christians and non-Christians alike, he maintained that any restrictions imposed, for example, to missionaries was just grounds to wage war.[223] These ideas of Innocent IV were, according to Brett Bowden, instrumental in the development of international law by its early father

[220] Mary Midgley, *The Myths We Live By* (Routledge 2003).
[221] Janet McIntosh, 'Personhood, Self, and Individual' in Hilary Callan (ed), *International Encyclopedia of Anthropology* (John Wiley & Sons 2018).
[222] Brian Mooney, 'Introduction: Some Thoughts on Colonialism' (2020) 25 European Legacy 499, 500.
[223] James Muldoon, *Popes, Lawyers, and Infidels: The Church and the Non-Christian World, 1250-1550* (University of Pennsylvania Press 1979).

figures.[224] Universal humanity has only ever been superficial or a part of an argument that has been used to justify unequal treatment of some in the name of supposedly universally egalitarian creed or thought.

What worked for creed (Christians vs. infidels) in terms of theology functioned well for philosophical variants of exclusive inclusion. Many Enlightenment philosophers were unable to notice the apparent blind spots of their formulated liberal and inclusive theories. Formulations for universality articulated against the backdrop of former privileges of nobility and clergy, often fell short in their universality. These impaired understandings of philosophical equality were central for the formulation of many of the earliest 'universal' rights, such as the French Declaration of Rights of Citizens and the United States Constitution.[225] Freedom that philosophy and rights proclaimed was issued only to free men. Thus, even though there might have been a more general move from status to contract as an organising principle of a society, as Maine had suggested in *Ancient Law*, this was not at the time nor long thereafter the case.[226] Women, racial, sexual, and religious minorities were for the most part beyond universal recognition both in theory and in practice. Quite like within theology, there are numerous examples of genuinely universal thought by a wide range of authors. Yet, as many were able to note already at the time, rights without obligations matter little.[227] Thus, if philosophy fell short in recognition of basic equality in terms of social justice the goals were even further away, as Anatole France's memorable quip of an equal right to sleep under a bridge reminds. Ultimately, a death knell for much of the philosophy of personhood were

[224] Brett Bowden, 'The Colonial Origins of International Law - European Expansion and the Classical Standard of Civilization' (2005) 7 Journal of the History of International Law 1.

[225] An account of early declarations and their odd blind spots as well as cascading effects of inclusion, see e.g. Lynn Hunt, *Inventing Human Rights: A History* (WW Norton 2007) ch 4.

[226] A separate note in tenth edition of Ancient Law, the author of note points out with a view on marital status, that '[a]s regards the actual definition of different personal conditions, and the more personal relations incidental to them, it does not seem that a movement from Status to Contract can be asserted with any generality,' see Maine (n 119) 423. Compare this to Frederic Maitland's argument at around the same time: 'The march of progressive societies was, as we all know, from status to contract. And now? And now that forlorn old title is wont to introduce us to ever new species and new genera of persons, to vivacious controversy, to teeming life; and there are many to tell us that the line of advance is no longer from status to contract, but through contract to something that contract cannot explain,' Frederic Maitland, 'Moral Personality and Legal Personality' (1905) 6 Journal of the Society of Comparative Legislation 192, 198.

[227] For a contemporary accounts and their context, see Jeremy Waldron (ed), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen 1987). The permanence of the theme in wider human right parlance can be attested e.g. in Onora O'Neill, 'The Dark Side of Human Rights' (2005) 81 International Affairs 427.

the Holocaust and more general atrocities perpetrated during the Second World War. In this sense, the universalist credo encoded in UDHR with is aspirational language is as much a sign of loss of footing as it is of securing one.[228] The new concept of person was full of potential, yet how much of that would be realised remained and remains open.[229] The person that emerged was a communal individual, but especially at the international level, person as an individual was missing a community.[230]

In general, the longer quest of reason to eradicate metaphysical considerations from philosophy, and, as a corollary, from law seemed to triumph in the aftermath of the Second World War. With a loss of god, there was a demand for new gods. Empiricism, naturalism, and more concretely biology seemed to provide a master narrative that would be able to overcome the particularism inherent in all ideas. If, as Darwin argued in *the Origin of Species* and later in *the Descent of Man*, humans were animals subject to forces of evolution, we ought to 'view[] him in the same spirit as a naturalist would any other animal.'[231] And despite the great differences perceived and reported by Darwin himself between humans, he held fast to a belief that 'every naturalist' would 'end by uniting all the forms [of humans] which graduate into each other as a single species,' as he would lack a 'right to give names to objects which he cannot define.'[232] Biology seemed to crush all distinctions into a single graduate whole or at least, as in the case of animals, to a single source of measurement. Obviously, as the legacy of Darwin's evolutionary thought in social sciences illustrates, there were many who wanted to employ biology to justify precisely the kind of sorting Darwin himself had considered impossible. Darwin's half-cousin Francis Galton's use of statistics to measure and sort humans and ultimately breed a better humanity is but a notable illustration of such attempts.

In the years following the Second World War, UNESCO issued a line of reports from renowned scholars to stress the importance of seeing humanity as one.[233] Scholarly and scientific luminaries, such as Claude Levi-Strauss and Leslie Clarence Dunn, provided their support for the mission, concluding the question biologically

[228] Samuel Moyn, 'Personalism, Community, and the Origins of Human Rights' in Stefan-Ludwig Hoffman (ed), *Human Rights in the Twentieth Century* (Cambridge University Press 2011).

[229] In this sense, construing the idea of a person as a blank slate comes close to Hannah Arendt's idea of natality, a new beginning and introduction of novelty to the world.

[230] Compare to the status of Jews after the First World War e.g. in James Loeffler, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (Yale University Press 2018).

[231] Charles Darwin, *The Descent of Man, and Selection in Relation to Sex* (J Murray 1871) 215.

[232] ibid 226–27.

[233] Many of these reports were collected into a single volume that was updated in 1975, see Leo Kuper (ed), *Race, Science and Society* (UNESCO 1975).

settled. Yet, even within those arguing for a biological notion of humanity, many scientifically suspect claims echoing eugenic credo of the pre-War era were voiced. One can find, for example, Aldous Huxley's Malthusian concern over limits of food supply clad in garbs of eugenics: '[i]n Western Europe the reduction in the quantity of population is destined, it would seem, to be accompanied by a deterioration (owing to the infertility of the more gifted members of the community) of its quality,' leading to a decline of the IQ levels of the population as a whole.[234] Nevertheless, the triumph of science as a source for a common denominator shared by everyone appeared to be all but settled by the time of the discovery of the double helix structure of DNA in the 1950s and a shared molecular constitution for all life on earth. If, deep down, we all are made of same substance, any differences in appearance and ability are simply epiphenomenal to the sameness that truly matters.

However, by the time the Human Genome Project published first version of human genome in 2004, the science was already mired in equal controversy as religion and philosophy before it. Albeit scattered and insignificant in the whole body of genome, there were specific ranges of genes that were associated with different phenotypes—sets of observable characteristics of an individual. Jonathan Xavier Inda in his research on race and pharmaceuticals in the United States considers this tendency to biologise and geneticise race 'a strong penchant in scientific thought,'[235] while noting the sustained critique against such tendency to genetically reify race especially among social scientists.[236] The controversy over race as a biological or scientific category spilled out to pages of esteemed science publications at the time. In the *New England Journal of Medicine*, a group of researchers argued that '[i]nformation about patients' ethnic or racial group is imperative'[237] for treatment and development of medicine. At the same time, on pages of *Nature Genetics*, a different set of researchers suggested that 'there is no scientific support for the concept that human populations are discrete, overlapping entities.'[238] And while these early stages of post-genomic research might have blurred the boundaries, the emergence of epigenetics—the study of changes in organisms caused by modification of gene expression rather than alteration of the

[234] UNESCO (n 200) 204. These are familiar themes from Huxley's earlier literary work, most notably Aldous Huxley, *Brave New World* (Harper Collins 2010).
[235] Jonathan Xavier Inda, *Racial Prescriptions: Pharmaceuticals, Difference, and the Politics of Life* (Ashgate 2014) 61.
[236] ibid 65ff.
[237] Esteban González Burchard and others, 'The Importance of Race and Ethnic Background in Biomedical Research and Clinical Practice' (2003) 348 New England Journal of Medicine 1170, 1174.
[238] Lynn B Jorde and Stephen P Wooding, 'Genetic Variation, Classification and "Race"' (2004) 36 Nature Genetics 11, S28, s32.

genetic code itself—seemed to undermine entirely the claim of human biology as the great unifier. The very genes that were hailed as the code of life turned out difficult to decipher, and, what is likely of greater importance, mutable and contingent—'a new divinatory space'[239]—even during the course of life of a single human being.

At the turn of the millennium, millenarianism abounded around the question who we are as humans. The traditional sources that had for long supported the edifice of personhood had crumbled one after another. Theological explanations had been cast suspect by the critique of reason since the Enlightenment, the erudite philosophical thought turned out to provide no shelter against dehumanisation of others, and, ultimately, biology transformed what were deemed mere social classification into essential and immutable traits of groups of individuals. Simultaneously, law's concept of a person in the West had remained largely the same. Maitland writing in 1905 of person as 'right-and-duty-bearing unit' remains to this day the standard definition provided in legal dictionaries as well as the formulation criticised by those seeking to introduce new ones.[240] In the continental legal tradition, situation has not been all that different with great treatises of late 19th and early 20th century on personhood still acting as foundational building blocks for the present accounts.[241] While there are few who would at present argue that law is at full liberty to endow status of person to anyone or anything, the barebones definition of person normally provided as a starting point certainly would allow for such a reading. Personhood does not flow from isolating any autonomous agency of reason and sentience deduced from theological, philosophical, or biological insights. Even if we were able to construe an analytical concept of law's person that would be more nuanced than mere container of rights and duties, as suggested by Greasley and Kurki, notably little in terms of additional insights of legal interaction would be gained. This does not flow from misrecognition of law's personhood on analytical level, but from the problems that stem from transposing those analytical insights internal to law's

[239] Margaret Lock and Vinh-Kim Nguyen, *An Anthropology of Biomedicine* (John Wiley & Sons 2010) 331.

[240] Maitland (n 226). For a criticism of this position, see e.g. Kurki, 'A Theory of Legal Personality' (n 127).

[241] Matthias Lehmann, 'Der Begriff Der Rechstfähigkeit' (2007) 207 Archiv für die Civilistische Praxis 225; Jean-Pierre Marguénaud, 'Actualité et Actualisation Des Propositions de René Demogue Sur La Personnalité Juridique Des Animaux' (2015) 40 Revue Juridique de l'Environnement 73. Of the two, Marguénaud looks back to René Demogue's article from 1905 that provides a summary of many late 19th century and early 20th century French theorists. Lehmann refers the idea back to von Savigny.

relations to any relationship that opens from law's application: while we may construe perfect ontologies, we can fail to construe sensible events that ensue.[242]

Before moving further to analyse the impact of the collapse of the traditional moorings of law's person, there is a question that needs to be addressed that has up till this point remained merely presumed; why should there be a unitary standard for personhood? Why does it matter if we end up philosophically justifying hierarchical society or biologically sort humans into immutable containers?[243] I do not intend to entertain a discussion on relative merits of equality as a concept in law, but rather the underlying question why law ought to be interested from equality and due to dictates of equality embrace a singular notion of personhood. After all, if a modern legal system is described through its ascendancy from status to contract as its organising principle, a legal difference if any is a creature of contract rather than inherent feature of a person. Say, a status of a diplomat or a head of state internationally, is not a feature of a person but that of a contract between the state parties to confer them special privileges for the duration of their recognised position as an office holder. Not a status but a contract. The concern with equality more widely is that no one ought to have such special privileges initially because who they are. Behind the Rawlsian veil, we are all the same. Thus, the initial answer to the question why we should all be seen equal before law is the simple contention that in a just society no one would accept being subjected to a lesser stature to promote welfare of others.

While this is certainly an alluring answer, it is only a partial one. We can all readily accept that some forms of differences are acceptable. Very small children do not have similar rights and duties as adults, minors, even if otherwise legally competent, are commonly barred from a right to vote or, say, marry, and a similar set of limitations are imposed to persons with severe disabilities and, to some extent, non-citizens.[244] Why we are then ideologically committed to egalitarianism and why we seem to be deviating so greatly from this standard are two sides of the same coin. The reason why we impose these limitations to children, non-citizens, or persons with disabilities is because we consider them to be somehow different in terms of

[242] This problem will be more closely explored in Chapter 5 with connection to philosophy of Alain Badiou, whose mathematical ontology arguably provides a fully analytical explanation of being through set theory, while falling short in describing events that occur outside the non-ideal settings of mathematical ontology.

[243] An insightful analysis of the question is provided in Jonathan Wolff, 'I—the Presidential Address: Equality and Hierarchy' (2019) 119 Proceedings of the Aristotelian Society 1.

[244] See in general, Waldron, *One Another's Equals: The Basis of Human Equality* (n 204). Waldron focuses chiefly on basic equality but does treat the problems posed to our vision of equality by disability.

the basic 'currency' we use to measure equality. Although for the most part we have come to deny any personal traits as acceptable 'currency' for egalitarian calculus, economic differences have largely escaped these limitations. On the one hand, we are committed to the view that everyone ought to be equal, on the other hand, we accept differences especially in purely economic affluence for as long as they also contribute to those worst of.[245] G. A. Cohen has argued, there are good reasons to believe that a quest for a currency we employ for equality might push us far in the way towards accepting acts only little short of exploitation.[246] As with personhood, an altogether too abstract formulation of equality, is incapable to address experienced sense of inequality.[247] The disagreement is not of the import of equality, but the currency used to assess its presence and the relative import given to equality as a value vis-à-vis other values. There are few who oppose equality, but there are many who want to limit its application within the perimeters of a community, family, or some other group of people making the global and local equality look notably different. The same applies, *mutatis mutandis*, to law's concept of person.

Although the traditional moorings of personhood have all failed to produce a unitary vision of humanity, this has not reduced the relative worth of them as 'currency' to develop notion of personhood. A cursory glance on the substantive recent literature on the concept of person in law reveals the purchase attributes derived from the traditional sources still carry. On the one hand, this lack of interest for the foundational attributes stems from a pragmatic alignment with perceived concerns of the present. There is a sense of urgency: the response of law's logic to a novel technology seems unsatisfactory at best. On the other hand, it might be a sign of a conservative bias among lawyers—a desire to uphold order and construct the future on grounds of what exists rather than question how solid that former bastion of personhood is. A good example of the former tendency is an article by Delphine Rabet where she explores the impact of neuroscience to law's person. She commences her foray with the following throat clearing on personhood:

Legal personhood relies on a particular representation of what it means to be a person according to the law. This representation is centered on concepts of

[245] Rawls's legacy on the matter remains contested as e.g. William Edmundson, *John Rawls: Reticent Socialist* (Cambridge University Press 2017) indicates. According to Edmundson, Rawls ought to be seen primarily as a socialist rather than a supporter of a welfare state. This would, according to Edmundson, remove the source of most glaring economic inequality and strengthen the egalitarian credentials of Rawls's theory.

[246] Gerald A Cohen, *Rescuing Justice and Equality* (Harvard University Press 2008).

[247] See e.g. ibid 35. There Cohen argues that 'although the argument may sound reasonable when it is presented in blandly impersonal form, as it usually is, and as it was above, it does not sound so good when we fix on a presentation of it in which a talented rich person pronounces it to a badly off person.'

rationality, reasonableness, choice, intentionality, and responsibility among others.[248]

The article then continues to chart the borders of the pre-defined realm of personhood as well as any perceived problems the new technological innovations may carry for any of the constituent elements of the standing definition. This mode of inquiry tends to cement existing understanding and modestly expanding the scope of rights to include aspects that appear salient from the vantage point of chosen technology. Science and technology at large supersede the past external sources of influence for law's personality by becoming the primary lens through which personhood and its limits is reflected. Yet, it does only partly reflect or translate anew the subjects and objects of law, leaving much of the old behind.[249] Are the old concepts of choice and intent or that of reason and rationality ill-founded considering this new technological advancement?[250]

While such explorations may serve the immediate goal of a more just society by correcting our faulty beliefs of autonomy, reason, or any other external attribute attached to person in law, it effectively masks the externality of those attributes. The past fiction of a person found on theological, philosophical, and biological understanding is turned into a fact upon which future modifications of personhood can attach, transforming it from an 'expedient, but consciously false, assumption' into an expedient assumption deemed to be true.[251] This is what Greasley suggested with her idea that there are cogent limits to our debate on personhood: the legal concept has become more than an expedient vessel and transformed into a materially true statement about nature of an entity. Yet, as Hans Kelsen argued already in the beginning of the 20th century, such naturalism imbued to legal fiction 'involve[s] an opposition to actual reality, which can only be possible in the transgression of a legal

[248] Delphine Rabet, 'The Political Economy of Neurolaw: Can Neurolaw Destabilize the Neoliberal Discourse about Human Rights' in Marc de Leeuw and Sonja van Wichelen (eds), *Personhood in the Age of Biolegality* (Palgrave Macmillan 2020) 39.

[249] That this act of translation is only partial retains a particular universalism as suggested in Bruno Latour, *We Have Never Been Modern* (Harvard University Press 1993) ch 4. See also p.136 where Latour describes attempts like Rabet's as one of 'cloth[ing] this robot animated with neurons, impulses, selfish genes, elementary needs and economic calculations, […] never get[ting] beyond monsters and masks.'

[250] Similar technology-centred views are commonplace, see e.g. Samir Chopra and Laurence White, *A Legal Theory for Autonomous Artificial Agents* (University of Michigan Press 2011); Gunkel (n 143); Britta van Beers, 'The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person' (2017) 18 German Law Journal 560.

[251] The quotation is from Fuller (n 95) 7. There Fuller is referring to fourth edition of Vaihinger's *Die Philosophie des Als Ob*, which has been translated as Vaihinger (n 94).

theory, thus in a theory that claims to have natural facts as its objects.'[252] In brief, presuming that there are boundaries which we recognise that stem from existence of a naturally existing human person as both analytical and, to an extent, more empirical accounts of personhood seem to suggest, is to constitute a category error where a fictive entity (i.e. legal personality) is treated as if it would be a naturally occurring entity rather than 'an object of cognition' to borrow the term from Kelsen. This does not imply that legal language would be at full liberty to construe its concepts as distinct from language at large. Rather, it warns on attaching legal ideas with too much materiality. It warns of all external lenses that would directly indicate conditions for law's concepts, whether hailing from moral philosophy or latest technological advances.

An alternative to a gradual (re)construction of law's concept of person is to dismantle the concept, to vacate it of every content and render it malleable to contemporary legal complexity. According to Anne Grear, an account that is at liberty to endow rights and personhood to anything and anyone

> offers particularly rich possibilities from the critical point of view. Its insistence on the fact that law's entity is but a constructus made up of intersecting normative relations within law's systemic thought-stream is potentially the most powerful way of rendering naked, as it were, the systemic gap between law and complex, dynamic, relationally productive materialities.[253]

It confronts Kelsen's critique by reversing it. Instead of starting from a person as a fiction that stands for a complex of intersecting norms, Grear suggests the intersecting norms should be our focus and whatever constellation of rights emerge through such an exercise is then what law's person is all about. Thus, for example, a technological object can act as an important source of a definitional matrix, while impacting differently to construction of personhood in different jurisdictions.

There are many ways to understand and construe personhood in law as I have sought to illustrate above. Most common in literature are forms of universal personhood, either based on analytical theory building or presumed universality of the person of human rights. Next, I pursue an argument that rather than a single universal personhood or autonomous local personhoods, an account of personhood

[252] Hans Kelsen, 'On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy of the As-If' in Maksymilian Del Mar and William Twining (eds), *Legal Fictions in Theory and Practice* (Springer 2015) 6.

[253] Anna Grear, 'Law's Entities: Complexity, Plasticity and Justice' (2013) 4 Jurisprudence 76, 88. She builds her classification on Naffine, 'Who Are Law's Persons? From Cheshire Cats to Responsible Subjects' (n 217).

that perceives international and national definitions of personhood as partly overlapping provides a much clearer picture from the functioning of (human) rights internationally. Further, I suggest that disparate understandings of personhood draw their influences from diverse narrative constructions of identity. The basic stock of narrative cues is dictated by the international human rights and humanitarian law. They set boundaries for national definitions. As with basic equality, the international humanity's law employs only few narratives as relevant currency for definition of personhood.[254] Outside this basic currency of international personhood, the local variants are at relative liberty to cultivate their narratives of personhood, which partly explains the complexity of the transnational legal terrain. Yet, more central for the argument to ensue, is the partial harmonisation of narratives, which enables global circulation of some rights without concomitant carry-on of duties. This partial harmonisation causes emergence of legal black holes central to emergence of particularly repugnant rights internationally.

To illustrate this harmonisation and the effect of internationalisation of some narratives over identity, I first turn to international human rights. The notable ascendancy of human rights from the 1970s onwards has anchored a liberal egalitarian view endorsed by the likes of John Rawls at the heart of the notion of personhood. Justice locally and globally was about 'establishing a normative and actual floor for protection' for everyone without discrimination.[255] But most notably, justice was a concern of individuals and their freedom from suppressive collective. According to a common left critique of human rights,

> [t]he subject of liberal human rights is a bounded individual who possesses their life, liberty and security as property which should be protected from external interference, in doing so reflecting the wider imperatives of a capitalist economy.[256]

To what extent this connection of neoliberal capitalism and human rights can be substantiated has been a matter of debate in recent years, thus I intend to use a more limited form of a shared narrative of individualism's triumph over collectivism and

[254] An analysis and critique of this limited register is provided in Ukri Soirila, 'The Law of Humanity Project: An Immanent Critique' (Dissertation, University of Helsinki 2018).
[255] Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 Law and Contemporary Problems 147, 149.
[256] Kathryn McNeilly, 'After the Critique of Rights: For a Radical Democratic Theory and Practice of Human Rights' (2016) 27 Law & Critique 269, 271.

human rights as a freedom project rather than one highlighting duties.[257] Even this more limited form allows economic freedoms to span the globe and describes any curtailment of them as antithetical to realisation of (human) rights internationally. The dominance of this narrative has overshadowed other narratives internationally, most notably those of the Third World.[258]

So defined, the stories of personhood told, construe the narrative undercurrents that then circulate as valid arguments in debate over law's person internationally and domestically. As the analytical tradition and its empirical critique indicate, there are elements of stability and those of relative mutability for these narratives. A Eurocentric insistence upon 'Enlightenment values' is one among the more stable elements, while their reach remains a matter of some contestation (i.e. who counts as everyone, how to measure rationality, what is the correct currency to assess equality, etc.). We can expect to see a variation of these themes as construction blocks of identity and personhood most everywhere. Conversely, concern over communal rights or of social justice are outside the bounds of internationally shared narratives. These narrative markers are more localised and often subject to critical international attention. Thus, public policy concerns such as clean environment, accessible healthcare, or dignified working conditions are seldom sustained against a more minimal understanding of acceptable identities internationally. Also, narrative cues to culture, family, or religion as source of identity are local and commonly contested internationally, with exception to narrowly defined sources of identity for indigenous people.[259] When expansive reading of narrative identity thrives, the narrative cues employed seek to expand freedoms rather than duties.

[257] For the extensive recent debate, see e.g. Susan Marks, 'Four Human Rights Myths' in David Kinley and others (eds), *Human Rights* (Edward Elgar 2013); Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (n 255); Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books 2015); Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018); Joseph Slaughter, 'Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World' (2018) 40 Human Rights Quarterly 735; Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019).

[258] For an early account of such selective understanding of the impact of human rights in the Third World, see Bonny Ibhawoh, 'Structural Adjustment, Authoritarianism and Human Rights in Africa' (1999) 19 Comparative Studies of South Asia, Africa and the Middle East 158. A recent historical charting of such silencing of narratives is in Emma Stone Mackinnon, 'Declaration as Disavowal: The Politics of Race and Empire in the Universal Declaration of Human Rights' (2019) 47 Political Theory 57.

[259] Rights of indigenous peoples have been recognised in UN General Assembly, *United Nations Declaration on the Rights of Indigenous People*, 2 October 2007, UN. Doc. A/RES/61/295. There have also been local responses to indigenous rights in recent

In a 2012 article on *the Atlantic*, novelist Teju Cole puts his finger on an element of this narrowing of narratives to construe an identity.

> People of color, women, and gays – who now have greater access to the centers of influence that ever before – are under pressure to be well-behaved when talking about their struggles. There is an expectation that we can talk about sins but no one must be identified as a sinner: newspapers love to describe words or deeds as "racially charged" even in those cases when it would be more honest to say "racist"; we agree that there is rampant misogyny, but misogynists are nowhere to be found; homophobia is a problem but no one is homophobic.[260]

The freedoms gained are not because someone's agency has been curtailed by additional duties, but freedom simply increases when former patients of our good will are transformed into agents in their own rights. The past narrative of victims is altered to serve as an emancipatory narrative of rights and their realisation. Rather than treat others living in far-flung places contemptuously as victims lacking agency, Cole calls for recognition of everyone's agency, even if it appears to fail to fulfil its intended task. Using the example of his native Nigeria, Cole writes of demonstrations against corrupt government, how '[f]or me and for a number of people I know, the protests gave us an opportunity to be proud of Nigeria, many of us for the first time in our lives.'[261] Silencing the struggles encountered, silences also meaningful sources of narrative identity construction. This white saviourism has, for long, been subject of critique for many critical voices in human rights research. Yet, to this day the framing of rational narrative of human agency in international law, and through that that of personhood, remains captive of a more limited range of narratives for what constitutes meaningful agency and therewith meaningful rights.

A similar theme from the import of narratives in construal of rights and of humans entertaining those rights is shown in Patricia Williams's short article on images shared after the 2010 earthquake in Haiti. Her article starts with three pictures she tells of showing to students without captions. When seen only as pictures, students see the people in them empathically, but when given with originally

years around the globe. See, for example, Swedish Supreme Court's case on indigenous people's land rights Högstä Domstolen T 853-18; a special constitutional protection for aboriginal rights in section 35 of the Constitution Act, 1982 in Canada; and Ecuador's Constitutional Court annulling mining concessions to protect indigenous rights, Corte Constitucional del Ecuador, 273-19-JP.

[260] Teju Cole, 'The White-Savior Industrial Complex' (*The Atlantic*, 21 March 2012) <https://www.theatlantic.com/international/archive/2012/03/the-white-savior-industrial-complex/254843/> accessed 13 August 2023.

[261] ibid.

provided captions, which for all three of her pictures mentions 'looter', interpretation of the pictures change accordingly. Williams writes:

> [w]hat is interesting is that title really shift perceptions; if I initially show these images with the captions, the students tend to see riots and lawlessness. So just the word "looter" seems to change the relationship to these figures as legal subjects as well as human beings.[262]

But what is more, the narrative elements available for construction of personhood internationally are intimately bound to liberalism. Not to a liberalism as a precise political ideology or a set of doctrines outlined in advance, but as a catchall signalling all Western political discourse.[263] In this sense, the mutable Western common-sense narratives of personhood ('not rocks or rivers, but maybe robots') defines the available discourses of everyone, but also renders this Western vision constitutive of acceptance or denial of other perceived narratives.

In this sense, the narratives that represent stability and those that stand for change are difficult to trace. According to Paul Ricoeur, our identity is construed through the stories we tell ourselves, but to apply this insight to personhood as perceived in the present work calls for some modification. Permanence and change are complex phenomenon even within a more confined space of traditional community where we build our identities. Serge Gutwirth's example provides a good illustration of these more traditional identitarian articulations of relevant narratives:

> you opt in, and you opt out, others do likewise, and all in all, the group is never the same as it was. Moroccans living in Antwerp will become Flemish and change what the Flemish are, and so on.[264]

Problems associated with this more limited identity building are related generally to pluralism and multiculturalism. The mutable material surroundings that are locally immediately noticeable encounter more resistance at national, regional, and international level. This resistance leads into desynchronization between local and more global narratives. As we imagine communities, we imagine people making those communities, and the stories we tell of us, then, in their turn, come to define what the legal community will consider worthy of protection, respect, and rights.

[262] Patricia Williams, 'The Raw and the Half-Cooked' in Peter Brooks (ed), *The Humanities and Public Life* (Fordham University Press 2014) 77.
[263] See, Duncan Bell, 'What is Liberalism?' (2014) 42 Political Theory 682. Bell provides an array of different definitions employed for liberalism.
[264] Serge Gutwirth, 'Beyond Identity?' (2008) 1 Identity in the Information Society 123, 128.

The greater the distance grows between the narrative cues used to construe identities and the narratives told by people in their everyday life, the larger the mismatch between the two. This distance between the narratives used to construe person of human rights internationally and the diverse national understanding of personhood is the breeding ground for rightlessness.

At the international level, the narratives used for marking the identities are more idealised or, to quote from Hartmut Rosa's analysis of modernity, are subject to greater inertia where 'all the apparent speed and transformation of society are only changes on the "user surface," beneath which processes of paralysis and sclerosis predominate.'[265] Amidst all the technological acceleration, law provides a means to secure expectations – to act as a process of temporal paralysis – that has been instrumental not only for global capitalism to emerge but also to other global aspirations of law. Yet, as Wouter Werner indicates, international law has been no stranger to push for acceleration when encountering 'exceptional' events.[266] Thus, law operates simultaneously as an accelerator and decelerator. And while the pace of change might have increased, causing concerns due to 'the growing instability of time horizons and bases of selection produced by the ongoing revision of expectations and reconstructed experiences,'[267] as Rosa argues, this instability of time horizons for personhood is more closely connected to technological changes than direct changes in the image and legal codification of person. Obviously, these developments cannot be neatly separated as, for example, advances in biotechnology clearly indicate, but these changes have not directly contributed to the modification of concept of person locally any more than they have globally. This has much to do with the legitimate expectations that law is tasked to ensure and the central role personhood serves in anchoring those expectations. The resilience of what is expected of persons internationally and the limit of protection nationally punctures law's shelter by exposing it to multiple temporalities at the same time.

This phenomenon can be illustrated by building on Gutwirth's example. The example sought to underline how mutable elements of narrative identity are where influx of new inhabitants alters the fabric of identity for everyone. At the same time, as indicated by, for example, the Swiss 2009 vote against minarets as well as legislative measures in number of countries to impose limitations to minorities, the material realities change commonly faster than legal reality does. Thus, while the

[265] Hartmut Rosa, 'Social Acceleration: Ethical and Political Consequences of a Desynchronized High-Speed Society' (2003) 10 Constellations 3, 5.

[266] Wouter Werner, 'Regulating Speed: Social Acceleration and International Law' in Moshe Hirsch and Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Elgar 2018).

[267] Hartmut Rosa, *Social Acceleration: A New Theory of Modernity* (Columbia University Press 2013) 77.

Swiss minaret ban did little to alter the country's changing religious demographics, it did curtail the rights of religious expression for a large minority. The Swiss themselves might be more diverse than ever, but legally they continue to define themselves as (white) Christians. As noted by Daniel Moeckli, in Switzerland 'popular votes have a significant negative impact for religious minorities (especially non-Christian communities) and, in particular, foreign nationals.'[268] In empirical research on popular initiatives in Switzerland, Adrian Vatter and Deniz Danaci likewise conclude that

> Während Volksentscheide über die Rechte von Outgroups wie Ausländer und Muslime besonders oft minderheitenfeindlich ausgefallen sind, zeigte sich die Mehrheit der Schweizer Bevölkerung tolerant, wenn es um die Rechte von kulturell integrierten Ingroups wie die eigenen Sprach- und Konfessionsminderheiten geht.[269]

In short, those who a fictional median voter considers part of the community have their rights protected while 'outgroups', such as foreigners and Muslims, are commonly subject to limitations of their rights. To return to Gutwirth and Ricoeur, law imposes significant limits to the free formation of (narrative) identity, and the arrival of Moroccans to Antwerp might not immediately transform into locally construed stories of personhood.

Yet, there are limits to this local inertia imposed on the change of communal identity and therewith the 'median person' or law's paradigmatic person. As the Swiss case indicates, these emanate from international law, albeit how and to what extent these limitations reach remains contested. In a communication from the Swiss Federal Council before the 2009 Minaret Ban vote, the Council first assessed the validity of the suggested change to constitution.[270] The Council could not find a violation of an international peremptory norm (*ius cogens*), wherefore it saw no constitutional constraints for the vote. This signals the first part of traditional international law argument: states are sovereign and at liberty to internally regulate matters as they deem best for as long as they do not pass the minimal threshold imposed by *ius cogens* norms. After finding the vote itself legal within the remit of Swiss Constitution, the Council assesses it in light of earlier human rights

[268] Daniel Moeckli, 'Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights' (2011) 11 Human Rights Law Review 774, 779.
[269] Adrian Vatter and Deniz Danaci, 'Mehrheitstyrannei Durch Volksentscheide?' (2010) 51 Politische Vierteljahresschrift 205, 219.
[270] Conseil fédéral suisse, 'Message relatif à l'initiative populaire «contre la construction de minarets», 27 August 2008, doc. no. 08.061, 6923.

commitments of Switzerland. Here, the Council argues that the Minaret Ban initiative

> viole nèanmoins les art. 9 et 14 CEDH, de même que les arts. 2 et 18 (et, éventuellement, l'art. 27) du Pacte II de l'ONU. Même si cela n'entache pas la validité de l'initiative, il n'en demeure pas moins qu'en acceptant cette initiative, la Suisse ne respecterait plus ses engagements internationaux.[271]

Thus, despite indicating the existence of violation of human rights, a decision to transgress rights is the sole prerogative of the sovereign. That Switzerland as a state may consequently violate its earlier commitments is a matter that might affects its international standing, but that is no reason to enforce a vision of person domestically that would align with the international law. If, as Fabienne Bretscher suggests, Swiss perceive Muslims as foreign (*fremd*) and want to enforce that view by limiting religious rights,[272] there is nothing that immediately follows from such decision: Switzerland remains largely autonomous in its construction of the paradigmatic bearer of rights.

As will be explored later in Chapter 4, despite the foundational sovereign equality of states, not all states remain as autonomous in their capacity to articulate treatment of minorities. A state more directly dependent on international financial or humanitarian institutions than Switzerland has its capacity to regulate personhood curtailed significantly prior to limited violations of *ius cogens*. Simultaneously, the impact of 'foreign' narratives to local construction of identity intensifies often following a form of liberal human rights narrative. A case in point would be the construal of Sudanese crisis internationally chiefly as one between feuding religious groups without any other possible resolution than secession of the south. In this mainstream narrative employed in the West, as Amir Idris writes, '[t]he civil war in the Sudan is often presented in essentially ethnic and religious terms: "Arab" Muslim North against "African" Christian South.'[273] According to Amal Hassan Fadlalla, these simplified narratives of conflict's root causes portrayed in the Western media also affect the choices and solutions provided by the Sudanese themselves, albeit

[271] ibid 6968-6969.

[272] Farienne Bretscher, 'Osmanoğlu and Kocabaş v. Switzerland: A Swiss Perspective' (*Strasbourg Observers*, 30 March 2017) <https://strasbourgobservers.com/2017/03/30/osmanoglu-and-kocabas-v-switzerland-a-swiss-perspective/> accessed 13 August 2023.

[273] Amir Idris, *Conflict and Politics of Identity in Sudan* (Palgrave Macmillan 2005) 1. The same argument has been extended to virtually all conflicts in the Sudan, as documented in Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (CODESRIA 2010).

they recognise the inherent complexity of the conflict beyond simplistic portrayal of religion as its sole or main cause.[274] Fadlalla connects the raise in authoritarian and exclusionary Islamic visions for the Sudan to a line of structural adjustment programmes and other interventions of the international financial institutions.[275] As such, the vision of humanity provided by both the Western humanitarians and the Islamist ruling elite, Faldalla contends, are both an outcome of a peculiar neoliberal vision for a state and human rights. Understood on these terms, local definition of person remains heteronomous to foreign dictates, barring constitution of a 'person' that would be reflective of the diversity found in the Sudan.

Switzerland's discriminatory treatment of minorities was widely condemned, yet the exclusion of 'foreign' remained largely an internal matter for the state, unlike in the Sudan. But even outside the extreme example of the Sudan, a sustained argument has been made in recent years on the influence of international law, especially international institutional law, has to the regulatory capacity of an individual state. Whether this influence is due to (neo)liberal economic policies promoted by the international financial institutions, an encoded feature of welfarist international law,[276] or an altogether different reason remains contested. Yet, as Armin von Bogdandy, Matthias Goldmann and Ingo Venzke argue, there has been in recent decades a tendency towards what they title international public law, which seeks to curtail state's capacity to regulate.[277] The more a state is bound to dictates of such international public law and its administration by an international executive, the greater the impact on state's autonomous capacity to regulate rights and duties locally. To what extent this all plays out in the daily exercise of authority of a state remains unclear, yet as many international legal scholars argue, international law in general and international institutions in particular shape the states towards a singular image of a successful state.[278] A key tenet of this argument is the advancement of human rights and economic liberalization: flaunting either has, especially during the 1990s and the early 2000s, led into economic sanctions if not downright occupation of a state in the name of international authority. That some states, such as Switzerland

[274] Amal Hassan Fadlalla, *Branding Humanity: Competing Narratives of Rights, Violence, and Global Citizenship* (Stanford University Press 2019).

[275] Of similar 'tutelage' of international financial institutions more widely in Africa, Achille Mbembe, *On the Postcolony* (University of California Press 2001) ch 2.

[276] Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (Cambridge University Press 2012).

[277] Armin von Bogdandy and others, 'From Public International Law to International Public Law' (2017) 28 European Journal of International Law 115.

[278] See e.g. Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017); Luis Eslava and Sundhya Pahuja, 'The State and International Law: A Reading from the Global South' (2020) 11 Humanity 118.

are more resilient to these pressures merely indicates their relatively stronger position among equal states.

An outcome of the narrowing space for domestic regulation has been the enlargement of the 'shared' public international space when defining 'human' or 'person' at the epicentre of state's human rights responsibilities. This has a direct bearing on the group to which narrative identity in Ricoeur's thought is anchored. If, as Ricoeur argues, the more stable side of a narrative identity (*idem*) is bound to a community or a group, relocating this community from nation-state – however imagined – to the realm of international, weakens the voice of many subaltern and Third World individuals in the legal articulation of their personhood locally. As the narrative cues for identity construction derive from presumably universal dictates of human rights to which the state has been conditioned to adhere to, the possibilities for alternative identity construction are limited. The more heteronomous the state, the less it can object to the external formulation of 'human' and 'person'. And further still, as Faldalla among others argues, human rights and humanitarian discourses provide potent communicative means to narrate selfhood (i.e. Ricoeur's *ipse*) locally when seeking international support for local changes.[279] Thus, while the Antwerpenaars and Flemish may narrate their changing identities in ways suggested by Gutwirth, on legal realm the construction of identity is subject to greater inertia; for one, law may be, and commonly is, employed to exclude the 'foreign' as in the case of Switzerland. But more pertinently for the present purpose, international law in its quest to harmonise the *idem* side of the narrative construction to align with human rights, cements the formulation of legal personhood locally in heteronomous states.

How does then all this boundary work between different strands of identity anchor to personhood? As Mireille Hildebrandt argues, free shaping and re-shaping of our identity is necessary for heterodox thought that she links to a genuine autonomy. She further argues that the negotiation between the two poles of *idem* and *ipse* is public in character:

> I contend that the appropriateness of specific information flows does not necessarily depend on individual preferences but rather on what fortifies identity

[279] Ricour develops his account from his early writings onwards, but the most robust articulation of narrative identity he provides in Paul Ricoeur, *Soi-Même Comme Un Autre* (Seuil 1990). The text is translated in English as *Oneself as Another* (University of Chicago Press 1992).

> construction and generates a resilient civil society, as well as on the fairness of the ensuing distribution of information.[280]

While Hildebrandt makes her argument in the realm of privacy, it can be readily expanded to what has been argued above concerning rigidity of identity formulation in heteronomous states. If the identity construction in much of the globe is limited to international formulation of humanity that remains predominantly Eurocentric, it is difficult to see such formulation promoting or fortifying identity construction or a resilient civil society outside Europe. The lived experience of identity is permanently disconnected from its legal formulation. Further still, this anchoring of identity to eternal and universal human rights grants the legal identity with permanence, but in doing so it removes all need for material realities as what matters is the predefined analytical category of a human.

This disappearance of the material reality is what marks the interaction of international formulations of personhood through ephemeral notion of humanity and the multifarious domestic articulations of personhood. A state with greater independent capacity to act both internally and externally remains at greater liberty to also formulate its personhood in distinction to the morals of the international order and vice versa. A state dependant from international institutional support commonly finds itself conditioned to follow dictates of international human rights and its notion of a person as a free from stately interference and autonomous in private relationships. The concomitant notion of person stresses the import of individual preferences over collective interests. It construes a concept of a person that perceives individuals as rational and atomistic, marking the culmination of a transition from status to contract suggested by Maine. In an immaterial world of legal relations disconnected from local narrative cues the person appears solely as a negation, a site of violation of minimal yet essential qualities of a human embodied internationally. This interaction of international and local on level of personhood is at the heart of the theory of repugnant rights outlined in Chapter 5.

[280] Mireille Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Edward Elgar 2015) 83.

2.3 Conclusion

An essence of a person that is retained through time and space is the lynchpin holding rights together. Without a presumption of a person, all legal actions appear suspect. If the person who made the promise to me yesterday would claim to be a different person tomorrow, most legal relations would become practically impossible. Yet, as the numerous formulations of this essence elucidated above indicate, there is a manifest lack of consensus what such an essence could entail. In order to retain legal relations, lawyers often formulate a pragmatic account—especially about entities whose membership in the category of personhood is unsettled—that seeks to curtail nihilistic doubt of everything through assertive power of a legislator to prescribe emergence of liminal entities. Many such accounts construe a paradigm akin to one in analytical tradition and claim that such a paradigm is what law, legislator, or justice dictates. These are often defined through a set of ethical red lines that prevent emergence of new persons that the spirit of law or some common morality would abhor. Most noted of these pragmatic tools is likely the concept of pre-embryo used in Warnock Report, but similar constraints are commonplace also in, for example, animal welfare and regulation of artificial intelligence. Like pre-embryo, they prescribe a framework within which personhood does not emerge to allow treatment of entities in a fashion that enables practices we would not condone towards persons. The idea is that even if we do accept that personhood is not a quality of autonomous actors but a negotiated realm of more or less heteronomous entities, it is prudent for law to create clear frames of exclusion: what a person is, is ultimately a choice of community, not a function of emergent capacities in an entity.

Legally these exemptions are constructed as a duty not to enter the twilight zone. Do not temper with embryos in vitro past fourteen days of development, do not develop an algorithm capable of consciousness, do not subject fish to pain, but subject fish embryos. This seems to skirt away from the problem of claiming any new persons in law. Rather, it is a precautionary principle in action: do not even approach the boundary that could later materialise as a person in law. This does not however escape the problem of categories. Drawing from the examples above, the person would then carry a set of ontological capacities that are familiar to personhood debate more widely. A pre-embryo would suggest that genetic humanness is not constitutive of personhood, but developmental uniqueness; a moratorium for algorithm development suggests that some form of independent, higher order consciousness is foundational for personhood; and the use of alternate animal-based testing indicates that while some animals might develop towards legal personhood, such concern only exist towards sentient animals not their existence as such. It is this dialectical relationship to the negation that carries over many of the ontological beliefs of those proposing these solutions. They might be related to

economic interests or deeply ingrained visions of human responsibility – it matters little – but they all seem to fall prey to precisely similar superimposition of unintended morality as took place when analytical tradition sought to carve out implications in the legal realm of its conceptual work.

Personally, these phenomenological accounts of personhood as ultimately relational and bound to a community appear sensible. Within this space it is also prudent to limit moral patients or sources of identity from having a direct recourse to personhood. Otherwise, the phenomenologically tinted personhood debate would collapse to mere legal nominalism where frozen bicycle lock could as much or even more so be a person than a human being I never encounter. After all, I am directing my agency towards that lock in a way that is hardly dignifying to me or to the lock. It reveals my baseness in much clearer light than a person to whom I might show token respect without ever encountering them or addressing my actions to them. Its patiency transforms me in ways that John Danaher argued artificial intelligence might, its existence shapes my *idem* identity as a Finnish cyclist against which I narrate my *ipse* identity of struggle, frustration, and fury. And still, I would not consider it particularly acute legal craftsmanship to suggest that a frozen lock ought to be a moral patient in the ways argued by non-traditional ethics, even though it does reveal my basic ontological assumption over personhood to entail something that a lock does not command.

The phenomenological accounts of personhood do provide a better fit to our understanding of personhood as a concept and how rights do de facto exist than any accounts of analytical personhood. Yet, they are often complex, contingent, and constantly mutating in ways that make it difficult to assess what happens when cooperation of these complex systems is called for. As Ratna Kapur indicates, it might be that all of these persons that should be called for to enable de facto rights of the disenfranchised to materialise lead to similar disappearance of persons as conceptual rigour of analytical scholarship.[281] That when the prudential choices of, say, legal scholars of artificial intelligence or of biotechnology fail to account for the unforeseen interactions their choices have for everyone in Zimbabwe, whose facial profiles have been commoditised to provide less bias for a facial recognition software that can then be deployed to the West. Thus, a genuine concern over bias in information technology and biotechnology can effectively curtail rights and ultimately personhood elsewhere. Or to place the concern more to the point of traditionally liminal entities, what follows from European Union's decision to transform human embryos into dignified entities? I return to these questions and their problems to personhood in the second part.

[281] Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (n 196).

3 On Technology

Unlike the notion of legal personhood that of technology seems non-controversial. Technology is something we can perceive and interact with—a moniker for material entities lingering about in all human societies. Also, the technology I envisioned to employ in my own research seemed to neatly fall within a materialist reading of technology and one commonplace in everyday parlance. It was the sort of advanced technology whose advances and pitfalls are, or at the very least have recently been, a matter of acute societal interest. I saw interaction of biotechnology and information technology as formative of distinct patterns in constitution of personhood that would be easily reducible to the material impact those technologies have to material 'bodies' of persons I considered liminal and controversial. In short, my initial understanding of technology was instrumental, focusing on what it does.[282] Biotechnology creates cryopreserved embryos, clones, and chimeras, while information technology creates data doubles, shadows, and zombies.

I declared above in the Introduction that I would first address each concept by limiting my focus on a strict understanding of what they do mean in law. With technology the task is fraught with problems as the word 'technology' is largely missing from statutes, treaties, and even cases. Obviously, there are numerous statutory instruments that refer to technology as well as a vast bulk of official documents, recommendations, and court decisions that speak of technology.[283] The problem is that on most of these documents, technology is not defined: it merely is something that is attributed to objects—but not all objects. While it remains common to describe smartphones, computers, and in vitro fertilisation as technologies in various legal documents, a similar moniker is seldom provided for clothes,

[282] Sherry Turkle, *The Second Self: Computers and the Human Spirit* (Granada 1984) 19.

[283] To use the European Union as an example, there are more than 600 legislative and regulatory instruments in force that in one way or another address technology. Despite a wide range of topics and areas covered, there is not a single instrument providing a definition for technology. Even rules and procedures that are directly related to technology, such as those on technology transfer, do not provide a definition of technology.

household appliances, and furniture.[284] Yet, a closer look on the regulation of these diverse products shows that legally they are treated largely the same:[285] there are standards for smartphones and clothing, there is patent protection for household appliances and computers, and there are trade secrets in provision of in vitro fertilisation as there is in manufacturing furniture. At first sight, then, there is no 'law' on technology that would enable distinction between diverse objects circulating in a market society. And still, a perusal through annals of law journals dedicated to technology clearly indicates that technology is not, at least for scholarly purposes, understood as a catch-all for manufactured goods.[286]

This poses an obvious problem for a semantic account of technology in law. A deductive approach where uses of technology in statutory documents and/or legal literature is reduced to the legal instruments embodied in such arguments will yield an account of technology that does not respect the apparent distinction entertained by scholars between 'new' technologies and technological products writ large. The outcome is an undifferentiated mass of rules that carry some connection to an idea or a concept that is commonly called technology yet reveals nothing of such technology. A patent may be essential for a legal manifestation of technology, but it is not what 'technology' as a semantic unit implies for law. This problem with 'technology' as a meaningful unit in law has received relatively little attention, as if the concept of 'technology' would be evident. Law addresses biotechnology and information technology, strives towards technological neutrality, promotes transfer of technology, and speaks of development of technology, yet remains silent what technology in these and other contexts is supposed to imply. In a sense, technology for technology law (or law & technology) has become myth-like in ways argued by Roland Barthes.[287]

> The nature of the mythical signification can in fact be well conveyed by one particular simile: it is neither more nor less arbitrary than an ideograph. Myth is

[284] A similar notice on particularity of technology is provided in Jaakko Suominen, *Koneen Kokemus* (Vastapaino 2003) 11.

[285] See *infra*.

[286] I went through database of all articles published in five most cited technology law journals (*Computer Law & Security Review*, *Berkeley Technology Law Journal*, *International Data Privacy Law*, *Vanderbildt Journal of Entertainment and Technology Law*, *World Patent Information*) as well as a more scattered search on a number of other technology law journals. On all there are clear indications of 'technology' signalling a very limited set of technologies, with topics changing every five to ten years: from satellite transmission to biotechnology to computers and smartphones to neurotechnology to artificial intelligence and robots. Obviously, there are legal scholars addressing this question many of whom I shall interrogate as part of my analysis below.

[287] Latour (n 249) 93. Latour attributes this idea to Michel Serres.

> a pure ideographic system, where the forms are still motivated by the concept which they represent while not yet, by a long way, covering the sum of its possibilities for representation.[288]

A fuller account of technology remains always at disposal for scholarship to indicate alternatively menacing or promising visions for technology; from Luddites to Japanese techno-utopia, from Terminator to cuddly robot seals, the choice for form from the rich texture of meaning available for technology animates as much legislators as it does judges and scholars.

Yet, what is this tamed richness that technology as a concept in law carries? Especially in English, not much. According to historians of the concept of 'technology' in English, its present meaning emerged in wider circulation first in 1930s to fill a 'semantic void'; there were no words to describe collectively the new material objects that sprouted as parts of everyday.[289] In a detailed research on the origins of 'technology' in English, Eric Schatzberg binds the emergence of 'technology' in its present function to early 20th century scholars such as Thorstein Veblen, Lewis Mumford, Talcott Parsons, and William Ogburn. Through their work, German *Technik* was transformed into 'technology' that, while initially part of a culture, became a deterministic force of societal change hors society that was intimately bound to innovation, efficacy, and progress.[290] As Schatzberg writes

> For Ogburn, technology centered on invention and depended on science while possessing tremendous power to transform society, politics, and morality. People had little choice in the direction of change, even through collective action; they could only retard the inevitable adoption of new technologies. In many ways, this vision of technology still dominates today.[291]

A similar dearth of technology as a concept before the 1930s marks also legal writing, albeit, for example, in German there were earlier commentaries on the possible and probable consequences for law from greater prevalence of technology, echoing writings of early German sociologists on impact of machine and

[288] Roland Barthes, *Mythologies* (Noonday Press 1972) 126.
[289] Leo Marx, 'Technology: The Emergence of a Hazardous Concept' (2010) 51 Technology and Culture 561.
[290] Eric Schatzberg, *Technology: Critical History of a Concept* (University of Chicago Press 2018).
[291] ibid 172. More from the significance of William Ogburn in establishing a link between innovation and technology, see e.g. Benoît Godin, 'Innovation without the Word: William F. Ogburn's Contribution to the Study of Technological Innovation' (2010) 48 Minerva 277.

mechanization to labour.[292] Thus, it is hardly surprising that there are no accounts of technology in contemporary sense provided by legal scholars or statutory texts or case law addressing technology from 19th century or even first few decades of the 20th century.

Technology did not however emerge in a legal vacuum. There were ideas, concepts, and legal instruments that already governed the area of 'technology' as it was to be construed during the early decades of the 20th century. In hindsight, the most obvious of these prior concepts were those related to innovation and invention, both intimately bound to patent law. If the work of sociologists and economists of the first decades of the 20th century paved the way for an idea of a value-neutral, deterministic, and progressive technology,[293] a similar re-shaping of patents, innovations, and inventions took place in legal terms during the late 18th century and throughout the 19th century. Alain Pottage and Brad Sherman argue,

> In order to apprehend ideas as they were constituted and revealed by the economy of manufactures, it was necessary to develop a specifically legal sense of the idea as a thing in its own right, something distinct from the artefacts in which it was embodied and from the persons by whom it was put to work.[294]

This transmutation of a patent into protection of the property of an idea necessitated a prior transformation that had seen the invention being turned into a thing.[295] According to Pottage and Sherman, this took place through the patent specifications that turned boundless ideas into 'something that could be possessed, delimited, and conveyed.'[296] The legal material embodiment of an idea into a patent specification reified innovation into a thing. Hence, '[w]ithout the specification, there would be no objects for patent doctrine to scrutinize, conceptualize, and transfer,' and in the process invention 'became the kind of thing that could be materialized and conveyed' through text and drawings.[297] Rather than being an immaterial flash of genius, the invention was legally transformed into an entity that could, with proper

[292] Of early German commentaries on 'technology' and law, see e.g. Friedrich Georg Jünger, *The Failure of Technology* (Gateway Editions 1956) 80–81. While published in German as well first after the Second World War, the booklet is written before the break of war in 1930s. Jünger speaks of technology leading to increased juridification of a society through technical regulation as well as from more general 'colonisation of the Lifeworld' to employ a term later used by Jürgen Habermas.

[293] Schatzberg (n 290) ch 10.

[294] Alain Pottage and Brad Sherman, *Figures of Invention: A History of Modern Patent Law* (Oxford University Press 2010) 46.

[295] ibid 51.

[296] ibid 59.

[297] ibid 62.

education and erudition, be discerned through the material medium of a patent specification.

As Christopher Beauchamp notes on his book on the historical role of patent law in the invention of the telephone, 'the role of law in the history of invention is a problem hiding in plain sight.'[298] He argues that ultimately '"Who invented the telephone?," is not a question of whose genius managed to carry over first a message through a line, but rather one 'defined by law' up to a point where 'it was the lawyers, as much as anyone else, who invented the telephone.'[299] Thus, it was the prior development of patent law towards making an invention, which allowed the later conjoinment of technology, innovation, and patents. First, as argued by Mario Biagioli, the modern patent law born in late 18th century made ideas and their representation in the patent specifications as well as absolute novelty of an idea central to patenting. According to Biagioli, this was in marked contrast with the earlier privilege system that had focused on territorial novelty and immediate economic benefits for the state from the use of an innovation. Modern patent system as developed in the United States and France focused on the absolute novelty of an idea. The patent monopoly was a token of recognition from a commonwealth to an innovator—a thank you note from advancement of knowledge that was described in the patent specification.[300] Second, as suggested by Beauchamp, the patents and the ideas embodied in their specifications became subject of voluminous litigation, which provided 'invention' with a very specific legal meaning that was argued through patent law. It is against this backdrop that the partly contemporary mutation of 'technology' in law emerged and is to be understood.

An 1843 case from the Supreme Court of Pennsylvania illustrates well earlier uses of technology in law. In it the Court finds that

> modern legislation has changed the relative legal philological use of the term lunatic, and has substituted it in the place of the old Latin phrase, non compos mentis. So that now, instead of denoting a species, it is the generic term in legislative technology for all sorts of mental unsound ness.[301]

Here technology stands for a way of the art or craft of legal writing without any specific connection to mechanical or industrial production that 'technology' would

[298] Christopher Beauchamp, *Invented by Law: Alexander Graham Bell and the Patent That Changed America* (Harvard University Press 2015) 3.
[299] ibid 5.
[300] Mario Biagioli, 'Patent Republic: Representing Inventions, Constructing Rights and Authors' (2006) 73 Social Research 1129.
[301] *M'Elroy's Case*, 6 Watts & Serg. 451, 453 (1843).

later come to carry. A similar use of technology is found from an 1864 Iowa Supreme Court case, where the Court employs 'technology' to imply something close to jargon: '[they] commenced searching for ore, or, in the mining technology of the witnesses, *prospecting*,'[302] or one from 1876 United States District Court for the Eastern District of Virginia finding it 'probably a subject of regret that the common law term has been adopted into the technology of the admiralty law.'[303] This is also the content of William Taylor Hughes's book *The Technology of Law* from 1893, where the author liberally confuses technics and technology as Schatzberg suggests was common of the era.[304] All in all, from the more than 50,000 cases with 'technology' listed in the used case law database, the 19th century references are but a handful with most of the references to an 'Institute of Technology' or to a book or an article using word 'technology' in them.[305] It is first in the early years of the 20th century that references to 'technology' diversify and start a gradual move towards more contemporary usage of the term.

In 1907, the Supreme Court of the United States had to decide a case over constitutionality of a statute that required vendors of paints to label the ingredients used.[306] On the sole reference to 'technology' in the case, the Court refers to 'the technology of paint manufacture' which it paraphrases as manufacture of paints that is improved as a result of 'a variety of practical tests and experiments.'[307] After this for a long the sole references to technology in U.S. case law are to 'technology' as a jargon as in a pair of cases from 1920 indicate.[308] Moving to 1930s, references to technology as a way of manufacturing become more commonplace as in an 1930 case before the United States Court of Customs and Patent Appeals, where the court finds a particular production method 'well known to those versed in artificial silk technology.'[309] The early 1930s also mark first clear indication of a separation of

[302] *Upton v. Brazier*, 17 Iowa 153, 155 (1864).
[303] *Sundry Material-Men of Norfolk & Portsmouth v. Pioneer Transp Co.*, 20 F. Cas. 195, 198, 2 Hughes 44 (1876).
[304] William T Hughes, *The Technology of Law* (Adams 1893).
[305] I used the Caselaw Access Project of Harvard Law School with a simple full-text search for the word 'technology' sorted from oldest decision first. At the time of the search, there were in total 51,408 cases with a reference to technology, but most of these are of recent origin. For example, 371st entry is from January 7, 1946.
[306] *Heath & Milligan Manufacturing Co. v. Worst*, 207 U.S. 338, 52 L. Ed. 236, 28 S. Ct. 114 (1907).
[307] ibid 348.
[308] *Hall v. Garvin*, 113 S.C. 182, 102 S.E. 1 (1920); *McIlhenny Co. v. Bulliard*, 265 F. 705 (1920). Technology in the latter case is part of a quotation from an earlier English case from late 19th century that was widely cited in the era for its embodiment of the doctrine of 'unfair competition', see *Powell v. Birmingham Vinegar Brewery*, [1897] A. C. 710, 14 R. P. C.
[309] *Jett v. United States*, 18 C.C.P.A. 86, 88 (1930).

science and technology in case law, even if only through recorded words of an expert witness.[310] A more drastic departure from the past limited understanding of technology is a 1935 case, where Hamilton, District Judge, concludes a decision with a prognosis for new times; 'Modern technology has broken down barriers of space and time,' followed by a list of specific technologies the Court has in mind: radio, nation-wide highways, airplane, in general rapid systems of communication and transportation.[311] And while the old uses of technology still co-exist alongside this new understanding of technology, the new, 'modern' understanding of technology gains credence by the mid-1940s. Thus, in 1942 a Court suggested that '[n]o one can foretell what changes in technology will do to the earnings of any business.'[312] But legally, the most salient modification took place when technology became closely adjoined to innovations and therewith to patents.

As 'technology' moved away from general references to 'legal technology', as an often idiosyncratic and cumbersome way of expressing the letter of law, it gained in patents a specific subject area where it interacted with law. While the courts had already paved way for an understanding of technology as an unstoppable force able to shake the foundations of a society, the connection established between patenting and technology suggested that a key legal instrument ensuring public's role in harnessing this unstoppable progress was through patents. After the U.S. joined the Second World War, courts increasingly articulated the public interest for technology suitable for warfare through patent law. In a 1942 case, a court refers directly to a letter of the then U.S. president Franklin D. Roosevelt: '[p]atents are the key to our technology, technology is the key to production.'[313] Roosevelt's letter was linked to 'a bill to "draft patents" for all-out war production,' as the New York Times reported at the time.[314] The concern over patents as vessels to technology was widespread at the time due to fears of monopolies abusing patents to curtail technological progress.[315] But more than anything, the addition of technology in the patent vocabulary, marked a step from mechanical era to a more 'scientific' era of technology that would be produced jointly in large groups rather than through a flash of genius of an individual inventor. As the United States Court of Appeals for the District of Columbia found in 1944,

[310] *Commonwealth v. Keystone Pipe Line Co.*, 24 Pa. D. & C. 400, 425 (1934).
[311] *R. C. Tway Coal Co. v. Glenn*, 12 F. Supp. 570, 595 (1935).
[312] *Commissioner of Internal Revenue v. Marshall*, 125 F.2d 943, 946 (1942).
[313] *Picard v. United Aircraft Corp.*, 128 F.2d 632, 645 (1942).
[314] 'Roosevelt and Biddle Back Patents Bill as Senators Open Hearing on "Draft" Plan', *The New York Times* (14 April 1942).
[315] Walton Hale Hamilton, *Patents and Free Enterprise* (Investigation of concentration of economic power. Monograph ; no. 31, US GPO 1941).

> In an earlier time when most patents were on machines or mechanical appliances neglect to consider industrial facts in adjudicating the scope of patent had less serious consequences. […] Each machine is a specific thing, not an abstract idea. […] But modern industrial technology is concerned with patents on ways of doing things rather than on the machines which do them. […] The control of a single chemical process may spread out in an ever-increasing radius covering every type of machine which uses the principle.[316]

A move from mechanical art to technology signalled a move from material objects to ideas, while upholding the earlier connection of patent with innovation.

In sum, the emergence of 'technology' in English legal language in its more contemporary meaning was a sudden affair in the first few decades of the 20th century. In the span of relatively few years, technology moved from denoting a professional or specialised language to standing for a force outside society that was uncontrollable and unforeseeable. Simultaneously, it came to stand for 'new' chemical, transport, and communication inventions that were clearly construed as embodiments of science applied rather than the crafts of yore. As suggested by Larry Owens, technology presented a new frontier that could be conquered by the American spirit, and the means for this conquest were patents that legally anchored technology to the past system while still marking a significant departure from the old.[317] It is based on this rudimentary understanding of 'technology' in law that I set forward to explore how more contemporary law codifies technology. I will first look more closely on the supposed urform of technology for law—patent and the patent system. To borrow a term from Carl Mitcham, this inquiry is focused on engineering philosophy of technology.[318] The latter part of the present chapter is devoted to what Mitcham titles a humanities philosophy of technology, where I explore what the relatively narrow and instrumental understanding of patent law does when set into interaction with different legal regimes serving diverse, non-technological ends.

[316] *Monsanto Chemical Co. v. Coe*, 145 F.2d 18, 21 (1944).
[317] Larry Owens, 'Patents, the "Frontiers" of American Innovation, and the Monopoly Committee of 1939: Anatomy of a Discourse' (1991) 32 Technology and Culture 1076.
[318] Carl Mitcham, *Thinking through Technology: The Path between Engineering and Philosophy* (University of Chicago Press 1994).

3.1 Patents as technological urform

It is easy to capture technology as an instrument through a description of everyday use of technological tools. 'I open my laptop and start to write,' suggests that the computer I use for writing exists for me to create something.[319] It is an instrument I use to achieve a precise and predetermined cause. I can provide a more technical explanation from the functions of a portable computing device and its programming, but additional details do not seem to portray a change in function. The focal point of an instrumental account of technology is to describe the application of a tool that does not alter with a change of level of abstraction with which we describe it. A more detailed description of a tool may affect choice of categories it falls into, yet this does not alter the nature of a technological object for the chosen cause. A computer, a pen, and a dictating machine enable for different uses to enregister thoughts, a difference I will return later, but as an instrument or a tool they all are means to an end. I can list benefits and drawbacks of each technology and prefer one over another for different tasks, say, a pen over a computer when writing a shopping list. Yet, I can see them both as instruments to my end of shopping-list-making.

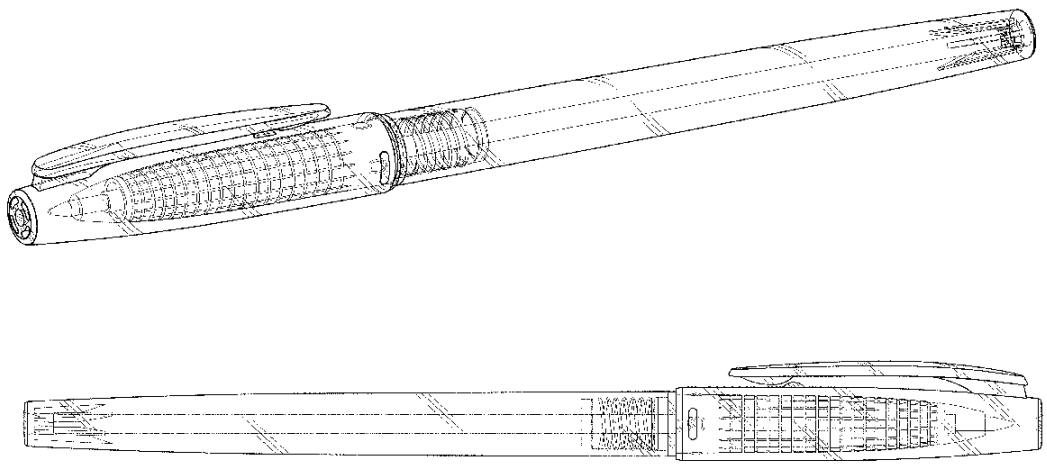


Figure 1. USD822111S1

[319] This remains but one way to conceptualise computer. For other possible definitions, see Suzana Alpsancar, *Das Ding Namens Computer* (transcript Verlag 2012); Katherine Hayles, *My Mother Was a Computer: Digital Subjects and Literary Texts* (University of Chicago Press 2005).

The question posed in the present chapter is how these instruments emerge in law. Or, in a more circumspect way, how law codes technology? As I suggest above, the semantic question of technology in law has been mostly unarticulated. This has led into a conundrum of a sort where only objects considered to be blatantly obviously technology are treated as one. Should we write of pen as a technology or not is seldom addressed and even less contemplated. Arguably, there is nothing from a legal point of view in the technological nature of a pen that would differ from a computer: both can be subject to a range of legal shelters that are codified using the exact same legal forms. With a simple patent search, it is possible to find tens of patents, for example, for fountain pen and a range of still valid patents for, say, a ballpoint pen (See **Error! Reference source not found.**). There are also rules for the safety of pens that are to be fulfilled prior to the market entry.[320] Yet, there are no law review articles from the regulation of pens or assessment of the legal problems associated with pens.[321] Albeit the example might be simplistic, I only intend to highlight the point stressed above: not all technologies are perceived as technologies, irrespective of their identical treatment in regulatory terms. This has much to do with the way technology is perceived in law as suggested above, even though it does not signal any difference in the applicable legal regulation. In short, technology in law could as well be written through pens, chairs, and clothes and they could reveal equally troublesome systemic features as more customary focus on 'new' technologies.[322] Thus, my focus in the following to characteristically 'new' technologies reveals more from my initial acceptance of the concept of technology embraced more widely in writing on positive law than any qualitative rupture in statutory terms between pens and computers, artificial intelligence and recliners.

The question with much philosophy of technology scholarship is, which of descriptions or attributes belong to technology itself. For positive law, this

[320] See e.g. ISO 11540:1993, 'Caps for writing and marking instruments intended for use by children up to 14 years of age – Safety requirements'.

[321] There is research on how different text mediums affect on the access to judicial opinions, see Kenneth Ryesky, 'From Pens to Pixels: Text-Media Issues in Promulgating, Archiving, and Using Judicial Opinions' (2002) 4 Journal of Appellate Practice and Process 353. Likewise, an attention has been paid to the manual requirements associated with using a pen and the appreciation (or lack thereof) to those wielding a pen, see Clare Cushman, 'Fountain Pens and Typewriters: Supreme Court Stenographers and Law Clerks' (2016) 41 Journal of Supreme Court History 39.

[322] See, for example, Maria Hayward, *Rich Apparel: Clothing and the Law in Henry VIII's England* (Ashgate 2009); Genevieve Bell and others, 'Making by Making Strange: Defamiliarization and the Design of Domestic Technologies' (2005) 12 ACM Transactions on Computer-Human Interaction 149. Hayward indicates the ways how legislation categorises humans through technology of clothing and Bell and others suggest that only through making design apparent for domestic technologies would allow us to perceive, for example, their gendered nature.

conundrum has seldom surfaced. On most instances when law directly attributes technology, it does so through description of qualities, properties, and attributes at first sight exempt from subjective assessment. The most traditional interface of law and technology are patents that are then used as a short-hand for technology or part thereof in, for example, rules governing technology transfer or standardisation. Yet, patent law does not define what counts as technology. Rather, patents are uses of knowledge that are inventive and have an industrial application. I will briefly deal with the view of technology as it emerges through patent legislation in a select few jurisdictions (the European Union and the United States) and their relation to international law. After this, I will introduce two derivative interpretations of patent law's notion of technology through the international technology transfer regime and in technical standardisation.

A distinctive character of patents as technology surfaces virtually everywhere; as I write this sentence, I have just finished reading a monthly blog post of the Electronic Frontier Foundation titled 'Stupid Patent of the Month' where authors lambast month's stupid patent, suggesting that '[t]his is not *technology* this is *policy*.'[323] This intimate relationship of patents and technology merits a brief note, before I simply carry on presuming that such a connection exists. To start with something, the definition for a patent provided by most patent offices refer patents as innovations rather than technologies.[324] The concept of 'innovation' and related 'invention' then is transformed into 'technology' with ease as if the two very synonymous.[325] Relatively similar nomenclature is inherited by much of the literature on patent law whether in books used commonly to teach intellectual property rights, in international instruments, or research literature geared more specifically to expert audiences. The concepts of 'patent,' 'innovation,' and 'technology' are employed interchangeably without a reference to differing extensional definitions these concepts carry. While it is possible to trace the development to earlier eras of patent protection, it is not entirely certain whether any

[323] Joe Mullin and Daniel Nazer, 'Stupid Patent of the Month: Veripath Patents Following Privacy Laws' (*Electronic Frontier Foundation*, 28 February 2019) <https://www.eff.org/deeplinks/2019/02/stupid-patent-month-patent-following-privacy-laws> accessed 14 August 2023.

[324] European Patent Office (EPO) defines patent as a 'legal title that gives *inventor* the right … to prevent others from making, using or selling their *invention* without their permission' and the U.S Patent and Trademark Office (USPTO) as 'the right to exclude others from making, using, offering for sale, or selling the *invention*.'

[325] For example, both EPO and USPTO describe their task in filing patents as working with 'technologies.' A contrasting view between technology and innovation in philosophical level has been recently argued by, for example, Vincent Blok and Philosophy Documentation Center, 'What Is Innovation?: Laying the Ground for a Philosophy of Innovation' (2021) 25 Techné: Research in Philosophy and Technology 72.

of the present authors or authorities truly refer to separate entities in their varying nomenclature.[326] Thus, I carry on applying the confusing nomenclature of patent as technology par excellence.

A patent is commonly referred to as a right to exclude others, a right to a monopoly on economic uses of innovation claimed in a patent application. As Alain Pottage and Brad Sherman suggest, the definition of patent as an intellectual property along these lines is an oxymoron

> Whatever label we might use, the idea that patents provide a right to exclude only makes sense if there is an object that can be possessed to the exclusion of others. But ideas are non-excludable and nonrivalrous: any number of people can possess the same idea at the same time, and no person's possession is diminished by the enjoyment of others. As a result, patent law has to fictionalize scarcity.[327]

Even though modern patent law understands itself as a protection of ideas, it subsumes that any innovation must have a material manifestation, illegal creation of which the patent forbids.[328] Despite all this—for a patent law and a patent lawyer—the protection of a patent expands solely to an idea that in an eventual dispute is compared to another product materialising that idea. That is precisely the reason why it is possible to speak of technology transfer or a standard-essential patent as essential technology. If those regimes were about material objects, lawyers would indicate these as sales in goods and products, not as transfers of technology or essential technology. In short, technology in law in addition from being described through its use is always immaterial and intangible. As such, technology in law, quite like invention, draws a 'distinction between the idea and the embodiment'[329] leaving it to later discretion whether there are similarities with the technological idea and diverse technological objects.

But how do patents constitute technology in law? Despite a long-standing internationalisation of patent law, it is still customary to refer to different patent systems that exist globally. Due to their sheer output of patents, the Japanese, Chinese, European, and the United States system are common points of reference in

[326] For example, Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century' (1950) 10 Journal of Economic History 1. Writing in 1950, they refer to what would these days be called 'technology' as 'industrial progress' (p.10). See also *supra* for a brief genealogy of this confusion.

[327] Pottage and Sherman (n 294) 4.

[328] Hyo Yoon Kang, 'Ghosts of Inventions: Patent Law's Digital Mediations' (2019) 57 History of Science 38, 41 refers to this as a paradox of patents.

[329] Pottage and Sherman (n 294) 22.

the patent literature.[330] The differences between these systems have a direct bearing on the scope of patentability, that is, on the ideas that can turn into technology. Some of the systems have categories of inventions that are precluded from the realm of patents altogether and there are important differences in the applied standards that define whether a patent is granted. For example, the Biotechnology Directive of the European Union (98/EC/44) bars patents for innovations that require use of human embryos, which has led into an effective limitation of the scope of applications within the European Union to circumvent these limits.[331] Outside direct limitations of the scope, there are significant differences in interpretation of similar language concerning scope between different systems. Therefore, patents granted to genes and their expression diverge despite relatively similar language barring nature itself from being patented.[332]

Despite differences in substantive cover of patents, tests used to attest patentability have been globally converging one another. This is attributable to a number of factors, but most prominently they stem from international harmonisation through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and later expansion of U.S. and European understanding of patentability through a network of bilateral investment treaties (BITs).[333] Further, the rapprochement of review standards between many developed country patent offices

[330] These four patent offices together with South Korean patent office form the IP5, a cooperative to 'improve the efficiency of the examination process for patents worldwide.' According to most recent statistics provided by the IP5, a vast majority of global patents (91%) are in force in one of the IP5 jurisdictions and even greater percentage (94%) of patent applications are filed to them. See, 'IP5 Statistics Report. 2018 Edition' (2019).

[331] Directive 98/44/EC on the legal protection of biotechnological inventions, O.J. L 213 13. The moratorium on the use of human embryos is in art. 6 of the Directive. For enforcement of said directive, see e.g. from the side of the European Patent Office, G 0002/06 (*Use of embryos/WARF*) of 25 November 2008; from the side of the Court of Justice of the European Union, see C-34/10 *Oliver Brüstle v Greenpeace eV*, ECR 2011 I-9821 and C-364/13 *International Stem Cell Corporation v Comptroller General of Patents, Designs and Trade Marks*.

[332] Justine Pila, *The Subject Matter of Intellectual Property* (Oxford University Press 2017) 12.

[333] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 *United Nations Treaty Series* 299. For changing from World Trade Organization (WTO) driven processes to bilateral agreements as a regime change, see e.g. Laurence Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29 Yale Journal of International Law 1; Henning Grosse Ruse-Khan, 'The International Law Relation Between TRIPs and Subsequent TRIPs-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities' (2011) 18 Journal of Intellectual Property Law 325.

is an outcome of negotiations between the patent offices. Thus, while the TRIPS agreement provides space for variation in the scope of patent protection, the later uses of 'flexibilities' has forced upon trade partners of the developed countries to uphold often more extensive standards of these jurisdictions. This has amounted to a significant common ground for global conditions of patentability and that common ground has been further expanded through inter-office negotiations.[334] I will first describe the conditions of patentability as they are defined in TRIPS agreement as that constitutes a widely shared common denominator for patentability. First after these general conditions for granting a patent are clarified, I will address some of the divergent interpretations still manifest in practices of the European and the United States practice. What is said in the following on conditions of patentability and, thus, emergence of technology in law applies, *mutatis mutandis*, to a growing number of jurisdictions globally.[335]

A definition of patent as a 'limited-term monopoly rights granted in respect of new, inventive, and industrially applicable inventions,' or variation thereof can be found from all books treating patents, whether international, regional, or national.[336] This definition combines two elements of patent, namely, the rights conferred (*monopoly*) and conditions for granting such rights (*new, involve an inventive step and are capable of industrial application*). These rights and conditions are codified in the TRIPS agreement under headings of 'patentable subject matter' (art. 27) and 'rights conferred' (art. 28). A uniform definition for a minimum threshold of a patent that TRIPS provides differs notably from other international treaties on industrial property or patents. It is technology-neutral and imposes a minimum duration for

[334] See, in general, Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* (Cambridge University Press 2010).

[335] Compare however to the account provided by Graeme Dinwoodie and Rochelle Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (Oxford University Press 2012). They argue that TRIPS provides national leeway to adapt intellectual property rights to domestic settings. Arguably, such rights can be entertained by those actors who command the process in general, yet there is little evidence that their trade partners 'lured' in by trade concessions and preferential treatment possess similar regulatory maneuvering space. Of such bounded rationality model for BITs, see Lauge Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 World Politics 273.

[336] In addition to the sources referred elsewhere in this present chapter, for definition see e.g. Justine Pila and Paul LC Torremans, *European Intellectual Property Law* (Oxford University Press 2016); Pirkko-Liisa Haarmann, *Immateriaalioikeus* (5th edition, Talentum 2014); Ulf Bernitz, *Immaterialrätt och otillbörlig konkurrens* (14th edition, Jure 2017); Lionel Bently, *Intellectual Property Law* (5th edition, Oxford University Press 2018); Sheldon W Halpern, *Fundamentals of United States Intellectual Property Law: Copyright, Patent and Trademark* (Kluwer 1999).

granted monopoly rights, addressing what many considered as the major limitations of the Paris Convention.[337] For example, the definition of a patent in the Patent Cooperation Treaty[338] reads as follows:

> references to a "patent" shall be construed as references to patents for inventions, inventors' certificates, utility certificates, utility models, patents or certificates of addition, inventors' certificates of addition, and utility certificates of addition. (art. 2 (ii))

Quite like uniform definition of patent, many elements of patent law that at present appear uncontested are of equally recent origin. For one, an idea of a monopoly of economic exploitation, whilst relatively uncontested at present, has in the past been a subject to an intense debate. According to Fritz Machlup and Edith Penrose, the patents were widely deemed in continental Europe as antithetical to free trade in mid-19th century.[339] These days they and the limited monopolies created by them are seen as instrumental to a declared goal of patent system to incentivise innovation and new technologies. Modern instruments of free trade from multilateral to bilateral trade treaties stress the importance of upholding patents to protect the free flow of goods.[340] Although, the legal rights conferred are the reason to seek a patent, those rights are not dealt in more detail in the following and the focus will be on what patent law declares to constitute technology, i.e., conditions for granting a patent.

TRIPS outlines a patent in a technology-neutral fashion, extending the patent protection to cover areas that were formerly subject to national discretion, such as medicine. At present, this role of excluding subject matter from scope of patentability is reserved for the flexibilities provided by the TRIPS, but unlike in the past, these cannot be full categories of ideas (such as pharmaceutical patents) but must fall within the frame of one of the provided exceptions. In this sense, the idea of technology has become universal together with the framework of patents—even if something is excluded from patentability on grounds of, say, public health or public morality, its nature as technology is retained and that nature is articulated through the patent law. A question whether something is patentable is defined

[337] Hiroko Yamane, *Interpreting TRIPS: Globalisation of Intellectual Property Rights and Access to Medicines* (Hart 2011); Paul Goldstein, *International Intellectual Property Law: Cases and Materials* (3rd edition, Thomson Reuters 2012) 388–89.

[338] Patent Co-operation Treaty (with annexed Regulations and procés-verbal of rectification of the French original of the Treaty dated 14 June 1972), 1160 United Nations Treaty Series 231 [hereinafter PCT].

[339] Machlup and Penrose (n 326).

[340] See e.g. *2012 U.S. Model Bilateral Investment Treaty* provided by Office of the United States Trade Representative.

through substantive conditions of the proposed innovation or technology. These conditions are assessed using three tests of patentability: novelty, inventive step, and industrial applicability.[341] Additionally, there are requirements set for the patent application itself, most notably extent of disclosure which has a direct bearing on the scope of the patent protection and, through that, to contours of technology. The conditions of patentability in TRIPS align with those found from the U.S. and the European systems, albeit with somewhat different names. It bears to note, however, that universally shared principles does not equate to harmonised interpretation of those principles.[342] In this sense, as with much law, the devil is in the detail.

The U.S. patent system is seen as more liberal than its European counterpart in its evaluation of the conditions of patentability and more in general awarding patents.[343] Within the U.S. system, the three steps to assess are novelty, nonobviousness, and utility that correspond *grosso modo* to those of TRIPS.[344] This, nonetheless, belies at times notable differences in interpretation of what constitutes technology. These differences emanate from domestically grounded interpretation of the conditions for patentability and therewith technology. In recent years, nature of business methods patents or patentability of biotechnological innovations have been but some signs of these differences between the U.S. and the European patent system. From the vantage point of technology, the expansive case law on patents and their opposition is incisive. The construction of prevailing technological level through mnemonic tools such as 'person having ordinary skills in the art' (PHOSITA) synchronous to the filing of a patent and its contrast to existence of 'prior art' operating in a different temporal framing construct a technological ether from which innovations and new technologies emerge.[345] Simultaneous presence of multiple similar technologies that all can amount to technology in the same patent

[341] TRIPS art. 27.1.

[342] Peter Drahos, 'Cooperation, Trust and Risk in the World's Major Patent Offices' (2009) 36 Science and Public Policy 641.

[343] Standards of other patent offices is a common point of contention in patent literature with standard being either too stringent or too lax, leading to claims of protectionism against more innovative trade partners or accusations of ballooning number of patents that contributes to creation of patent thickets and general impediments for the market entry. In general from the problems with patent review, see Robert Merges and Joseph Farrell, 'Incentives to Challenge and Defend Patents: Why Litigation Won't Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help' (2004) 19 Berkeley Technology Law Journal 1.

[344] The concepts used in the U.S. are cited as synonymous to those found in the TRIPS within a footnote accompanying enumeration of conditions of patentability.

[345] On the use of said standard in the U.S. patent system, see Jonathan Darrow, 'The Neglected Dimension of Patent Law's PHOSITA Standard' (2009) 23 Harvard Journal of Law & Technology 227; Ryan Abbott, 'Everything is Obvious' (2019) 66 UCLA Law Review 2.

system does appear, at first sight, as a problem of co-ordination that ought to be sorted out at the patent office.

A good illustration from impact of context in constructing both prior art and the PHOSITA standard is patent dispute on the U.S. Patent No. 7,844,915 assigned to Apple Inc.[346] The patent in question concerns software or features of graphical user interface (GUI) of Apple's mobile devices. The two claims of the '915 patent concern method of 'scroll or gesture' and 'rubberbanding' that were part of a larger patent litigation between Apple and Samsung.[347] Originally filed in 2007 and granted in 2010, the '915 patent was during the litigation process called for review as new prior art was found, most notably a prior patent granted to AOL/Lira that seemed to cover similar claims as those raised by Apple in its patent.[348] An *ex parte* request for re-examination of the patent led in 2013 to rejection of all claims of the patent, a decision that was later twice affirmed by the Board of the USPTO in a rehearing process.[349] Finally, the patent revision was brought before the Court of Appeals for the Federal Circuit, whose decision from 2017 affirmed-in-part, vacated-in-part, and remanded the patent claim. Argumentation of the Federal Circuit is instructive of the great uncertainty of technology from the vantage point of patent law, an uncertainty all but lost once the technology gains a settled status.[350]

The Federal Circuit in its decision on '915 patent divides its argumentation in two. First it addresses claim for 'scroll or gesture.' At the heart of the Federal Circuit's analysis and Apple's contestation is what 'two or more' means. According to Apple, '"two or more" must be interpreted as an atomic unit, meaning that two-, three-, four-, and five-input points must *all* be interpreted as gestures,' a claim that the Board of the USPTO had denied. The Federal Circuit agrees with the construction of the 'two or more' devised by the Board, suggesting that 'Apple's construction would replace the word "or" with "and."'[351] In contrast to this, with the

[346] Andrew Platzer and Scott Hertz, 'Application programming interfaces for scrolling operations', U.S. patent 7,844,915 issued on 30 November 2010.

[347] For a brief summary of the long-standing dispute surrounding this and other patents, see Joe Mullin, 'Appeals Court Revives Apple's Patented "Rubber Banding" Tech Because of One Small Tweak' (*Ars Technica*, 17 April 2017) <https://arstechnica.com/tech-policy/2017/04/appeals-court-revives-apples-patented-rubber-banding-tech-because-of-one-small-tweak/> accessed 14 August 2023.

[348] Luigi Lira, 'Controlling content display', International patent number WO 03/081458 A1, issued on 2 October 2003.

[349] United States Patent and Trademark Office, 'Ex parte reexamination', Control no. 90/012,332 for Patent no. 7,844,915 of 26 July 2013. The USPTO Board's first decision, *Ex Parte Apple, Inc.*, No. 2014-007899, 2014 WL 7171965 of 9 December 2014. Upon Apple's request, the Board reheard the case, *Ex Parte Apple, Inc.*, No. 2014-007899, 2015 WL 5676869 of 24 September 2015.

[350] *In re Apple Inc.*, 2016-1402 (Fed. Cir. Apr. 14, 2017).

[351] ibid. 6.

'rubberbanding' claim, the Federal Circuit ends up disagreeing with the interpretation provided by the Board. It had argued that Apple's construction of 'rubberbanding "simply seeks to control the movement of scrolled content,"' a definition with which the Federal Circuit disagreed. According to it, the patent claim for rubberbanding did not cover a situation where content slides forward but only its sliding backwards. The Federal Circuit found this to be a nonobvious innovation, for which 'the Examiner did not cite any evidence to support the proposition that selecting the direction of the scrolling would be within the level of ordinary skill.'[352] In short, decisive for an emergence of technology was the choice of expression in the initial patent filing and the construction of fictious person with ordinary skills.

Irrespective of how one sees the inventiveness of a software controlling scrolling of a document on a touch screen, the Federal Circuit's decision *in re: Apple Inc* is hardly an outlier in the larger field of patenting. Construction of technology in law is a semantic and a fictious event. Quibbling over semantics of 'two or more' may at first sight appear far-flung from any notion of technology, yet mastery over the language of patents is a cornerstone of the patent system. In patent filings, technology is defined using technical language that seeks to betray its open-ended and context-bound nature.[353] As Bowker shows in his case study of Schlumberger's patents on electrical logging, patents serve as a device among many in a company's attempt to reconfigure a field of oil field logging. According to him, when successful, the material reality bends to the story of invention told through patent documents. On a more individual level, Greg Myers details the differences between scientific argumentation and claim-making in patents.[354] He suggests a foundational difference in the way of communication that also Bowker briefly notes on his part: where science belabours to establish continuity between past research and the reported results, patenting seeks to redraw a map to clearly pinpoint a new territory where no one has entered before. Seen in this light, Apple's insistence on novelty and non-obviousness of its patent appears in a different light; it does not seek to suggest that the idea would be outlandish or even particularly difficult to grasp. Rather, Apple is only arguing that it has staked a claim on a territory others surround but have never entered. The technology as such is contingent on earlier patents, not on earlier knowledge or even basic precepts of logical thinking.

The possibility of such charting is possible due to a legal fiction employed to recognise novelty. In the U.S. system, the standard is that of 'ordinary person' as

[352] ibid. 10.

[353] Geof Bowker, 'What's in a Patent?' in Wiebe Bijker and John Law (eds), *Shaping Technology/Building Society: Studies in Sociotechnical Change* (MIT Press 1992).

[354] Greg Myers, 'From Discovery to Invention: The Writing and Rewriting of Two Patents' (1995) 25 Social Studies of Science 57.

indicated by the Federal Circuit *in re: Apple Inc*. In assessing what is obvious or non-obvious,

> the decisionmaker confronts a ghost, i.e., "a person having ordinary skill in the art," not unlike the "reasonable man" and other ghosts in the law. To reach a proper conclusion under § 103, the decisionmaker must step backward in time and into the shoes worn by that "person" when the invention was unknown and just before it was made. In light of all the evidence, the decisionmaker must then determine whether the patent challenger has convincingly established, 35 U.S.C. § 282, that the claimed invention as a whole would have been obvious at that time to that person.[355]

As Myers suggests, the idealised person skilled in the art is 'by definition ordinary in knowledge,' while being extraordinarily capable to 'juxtapose widely separated discussions, and [] draw analogies between them.'[356] Following John Noonan's work on law's masks, the PHOSITA appears to function as a mask that is capable of both concealing and exposing ulterior motives for upholding or changing the patent law.[357] While the PHOSITA standard is often argued to develop hand-in-hand with advancement of technological competence, in arguments over technological merits of a direction of a swipe the role of PHOSITA seems to be different. It ensures upholding the system of patents and a trust in limited time monopoly that was the public's promise to an innovator from advancement of technology – even if that technology amounts to replacing a right/down-to-left movement into a right/down-to-left/up movement on a screen of a mobile device.

The PHOSITA standard and the Apple's rubberbanding patent provide an insight on the differences between the U.S. and the European patent system that in terms of legal texts appear notably similar. According to the art. 52 of the European Patent Convention, patents shall be granted to all inventions 'provided that they are new, involve an inventive step and are susceptible of industrial application.'[358] Before 2011 and the America Invents Act, there were differences past semantic interpretation between the two systems when it comes to patentability, most notably with regard to assessment of prior art with regard to filing date.[359] Whereas before

[355] *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1566 (Fed. Cir. 1987).
[356] Myers (n 354) 86.
[357] Noonan (n 46).
[358] *Convention on the Grant of European Patents (European Patent Convention)*, 1065 United Nations Treaty Series 16208.
[359] Leahy-Smith America Invents Act, Public Law No. 112-29, 125 Stat. 284 (2011). For a brief summary of initiated changes, HLR, 'Leahy-Smith America Invents Act' (2012) 125 Harvard Law Review 1290.

America Invents Act, the U.S. recognised a twelve-month grace period during which no new publicly available knowledge would count as prior art, there has not been a similar system in the use within the European Patent Convention.[360] At present, both systems use 'first-to-file' with filing date marking the effective date when prior art assessment stops. Despite growing similarity in terms of process, there are notable differences in ways the two patent systems assess patentability and technology itself, some of which can be spelled out through the European Patent Office's decision on Apple's rubberbanding patent.

The decision of the Boards of Appeal of the European Patent Office is from June 2018, more than a year after the U.S. Federal Circuit decision.[361] The arguments of Apple in the Board of Appeal are relatively similar to ones it employed before the Federal Circuit: they rely on semantics and limited claims for novelty and inventiveness. Thus, any difference in the outcome amounts from different rules to construct semantic content of the patent and/or different constructing of the expected level of a person working in the specific field of technology—in a word, concerns disconnected from the technical question(s) of technology. The Boards of Appeal adopts in the case clearly a more restricted interpretation of patent's scope as well as requires more expansive knowledge from the 'person skilled in the art.' For example, Apple does put forward a claim that it found meritorious before the Federal Circuit. In the third auxiliary request Apple's claim contains a 'new feature G) [which] requires that the second translation's direction is opposite to the first one.'[362] With regard to this new feature, the Board of Appeal agrees with the Federal Circuit that this, indeed, does constitute novelty over the prior art: direction is new and not something claimed in the AOL/Lira patent. Thus, when it comes to semantic construction of the claims, there appears little divergence between the two systems.

The Board of Appeal begins the paragraph following its finding of novelty with ominous '[h]owever, as to innovative step.' It argues that the reason for the choice depends primarily on 'subjective user preference,' and further,

> If such user preferences or studies mandate the implementation of opposite direction as regards the first and second translations in the framework of an

[360] This difference actually surfaced in one of the myriad streams of the Apple's patent litigation, as a German patent court declared a different rubberbanding patent invalid due to prior art considerations as the then CEO of Apple, Steve Jobs, had in a press conference showed said rubberbanding technology and first after that the company had sought for patent protection. While the patent held in the U.S. due to grace period, in Europe technology was not new because of the prior art shown by the company and its CEO itself. See, Bundespatentgericht, 26.09.2013 – *2 Ni 61/11* (EP).

[361] Board of Appeal of the European Patent Office, *T 1459/15 – 3.5.05*, 21 June 2018.

[362] ibid. 24.

> objective problem posed, the person skilled in the field of GUI design would have no difficulties in replacing a right/down-to-left movement into a right/down-to-left/up movement.[363]

On these grounds the Board of Appeal finds there to be a missing inventiveness with this new function. Thus, while the different patent offices might share rules on semantic construction their 'ghosts in the law' result in different technologies being validated. To tackle such discrepancies in the outcomes and to universalise technology, patent offices have sought to unify the processes of granting a patent, forming networks such as the Global Patent Prosecution Highway (GPPH) or a similar fast-track process adopted between the five largest patent offices (IP5).[364] The outlined goal of the GPPH is to provide more robust patents while providing ease and economy to inventors. The latter goal is remarkably similar to that of the Patent Convention Treaty in providing ease of access to a number of national patent offices, whereas the former function appears a more novel approach to create uniform scope of patents.

The work to unify assessment standards of patent offices has been on-going for two decades. Originally initiated as a test process between Japan's patent office (JPTO) and its U.S. counterpart in 2004, a patent prosecution highway (PPH) has since expanded to all corners of the globe with more than forty partners. The idea behind the PPH is simple. The patent offices promise a co-operation in their assessment of patentability with the office of first filing (OFF) forming first an opinion on the merits of the filed patent. This opinion of the OFF on patentability together with the technical information gathered will be submitted to office of second or later filing (OSF / OLF). While the opinion of the OFF is not binding on OSF / OLF, the PPH process promises a fast-track examination of the patent application in OLF. While there were initially concerns over eroding assessment standards and independence, at present all major patent offices are part of one or the other system. Also, the process seems to lead to a notably high grant rate for the patents in offices of later examination. For example, Australian, Danish, Moroccan, Malaysian, Russian, and Singaporean patent offices granted patent in all instances during the first half of the 2018 when acting as offices of later examination. Yet, it seems likely

[363] ibid. 25.

[364] There is relatively little in terms of research on different PPH initiatives globally. A list of existing PPH agreements as well as references to the multilateral agreements can be found from 'PCT-Patent Prosecution Highway Program (PCT-PPH and Global PPH)' (*WIPO*, 19 January 2023) <https://www.wipo.int/pct/en/filing/pct_pph.html> accessed 14 August 2023. For the GPPH initiative, see 'PPH Portal' (*PPH Portal*, 28 July 2023) <https://www.jpo.go.jp/e/toppage/pph-portal/> accessed 14 August 2023.

that even more than the GPPH, current co-operation between the IP5 is driving uniformity of technology globally.

The IP5—or the European, United States, Japanese, Chinese, and Korean patent offices—are patent offices with most patent applications and granted patents globally with a notable margin. The goal of their co-operation is according to a vision updated in 2017:

> Patent harmonization of practices and procedures, enhanced work-sharing, high-quality and timely search and examination results, and seamless access to patent information to promote an efficient, cost-effective and user-friendly international patent landscape.[365]

The new vision added precisely a goal to harmonise patent practices and procedures whereas the old vision serving for the first ten years of co-operation focused on limiting the workload of offices. An increased focus on harmonisation through practices and procedures suggests that the patent offices would not like to encounter in the future divergent patent protection for same technology. In short, the goal seems to be to create a uniform standard for technology globally—a vision that is backed by the dominance of the IP5. How well does this uniformity align with flexibilities provided by TRIPS agreement? And more pertinently, does a global technology take into consideration local conditions that in the past has enabled adaptations either through barring or granting a patent?

Traditionally, the answer for local adaptability of the patent regime is sought from the 'flexibilities' provided by the TRIPS agreement.[366] According to TRIPS, a technology may be denied a protection and commercial application when it is against *ordre public*, which as an open category provides widest scope to adjust technology to local conditions. The other exceptions to universal condition of patentability outlined in the Article 27(3), while important, are much more muddled and confined.[367] The example of India is often used to highlight importance of flexibilities for local technological needs. Yet, as Jodie Liu indicates the use of

[365] 'About IP5 Co-Operation' (*fiveIPoffices*, no date) <https://www.fiveipoffices.org/about> accessed 14 August 2023.

[366] See e.g. Peter Drahos, 'Bits and Bips: Bilateralism in Intellectual Property' (2001) 4 Journal of World Intellectual Property 791; Susan Sell, 'TRIPS-plus Free Trade Agreements and Access to Medicine' (2007) 28 Liverpool Law Review 41; Peter Yu, 'TRIPS and Its Discontents' (2006) 10 Marquette Intellectual Property Law Review 369.

[367] Takafumi Kurosawa, 'Afterword: Technology Transfer and the Competitive Advantages of Regions' in Shigehiro Nishimura and Pierre-Yves Donze (eds), *Organizing Global Technology Flows* (Routledge 2014).

flexibilities or mandatory licensing to adjust technology for local needs might still curtail the realm of non-technological solutions and achieve little in terms to re-defining technology and more in terms of re-appropriating technology.[368] Also, while India has upheld its independence to define technology within the limits of TRIPS flexibilities, a recently negotiated Japan-India patent prosecution highway suggests that streamlining patents globally is within the interests of India as well. Arguably, the streamlining of the patent prosecution globally creates expert network within and between administrators as hailed by Anne-Mary Slaughter.[369] Whether the formed epistemic communities with a relatively uniform vision of technology take into account interests of everyone or only serve narrowly defined technocratic ends to the detriment of wider *demos* is a question I look more closely below.[370]

The international patent system that is commonly referred to as highly fragmented has in recent years been subject to growing uniformity. A close co-operation between patent offices and a relatively uniform statutory framing of patents appears to suggest that where in the past historical causalities emanating from 'nonrepetitive and irrevocable historical events ("actors," "processes," and transformations of "institutions)'[371] might have provided a useful framing of technology and its use, the present with calls for uniformity and streamlining give little place for these historical contingencies. Simultaneously with the increase of importance of the five largest patent offices, the number of patent offices participating in multilateral patent prosecution highways increases. The dominance of the IP5 in the global patent landscape leads to increasingly heteronomous patent offices elsewhere as the centripetal force of the practices in the IP5 grows stronger; developing standards for patenting and patent assessment that diverge from those of the IP5 is counter-productive for as long as 94% of all patent applications are filed on those five offices. Consequently, the vision for technology that the patents embody is universalised. This can lead to even greater technological path-dependency as well as lead to embracing technology that is cheap to produce globally due to uniform protection, while paying little attention to suitability of such

[368] Jodie Liu, 'Compulsory Licensing and Anti-Evergreening: Interpreting the TRIPS Flexibilities in Sections 84 and 3(d) of the Indian Patents Act' (2015) 56 Harvard International Law Journal 207.

[369] Slaughter, *A new world order* (n 9).

[370] On concept of epistemic communities, Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 International Organization 1. A widely read critique of such technically minded rule in international law is provided by Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Modern Law Review 1.

[371] Kurosawa (n 367) 245.

technology to diverse climate and societal conditions wherein technologies are employed.

An outcome from the closer alignment of the largest patent offices is a view of technology that seeks to escape its contingencies. In an attempt to create a uniform administration of patentability, the context within which technology emerges is neutralised. The technological ether from which new technologies emerge as inventive or nonobvious solutions is understood in a single, precisely bounded context shared globally. This context is spelled out in detailed analysis of courts and guidelines of patent offices. A change in the context changes also what counts as technology. This highly contingent and mutable standard is readily recognised in patent law, but the contingency is chiefly perceived as a function of economical optimisation between public good and private interest. Therefore, the technology itself is already on this analysis seen as a relatively acontextual and a global fact, with prudence of different decision on patentability lying in difference of underlying economic analysis. Patent co-operation between the patent offices harmonises also the economic considerations to follow a model of efficacy to end user.

I will next indicate some ramifications the elevation of technology to an acontextual and global condition has. Through examples drawn from technology transfer and standardisation, I suggest that on these realms, technology functions as an instrument for realisation of holistic goals outlined for law. In standards, I will focus on safety standards and in technological transfer I look more closely at technological assistance as outlined in international environmental law. Through these examples I indicate how the essentialised technology created through patent law enables law to mobilise technology to the pursuit of varied goals from safety to environmental protection without having to consider the contexts where laws are ultimately applied. I argue that such universal and acontextual technology remains to be the international law's preferred understanding of technology at present.

3.2 Technology as an instrument

In the previous chapter I laid out an account of patents as a foundational form for 'technology' in law. I suggested that patents as encoders of technology have mutated notably since the inception of the TRIPS treaty in the 1990s. Since then, patenting has evinced ever-greater calls for uniformity in procedural and substantive terms. The substantive rapprochement has sought to universalise what counts as technology, while the procedural harmonisation has focused on who, where, and how gets to decide whether a technology is worthy of patent protection. Chronologically first of the two was the substantive harmonisation, which followed quickly after TRIPS, when the advanced economies moved from multilateral negotiations to bilateral negotiations. Instead of realising the flexibilities on a global scale, the U.S. and the European Union in particular, established a set of more stringent intellectual property protections through bilateral investment treaties (BITs).[372] After the substantive harmonisation had been established on this higher level, the procedural harmonisation followed in form of patent prosecution pathways, bilateral agreements between patent offices to fast-track patent applications already submitted in the other patent office. A global uptake of these patent prosecution pathways has continued both in multilateral and bilateral terms, but with a clear directionality: the procedures and patents flow from centre to periphery with more than 90% of all patents worldwide coming from just five jurisdictions.

This tendency to universalise patents and the prior entanglement of technology, inventions, and innovations to patent is what leads to two excurses that constitute the present chapter. I look more closely on legal phenomena that are intimately bound to patents and technology: technology transfer and standardisation. Both are areas of vast scholarly literature of often intricate detail and whole bodies of critical accounts on their respective merits and demerits. My focus with both is on how these regulatory systems, especially on international level, embrace the vision of universal technology that is privately generated and secured through patents.[373] A vision of universal technology of private providence that can be carried across borders to promote development, environment, and safety is at my focus. In the first subsection, I look at origins of technology transfer in international law and the gradual constitution of technology as a chiefly private concern. On this narrative, technology

[372] A summary as well as a database is provided in Jean Frédéric Morin and Jenny Surbeck, 'Mapping the New Frontier of International IP Law: Introducing a TRIPS-plus Dataset' (2020) 19 World Trade Review 109.

[373] For a forceful critique of private as innovator in economics, Mariana Mazzucato, *The Entrepreneurial State: Debunking Public vs. Private Sector Myths* (Anthem Press 2014).

is perceived as an easily transferrable antidote to ills of poverty, environmental degradation, and human safety and security. Simultaneously, the universality of technology enables to divert attention from eventual failures in the process to other reasons, most notably to the mismanagement of those receiving the technology.

The following two subsections remain inside the confines of positive law with a markedly internal view on law and technology. As such, they do not attempt to elucidate a more grounded account of technology, but instead focus on charting constitution of 'technology' in law, especially international law. The intent of chosen approach is to indicate how international law operates technology as a neutral and chiefly empty container that can be disposed to serve other goals of international law articulated in more markedly 'political' fashion. As such, they illustrate technology's capacity to act as a universal antidote or a tool to secure international law's ultimate goals of peace and security; a neutral medium whose function is hardly noticed and even less analysed. This is certainly not unique to technology as numerous recent studies on law's appreciation of other complex phenomena has shown,[374] yet this does little to reduce the significance of technological universalism and instrumentalism. A challenge to the view of law as a neutral backdrop on which (international) law operates is reserved for the Second Part of this dissertation.

3.2.1 Transferring development through technology

In this section I will explore how technology has come to occupy a central place in global efforts to curtail climate change and the countless mutations that has taken place in the process of technology transfer from the early years of the United Nations to the present. I argue throughout that within the technology transfer narrative, a profound change took place without much of an attention: technology, or at the very least the capacity to control technology, moved from states to private actors. Seen against the backdrop of a wider law and development debate, the technology debate is seen a precursor and a testament of the difference drawn between the developed and developing states. In a curious turn of events, the advancement of a state was perceived through its technological capacity, while the technology itself was

[374] For complex responses to climate change, see Julia Dehm, 'International Law, Temporalities and Narratives of the Climate Crisis' (2016) 4 London Review of International Law 167; Steve Keen, 'The Appallingly Bad Neoclassical Economics of Climate Change' (2021) 18 Globalizations 1149. For a failure of banking regulators understanding banking regulation, see Ranjit Lall, 'From Failure to Failure: The Politics of International Banking Regulation' (2012) 19 Review of International Political Economy 609.

separated from states' command. I suggest that quite like other means that reformed or reshaped the modern state, technology spurred a special vision for a state that was largely dictated by private possessors of technology. Drawing a line from early decolonisation debates surrounding state responsibility from past private commitments to New International Economic Order (hereinafter NIEO), and beyond, the present section illustrates how technology that never truly materialised as a matter for public international law turned into decisive element of a state—the foundational unit of international order. As such, the present section illustrates the power of technology to conceal even at times significant mutations in the legal understanding of states, while at the same time remain virtually beyond regulation as inherently a matter for private domain.

Most accounts on the transfer of technology for development locate its origins in the early post-War years' program of technical assistance within the United Nations prompted by U.S. President Harry Truman's inaugural address of 1949.[375] In his speech, Truman called for a 'new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas.'[376] For him the purpose of technical assistance was developmental in a narrow sense, seeking to eradicate poverty and suffering from underdeveloped areas of the world. But marked was also what it was not. The call for technical assistance was never about equality between the developed and developing world. Rather, it was a call to provide technological modernity—often conditional to support of free markets or, at the very least, opposition to communism.[377] Arguably, the developmental promise of technical would not change much even by changing the lens to that of the Soviet or Chinese assistance—yet, this is an argument that shall not be entertained here for the sake of brevity. Further still, the technical assistance promulgated in the post-War years was hardly a novelty even at the time. Truman's proposal echoed technical assistance provisioned through European colonial powers starting from the late 19th century and those of the League of Nations during the inter-war years and Americans own experiences as colonisers of the Philippines.

[375] Harry S Truman, 'Inaugural Addresses of the Presidents of the United States : From George Washington 1789 to George Bush 1989' (*The Avalon Project*, 20 January 1949) <https://avalon.law.yale.edu/20th_century/truman.asp> accessed 14 August 2023.

[376] idem.

[377] Moyn, *Not Enough: Human Rights in an Unequal World* (n 198). Moyn provides an argument for equality rather than sufficiency as a proper standard for rights, outlining the long development from the Jacobin state of late 18th century to the present in terms of social justice—a development increasingly highlighting sufficiency rather than limits to inequality.

A growing bulk of scholarship on development in recent years has underlined both the continuities and disruptions in concepts of development and of technical assistance from the colonial era to early post-War years and beyond.[378] In an influential early revisionist account of development, Cowen and Shenton argue for a mid-19th century origins of the concept.

> When we review the Saint-Simonians, Comte, Mill, and Newman as a possible progenitor of underdevelopment, our purpose is to reveal how a theory of trusteeship was built into the construction of development before 1850.[379]

The early accounts of underdevelopment and calls for progress led to an emergence of a form of assistance that sought to lift 'backwards' people or 'savages' to higher prongs on the civilizational ladder.[380] Within the British Empire, this idea of technical assistance was first articulated at the turn of the 20th century.[381] Contemporarily, the Dutch colonial administration construed a set of 'ethical policies' geared towards development. These policies stressed the import of small-scale technological advancements developed jointly by the European 'tutors' and the local population.[382] Alongside creating models for future technical assistance, the

[378] In addition to sources cited below, see Joseph Hodge, 'Science, Development, and Empire: The Colonial Advisory Council on Agriculture and Animal Health, 1929-43' (2002) 30 Journal of Imperial and Commonwealth History 1; Margot Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice' (2013) 62 International and Comparative Law Quarterly 31; Arpita Gupta, 'Law and Development: A History in Three Moments' in Ugo Mattei and John Haskell (eds), *Research Handbook on Political Economy and Law* (Edward Elgar 2015); Guy Fiti Sinclair, 'Forging Modern States with Imperfect Tools: United Nations Technical Assistance for Public Administration in Decolonized States' (2020) 11 Humanity 54.

[379] Michael Cowen and Robert Shenton, *Doctrines of Development* (Routledge 1996) 9.

[380] In general, from the technology as a measure of human development and the U.S. attempts to employ technology to modernise, see Michael Adas, *Machines as the Measure of Men: Science, Technology, and Ideologies of Western Dominance* (Cornell University Press 1989); Michael Adas, *Dominance by Design: Technological Imperatives and America's Civilizing Mission* (Harvard University Press 2006).

[381] Joseph Hodge, 'Writing the History of Development (Part 2: Longer, Deeper, Wider)' (2016) 7 Humanity 125, 130ff.

[382] Suzanne Moon, *Technology and Ethical Idealism: A History of Development in the Netherlands East Indies* (CNWS Publications 2007). Moon argues that '"development of the native peoples" took an entirely different direction, consistently favoring the small over the large.' (at 3), suggesting an early emergence of differing approaches to technology among providers of 'development.'

colonial administrations created a class of development experts that would later occupy the ranks of international organisations.[383]

On the international plane, the colonial development experts first found shelter in the work of the League of Nations. Within the League system, technical assistance for development emerged under a number of guises. First, and most evidently, the Mandate System created to govern the former colonies of Germany and the Ottoman Empire was premised on an idea of sacred trust of civilization to promote development of peoples living within the Mandatories under the tutelage of advanced nations.[384] Second, through the specialised agencies akin to the International Labour Organisation (ILO), expanding the European social policies of worker protection outside Europe.[385] And finally, through the special League programmes of technical assistance that were conditional on the League member states asking for such assistance.[386] To fulfil many of these tasks, the League employed former colonial administrators or European social reformers. They carried their visions of development inherited from the years of work in constructing either European welfare state or colonial welfarist policies to their newly minted international functions. The work of the international civil servants of the League and the last colonial administrators was formative for the developmental ideas of the post-War technical assistance.[387]

[383] Joseph Hodge, 'British Colonial Expertise, Post-Colonial Careering and the Early History of International Development' (2010) 8 Journal of Modern European History 24. For the role of French colonial administrators in shaping the European Economic Community's development policies, see Veronique Dimier, *The Invention of a European Development Aid Bureaucracy: Recycling Empire* (Palgrave Macmillan 2014) ch 2.

[384] League of Nations, Covenant of the League of Nations, 28 April 1919, art. 22. See further, Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) ch 3.

[385] Sinclair (n 278).

[386] Margherita Zanasi, 'Exporting Development: The League of Nations and Republican China' (2007) 49 Comparative Studies in Society and History 143.

[387] See e.g. David Owen, head of the Economic Affairs Department at the United Nations. A British civil servant who participated, among others, in the British—ultimately failed—attempt to convince India to join the Second World War (the Cripps mission) with a promise of freedom from any post-war arrangements that in many analyses was foundational for later Indian independence (see *Statement and Draft Declaration by His Majesty's Government with Correspondence and Resolutions Connected Therewith of 30th March 1942* for content of the proposal promising self-government and status as a dominion under crown akin to Canada).

The post-War technical assistance[388] was promulgated on familiar notions underpinning all prior developmental programmes: through improvement of technological competences of underdeveloped people and areas, the international community could better uphold peace and security and improve health of all peoples.[389] While some readily recognised the need to focus on co-operation rather than one-sided tutelage or transfer of technology, the development spurred by the Point Four programme and much of the other bilateral aid focused on

> large factories, a mechanized agriculture, the rapid exploitation of natural resources, and the making of engineering infrastructure (especially large electrical power projects) … ignor[ing] and misunderst[anding] local environments, both natural and cultural.[390]

Even though such directly negative reading of all technical assistance through large scale projects has been critically assessed lately, these early failures of the technical assistance transformed its landscape. As some Western observers noted in the aftermath of the 1963 UN conference on application of science and technology for the benefit of the less developed areas, the focus of technical assistance ought to move from purely technical questions to more widely social ones.[391] A statist approach could only ever improve the lot of human resources of the less developed areas, therewith creating a fertile soil for later introduction of private technology to truly modernise these areas. Highlighting small-scale projects and local knowledge—a Schumacherian 'intermediate technology'[392]—was however merely a return to practices promoted by the Dutch colonial administration's ethical policies or many of the League's reform missions.

While the narrative of technical assistance often underlines the import of states and international organisations as promulgators of aid, many of the significant changes in the landscape of development took place either through or because of

[388] Here technical assistance is used to describe both what initially were titled the *regular technical assistance* programmes undertaken solely under purview of the United Nations as well as *expanded programme of technical* assistance wherein different specialized agencies acted jointly with the United Nations. On the differences of these, see Üner Kirdar, *The Structure of United Nations Economic Aid to Underdeveloped Countries* (Martinus Nijhoff 1966).

[389] David Owen, 'The United Nations Program of Technical Assistance' (1950) 270 Annals of the American Academy of Political and Social Science 109.

[390] Carroll Pursell, 'The Rise and Fall of the Appropriate Technology Movement in the United States, 1965-1985' (1993) 34 Technology and Culture 629, 631.

[391] Eugene Stanley, 'Technology and Development' (1963) 142 Science 216.

[392] EF Schumacher, *Small is Beautiful* (Harper and Row 1973). See especially part three concerned with the question of the Third World.

private actors.[393] The focus on states is however understandable: monies flowing to developing countries, and especially to the least-developed countries, were provided by the governments of developed countries. Despite the early interest after Truman's Point Four to device development aid through multilateral means, the political realities of the Cold War soon changed the focus to bilateral aid. According to the OECD statistics from the mid-1960s, the total aid provided by developed countries was around ten billion U.S. dollars of which some 85 percent was bilateral state aid or, to a lesser extent, private investments.[394] The political underpinnings of the bilateral development aid were in striking contrast to the professed neutrality of the UN technical assistance.

> (d) The technical assistance furnished shall (i) not be a means of foreign economic and political interference in the internal affairs of the country concerned and shall not be accompanied by any considerations of a political nature; (ii) be given only to or through Governments; (iii) be designed to meet the needs of the country concerned; (iv) be provided, as far as possible, in the form which that country desires; (v) be of high quality and technical competence.[395]

Unlike the UN technical assistance, bilateral assistance or aid came often with requirements and attached strings—or economic and political attachments—that were quickly seen by the leaders of the former colonies as colonialism by other means. According to them, while the former colonies had gained their political independence, the command of trade and monetary system by their former colonial rulers subjected the newly independent states to economic vassalage.[396] This criticism covered numerous concerns over trade and finance, but the ones on unfair trade practices of transnational corporations are most salient for the formulation of later technology transfer practices. What is notable of these concerns is that they were articulated as problems of inter-state relations (i.e. public international law)

[393] According to Vanessa Ogle this is a more general tendency in recent development aid scholarship to focus on states, a fact she calls for re-assessment. See Vanessa Ogle, 'State Rights against Private Capital: The "New International Economic Order" and the Struggle over Aid, Trade, and Foreign Investment, 1962-1981' (2014) 5 Humanity 211; Vanessa Ogle, 'Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s' (2017) 122 Am Hist Rev 1431.

[394] Figures cited in Ritva Alanaatu, *Suomi Ja Kehitysyhteistyö: 1967-8 = Finland Och Utvecklingssamarbete: 1967-8* (Ulkoasiainministeriön kansainvälisen kehitysavun toimisto 1968).

[395] UN GA, 'Resolution on Technical assistance for economic development', UN Doc. A/RES/200(III)

[396] Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (Nelson 1965).

rather than relations between a state and a corporation (i.e. private international law), and found solutions in regulating the state, rather than the private behaviour.

On the other side of the development divide, for example in the Nordic countries, there was a chorus of voices in favour of private investments and bundling up technical assistance with manufactured goods of donor countries to boost their imports.[397] Finland's official position at the time considered it 'rational',[398] Torsten Gårdlund, professor of international economy from University of Lund, argued that any opposition to technical assistance through private means was a Marxist-Leninist plot,[399] and in Norway a director of Unilever in a memorial lecture considered technological advance a fundamentally private province.[400] The Nordic voices were at a marked distance from those of the developing world. According to these opinions, the focus of any regulation should be in transforming the developing countries to be more receptive to new technologies. All development aid is an act of charity—a gift horse to whose mouth developing countries had little business to look in. These responses come close to a later criticism mounted against the proposed UN Code of Conduct Regulating Technology transfer[401]:

> But if [restrictive business practices are] prohibited by law, will the supplier refuse to sell the technology as he is free to do? The issue therefore is not whether

[397] Amy Staples, *Birth of Development: How the World Bank, Food and Agriculture Organization, and World Health Organization Changed the World, 1945-1965* (Kent State University Press 2006). She suggests this is a particularly European development also with their approach to funding international organisations: '[M]any European countries would only release [assets] for loans that would be used to purchase their own goods.' (p. 32)

[398] Alanaatu (n 394). The argument for rationality in report suggests that without bundling up of loans to acquisitions from the loan-giver, there would be less loans overall ('Ylivoimainen pääosa kaikista lainoista on sidottu hankintoihin lainan antajamaasta, joten niillä on antajamaan vientiä edistävä vaikutus. Sidonnaisuus voi johtaa kehitysmaan kannalta epäedullisiin hintatason korotuksiin ja valikoiman suppeuteen. On kuitenkin todennäköistä, että jos lainat eivät olisi täten sidottuja, niiden määrä olisi nykyistä vähäisempi,' p. 4)

[399] Torsten Gårdlund, *Främmande Investeringar i U-Land* (Almqvist & Wiksell 1968). On technical assistance, see especially ch. 4 on the failure of planned economy ch. 5.

[400] O Strugstad, *The Role of Private Industry in the Transfer of Technology to Developing Countries: Memorial Lecture Delivered at the Norwegian School of Economics, Bergen 27th September, 1976* (Norwegian School of Economics 1976) 5.

[401] United Nations, 'An International Code of Conduct on Transfer of Technology', TD/B/C.6/AC.1/2/Suppl. 1/Add. 1 (1975). For the process in general, see Pease Jeffries, 'Regulation of Transfer of Technology: An Evaluation of the UNCTAD Code of Conduct' (1977) 18 Harvard International Law Journal 309.

> the restriction can be eliminated by treaty or law but whether the technology will be made available at all.[402]

As such, any arguments for lop-sided negotiations between private multinational corporations and cash-strapped developing countries were given little credence in the mainstream economic considerations, at least in the Nordics.[403] Dependency arguments stressing the failure of foreign investments to promote welfare of citizens in developing countries—such as Evans' triple alliance thesis stressing the important connection between local elites and foreign capital[404] or dual economy of manufacturing and subsistence agriculture outlined by Jorgenson[405]—were chiefly side-lined through referral on the role of local governments to simply govern better.[406]

Thus, despite existing developmental trajectories from late colonial administration through the League of Nations to the 1960s in terms of provision of assistance, the nature of technical changed in relatively short order during the early post-War years.[407] Whereas the United States International Development Advisory

[402] Oscar Schachter, 'Transfer of Technology and Developing Countries' in Kamal Hossain (ed), *Legal Aspects of the New International Economic Order* (Frances Pinter 1980) 157.

[403] In a sense this can be seen in later common Nordic position endorsed when negotiating guidelines for technology transfer in the late 1970s. For example, in the 1979 UNCTAD round this common position entailed a non-binding framework that would nonetheless have an effective international enforcement (see e.g. Ulkoasiainministeriö, *UNCTAD V: YK:N Kauppa- Ja Kehityskonferenssin Viides Istunto Manilassa 7.5.-2.6.1979* (Ulkoasiainministeriö 1979) 95ff.) At the time there was a more widespread concern in the Nordics over protection of investments, see e.g. Ove Bring, *Det Folkrättsliga Investeringsskyddet: En Studie i u-Ländernas Inflytande På Den Internationella Sedvanerätten* (Liber förlag 1979). The author provides an exhaustive listing of expropriations in developing countries in South America, Africa, and Asia.

[404] Peter Evans, *Dependent Development: The Alliance of Multinational, State, and Local Capital in Brazil* (Princeton University Press 1979).

[405] Dale Jorgenson, 'The Development of a Dual Economy' (1961) 71 Economic Journal 309.

[406] See Henry Simon Bloch, 'The Fiscal Advisory Functions of United Nations Technical Assistance' (1957) 11 International Organization 248. Bloch outlines multilevel technical assistance in the UN system in the fiscal and financial fields. Similar structure was mirrored in much of the expanded technical assistance where both the UN as well as one or several of its specialized agencies worked jointly to issue technical assistance.

[407] See International Development Advisory Board, *A New Emphasis on Economic Development Abroad: A Report to the President of the United States on Ways, Means and Reasons for U.S. Assistance to International Economic Development* (International Development Advisory Board 1957). The Board suggests that 'in the near future, foreign private capital is not likely to play a major role in the development of either Asia or Africa. The immediate primary need for capital in these areas is in "social

Board (IDAB) in 1957 still saw it improbable to make a profitable private investment in infrastructure, the 1990s touted impressive private investments in the very same infrastructure.[408] It is difficult to exactly pinpoint when the change took place. After all, already early in the post-War era it was commonly agreed that technology was in the possession of transnational corporations (TNCs), but solutions to the transfer and provision of technology were articulated in chiefly statist terms.[409] A report from 1963, mapping the role of patents in transfer of technology, recognises many corporate practices that later became central for the Draft UN Code of Conduct Regulating Technology Transfer.[410] There is however a significant difference in the subjects addressed through these regulations. While the former aimed to alleviate these problems through a set of demands for developed countries and possible regulatory measures for developing ones, the latter directly concerns with TNCs and their duties. Behind this change lies a string of developments from early post-War years to the mid-1970s that empowered the TNCs while enfeebling the developing countries.

There is an array of overlapping narratives that point to the transformation of the international community shortly after the establishment of the United Nations. A common point of reference in scholarship on the nature of this transformation is the number of members and its quick growth during the first few decades of the UN.[411] For international law, the emergence of new members to the family of states posed new, often unanswered questions relating to the problem of state succession. Of particular interest for the present purpose are the answers provided to formulation of property relationships in the newly independent former colonies. Yet, a more immediate concern to the consciousness of the post-War international lawyers was however the destroyed European heartlands and the international economic system that rest in ruins. These concerns led to the creation of a new international political economic order to support monetary stability throughout the globe and to re-construct Europe. The new economic order was intimately bound to the last

overhead"—power, communication, transportation and educational facilities—and it is improbable that U.S. private capital will find this a profitable field for investment.' at 13.

[408] See Jack Glen, 'Private Sector Electricity in Developing Countries: Supply and Demand' (Working Paper, International Finance Corporation Working Paper, 2 September 1999).

[409] A good example from the immediate post-War argument for state's role is Robert Terrill, 'Cartels and the International Exchange of Technology' (1946) 36 American Economic Review 745.

[410] United Nations Department of Economic and Social Affairs, *The Role of Patents in the Transfer of Technology to Developing Countries: Report* (Document (United Nations), United Nations 1964).

[411] For this, see *infra* Chapter 4 on International Law.

momentous change, namely, a turn to institutions and creation of a characteristically international authority. These intertwined legal developments mature by the 1970s, leading to what Vanessa Ogle calls "[a] distinctly new phase in the contest over the role and rights of states and private capital in economic development."[412]

In the area of state succession, the ideas formulated already during the inter-War years came to dominate rights and duties of states that emerged through the decolonization process.[413] In the early 20th century practice, responsibilities of successor states were bifurcated: on the one hand, they were found to have no responsibility over public law acts of the past rulers, whereas, on the other hand, they had a duty to uphold any and all rights of private citizens to property.[414] Yet, as Matthew Craven suggests, much of what came to pass as successions of diverse kind or continuation of statehood was marked with 'the absence of any obvious methods of determination' when it came to international law.[415] The consequences of this lacking method to determine the outcome of succession in the realm of decolonization was however real and often adverse to colonies seeking independence. As Mohammed Bedjaoui argued on his lecture at the Hague Academy, a succession that forces former colonies to recognise titles of private corporations to natural resources forces upon them a condition of continued bondage.[416] Bedjaoui and many other authors from the South highlighted the new state as a tabula rasa—a blank slate at liberty to choose its future course and destiny.

Despite spirited opposition to bondage of past commitments, many a state emerging through the process of decolonization did inherit those commitments. It is in this context that the wave of expropriations or nationalisations of foreign property throughout Africa and Asia at the time was understood.[417] Yet, as Frantz Fanon argued at the time, many of these nationalising projects were betrayals of the anticolonial impetus and amounted to little else than a transfer of wealth from one

[412] Ogle, 'State Rights against Private Capital: The "New International Economic Order" and the Struggle over Aid, Trade, and Foreign Investment, 1962-1981' (n 393) 217.

[413] Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford University Press 2007) pt I. He provides an account on the pre-decolonization history of the notion of succession in international law as well as its impact on succession as it was applied in the context of decolonization.

[414] Carl Schmitt, *Der Nomos Der Erde Im Völkerrecht Des Jus Publicum Europaeum* (Greven 1950).

[415] Craven (n 413) 72.

[416] Mohammed Bedjaoui, 'Problèmes Récents de Succession d'états Dan Les États Nouveaux' in *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 1970) vol 130.

[417] There were also numerous instances of expropriation in Central and South America, but they are more meaningfully understood as a continuation of a long-standing tradition of expropriation for public interest.

set of ruling classes to another.[418] Inasmuch as the prevalent doctrine of state succession at the time seemed to favour continuity of responsibilities of newly emerged states,[419] the changing constitution of international community of states allowed these states to seek change through the United Nations. As an example of such changes, in 1962 the General Assembly passed a resolution on permanent sovereignty over natural resources.[420] The resolution bundled together self-determination, national interest, and economic independence, laying foundation for much of what later came to be called the New International Economic Order. Although an apparent sign of the changed balance of power especially on the General Assembly, the resolution on permanent sovereignty over natural resources contains provisions that significantly curtailed the sovereign's capacity to control exploitation of natural resources. Most notable of these restrictions is set in the fourth article of the resolution. It limits the material scope of requisitioning of natural resources, makes all requisitions subject to international law, and allows state contracts to subject dispute resolution to arbitration.

The international law of state succession left newly emerged states with a long list of other than treaty-based obligations, often in the shape of concessions to private corporations to exploit natural resources.[421] A contract-based order of resource exploitation was established in the first decades of the 20th century and was a part of larger economic development narrative of the interwar period.

> Thus, while the sort of outright exploitation of native peoples by chartered companies that took place in the nineteenth century was condemned, the new regime of unequal exchange, officially sanctioned by the colonial state and embodied in legal regulations, was completely acceptable.[422]

Alternatively, the same could be argued through the doctrine of self-government and, ultimately, as a precondition to statehood.

[418] Frantz Fanon, *The Wretched of the Earth* (Penguin books 1967) ch 3.

[419] See International Law Commission's reports conducted by the special rapporteur Mohammed Bedjaoui on succession in respect of matters other than treaties, especially UN Doc. A/CN.4/204 of 5 April 1968 from 20th session and A/CN.4/216/Rev.1 of 18 June 1969 from 21th session.

[420] UN GA 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources.'

[421] A debate over inheritance of private capitalists of late colonial era continues, see e.g. Achille Mbembe, 'Decolonizing Knowledge and the Question of the Archive' (2015). It provides an influential account on *Rhodes Must Fall movement* in South Africa.

[422] Anghie (n 384) 161.

> [T]he first step for 'self-government', and therefore the first step towards some kind of international personality, involved the protection of the rights of existing legal subjects ('foreign citizens') such that those rights could be 'effective' in the territory in question.[423]

And as inter-war period cases from the Permanent Court of International Justice and arbitration indicate, the rights protected entailed most clearly the economic rights of citizens and of corporations.[424] In a marked rift between the arbitral decisions of the era and those of the PCIJ, the latter relied on 'traditional' doctrines of international law upholding sovereign's prerogatives, whereas the former started to suggest a gradual shift towards internationalisation of contracts. Thus, the PCIJ in *Serbian Loans* decision held it customary that the municipal law of the state party applies in contracts between a private party and a state,[425] while arbitral decisions in the cases such as *Société Rialet* and *Lena Goldfields Ltd* considered principles of public (or European[426]) international law as part of interpretation of private-to-state contracts. These contract-based, yet quasi-internationalised protections of property in the early post-War years pitted newly independent states against private interests.[427]

During the first post-War years, concession agreements created irresolvable tensions: in the eyes of many governments of the Third World, the colonial past of

[423] Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press 2019) 162. See also Anghie (n 384) 179ff for a similar conclusion on the Mandate system.

[424] Of early PCIJ case law, see e.g. *The Mavrommatis Palestine Concessions* (Judgment), 1924 PCIJ Series A No. 2 where the Court declares that 'the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State.' (at 12); from international arbitration relying on international law rather than on municipal law of the interwar period, see e.g. *Sentence arbitrale entre la Société Rialet et le Gouvernement éthiopien*, 8 Recuil de decisions des tribunal arbitrales mixtes (1928-29), 742 seq. between a French company importing alcohol and an Ethiopian concession provided by a state monopoly. For notable protection post-War, see *infra*.

[425] *Case Concerning the Payments of Various Serbian Loans Issued in France* (Judgment), 1929 PCIJ Series A No. 20. The statement on the applicability of the municipal law at 41. See in more general on the 'state-only' image of personality embraced in both *Mavrommatis* and *Serbian Loans* in Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 64–77.

[426] In the *Société Rialet* case the arbitral decision declares 'les parties on manifesté leur volonté commune de se conformer aux droit et usages des pays européens,' cited in Prosper Weil, 'Problèmes Relatifs Aux Contrats Passés Entre Un État et Un Particulier' in *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 1969) vol 128, 165.

[427] Of these developments more in general in international law, see Juha Kuusi, *The Host State and the Transnational Corporation: An Analysis of Legal Relationships* (Saxon House 1979).

the newly independent states manifested in these agreements. These tensions surfaced in a line of cases both before arbitral tribunals as well as in the International Court of Justice that dealt with the question of concessions and the sovereign capacity of a state to alter or annul them. The case of *Anglo-Iranian Oil Company* before the ICJ is illustrative of this process, even if diverting significantly in the strictly legal outcome of the concessions' arbitrations.[428] At dispute in the *Anglo-Iranian Oil Company* was a concession originally granted in 1903 and partly revised in 1933, whereby the Anglo-Iranian Oil Company was granted with a sole right to exploit oil resources in Iran in compensation of 16% of its revenue and the improvement of the technical capacity of Iran. By 1950, Iran had grown disillusioned of the promises made in the concession agreement: the company was devaluing its oil exports to diminish the value of royalties and there was no notable uptake of technical capacity in Iran; rather, most of the technical professionals remained British. To attest its sovereign capacity, Iran decided to nationalise its oil resources and was prepared to compensate the Anglo-Iranian Oil Company providing '"fair compensation" […] based on the value of the oil instalments in 1951.'[429] As the Company, closely aligned with the government of the United Kingdom, deemed such compensation insufficient, it resorted to the diplomatic protection of the United Kingdom to institute proceedings at the ICJ in May 1951. For its part, Iran denied jurisdiction of the Court on the matter as it had provided jurisdiction for the ICJ and its precursor in 1932 solely to settle disputes arising from treaties and agreements, not based on what it deemed ultimately a state contract with a private party.

The British government insisted that the concession agreement was of a double character, simultaneously a contract between a private party and a state, while also marking an international agreement between two states. When issuing its final decision in 1952, the Court aligned with Iran. But as Sundhya Pahuja and Cait Storr argue, while an outright victory for Iran, within the wider historical context the dispute led to a *coup d'état* and a new concessionary agreement to major Western oil companies.[430] As they suggest, Iran's 'invocation of "sovereignty" itself was decried as being *against* the (international) law of which it is a key jurisdictional

[428] *Anglo-Iranian Oil Co.* (*UK v. Iran*) (Jurisdiction) [1952] ICJ Rep 93.

[429] Katayoun Shafiee, 'Technopolitics of a Concessionary Contract: How International Law Was Transformed by Its Encounter with Anglo-Iranian Oil' (2018) 50 International Journal of Middle East Studies 627, 637.

[430] Sundhya Pahuja and Cait Storr, 'Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited' in James Crawford and others (eds), *The International Legal Order: Current Needs and Possible Responses* (Brill 2017). The Agreement referred, The Iran-Consortium Agreement of 19-20 September 1954 entered into force on 29 October 1954 https://archive.org/details/1954IranOilConsortium, re-enacted concessions to the benefit of nine Western companies for the duration of 25 years.

form.'[431] Further, a de-contextual reading of *Anglo-Iranian Oil Company* case fails to see the inherent tragedy of its aftermath, which sees 'foreign companies […] defend[ing] foreign ownership of [natural] resources, arguing that the proper observance of contract and property rights was in keeping with principles of peace and stability.'[432] This was also the lesson learned among the contemporary scholars analysing the case. They vouched for internationalisation of some state contracts or, alternatively, applying general principles of international law in municipal courts. Foremost among these principles was the protection of private property.

In a nutshell, the vacuous doctrines of state succession that led many of the newly developed states to inherit concessionary agreements directly contributed to the emergence of a body of international law interpreting these agreements, and, ultimately to the creation of international investment law as a scholarly discipline. Simultaneously, on a forum that received scant contemporary attention,[433] an international organisation was systematically internationalising its contracts with private corporations.[434] What the ICJ retained as an anathema of public international law, emerged as a daily lending practice of the World Bank. As Anthony Anghie suggests, the Bretton Woods institutions (i.e. the World Bank, the International Monetary Fund (IMF), and the General Agreement on Tariffs and Trade (GATT)) ought to be considered the more direct inheritors of the Mandate system than the UN trusteeship system ever was.[435] These institutions emerged as governors of economic development already in the early post-War years and have retained that role up to the present. Thus, the last part of the process that evinced empowerment of the private corporation and relative enfeeblement of the Third World states, moves through the international financial institutions and the emergent international authority through executive rule of the United Nations.

[431] ibid 71.
[432] ibid 73.
[433] Of the limited attention the World Bank received at the time, see Sinclair (n 278) 245ff. For a recent account on the evolving role law and lawyers of World Bank for international law, see, Dimitri van den Meerssche, *The World Bank's Lawyers* (Oxford University Press 2023).
[434] See, International Bank for Reconstruction and Development Loan Regulations vol. 4 (adopted 15 June 1956), 260 UNTS 376. These loan regulations were applicable to loans made by the Bank to borrowers other than member state, in essence to private corporations performing the project funded by the Bank. The section 7.01 on enforceability (at 396) states '[t]he rights and obligations […] shall be valid and enforceable in accordance with their terms notwithstanding the law of any state,' and further, as all controversies are to be settled in arbitration (section 7.04, 396-400) the contracts are by their very nature subject to only rules of international law.
[435] Anghie (n 384) ch 6. To similar effect for the raise of international executive authority of the United Nations, see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011) 32.

A central pillar on the construction of an international institutional authority to spur economic development towards a Western or a capitalist market economy was the World Bank. Its diverse funding instruments were foundational for the creation of 'a favourable investment climate'[436] jointly with other international organisations during the 1950s and the 1960s. The World Bank—initially devised to fund re-construction of the Western Europe—turned in the early 1950s from a re-construction bank to a development bank, after the U.S. provision of bilateral aid to the Western European countries through the Marshall Plan. A bank intended to serve as a reserve for eminently profitable re-construction of the European industrial production, was ill-equipped to fund for example infrastructure projects in developing countries that—while important—might never turn a profit. Consequently,

> [t]hroughout the fifties the bank funded industrial infrastructure and industrial development projects because those were the sorts of projects designed by the states whose wealth and (relatively) liberal development doctrines appeared to promise that they would be able to repay loans.[437]

In addition to conservative loan practices, the Bank developed early on an efficient hedge to country and regulatory risk by internationalising all its loan contracts, irrespective of the international status of the borrower. All loans, whether for private enterprises or for governments, were subject to no municipal law and any disputes over their status were to be decided in international arbitration.[438] While the status of the loan agreements has been subject to some controversy, for the Bank their status was settled.[439]

The limited early scope of the World Bank lending was subject to change in the mid-1950s and the early-1960s through introduction of two new lending mechanisms: International Finance Corporation (IFC) and International Development Association (IDA). Of the two, IDA and its concessionary lending to developing countries has received a much more sustained attention in scholarship.

[436] Oscar Schachter, 'Private Foreign Investment and International Organizations' (1960) 45 Cornell Law Review 415, 418.

[437] Craig Murphy, *The Emergence of the NIEO Ideology* (Westview Press 1983) 49.

[438] Aron Broches, *Selected Essays: World Bank, ICSID and Other Subjects of Public and Private International Law* (Martinus Nijhoff 1995) 38.

[439] See Finn Seyersted, 'Applicable Law in Relations between Intergovernmental Organizations and Private Parties' in *Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 1967) vol 122; John Head, 'Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks' (1996) 90 American Journal of International Law 214.

The IFC, originally framed as a stopgap measure against raising calls of the developing countries for the Special United Nations Fund for Economic Development (SUNFED),[440] had humble beginnings in lending. Often riddled with limited available funding and strict lending conditions, the IFC found it hard to find private investments it would have the financial muscle to back up. The goal of the IFC to spur private investments and therethrough growth and development came with a corollary demand of protection of these private investments from public encroachment.[441] This protection materialised through the work of the IFC to create a welcoming investment environment that its highly specialised corps of technical and managerial assistance spearheaded. Through provision of technical assistance, the IFC created a body of knowledge for susceptible environment for private investment that was employed widely in the wider work of the World Bank lending.[442] Often such knowledge aligned with profound modifications of the administrative and legislative framework of developing countries towards a more 'market-friendly' rules.[443]

The influence of the lending practices of the World Bank directly contributed to the empowerment of the private, while subjecting borrowers to growing dependency from international institutions and their authority. As Dag Hammarskjöld, Secretary-General of the United Nations from 1953 till his death in 1961, noted with regard to Congo in 1960 '[a] government without financial means is dependent on those who help it to meet its needs.'[444] In order to stall the advance of Cold War politics in the decolonised Africa, the UN under Hammarskjöld's command construed itself as a neutral and impartial guardian of peace and security that could act quickly based on decisions of the executive—a vision of a particular political technology that normalised exception to override conference politics deemed too slow.[445] Apart from

[440] See BE Matecki, 'Establishment of the International Finance Corporation: A Case Study' (1956) 10 International Organization 261; Kirdar (n 388) 197.

[441] Matecki (n 440) 262.

[442] Jonas Haralz, 'The International Finance Corporation' in Devesh Kapur and others (eds), *The World Bank: Its First Half Century Volume I: History* (Brookings Institute 1997).

[443] Gary Bond and Laurence Carter, 'Financing Energy Projects: Experience of the International Finance Corporation' (1995) 23 Energy Policy 967.

[444] Dag Hammarskjöld, 'Opening Statement in the Security Council: New York, September 9, 1960' in A. W. Cordier & W. Foote (eds), *Public Papers of the Secretaries-General of the United Nations, Volume V: Dag Hammarskjöld 1960-1961* (Columbia University Press 1975), 163 cited in Orford, *International Authority and the Responsibility to Protect* (n 435) 31.

[445] For Hammarskjöld's role in shaping international executive rule, see ibid ch 2. For a more general vision of a political technology reminiscent of the one embraced by the United Nations, Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law: Normalizing the State of Exception* (Edward Elgar 2014). Frankenberg's original

the technocratic views of those who formed the international executive rule, also the sheer amount of international organisations amplified their power in regulating all state behaviour, rarely in the name of developing countries. As John Braithwaite and Peter Drahos argue

> [t]he upshot of the activities of international organizations is that today most citizens greatly underestimate the extent to which most nations' shipping laws are written at the IMO in London, air safety laws at ICAO in Montreal, food standards at the FAO in Rome, intellectual property laws in Geneva at the WTO/WIPO, banking laws by the G-10 in Basel, chemicals regulations by the OECD in Paris, nuclear safety standards by IAEA in Vienna, telecommunications laws by the ITU in Geneva and motor vehicle standards by the ECE in Geneva.[446]

A development of technical assistance and a rule by expert initially launched by the Point Four programme transformed into a highly complex network of international organisations driven by a logic of benign universalism and technical neutrality.[447] These organisations and the authority they wield left little room for resistance and independent agency to decolonised states conditioned by their economic deprivation.

A world of newly sovereign states in what came to be called Third World, burdened by the past economic burdens and prodded towards development by a universalist ethos of international organisations, was discontent and disillusioned by the promises of development at the end of the UN's first development decade. The economic foundations of the Bretton Wood systems were in a point of collapse in the early 1970s, the abundant loans provided to the Third world countries saw their interests balloon as a consequence of the changes in the U.S. monetary policies, and the example of the increase in oil price initiated by the OPEC all contributed to the formal proclamation of the New International Economic Order in 1974.[448] It was amid these systemic concerns of the international order that the United Nations organised its first international conference on environment in 1972.[449] Technology

German concept for political technology, *Staatstechnik* (Berlin: Suhrkamp, 2010), reveals the intricate tinkering in transforming a state to executive rule.

[446] Braithwaite and Drahos (n 8) 488.

[447] In general, of the role of technical assistance in shaping the UN development, see Mark Mazower, *Governing the World: The History of an Idea* (Allen Lane 2012) ch 10.

[448] A short summary of the events leading to NIEO Nils Gilman, 'The New International Economic Order: A Reintroduction' (2015) 6 Humanity 1.

[449] A more general international law perspective on the origins of the 1972 conference, see Nico Schrijver, *Evolution of Sustainable Development in International Law: Inception,*

was still something governments around the world had a control over, even if a realisation of the technology's private possessors was readily recognised. The Sussex Manifesto clearly illustrates this bifurcation.[450] Designed to serve as a science and technology roadmap for the second development decade, the manifesto commences with an outline of technology ownership chiefly in the private hands only to follow with a list of recommendations for the developing states to improve their capacity to adapt technologies. None of the recommendations addresses owners of technology.

The invisibility of the private in the process leading to the Stockholm conference is also notable.[451] In the preparatory materials to the conference it was suggested that 'the Declaration should not formulate legally binding provisions, in particular as regards relations between States and individuals.'[452] The Declaration itself has an ambivalent approach towards technology: it argues that the humanity as a whole (or alternatively the individual[453]) has reached a technological and scientific capacity to adversely transform the environment, while stressing that private persons possess the technology to forestall this negative mutation. In a sense, the role technology plays in the document is reminiscent of the operationalisation of the concept of self-determination argued by Nathaniel Berman.[454] When addressing the responsibility over the adverse effects, environment is turned into a global condition of which everyone has a duty without nominating anyone in particular, while—when speaking

Meaning and Status (Brill 2008) ch 2. He traces origins of sustainable development to early post-War years' resource management, especially that of fisheries. A more intimate account of the precise events within the UN system is provided in the first part of Louis Sohn, 'The Stockholm Declaration on the Human Environment' (1973) 14 Harvard International Law Journal 423.

[450] Hans Singer, *The Sussex Manifesto: Science and Technology to Developing Countries during the Second Development Decade* (Institute of Development Studies at the University of Sussex 1978).

[451] On a more general invisibility of the private, especially private corporations in international law, see Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press 2003).

[452] UN Doc. A/CONF.48/PO.9 of 26 February 1971, para 33.

[453] Of these differing possible readings of 'Man' used in the Declaration, see Sohn (n 449) 455.

[454] Berman deals the problem widely especially in his earlier articles, see Nathaniel Berman, 'Sovereignty in Abeyance: Self-Determination and International Law' (1988) 7 Wisconsin International Law Journal 51; Nathaniel Berman, '"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law' (1993) 106 Harvard Law Review 1793. A short introduction to themes explored in Berman's scholarship, Emmanuelle Jouannet, 'A Critical Introduction' in Nathaniel Berman and Euan Macdonald (eds), *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Brill 2011).

in a promissory key—technology is devolved into a possession of private Western corporations to whom the international law 'should not formulate legally binding provisions.'

Although in many ways reflecting the larger NIEO sentiments of the era, there is a marked absence of corporations in the Declaration. The sole reference to 'enterprises' in it was a negotiation result achieved by a group of developing countries and even there those are compared to private persons. There is a stark contrast to the concerns raised four years earlier at the UN Conference on Trade and Development (UNCTAD) over the growing power of multinational corporations:

> with the formation of multinational corporations the transfer of technology tended to become a matter of inter-company organization, which raised issues involving the national policies of developing countries.[455]

While it would be easy to attribute these differences to varying conference narratives and goals, the same statist approach marks much of the early environmental law discussion. Even when non-state concerns are raised, like in Günther Handl's article on transnational environmental damage by private persons and related OECD reports, all the solutions are markedly state-centred. Handl charts the different sources of state responsibility or liability ensuing from private acts and marks in passing a possibility of prioritising fuller private responsibility in a footnote that merits a verbatim quotation.

> Conceivably, a lifting of the corporate veil would allow access to the financial resources of those who stand behind the single-ship or single-plant company. However, this strategy offers, at best, a dubious prospect of compensation: national courts might be reluctant to pierce the veil, as it is likely to involve complex and time-consuming proceedings and, particularly in situations of catastrophic transnational damage, may fail to open up adequate funds for satisfaction of the transnational claims after all.[456]

The idea of a corporation in the two regimes differed vastly. Without assessing the merits of these ideas in more detail, it is apparent that in the development narrative

[455] *Proceedings of the United Nations Conference on Trade and Development*, second session. New Delhi, 1 February – 29 March 1968. Volume I: Report and Annexes, at 354 para. 29.

[456] Günther Handl, 'State Liability for Accidental Transnational Environmental Damage by Private Persons' (1980) 74 American Journal of International Law 525, 526. Handl suggests a concept of subsidiary direct state liability towards private victims instead as a solution (at 561ff.).

corporations were entities possessing quasi-sovereign powers, while in the environmental law discourse the polluting companies were small and insolvent.[457] This had a direct bearing on how corporations were addressed in these two regimes, even if for both the corporations of the time remained 'objects' rather than 'subjects' of international law.[458]

This either malign or benign invisibility of a corporation also influenced the providence of technology it commanded, preventing attempts to equate technology transfer in the development narrative and the one in the international environmental law. In short, there are no instances of technology in the Stockholm Declaration that would not be bound up to development; all efforts to curtail or promote the use of technology to improve the environment focus on states (e.g. atomic weapons in principle 26). Thus, an idea of transfer of technology to preserve environment in the Declaration is at best embryonic and markedly agnostic to the concerns of the developing world of time. In this sense, although the significance of technology transfer was recognised during the first UN conference on environment in 1972, its breakthrough as a tool to reach global environmental policy goals materialised within the United Nations Framework Convention on Climate Change (UNFCCC) in 1992 (the Rio Convention).[459] In this sense, Peter H. Sand's contemporary statement of a transition from environmental law to an undefined law of sustainable development occurring in and around the Earth Summit of 1992 seems relative non-controversial.[460]

However, the transition from an era to another pinpointed by Sand marked simultaneously a closure for an alternate constellation of the

[457] See, Fleur Johns, 'Theorizing the Corporation in International Law' in Anne Orford and Florian Hoffman (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) for the perceived image of a corporation in international law.

[458] An interesting contemporary account on status of corporations in international law is provided by Chris Nwachukwu Okeke, *Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and Their Treaty-Making Capacity* (Rotterdam University Press 1973). He argues that party autonomy and common arbitration turns corporations into actors with internationally important agency, whilst not fully recognising their subjecthood.

[459] In general, from the differing visions of the environmental law between developed and developing countries prior to 1992 Conference, see John Ntambirweki, 'The Developing Countries in the Evolution of an International Environmental Law' (1991) 14 Hastings International and Comparative Law Review 905.

[460] Peter Sand, 'International Environmental Law After Rio' (1993) 4 European Journal of International Law 377, 378. Sand later moved back to the moniker of international environmental law and called the transition from Stockholm to post-Rio one from modern to post-modern era, see Peter Sand, 'The Evolution of International Environmental Law' in Daniel Bodansky and others (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 31ff.

environment/development nexus that had briefly surfaced in a global effort to end depletion of ozone layer. For the Stockholm Declaration and the NIEO—two regimes of developmental technology transfer—technology was a proxy to material progress narrated in chiefly economic, even if concessional terms. The transfer of technology was to lift a country from poverty, while making economic or political sense. Technology or its transfer was never a right, rather it was an act of kindness for which no demands or requests could be made.[461] After the Rio Conference, the technology transfer was dominated by the same economic development narrative with an additional layer of environment that justified some additional costs (and further debt) of a developmental project. And often when it came to lending practices and promises, 'rhetoric [did not] always correlate with changes in actual lending and grant-giving behavior.'[462] Midst these two frames of technology transfer stands the technology transfer devised to the Vienna Convention for the Protection of the Ozone Layer[463] through the Montreal Protocol[464]. It constituted a different balance between environment and development, where the foremost value was placed on the former rather than the latter. The Montreal Protocol granted means for developing countries to demand for transfer of technology for which the costs were covered by the developed countries. The incremental costs from transition to non-ozone depleting substances included, inter alia, 'costs of patents and designs and incremental cost of royalties.'[465] The chief goal was the elimination of harmful chemicals, even if it would create competition from the developing countries.[466]

[461] Of an attempt to formulate transfer of technology as a duty of the developed countries and, thus, a right of the developing countries, see statements of Algeria UN Doc. A/CONF.48/WG.1/CRP.14.

[462] Robert L Hicks and others, *Greening Aid?: Understanding the Environmental Impact of Development Assistance* (Oxford University Press 2008) 9.

[463] Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985), 1513 UNTS 293.

[464] Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987), 1522 UNTS 3.

[465] Decisions of the Meetings of the Parties to the Montreal Protocol, Second Meeting of the Parties (London, 27-29 June 1990), Annex IV – Appendix I: Indicative list of categories of incremental costs.

[466] Of negotiation process of the amendments that led to establishment of multilateral fund, see Dale S Byrk, 'The Montreal Protocol and Recent Developments to Protect the Ozone Layer' (1991) 15 Harvard Environmental Law Review 275. A contemporary view of the system as unique and promising, Colin Alberts, 'Technology Transfer and Its Role in International Environmental Law: A Structural Dilemma' (1992) 6 Harvard Journal of Law & Technology 63 (comparing to earlier technology transfer schemes and their failures). A law & economics argument on the success of the Protocol is provided by Cass R Sunstein, 'Of Montreal and Kyoto: A Tale of Two Protocols' (2007) 31 Harvard Environmental Law Review 1 (arguing that success of Montreal

The model adopted for the transfer of technology and its funding in the first UNFCCC differed from the one taken just few years before in the Montreal Protocol. As a framework convention, the Rio Convention was short on details on how to accomplish transfer of nature-preserving technology (art. 11 of the Convention). It however did contain a specific reference to the funding mechanism for such transfers (art. 21.3). The chosen funding instrument—the Global Environmental Facility (GEF)—was a second-generation fund established in 1991 in the auspices of the World Bank, but jointly operated by the UN development and environmental programmes.[467] Unlike the multilateral fund employed by the Montreal Protocol, the GEF applies weighted voting rules that provide the donor countries a final say on all funding decisions.[468] The GEF project funding is centrally bound to the idea of incremental costs that are incurred by a project to transform a nationally beneficial programme (i.e. a one that could receive funding through other World Bank funding instruments) into a programme with global environmental benefits.[469] The idea of 'incrementality' or 'additionality' of the environmental funding was a cornerstone for developing country demands during the Earth Summit. It implies that the measures to conserve nature for the global cause ought not to mark a diminution to developed country support to the more immediate concerns of developing countries,

Protocol stems from salutary cost-benefit analysis for the U.S. industries). Sunstein's argument however has limited purchase. Despite a modified cost-benefit analysis with regard to the United States from the climate change (see e.g. https://carbon2018.globalchange.gov/chapter/executive-summary/ suggesting annual costs of up to $206 billion compared to at most $4 trillion costs till 2050), the US government opposes global action for climate change, unlike Sunstein's model would suggest.

[467] Of the classification between the first- and second-generation environmental funding mechanisms, see Laurence Boisson de Chazournes, 'Technical and Financial Assistance' in Daniel Bodansky and others (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 961ff.

[468] The initial weighted voting system of 1991 that was identical to the one used in World Bank was changed somewhat in 1994 when the GEF was restructured. However, even after the changes the donor countries' vote is decisive. See Patricia Birnie and others, *International Law and the Environment* (3rd edition, Oxford University Press 2009) 82; Zoe Young, *A New Green Order? The World Bank and the Politics of the Global Environmental Facility* (Pluto Press 2002) 91ff.

[469] Operational Guidelines for the Application of the Incremental Costs Principle, GEF/C.31/12 of 14 May 2007. For further assessment of the 'incremental costs' standard in GEF funding, see Justin Wolst, 'The Funding of International Environmental Law' in Shawkat Alam (ed), *Routledge Handbook of International Environmental Law* (Routledge 2012) 160–61.

such as poverty and hunger. Despite the centrality of the idea, its execution was—and to an extent remains[470]—an open question for long.[471]

Because of the inherent fuzziness on what counted as 'incremental' in the early GEF funding, it became increasingly hard to separate traditional development funding from sustainable development funding. In the years surrounding the Earth Summit and the UNFCCC, much of the environmental law remained oriented towards open-ended goals whose fulfilment was dictated by those controlling the processes.[472] On most instances, the control of the lending processes was with the donors and their governments, resulting in environmental funding of 'common public goods' and projects where provided funding trickled back to developing countries either through provision of technology or consulting.[473] Even though much of the technology transferred had little do with unique technological capacities of a single individual company,[474] the model of lending in support of sustainable development was premised, especially in the United States, on an idea of foreign direct investments in need of a public shelter to flourish. When submitting the ratification of the Biodiversity Convention to the U.S. Senate, President Bill Clinton outlined technology transfer as an ultimately private enterprise subject to a strong protection of various intellectual property rights.

> The participation of the private sector greatly enhances the attainment of economic value from genetic resources … The best means to foster the technology transfer envisioned by the Convention is for other Parties to provide an effective level of intellectual property protection. Such protection will provide the incentives necessary for the private sector to generate the technology using genetic resources in the first place.[475]

[470] Outlining some of the present concerns over the function of 'incremental costs' in GEF funding, see Soledad Aguilar, 'The International Finance for Biodiversity and the Global Environmental Facility' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017) 478–79.

[471] See Evaluation of Incremental Cost Assessment, GEF/ME/C.30/2 of 2 November 2006.

[472] Of such proceduralisation of international environmental law at the time, see Martti Koskenniemi, 'Peaceful Settlement of Environmental Disputes' (1991) 60 Nordic Journal of International Law 73.

[473] Hicks and others (n 462) 46ff.

[474] DHN Alleyne, 'The State Petroleum Enterprise and the Transfer of Technology' in *State Petroleum Enterprises in Developing Countries* (Pergamon Press 1980); Francesco Munari, 'Technology Transfer and the Protection of the Environment' in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (Hart 2001).

[475] Message from the President of the United States transmitting the Convention on Biological Diversity (1993), *Treaty Doc.* 103-20, vi-vii.

The transformation of technology transfer by the 1990s made it into another instrument to foster change in developing country policies, most notably in terms of protection to private property. As such, technology and environment came to occupy a position that the general principles of international law had served in the late 1950s.

That technology transfer necessitated an adjustment of legislation in the developing countries turned quickly into a platitude that was repeated equally much by those supportive of the order as well as its critics. For example, Francesco Munari writing on 2001 saw that with Montreal Protocol 'some positive results have been achieved,' only to conclude that moving out from this limited example 'the outcome is quite different.'[476] Despite his criticism of the success of transfer of technology, his suggestions align with those demanded by President Clinton; '[t]echnology transfer provides good results when it accompanies (hence, is a part of) sound (foreign direct) investments.' A key, according to Munari, to receive such investments is to create 'a favourable normative environment and adequate economic conditions in the recipient country,'[477] echoing Schachter's argument for a favourable investment climate from the 1960s and a long list of UN reports on the flow of private capital from the 1940s onwards.[478] In the era of sustainable development, the past concessions to development were simply reformulated as demands of the environment. The role of technology was to serve as a neutral medium through which to instantiate changes in regulation that would further open markets for the private enterprise to capture.

Within the greater 'sustainable development' narrative, technology serves a special role in its pervasiveness. A reference to technology and its transfer can be found from virtually all international treaties concerning environment. That this narrative of 'technology' is ill-defined or equates falsely patents with technology[479] is not a sign of dishonesty, rather it marks 'two different sets of rules of formation for discourse, or two different problematics,'[480] seeking to achieve two markedly distinct functions. Where the more critically aligned technology transfer narrative seeks to provide nuance and context to both success and failure, technology as perceived in the funding decisions and documents marks it as technical, apolitical,

[476] Munari (n 474) 159–60.
[477] ibid 163.
[478] Schachter (n 436). Schachter refer to a wide range of UN from early postwar years onwards that sought to establish such favourable investment climate, see footnote 14.
[479] Munari (n 474) 162. For a similar assessment of 'falsely' defined technology Alleyne (n 474); Lúcio Tomé Féteira, '(Right to) Development and International Transfer of Technology: A Competition Law Perspective' in Mario Viola de Azevedo Cunha and others (eds), *New Technologies and Human Rights: Challenges to Regulation* (Ashgate 2013).
[480] James Ferguson, *The Anti-Politics Machine: 'Development,' Depoliticization, and Bureaucractic Power in Lesotho* (University of Minnesota Press 1994) 28.

and sustainable by definition. A renewable energy project from Republic of Georgia works as a representative example.[481] The results of the project were middling or less than satisfactory even by the GEF's own standards with little in terms of reduction of the CO2 emissions and a collapse of geothermal heating component of the project. Despite all this, the final report of the project considers '[t]he geothermal pilot project … a partial success'[482] and overall finds the project to be 'marginally satisfactory'[483]. The success is hardly tangible. It is a mindset where the technical capacity accrued through the project promotes sustainability and continuity despite failure to reach outlined objectives.[484] An edifice of technical and technological advancement is erected, using open-ended indicators as its building blocks.

Within the provided narrative, technology and its transfer has always captured a peculiar function as a neutral harbinger of good tidings. It enables management of the international or global for different ends. In the development narrative, technology promoted economic advancement and, therewith, prosperity and peace within the international community. By the end of the Cold War, a narrative of economic development was replaced by a different global calling from the same era, aiming at preserving the spaceship Earth. In the environmental narrative, quite like in the developmental one, some elements of the international concern were transformed into common concerns to all humanity, while the solutions to those concerns remained in hands of the few, as Surabhi Ranganathan points out.

> The seabed, equatorial basins and other natural resources were described as being common heritage, but technology was not, and access to it remained crushingly expensive for developing states.[485]

Technology promised a key for exploitation of the untold mineral resources of the seabed, quite like it did promise a solution for the biodiversity and for the mitigation of climate change. Before these goals, technology had served as a provider of civilization, nourishment, and medication—and of order.

[481] Jesse Uzzell and Murman Margvelashvili, 'Evaluation of UNDP/GEF Project: Georgia - Promoting the Use of Renewable Energy Resources for Local Energy Supply' (2012).
[482] ibid 39.
[483] ibid 3.
[484] A comparable completed biodiversity project from Georgia provides a more favourable terminal evaluation, yet the shortcomings of institutional or governmental support – a key element in sustaining the changes – are identical in both reports. See Michael JB Green, 'Recovery, Conservation and Sustainable Use of Georgia's Agrobiodiversity, Terminal Evaluation' (2010).
[485] Surabhi Ranganathan, 'Global Commons' (2016) 27 European Journal of International Law 693, 711.

The act of transferral imbued in the idea of technology transfer was and remains the point of critique in the wider developmental or environmental debate. A failure to achieve the development goals in large dam projects was seen a function of faulty transferral or false premises; a failure of windmill and solar farms to curtail CO2 emission or stop deforestation are an outcome of abject governance or insufficient management.[486] This emplotment of technology exempts it from all misery that ensues from its use, as if the displacement of thousands of indigenous people from the flood plains caused by a dam project or from a land plotted for a windfarm or a nature resort were solely a result from mismanagement—mismanagement that fails to comprehend the liberating force of technology.[487] In this sense, technology is what Anthony Anghie aptly calls a 'dynamic of difference':

> Sovereignty is formulated in such a way as to exclude the non-European; following which, sovereignty can then be deployed to identify, locate, sanction and transform the uncivilized. This is the series of manoeuvres, the reflex, that I have termed the 'dynamic of difference'.[488]

Technology for law is an even more subtle difference than sovereignty for its universality is formulated through the mediation of natural sciences. For as much as an apple falls due to the gravitational pull for all of us to see, the application of this knowledge is at the command of every person and every nation. And further still, unlike sovereign, technology is transposed on a private plane, surpassing dichotomies between states: no state commands technology, yet, curiously, its lack is taken as a testament of insufficiency. As a tool, technology enables to transmit values of law. Where the tool of sovereign was employed for 'civilizing mission', technology has managed a different set of deficits, even if animated by a similar imperial logic. It transfers development and a global concern over environment. And

[486] For an insightful analysis of one such dam project, see Allen Isaacman and Barbara Isaacman, *Dams, Displacement and the Delusion of Development: Cahora Bassa and Its Legacies in Mozambique, 1965-2007* (Ohio University Press 2013).

[487] On land grabbing in general, see Umut Özsu, 'Grabbing Land Legally: A Marxist Analysis' (2019) 32 Leiden Journal of International Law 215. On land grabbing for production of renewable energy, see Cheryl McEwan, 'Spatial Processes and Politics of Renewable Energy Transition: Land, Zones and Frictions in South Africa' (2017) 56 Political Geography 1. For the displacement of indigenous people to support ecological diversity, see *Survival International Charitable Trust v World Wide Fund for Nature*, OECD Complaint, 10 February 2016. On transfer of resources from low-and-middle income countries to high-income countries on a global scale, Christian Dorninger and others, 'Global Patterns of Ecologically Unequal Exchange: Implications for Sustainability in the 21st Century' (2021) 179 Ecological Economics 106824.

[488] Anghie (n 384) 311.

it transfers them, wrapped in a package that remains immune to criticism for it is an object of desire for all those with a voice in setting its use and transmission.

3.2.2 Standards and the ritualism of safety

I sit by my—for all intents and purposes regular—laptop and write. Its conventional shape and form conceal its dislocation. Its keyboard and electric plug are an oddity in Finland, carrying a sign of my stay in the United Kingdom a couple of years ago. I miss my 'ä', 'ö', and 'å' most acutely when trying to spell my own name, but whenever I tinker with coding, I immediately notice how all the coding conventions are designed with this keyboard in mind. Everything else in the device resembles every other laptop I could get my hands on from screen's resolution to the ports it sports at its sides. They are standardised in accordance with technical standards that have been widely embraced by the industry, quite like the keyboard and electric plug are. In this sense, computers and information technology more generally are particularly visible locales of standardisation and one of the only areas of everyday life where a regular user might be familiar with differing standards and their development. The furore in the technology media after the transition from the USB-B to the USB-C ports is but one tell-tale sign of peoples' emotional and financial investment to their devices—and to the standards they bear.[489] The public attention to differing standards within the wider information technology debate, belies the fact that most standards remain invisible even if instrumental for trade. According to CEN and CENELEC – two central European standardisation organisations – standards serve much more than simply trade as they 'support Europe's priorities through improving business performance, reducing costs and creating consumer trust.'[490]

This chapter looks for what ends technology is used in standardisation. To address this underpinning value proposal of technology, I outline why and where standards emerged, how they function, and how standards achieve the goals outlined by the standardisation organisations themselves, namely, efficacy for businesses and legitimacy to consumers. There are a number of important caveats with the chosen approach. First, my account of standards and their impact is geographically limited to a select few systems; while it can be readily argued that standards are global, the regulatory position standardisation enjoys differs notably from one jurisdiction to

[489] See Dieter Bohn, 'I Have Lived the USB-C #donglelife. Here's What You're in for' (*The Verge*, 5 November 2016) <https://www.theverge.com/2016/11/5/13523372/usb-c-macbook-adapter-donglelife-problems-thunderbolt> accessed 14 August 2023; Alex Cranz, 'Your Guide to USB-C Dongle Hell' (*Gizmodo*, 22 November 2016) <https://gizmodo.com/your-guide-to-usb-c-dongle-hell-1788344714> accessed 14 August 2023.

[490] CEN & CENELEC, *Standards Build Trust*, Press Release, Brussels 9 April 2019.

another.[491] Second, I do not entertain an economic explanation of standards, despite economic rationale's centrality in virtually all justifications for standardisation. I merely assume that there is an economically sound argument for standardisation, which the alternate economic models do not undermine. And last, I consider standards chiefly as a form of regulation not as a technical how-to. Hence, in what follows, I perceive standards as eminently technical rules that modify behaviour of diverse actors. For the large part I also avoid treating the eminent role played by patents in standardisation, especially in standardising those new technologies that law and technology scholarship has mostly focused on.[492] The choice is done chiefly to avoid repeating much of what has already been stated above with regard to patents. Rather, through focus on processes and actors that turn technical specifications into regulatory norms, I underline much of what comes after the fight over patents, their licensing rates, and pooling. That standards align closely with patents acts simply as an undercurrent throughout the text, not its focus. In short, standards as means to promote technology are closely aligned with patents, which are defined essential for standards to function as means of uniformity.

I illustrate how a regulatory tool designed to abolish the non-tariff barriers to trade expanded the logic of these barriers to capture also other, later goals associated with standards. In promoting uniformity, standards have often made significant concessions to enable certifying conformity with their technical specifications. These concessions emanate from the modus operandi of standards as harmonisers. Without a rigorous definition of measurements against which technological objects are compared, the argument goes, it is not possible to verify whether a thing truly adheres to relevant standards. The outcome of this process towards uniformity has been a ritualistic adherence to the technical minutiae with often a wholesale ignorance of any societal or environmental concerns those technical norms were

[491] I am by no means alone here. It is relatively common to argue for some form of universalism of standards in international trade law. See, for example, Panagiotis Delimatsis, 'International Trade Law and Technical Standardization' in Jorge L Conteras (ed), *Cambridge Handbook of Technical Standardization Law*, vol 2 (Cambridge University Press 2019).

[492] In particular the early 21st century patent scholarship produced voluminous research on different ways to assess so-called FRAND (fair, reasonable, and non-discriminatory) commitments to licensing all providers of standard essential patents (or SEPs) have to provide. There was a notable difference between the interpretations provided in the U.S. and the EU and manufacturers of smartphones waged long-lasting and costly legal bouts on them. On these debates in the area of communication, see Tuomas Mylly, *Intellectual Property and European Economic Constitutional Law: The Trouble with Private Informational Power* (IPR University Center 2009); Jarkko Vuorinen, *Beyond Patent Pools: Patent Thickets, Transaction Costs, Self-Regulation and Competition* (IPR University Center 2013).

supposed to stand for. As with transfer of technology, also standards promote technology as an end in itself. Where transfer of technology for sustainable development signals ecological values despite opposite results, standards for safety and environmental protection stand for those values even in the face of deaths and environmental degradation as a direct consequence of standards.

As means to achieve uniformity, standards are a relatively old regulatory tool. A common point of reference for an early 'standardisation' scheme are local rules governing the form and shape of stones in large construction projects in Medieval Europe. The medieval master masons drew a variety of templates that served as a blueprint for the construction of different shapes and structures. While a quandary to most scholars of later eras,[493] the instructions to create templates were effectively communicated locally in the Medieval construction sites. The templates were shaped in an environment David Turnbull describes as a laboratory, creating a basis for enduring and, in many ways, unsurpassed craftmanship of Gothic cathedrals.[494] These precursors to modern standardisation were relatively permanent local modes of classification if understood in the light of Geoffrey Bowker and Susan Leigh Star's work.

> [C]lassifications and standards are two sides of the same coin. Classifications may or may not become standardized. If they do not, they are ad hoc, limited to an individual or a local community, and/or of limited duration. At the same time, every successful standard imposes a classification system.[495]

However, it would be beside the point to argue for any regulatory similarity between these early models for the communication or transmission of knowledge and present-day standards, even if they do share a functional similarity as human means to classify and organise humane interactions.

A more immediate regulatory precursor for current stock of standards are the first measures to guarantee interoperability for the new technologies of the 19th

[493] See Lon R Shelby, 'Mediaeval Masons' Templates' (1971) 30 Journal of the Society of Architectural Historians 140. Shelby focuses mostly on late-Medieval practices in southern Germany, but suggests that earlier Gothic tradition, most notably the 13th century *Sketchbook* of Villard de Honnecourt, 'is rather like bits and pieces of a ship that has otherwise disappeared into the sea of oral tradition on which it sailed.' (at 146).

[494] David Turnbull, 'The Ad Hoc Collective Work of Building Gothic Cathedrals with Templates, String, and Geometry' (1993) 18 Science, Technology & Human Values 315, 321ff.

[495] Geof Bowker and Susan Leigh Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press 1999) 15.

century.[496] Spurred by the development of transport and communication technologies[497], first the major cities, later countries, and ultimately the continents were connected to one another in a web-like network of telegraph lines and railroads. A new internationalism of the era created a need to establish international institutions to facilitate cooperation and regulate problems that were characteristically 'international' by nature.[498] Even before the mid-19th century and the technological breakthroughs, states had bound themselves in a network of bilateral treaties that sought to regulate problems that emanated from cross-border communication or movement of people and goods.[499] The project of bilateral agreements grew however increasingly complex, which was considered a hindrance to trade and commerce at the time. A solution to these problems was a turn to standards that would ensure compatibility of different national rules to one another. That trade dictated the needs of standardisation was but a continuation of Medieval praxis, albeit the guarantor and setter of standards had changed from the private to public sphere.

The turn towards the new interconnected internationalism then initiated the processes of standardisation in many areas, yet the trajectories of the earlier domestic or inter-state regulation differed significantly from one area to another. One of the early examples of 'modern' standardisation practice is related to railroads and the width of the standard gauge, where, according to prevalent interpretation, the standard emerged through a private-public interaction driven by a path dependency and positive network externalities.[500] Originally, a track gauge adopted by George Stephenson for his railway from Stockton and Darlington and later adopted in the United Kingdom through the Gauge Act of 1846, the creation of first railways across state borders led to a ripple effect that convinced the states to adapt common gauge

[496] In addition to telegraph, railroads, and postal standardisation addressed, also documentation of travelling was standardised during the same era. See John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge University Press 2000).

[497] For history of telegraph predating 19th century, Tom Standage, *The Victorian Internet: The Remarkable Story of the Telegraph and the Nineteenth Century's Online Pioneers* (Walker & Co 2007) ch 1.

[498] Leonard Woolf, *International Government* (Fabian Society 1916).

[499] A scrupulous list of many of these early rules appears in Georg Friedrich von Martens (ed), *Loix et Ordonnances Des Diverses Puissances Européennes Concernant Le Commerce, La Navigation et Les Assurances, Depuis Le Milieu Du 17e Siècle. Tome I, France* (Jean Fréderic Röwer 1802). A later magistral list of treaties in more than twenty tomes collected by Martens in *Recueil général de traités et autres actes relatifs aux rapports de droit international*.

[500] Douglas Puffert, 'Path Dependence in Spatial Networks: The Standardization of Railway Track Gauge' (2002) 39 Explorations in Economic History 282.

width.[501] Thus, already by 1886 there was a relatively widely shared consensus among the European states on a need to have commonly shared standards for trans-boundary railways, which led to signing of the Convention for Promoting Technical Uniformity in Railways.[502] While the track gauge signals a chiefly European development, the one on telegraph had a more universal adoption within the late 19th century international community and was more clearly an inter-state development. Signed originally by 20 states, the International Telegraph Convention[503] in 1865 provided detailed instructions from the opening hours of the telegraph offices as well as rules governing the way of transmitting international messages ('*l'appareil* Morse *reste provisoirement adopté pour le service des fils internationaux*'). These rules were further defined in a separate technical annex to the convention ('*règlement*') that contained, among others, a list of Morse codes for different signs and letters (art. VII of the *règlement*). The harmonisation work continued under the auspices of the International Telegraph Union established through entry into force of the Convention. The first journal published by the ITU in 1869 illustrates the role of the Union both as harmoniser as well as improver of standards.[504]

Although standardisation served mainly significant economic interests of European states, the creation of international institutions to administer these relations provided novel fora for states outside Europe to attest their sovereignty.[505] The new internationalism supported by new connections and new institutions was established on a small circle of European states together with the United States that gradually expanded to cover Latin American countries, Japan, Siam, and Ethiopia. Even if the states outside Europe were not equal in terms of their sovereignty, as for example the Abyssinian crisis clearly indicates,[506] within the more confined space of new

[501] Wolfram Kaiser and Johan W Schot, *Writing the Rules for Europe: Experts, Cartels, and International Organizations* (Palgrave Macmillan 2014) ch 5.

[502] Bob Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day* (Routledge 2009) 118. The Convention was negotiated as part of the International Conference for Promoting Technical Uniformity on Railways with its first conference in 1882, see *Procès-Verbaux Des Délibérations de La Conférence Internationale Pour l'unité Technique Des Chemins de Fer, Octobre 1882.* (Conseil Féderal 1882).

[503] *Convention Télégraphique Internationale de Paris* 1865.

[504] See 1 *Journal télégraphique* (1869) at 2ff. for an article on adoption of a common unit to measure resistance (Siemens) during the international telegraph conference held in Vienna in 1868, and at 5ff. for a list of best practices adopted by the Belgian telegraph offices.

[505] Douglas Howland, 'Japan and the Universal Postal Union: An Alternative Internationalism in the 19th Century' (2013) 17 Social Science Japan Journal 23.

[506] See Rose Parfitt, 'Empire Des Nègres Blancs: The Hybridity of International Personality and the Abyssinia Crisis of 1935-36' (2011) 24 Leiden Journal of International Law 849.

administrative international institutions like the Universal Postal Union (UPU), 'inevitably strengthened [non-European states'] claims for legal sovereignty and tariff autonomy.'[507] To some extent, early standardisation also provided a venue for non-European states to gain equal treatment by entering into unions' whose membership and conditions were geared towards maintenance of the European balance of power. If a postal convention or a telegraph treaty contained provisions for the maximum charges those applied with equal rigour in all member states. Therefore, a technical article, say, the Article 3 of the General Postal Union[508], stipulating tariff, size, and weight of single letter, barred at least *de jure* discrimination of a non-European state. In a curious way, binding themselves in new treaties, non-European states like Japan could view 'membership in the UPU as a means of asserting Japanese autonomy (*dokuritsu*) and recovering Japan's national rights (*kokken*).'[509]

All the early examples of international standardisation are what one could call 'interoperability' standards – a set of technical rules that allow two systems to co-operate. Other functions of standardisation, most notably those related to safety or other societal concern (e.g. environment, health, etc.) are of a much more recent origin. On the international level, the first social standards emerge through the work of International Labour Organisation (ILO) in the 1920s. Most of the early and later standard-setting by ILO focuses directly on working conditions through limiting, for example, work time to eight hours and preventing the use of child labour. There are however ILO standards that exemplify a highly technical standardisation with a societal goal. An early example of a health-promoting standardisation by the ILO is the Convention concerning the Use of White Lead in Painting from 1921.[510] The White Lead Convention sets a regulatory ban on uses of white lead and sulphate of lead, if they contain more than '2 per cent of lead expressed in terms of metallic lead' (art. 1(2)). Simultaneously on the national level, the turn of the 20th century functions as a watershed for emergence of a wide variety of standards to serve trade, but also safety of buildings, tools, and technologies.[511] In distinction to the early international standard-setting, many national standardisation systems relied on the input and expertise of private organisations, even if the measures to implement standards were issued as acts of legislation.

[507] Howland (n 505) 36.
[508] *Treaty Concerning the Formation of a General Postal Union*, 9 October 1874, signed in Bern.
[509] Howland (n 505) 24.
[510] Convention concerning the Use of White Lead in Painting (adopted 19 November 1921).
[511] From the history of standardisation in the US and Europe for 20th century, see Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart 2005).

A technical standardisation that emerged from the technological developments associated with industrialisation of Western Europe and the United States, created also an impetus to address societal concerns this new form of production created as is evident in the early ILO standards. An echo to the critique of the working conditions in mines and factories found from most of the socialist writings from mid-19th century onwards, the new means of production alongside new chemical and mechanical products poised a more systematic hazards to safety than earlier, more artisanal means of production ever could. To counter these hazards, states started to regulate excesses that the process of industrialisation and linked urbanisation were causing.[512] The new standards of the era, like the White Lead Convention, were a direct response to the real and perceived risks associated with new societal constellation. A standard regulating casing of electric wires as a measure for fire safety or finding a new measurement for electric resistance to better manage telegraph services were new kind of technical and technological fixes to old problems of co-operation. Where a merchant's guild in Florence could control modalities of trade by controlling its members and prospective buyers,[513] the new internationalism shaped by increase in interconnectedness seemed to lead into an overlap of mutually inconsistent rules with often adverse effects. Quite like the medieval masons before them, the industrialising countries of Western Europe and the United States soon found the power of standards in upholding public order—first at home, and gradually internationally.

Standards as a regulatory tool for industries emerged alongside institutes and organisations responsible for their development. The Engineering Standards Committee in London established in 1901 (later the British Standards Institute (BSI)) is commonly referred to as the first domestic standardisation organ in a modern sense, while the moniker on the international plane is donned to the International Electrotechnical Commission (IEC) found in 1906. As briefly suggested above, standardisation activities were pursued before the 20th century through the traditional state-centric measures, even if the use of an engineering elite as a standard-setter domestically and internationally was already prevalent in most industrialised countries in the 19th century. What was novel in both the BSI and the IEC was their non-governmental credentials, which saw new standards emerge as voluntary and consensus-driven agreement between experts or epistemic communities.[514] Any

[512] Judith Rainhorn, 'Workers Against Lead Paint' in Lars Bluma and Karsten Uhl (eds), *Kontrollierte Arbeit - disziplinierte Körper?* (transcript Verlag 2012).
[513] Iris Origo, *The Merchant of Prato* (Penguin Press 1957) 62–63.
[514] See, Craig Murphy and Joanne Yates, *The International Organization for Standardization: Global Governance through Voluntary Consensus* (Routledge 2009) ch 1..

persuasive power standards carried was framed as a function of the impartial expertise rather than political power or partisan interests. The model of these two institutions was promoted throughout the industrialised world, with the US, Germany, Australia, and France adopting their own standards institutes by the mid-1920s. These developments were consolidated in creation of the International Federation of the National Standardising Associations (ISA) in 1926, which issued only few international standards and ceased to function in 1942, even if resurrected briefly in 1946 to aid in creation of its more successful successor.[515]

ISA's successor, the International Organization for Standardization (ISO), was established in a London conference in October 1946. The conference was attended by twenty-five national standardisation organisations, most modelled after the private, voluntary, and consensual decision-making model of the BSI. Echoing both its constitutive members as well as the practice of ISA, the new organisation was adopting a decision-making process relying on consensus as well as thematic division of its work into numerous technical committees. Depending on the interpretation, the early work of ISO remained modest or mechanical. The outputs of its technical committees were titled recommendations rather than standards, and the international processes seemed to provide little in terms of uniformity to standards at use domestically.[516] According to Craig Murphy and JoAnne Yates, these modest first decades of the ISO's work started to change in the mid-1960s.[517] The transition towards international standardisation as it is known at present had to a great extent been completed by the 1980s during the long period of Olle Sturen as Secretary-General of ISO.[518] What is often left out from these stories of gradual

[515] Willy Kuert, 'The Founding of ISO' in Lawrence Eicher (ed), *Friendship among Equals: Recollections from ISO's First Fifty Years* (ISO 1997).

[516] A good example of this limited purchase is the fact that still in 1991 a European manufacturer of motorcycles had to produce 'over 400 different versions of the *same* motorcycle to satisfy a variety of Community regulations' according to Financial Times. The reference and quotation is cited in Michelle Egan, '"Associative Regulation" in the European Community: The Case of Technical Standards' (European Community Studies Association Biennial Conference, George Mason University, 22–24 May 1991).

[517] They mark this as a revitalisation of international standardisation after the slumber that started in the 1930s. See, in general, Joanne Yates and Craig Murphy, *Engineering Rules: Global Standard Setting since 1880* (Johns Hopkins University Press 2019).

[518] Sturen's own account can be read in the 50 years anniversary publication of ISO, Olle Sturen, 'The Expansion of ISO' in Lawrence Eicher (ed), *Friendship among Equals: Recollections from ISO's First Fifty Years* (ISO 1997). An equally praiseful account of Sturen's role as a Secretary-General of ISO is repeated in Swedish national biography. See, Jan Ollner, 'Carl Olof (Olle) Sturén' (*Svenskt Biografiskt Lexikon*, no date) <https://sok.riksarkivet.se/sbl/Presentation.aspx?id=34648> accessed 14 August 2023.

growth of standardisation is the impact that changing international regulatory field had on the possibility of the standards to blossom.

As briefly suggested above, during the Stockholm environment conference of 1972, the role of technology and development remained to a great extent separate. The promotion of trade and commerce was seen as a means to achieve higher societal development that would eradicate poverty and therewith many of the environmental concerns of the developing world (i.e. desertification, deforestation, etc.). One of the only areas where technology, environment, and development were jointly articulated in the Conference declaration is related to standards. The developing countries raised a concern that the new environmental consciousness of the developed countries would lead to more stringent environmental rules on goods and products on the market. These rules would have a detrimental effect for nascent industrial mass production in developing countries and allow non-tariff-based restrictions for global trade that would favour the domestic production of the developed world. During the negotiations, international standards emerged as a proposed solution for the concerns raised by the developing countries.[519]

In many ways, any reliance on standards was a loss to the position embraced by the decolonised countries in the past. Less than a decade before, Nkrumah had denounced standards alongside more general control over the means and rules of trade as a new form of colonialism.[520] As a matter of wider international legal concern, technical regulation and standards emerged during the Tokyo round of negotiations for the GATT. The preparatory material for the ministerial meeting in Tokyo in 1973 mentions non-tariff barriers to trade only with regard to health and sanitary measures, suggesting that despite the Stockholm declaration, environment was not initially seen as a source for additional trade barriers.[521] In a relatively characteristic turn of events for international law, in the final agreement on technical barriers to trade concluded in 1979, environment appears as a specific category allowing a national deviation from an international standard.[522] Thus, precisely promoting that which the developing countries had opposed during the Stockholm conference. Outside the range of exceptions, the TBT Agreement promoted

[519] A summary of the specific concerns raised regarding the environment are summarised in UNEP, 'Approval of activities within the Environment Programme, in the light inter alia of their implication for the Fund Programme', 2 December 1973, UNEP/GC/14/Add.2. The specific concerns of non-tariff barriers to trade are addressed starting from page 50 of the report.

[520] Nkrumah (n 396).

[521] General Agreement on Tariffs and Trade, *Group of Three, Third Report*. L/3871 of 28 June 1973, 12 (§45).

[522] Thomas R Graham, 'Results of the Tokyo Round' (1979) 9 Georgia Journal of International and Comparative Law 153, 167.

'international standards' as foremost vessels of international harmonisation, while leaving it to some extent uncertain what would count as an international standard.[523]

Through the Tokyo round of negotiations, the ISO and other international standardisation bodies were granted a power to impose a plateau for technical solutions adopted domestically. That the process of standardisation received new-found attention from the 1980s onwards can readily be seen a function of the TBT agreement as much as the improved and streamlined administration of the standardisation organisations themselves.[524] In global trade where an international standard provides conformity with legislation of virtually all countries, the work of standardisation is a work of making a market for products and technologies.[525] For the export industries and the standard-setters in the developed world, having the ability to affect the emerging global standards and rules before they emerge allows for a significant competitive advantage. As John Braithwaite and Peter Drahos point out

> Most influence to shape regulation globally is accumulated in thousands of obscure technical committees of international organizations like the ITU and private standard-setting bodies like the ISO.[526]

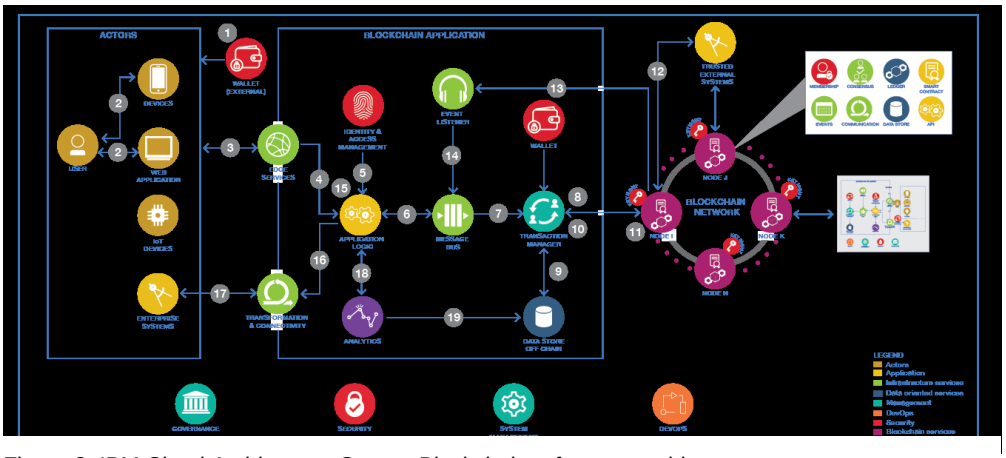


Figure 2. IBM Cloud Architecture Center: Blockchain reference architecture

[523] On definition of international standards within the TBT Agreement, see Mitsuo Matsushita, *The World Trade Organization: Law, Practice, and Policy* (3rd edition, Oxford University Press 2015) 436–63.

[524] Compare however to relatively minor role TBT played for the first decade of WTO, Robert Howse, 'Introduction' in Tracey Epps and Michael Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar 2012).

[525] This is an argument in Michelle Egan, *Constructing a European Market* (Oxford University Press 2001).

[526] Braithwaite and Drahos (n 8) 28.

It is through the work of these technical committees that technologies high and low emerge. In addition to producing the technical definitions of technologies themselves, the technical committees set methods that are to be used to assess whether a given product is in conformity with the technical requirements outlined in any given standard. It is this particular understanding of standards as technology that is considered next.

What then is a technology in and for standards? Obviously, as with most law, the definition of technology remains elusive. Is the work of ISO technical committee 307 on 'blockchain and distributed ledger technologies' technology or is it merely a list of technical specifications necessary for the technology to develop? In many senses, the answer is both. A standard currently under development for 'reference architecture' is likely to contain a definition of different nodes found on many of the currently available blockchain reference architecture models available (see **Error! Reference source not found.**).[527]

While the work of standardisation is likely in this case schematic and descriptive, it will also result into virtually all future development of the technology to follow a predefined reference model. After all, if a blockchain or distributed ledger standards are adopted internationally and later regulated domestically or regionally through technical standards, all providers of publicly procured blockchain solutions would have to rely on standard definition.[528] A disregard to imposed standard leads to

[527] There is relatively lot of interest by different standard-setting organisations on blockchain at present. See e.g. a list of active standard projects of the Institute of Electrical and Electronics Engineers (IEEE) (https://blockchain.ieee.org/standards). On background of the current ISO blockchain project and its goals, see e.g Nippon Telegraph and Telephone Corporation (NTT) (https://www.ntt-review.jp/archive/ntttechnical.php?contents=ntr201805gls.html)

[528] For current uses of blockchains in public sector, see Jamie Berryhill and others, 'Blockchains Unchained: Blockchain Technology and Its Use in the Public Sector' (OECD Working Papers on Public Governance, OECD Working Papers on Public Governance, 19 June 2018) vol 28. On the limited uses of blockchains, see e.g. Dylan Yaga and others, 'Blockchain Technology Overview' (National Institute of Standards and Technology October 2018). Legal scholarship provides a range of different regulatory approaches vis-à-vis blockchain; Karen Yeung provides three different models of law/code interaction based on intended purpose of a blockchain application, Angela Walch suggests a fiduciary duty to software developers responsible from key programming choices, while Michèle Finck provides a more grounded and hands-on guidelines for first steps towards regulating blockchains; Karen Yeung, 'Regulation by Blockchain: The Emerging Battle for Supremacy between the Code of Law and Code as Law' (2019) 82 Modern Law Review 207; Angela Walch, 'In Code(Rs) We Trust: Software Developers as Fiduciaries in Public Blockchains' in Philipp Hacker and others (eds), *Regulating Blockchain: Techno-Social and Legal Challenges* (Oxford University Press 2019); Michèle Finck, 'Blockchains: Regulating the Unknown' (2018) 19 German Law Journal 665.

increased costs for often a marginal benefit. At the same time, the specifications embraced should merely focus on results achieved, leaving a space for different providers to compete with interoperable innovation.

A good example of these network effects of standardisation is a charging cord used to charge different mobile devices. For long, virtually all mobile phones had different charging cords that changed from model to model. In 2009, the European Commission issued a joint memorandum of understanding with the mobile phone manufacturers of the time.[529] The MoU called for industry self-regulation to reduce electronic waste and prevent monopoly pricing from the use of proprietary technology. This shadow of the legislation worked for the most part and at present most mobile devices support a standardised technology (USB-C instead of the micro-USB current in 2009). A single market of sufficient economic clout was able to direct companies to adopt a standard technology to a large extent, where the existence of a standard itself was insufficient to result in harmonisation. Yet, despite the significant shift towards uniformity, the market leader Apple remains committed to a proprietary standard (Lightning).[530] The price of a charger and cords are several times higher for consumers, but it is a price consumers are ready to pay. It is an illustrative example from, on the one hand, power of standards to sustain competition while driving innovation, on the other hand, from their voluntary nature and possibility for successful non-conformity. Thus, while international standards allow trade, they do not force adoption of issued standards if those standards are not passed also as technical regulations.[531]

Together with the technical specification of the technology itself, standards provide measurements and means to certify that a product or a service complies or is in conformity with a standard. The certifying activity is carried out by certifiers

[529] European Commission, MoU regarding Harmonisation of a Charging Capability for Mobile Phones of 5 June 2009.

[530] The European Commission is preparing at present to impose legislation to force use of a single standard due to Apple's intransigence, see Reuters Staff, 'EU Regulators to Study Need for Action on Common Mobile Phone Charger', *Reuters* (8 June 2018) <https://www.reuters.com/article/us-eu-telecoms-charger-idUSKBN1KR1WE> accessed 14 August 2023. Apple's response to the demands for uniform charger standard decries it as an attempt to freeze innovation that will ultimately have negative consequences for environment, see https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6427186/feedback/F18119_fr?p_id=342389.

[531] There are limits to the amount of leeway regulators are willing to give to companies. After fifteen years of postponement, the European Union will, starting 2024, require all manufacturers of mobile phones to provide similar chargers. See, Directive (EU) 2022/2380 of the European Parliament and of the Council of 23 November 2022 amending Directive 2014/53/EU on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment, 7.12.2022 OJ L 315/30.

who themselves are subject to standards meant to guarantee their adherence to correct methods and precision.[532] Thus, if a producer of electric irons wants to bring them on the market for example in the United States, the irons have to fulfil requirements of ANSI IEC 60335-2-3 Ed. 6.0 b:2012 safety standard that contains particular requirements for electric irons. Yet, it is not always enough to merely declare to have produced goods in accordance with the standard ('self-certification'), but often this conformity must be shown to a certifier. The certifier will assess either production processes, products, or both to verify whether they are in adherence with the standard. Once this certification process is complete, the product may carry a sign of its conformity with standard requirements. For example, in the European Union this conformity is illustrated with a CE marking, in mobile phones sold in the US they are marked with FCC symbol, and so forth.

The certification procedure is highly formal as products from different producers are to be measured in a similar fashion. Thus, ISO 945-4:2019 standard sets out 'test methods for evaluating nodularity in spheroidal graphite cast irons' and similar standards exist for most industrial goods, products, and materials. A test for cast iron seems relatively non-controversial, but the more complex the product, the more discretionary the rules for assessment of conformity. How to measure 'normal' use of a mobile phone or a car or a vacuum cleaner is always a heuristic value choice that cannot be reduced to technical arguments. Does the normal use of a vacuum cleaner imply its use in a household with children and animals or in an office space? How to measure the battery life of a mobile phone under normal use? Or how to assess the emissions of a car that would reflect its normal use? These definitions of normalcy are encapsulated in measurement and certifying standards that accompany most technical standards. If the normal use, for example, is set to require fifteen minutes of uninterrupted use for vacuum cleaners that is what a conformity assessment assesses in terms of energy consumption, air flow, suction capacity, and so forth. These are then the results reported to prospective buyers as well as for regulators who allow the products to enter the market.

These highly formal criteria are what technology in standardisation boils down to. A vacuum cleaner is a sum of parts that are measured in accordance to diverse standards that might not converge with a common understanding of a vacuum cleaner as a household appliance. For example, a vacuum cleaner's energy consumption in the European Union was measured without any dust in the dust bag. Further still, the ulterior goals that standardisation serves (say, energy efficiency, safety of use, etc.) are imposed on technology based on these assessments. Therefore,

[532] On the economic rationale for legal regulation of certifiers, see Jonathan Barnett, 'The Certification Paradox' in Jorge L Conteras (ed), *Cambridge Handbook of Technical Standardization Law*, vol 2 (Cambridge University Press 2019)..

a children's inflatable swimming ring is safe for as long as it contains a warning that it is not safe to use. This is a paradox of standards, especially within the European Union where adherence to standards is a mandatory requirement for many goods to enter on the market. Whereas in the US a product having wrong language for a warning text would hardly constitute a liability for producer for as long as the product otherwise adhered to the safety rules, in the EU an omission of a warning text which states that a product is not safe is a violation of safety. Thus, the EU wide Rapid Alert System for dangerous non-food products (Safety Gate) in alert number A/12/1121/15 called for a destruction of a patch of inflatable armbands as '[t]he product poses a risk of drowning because it does not contain the necessary warning and instructions for use in Bulgarian.'[533] The presence or absence of the warning text obviously does not render the product itself any safer, but it makes it compliant with the requirements of the Personal Protective Equipment Regulation[534] and the relevant European standard.

While it is easy to dismiss instances of inflatable armbands as mere excess of standards and their view on technology, the recent years have shown that these excesses are the very paraphernalia of standards. Almost irrespective of the area of electronic appliances, machinery, or consumer electronics, the behaviour of companies towards the standard assessment has been the same. In 2008, the U.S. Department of Energy (DOE) and LG made an agreement that ushered LG to adjust the way it measures energy consumption of its refrigerators as it was found to under-report energy consumption data.[535] In 2013, the smartphone manufacturers were found to tweak the performance of their devices when they recognised the use of a benchmarking software.[536] In 2015, the U.S. Environmental Protection Agency (EPA) issued a notice of violation to Volkswagen for intentionally programming its cars to show reduced emission on tests.[537] In 2016, the Natural Resources Defense Council, a US-based NGO, reported from exploitation of energy test loopholes by

[533] Safety Gate, Alert number: A12/1121/15 on 18 September 2015, available at https://ec.europa.eu/safety-gate-alerts/screen/webReport/alertDetail/175410.

[534] Regulation 2016/425 on personal protective equipment, OJ L 81, 31 March 2016.

[535] United States Department of Energy, Agreement between the U.S. Department of Energy and LG Electronics, USA, Inc. of 14 November 2008.

[536] Anand Lal Shimpi and Brian Klug, 'They're (Almost) All Dirty: The State of Cheating in Android Benchmarks' (*Anandtech*, 2 October 2013) <https://www.anandtech.com/show/7384/state-of-cheating-in-android-benchmarks> accessed 14 August 2023.

[537] United States Environmental Protection Agency, Notice of Violation of 18 September 2015, https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-caa-09-18-15.pdf.

manufacturers of TVs.[538] And in late 2018, the General Court of the European Union annulled the regulation on the energy labelling of vacuum cleaners after a protracted dispute between the European Commission and the vacuum clean manufacturer Dyson.[539] At the heart of the dispute was the fact that energy consumption of vacuum cleaners was measured in a way that entirely distorted the actual energy consumption of the devices.

In all these instances, a standard exists that is tasked to measure adherence of a product with a pre-defined criterion. With televisions, for one, it is a ten-minute test video. The energy efficiency of a technology is defined as a function of this test. Consequently, technology, say a television, is energy efficient if it does well in the test, even if on eleventh minute or with different picture settings its energy consumption would double. The same applies for all public interests attached to standard-bearing technologies. There is a presumption that a toy projectile is safe, even if it leads to asphyxiation for as long as it comes with a warning,[540] quite like a medical air system in a hospital is safe for as long as its safety is verified by a certifier. The fact that in Australia the same person was responsible from installing and verifying installation was not the failure of standard nor of technology, but that of the person conducting these operations.[541] The standards and technology at large are, in this narrative, seen instrumental for promotion of wider values from environmental concerns to health and safety of everyone. Manufacturers of standards-abiding products widely abuse the system to signal a token respect for values considered foundational by the legislators, while maximising the positive signal from adhering to stringent energy or safety standards. Thus, when PIP implants were using industrial silicon in their breast implants, it was still able to produce immaculate paper trail indicating their adherence to stringent health standards for implantable medical devices.[542]

[538] NRDC, *The Secret Costs of Manufacturers Exploiting Loopholes in the Government's TV Energy Test*, September 2016, https://www.nrdc.org/sites/default/files/costs-manufacturers-exploiting-loopholes-tv-energy-test-report.pdf.

[539] Case T-544/13 RENV, *Dyson Ltd v. European Commission*, 8 November 2018.

[540] Commission decision concerning the publication of the reference of the standard EN 71-1: 2005, OJ L 96/18, 11 April 2007.

[541] Chief Health Officer, 'Bankstown-Lidcombe Hospital Medical Gases Incident: Final Report' (26 August 2016).

[542] The case remains inconclusive to the present in particular whether the certifier ought to have noticed the mismatch between the produced number of implants and the quantity of silicon acquired. See, Cour de Cassation, *Arrêt no 616* of 10 October 2018 which sends the question to cour d'appel de Paris to decide. As of writing this, the Court of Justice of the European Union has recently passed a judgment limiting the scope of insurance coverage of victims of defective implants to France alone (C-581/18, *RB v TÜV Rheinland* of 11 June 2020), which has left all non-French customers to rely on

It is the dissonance between the actual performance and the ritual of performing that is emblematic of technology associated with standards. Echoing what Michael Power writes on auditing, the official picture of standards is idealised to a great extent—a image of what could be rather than what is.[543] The reality is often much closer to the gas outlet test form from the Bankstown-Lidcombe Hospital medical theatre 8 (see **Error! Reference source not found.**): a ritual of ticking the right boxes. In the hospital, medical gas pipelines were mixed with '[t]he oxygen outlet … emitting nitrous oxide instead of oxygen.'[544] Nonetheless, a report from the company installing the medical gas system bears no indication of any problems, rather the oxygen concentration reported is identical to the one found in other medical theatres. Likely, the measurements were never made in the first place. While in the case of Bankstown-Lidcombe incident there is unlikely to be any mal-intent, but rather a ritual act of conformity assessment, the same cannot be said of large corporate actors intentionally gaming the standards. The corporations can more readily be perceived enjoying from what John Braithwaite, Toni Makkai and Valerie Braithwaite title regulatory ritualism that is inherent with its own paradoxes:

> Those political leaders who would prefer to deregulate but are forced by the electorate to actually increase regulation are often attracted to ritualistic regulation that gives the appearance of being tough without compelling major substantive change. Then when politicians come to power who really want regulation that forces improvement, they are paradoxically at risk of attack from conservative ritualists when they dismantle rituals that give the appearance of toughness in favour of reforms that deliver more substance.[545]

The same paradox is apparent in standardisation, where only more and additional standardisation can correct the past failures. Despite more than a decade-long period of repeated gaming for gain, there have been no suggestions to replace

compensation from certifier, TÜV Rheinland. This liability of certifier was verified in C-219/15, *Elisabeth Schmitt v TÜV Rheinland* of 26 February 2017. Later both Germany's and France's highest courts have established liability of certifier, see Bundesgerichtshof VII ZR 151/18 of 27 February 2020 and Cour de Cassation n°616 of 10 October 2018 (17-14.401) respectively. In the beginning of July 2020, the tribunal de commerce de Toulon commenced with expert assisted assessment of damages, but the cases are still on-going, with cour d'appel de Paris hearing the case on 17 and 18 November 2020 and cour d'appel d'Aix-en-Provence on 11 February 2021.

[543] Michael Power, *The Audit Society* (Oxford University Press 1997) 4.

[544] Chief Health Officer (n 541) 4.

[545] John Braithwaite and others, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar 2007) 219–20..

standardisation in its function to create health promoting, environmentally friendly, and safe technology.[546]

Through this limited look on some of the prominent standards and standard-setters, I have sought to underline the relatively similar instrumental value that technology plays in standardisation as it does in technology transfer. On both regimes, legislation in various forms attaches ulterior values to technology that can be accomplished through adherence to a legally codified articulation of those values. Our ability to enjoy from safe and energy efficient products is a consequence of standards and rigorous technology codified in them. The fact that standards are on many occasions paid little more than a lip service does not challenge this technologically mediated ground truth.[547] The logic or rationale behind this behaviour is obvious and well-captured in a response of Dr. Wang Chenglu, President of Software at Huawei's Consumer Business Group, to journalists trying to understand reasons why Huawei insists on cheating in mobile phone benchmarking: 'others do the same testing, get high scores, and Huawei cannot stay silent.'[548] When market craves for greater performance from smartphones, everyone resorts to cheating in order to sell their products. It is the logic of the market and the reason standards originally gained their prominence as regulatory tools to prevent non-tariff barriers to trade. Inasmuch as the other goals of standardisation have been captured by this market logic, follows from the primary function of standards as a means to market entry.

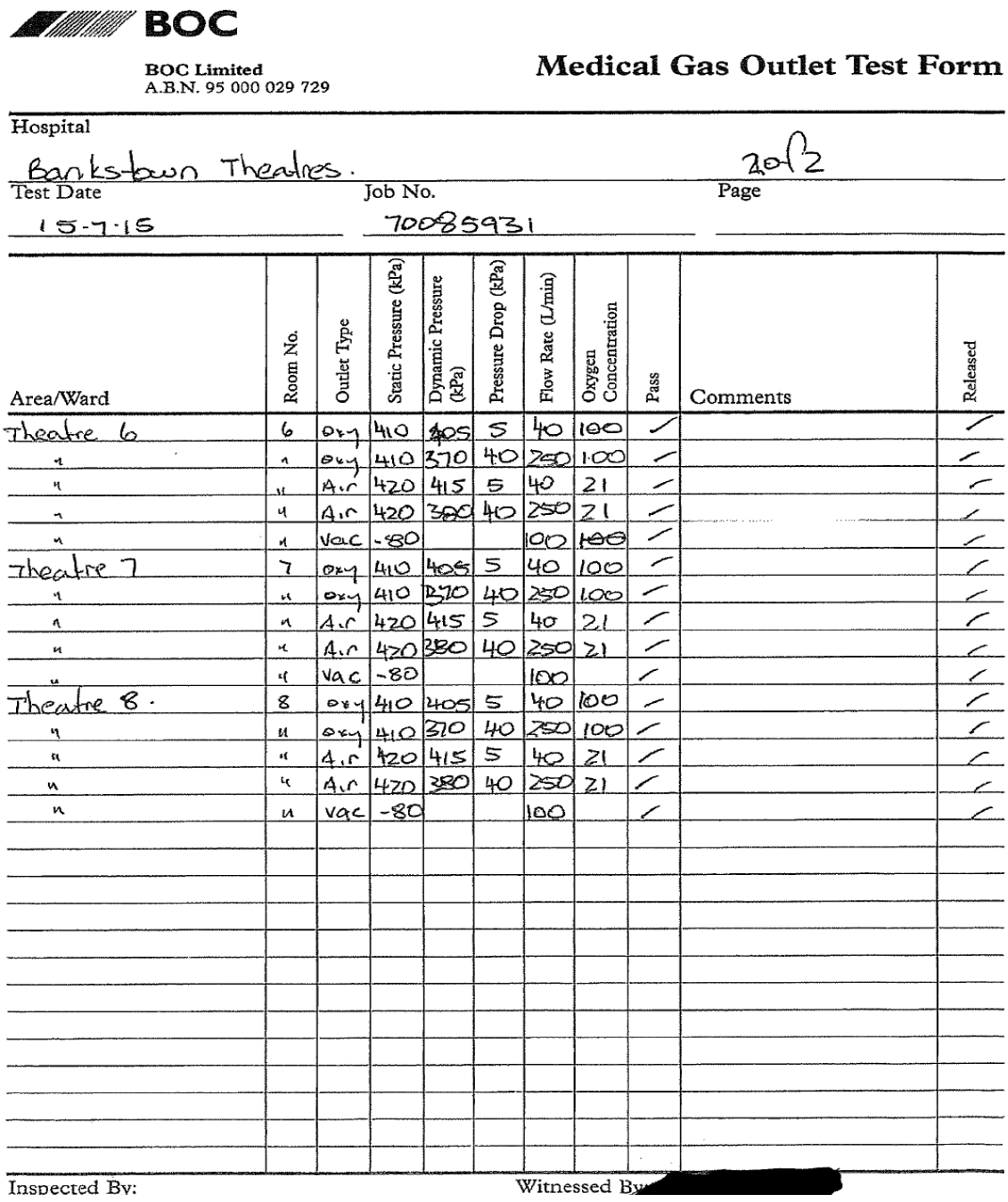
A standard captures a particular kind of technology, one circumscribed in technical detail and objective measurements. The technology codified in standards is readily available to everyone for a relatively low price. The use of such technology promises an entry to market globally. It also signals safety of use, interoperability, and a range of other coveted values a technology can possess. A technology in

[546] Arguably, the Court of Justice of the European Union has in recent years addressed standards as part of judicial review, which implies willingness to question their technical credentials and consumer protection. Of such cases, see e.g. C-613/14 *James Elliott Construction Limited v Irish Asphalt Limited*, 27 October 2016 and C-630/16 *Anstar*, 14 December 2017.

[547] This is highlighted by the fact that there is limited liability from failures of standards even within those jurisdictions that are responsible from most standards globally. Of this limited tort liability, see, Paul Verbruggen, 'Tort Liability for Standards Development in the United States and European Union' in Jorge L Conteras (ed), *Cambridge Handbook of Technical Standardization Law*, vol 2 (Cambridge University Press 2019).

[548] Andrei Frumusanu and Ian Cutress, 'Huawei & Honor's Recent Benchmarking Behaviour: A Cheating Headache' (*Anandtech*, 4 September 2018) <https://www.anandtech.com/show/13318/huawei-benchmark-cheating-headache> accessed 14 August 2023.

conformity with a standard does effectively remove non-tariff barriers to trade, as was promised to developing countries during the Tokyo round of negotiations. But this promise of free trade comes with a highly formalistic regime adherent to the privately set norms. Even if the formalism of standards empowers the developing country manufacturers, it accomplishes this only by subjecting safety, health, and other societal motives promoted by standards to similar formalism. And as regulatory research on ritualism encountered in auditing and aged care indicate, social justice is difficult to formalise without transforming the provision of justice into a technical exercise that has often had but little space for human concerns. The number of times an elderly person is turned in her bed indicates as little 'good care' as verifying adherence of a technological gadget to prescribed rules in predefined setting tells from 'safety' or 'energy efficiency.' There is good care as well as safe and energy efficient technology, but to what extent they are a consequence of standards that supposedly promote them is much harder to assess. Yet, in the idealised form widely attributed to standards, these public interests are a natural corollary of the standardisation system itself.



BOC

BOC Limited
A.B.N. 95 000 029 729

Medical Gas Outlet Test Form

Hospital: Bankstown Theatres. 2 of 2

Test Date: 15-7-15 Job No.: 70085931 Page:

Area/Ward	Room No.	Outlet Type	Static Pressure (kPa)	Dynamic Pressure (kPa)	Pressure Drop (kPa)	Flow Rate (L/min)	Oxygen Concentration	Pass	Comments	Released
Theatre 6	6	oxy	410	405	5	40	100	✓		✓
"	"	oxy	410	370	40	250	100	✓		✓
"	"	Air	420	415	5	40	21	✓		✓
"	"	Air	420	380	40	250	21	✓		✓
"	"	Vac	-80			100	100	✓		✓
Theatre 7	7	oxy	410	405	5	40	100	✓		✓
"	"	oxy	410	370	40	250	100	✓		✓
"	"	Air	420	415	5	40	21	✓		✓
"	"	Air	420	380	40	250	21	✓		✓
"	"	Vac	-80			100		✓		✓
Theatre 8.	8	oxy	410	405	5	40	100	✓		✓
"	"	oxy	410	370	40	250	100	✓		✓
"	"	Air	420	415	5	40	21	✓		✓
"	"	Air	420	380	40	250	21	✓		✓
"	"	Vac	-80			100		✓		✓

Inspected By: Witnessed By: [redacted]

PAD01223

Figure 3. A test form from gas outlets related to Bankstown-Lidcombe medical gas incident.

3.3 Conclusion

'An immature technology is a malleable technology,'[549] argues Michèle Finck on prospects of regulating largely uncharted and undefined territory of blockchains. In a similar way, law has moulded technology writ large for the past hundred years through shaping and forming of a legal fiction of technology. Throughout the present chapter, I have looked at law's internal vision of technology, but before I could chart this internal vision, I had to come in terms with what positive law means when it speaks of technology. A brief inquiry into the nature of technology revealed two things. First, that there is an apparent difficulty to provide a definition of technology that would be proper to law. Even though definitions are a central element of many statutes, acts, contracts, and decisions that are proper to law, definition of technology remains elusive even on documents that refer to 'technology'. Thus, in much of the literature on interaction of law and technology, technology denotes to a small sub-set of technologies considered new. Second, despite the common parlance of technological advances dating back to ages, the word technology in its present meaning has first emerged in English language in early decades of the 20th century. I looked more closely on the evolving legal articulation of 'technology' through a U.S. case law database, which clearly indicated the relative rarity of 'technology' as a word before late 1940s, and more importantly, that virtually all references to technology before the 1930s were to 'technology' as a specific way of writing using professional terms and concepts. A reference to 'legal technology' in the 19th century was to law's language, not to some technical advances.

Thus, while it certainly is true that law has regulated technology long before 1930s, it did so, using a different vocabulary. A key element of this earlier regulation were privileges and later patents as state-sanctioned tokens of innovation. Innovation came closely associated with technology in the early 20th century, which explains the close connection of 'technology' with patent law. Therefore, after the brief semantic account of 'technology', I analysed the evolution of meaning of technology through patent law. I suggested that patents are a urform of technology that informs all other internal accounts of technology in law. As such, I argued that mutations in patenting mutate technology as well. I provided a reading of globalised patent law and the growing importance of a select few jurisdictions in defining what is an innovation, and therethrough a technology, worth legal protection globally. The contingency of patenting that was left open in the negotiation process of TRIPS through 'flexibilities' was quickly erased through the stringent requirements set forth in various bilateral trade agreements negotiated by the U.S. and the European Union.

[549] Finck (n 528) 682.

After consolidation of the subject matter of patents and of technology, the past two decades has evinced growing procedural harmonisation in patenting. Together these developments have made global patent processes relatively uniform which has also rendered technology encoded in patent specifications universal. Armed with this idea of a universal technology, I placed my focus on two regulatory regimes that are intimately bound to technology: transfer of technology and standardisation. The question posed was what kind of an instrument a universal technology makes.

In transfer of technology I focused on a subset of it related to law and development and sustainable development. I excluded purely private forms of technology transfer and relevant licensing, not because it would have vastly differed from the other instrumental uses, but because that reveals relatively little from state and statehood that are central to international law. I argue throughout the subsection 3.2.1 that sustainable development was largely built on the foundations of early technical assistance regime of the United Nations. This regime, like the sustainable development one, was established on an idea of a precise direction of the flow of technology from the global North to the global South.[550] In all of this, technology served and continues to serve an important role of a mediator that is perceived largely as a neutral one. From the early development aid focusing on agriculture or building up factories to the more contemporary transfer of technology suited to tap sustainable energy sources, technology has largely been an intrinsic value. For as long as technology is transferred, any project is in the main a success. If the project fails in the end to reach its pre-defined goals, as the examples I draw from Georgia indicated, the failure is always a function of mismanagement and never that of unsuitable or dysfunctional technology. As such, technology becomes a perfect dynamic of difference, acting as a touchstone of a 'developed' state that is always fleeting, for the directionality of transfer is pre-defined. There is no transfer of technology from developing to developed states due to two reasons. First, technology is preposterously seen as something belonging to private actors, never to states. That at the same time a state can be considered to lack technological capacity that ought to be transferred is a clear contradiction in terms. Thus, while lack of technology characterises a state, its presence is an attribute of private creativity, wherefore a developed state is an oxymoron—a fact that has contributed to permanently changing nomenclature of this foundational division between states.[551] Second, due to the private provenance of technology, any transfer of technology from the developing

[550] For contestation of such unidirectionality, see for example, Eden Medina and others, *Beyond Imported Magic: Essays on Science, Technology, and Society in Latin America* (The MIT Press 2014).

[551] The opposite to a state transferring technology has been variedly called under-developed, developing, and, most recently, low-and-middle income.

states appears solely as an intra-corporation asset transfer, never a sign of the high-income countries learning from the rest. I argue that largely due to construction of sustainable development on prior development aid, technology is simultaneously public and private, neutral and instructive of a state's development.

In the last subsection of the present chapter, I looked more closely on technical specifications and international standards and the image of technology therein. At first sight, standards are proper to engineering rather than law and that is also how most of the literature on standards describe them. After all, standards are set by engineers gathering in countless technical committees that seek to formulate a consensus of what we mean with given technology, what are the attributes of that technology. Yet, since 1970s standards have served an important role in fostering global trade and since then have been part of every major technological change in society. Through this regulatory role of standards, they have also become more intimately bound with law. I argued that the apparent neutrality of technical specification belies their significant regulatory impact. As standards have become guarantors of safety, security, and ecological wholesomeness of technology, they have also regulated the legitimate expectations we can have towards technological objects we interact in our everyday. I pointed out a range of short-comings of standards – from unsafe inflatable armbands to gamed energy standards – to illustrate how focus on technical misses the forest for the trees. I suggested that with more complex and social technologies standards easily transform into ritualistic adherence, where technical details rather than the purported aim of standardisation are decisive. In a system of global trade where international standards provide access to markets everywhere, the apparent neutrality of technical specifications conceals significant material shortcomings of technology that become apparent when technology is transposed from idealised test environment into lived world of its end-users. These shortcomings range from silly, such as vacuum cleaners tested without dust, to much more harmful ones.[552]

All in all, in the present chapter I have focused on technology as it is encoded in positive law. I have not sought to provide a more robust vision of technology that many legal scholars have in recent years employed when they have analysed technology. That account will be saved for later chapters. With the chosen focus, I have indicated how relatively little there is in 'technology' that is proper to law. In

[552] As indicated by D Peel and others, 'Evaluation of Oxygen Concentrators for Use in Countries with Limited Resources' (2013) 68 Anaesthesia 706. all standard-abiding oxygen concentrators recommended by the WHO fail to function in ambient conditions that occur commonly in subtropical climate. Used standards outlined in World Health Organization, *Technical Specifications for Oxygen Concentrators* (WHO 2015) 39–40. are ones developed by the EU and US standardisation organisations.

most limited understanding, there is no definition of technology in law, and, therefore, no law of technology. I suggested that there is a long-standing ideological connection between patents, innovations, and technology, which justifies talk of patents as a foundational tenet of technology. A relatively similar conclusion is drawn by number of other authors who have looked the practice of technology transfer.[553] I do not intend to suggest that technology is the same as patents. Rather, my argument is that whenever law addresses questions of technology, patents are never far away. With the increased importance of software and algorithms as source of wealth, the patents as 'technology' narrative might be giving space to other forms of intellectual property rights, such as 'trade secrets' as technology. Time will tell. Irrespective of the foundational form of technology in law, the fact that it is at present articulated chiefly in universal terms is as at odds with materiality of technology. For as long as technology, say a vacuum cleaner, is perceived a single entity materially circulating the global trade network with predominantly similar material impact the world over, any regulation of technology will always remain both under- and overinclusive. Thus, it is not enough simply to re-assess our regulatory approaches to some specific technologies, but rather to question the hard-wired assumptions underpinning the entire notion of technology in law. Otherwise, the growing mass of regulation will create a too complex a network of norms for anyone to perceive the small, yet obvious holes in it that will become blatantly obvious only after the event.

Can hundred years of technology in law remain immature enough to be malleable? Certainly. But as Rorty suggested for pragmatism, also technology in law needs a weeding out of underbrush so that we could see more clearly the roots of our regulatory choices. Thus, we might need more than an introduction to a recent handbook of the law and regulation of technology suggests when it scopes the 'terminological terrain':

> In the early days of 'law and technology' studies, 'technology' often signalled an interest in computers or digital information and communication technologies. […] This is not a Handbook on law and technology that is directed at a particular stream or type of technology [...] Rather, this work covers a broad range of modern technologies […] each of which announces itself from time to time, often with a high-level report, as technology that warrants regulatory attention.[554]

[553] See *supra* (n 479).

[554] Roger Brownsword and others, 'Law, Regulation, and Technology: The Field, Frame, and Focal Questions' in Roger Brownsword and others (eds), *Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2017) 4–5.

As I will illustrate in second part, much of technology that does not produce any high-level reports or calls for regulatory attention is equally much technology that ought to be understood as calling for sustained legal attention. These uninteresting technologies are subject to same rules and regulations as those producing reports, yet we fail to address them as technological problems for we are lost in modern technology, however broadly defined. And every report that produces a new wave of regulatory action, grows the underbrush concealing ‘technology’ a bit thicker, blocking our view from what really matters.

4 On International Law

As with the previous concepts, this brief initial foray into international law focuses on the semantic question: what is international law in law? Quite unlike with personhood and technology, the semantic question of international law has occupied legal scholars for long, to the point where it has become an inseparable part of international lawyers' ethos to provide an answer how international law is law and how it matters. Thus, the structure of the present chapter differs notably from that of the previous ones. Rather than looking first in the semantic question and then looking how that semantic understanding of a concept is employed in legal practice, the present chapter provides three somewhat differing accounts of international lawyers' answer to the semantic question, each conceptualised as a crisis of international law.

A classic definition of international law starts with a statement of what it is not. Most certainly, the dictum goes, it is nothing like domestic law. This traditional definition is attributed to great many theorists of the 19th century, but most prominently it is associated with the work of John Austin.[555] In a curious twist of events, a legal scholar deeply influenced by the father of the concept of 'international law' Jeremy Bentham, became its foremost scholarly opponent for the early 20th century international legal scholars.[556] Austin's commentary on international law is not particularly damning nor thorough as it is relatively easy for most proponents of international law as law to set aside.[557] Austin and later H. L. A. Hart provided for international law nonetheless a rallying call around which to build professional identity and habitus.[558] To write and work with international law is to overcome the

[555] John Austin suggests that international law is a set of positive moral rules which is a type of 'laws improperly so called'. Other rules and laws referred in the same instance are rules of honour and the law set by fashion. See John Austin, *Providence of Jurisprudence Determined* (John Murray 1832) 146–47.

[556] For Bentham's coinage of the term, see MW Janis, 'Jeremy Bentham and the Fashioning of "International Law"' (1984) 78 American Journal of International Law 405.

[557] A good early example is James B Scott, 'The Legal Nature of International Law' (1905) 5 Columbia Law Review 124.

[558] An entertaining pair of later articles tackling this legacy, see Anthony D'Amato, 'Is International Law Really Law' (1985) 79 Northwestern University Law Review 1293;

stigma of being not law properly so called, due to its perceived lack: a lack of authority, a lack of enforcement, and a lack of great many other things.

For many an academic international lawyer, international law has, then, been a practice to establish the perceived lack by projecting the lack elsewhere or denying its existence. Depending on the era, the focal points of this strategy have varied somewhat, always highlighting a different facet of international law.[559] An early rebuttal to Austinian denouncement was to highlight international law's significance through its august history, pervasiveness, and effectiveness in solving the inter-European conflicts. There were attempts to speak and write of law as a positive science in footsteps of Auguste Comte's positive philosophy. Or an attempt to formulate universal meta-norms in the language of natural law. In recent decades, international law has sought to distance itself from the grand narratives either due to its theoretical commitment to post-modernism or as a consequence of sobering realisation that there is too much and too diverse forms of norms to all fit under a single moniker of international law.[560] For example, at the turn to history, there was a clarion call to leave behind 'epochal and conceptual abstractions' of international law, in favour of perceiving international law as a lived practice of international lawyers.[561] And more recently, the international law was called to question its internationality through an outright denouncement of the existence of any invisible college of like-minded international lawyers in favour of a view of locally and topically construed 'divisible college' of international lawyers.[562]

What then remains of international law if it is constituted chiefly through experiences of international lawyers and this college of lawyers is further divisible on the language they use, where they have received their education, an area of specialisation, and so forth? Not much and enormously much. If there is no commonly shared structure – discursive or other – that would be shared by international lawyers, then international law is reduced to the lowest common denominator shared by different colleges of international lawyers. This would then

Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2010) 21 European Journal of International Law 967.

[559] David Kennedy provides an illustrative reading of the role of 19th century international law to more contemporary international law in 'International Law and the Nineteenth Century: History of an Illusion' (1997) 17 Quinnipac Law Review 99.

[560] Of post-modern international law, see Anthony Carty, 'Introduction: Post-Modern Law' in Anthony Carty (ed), *Post-Modern Law* (Edinburgh University Press 1990). From the view of too-much-international-law and concern of legal fragmentation, see Ronald St J Macdonald and Douglas M Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Nijhoff 1983).

[561] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2002) 7.

[562] Anthea Roberts, *Is International Law International?* (Oxford University Press 2017) 2.

constitute the core of what international law stands for, of what international law is. Alternatively, international law can be traced everywhere. It is a glue that binds together criss-crossing transnational interactions, a technical rule of air safety, and the Charter of the United Nations or the Declaration of Human Rights. On this account, there is little that is not international law, which would—depending from the vantage point—signal disappearance or proliferation of international law. Ultimately, it is not a question that is or can be addressed in the pages that follow. My ambitions are much more modest.

In the following, I will provide a series of snapshots that I hope will in the end transform into a short film of a sort. These snapshots are not marked as much temporarily as much as they are emerging as responses to different crises of international law. A crisis, real or perceived, is a driving force behind much international legal debate, even if seldom materialising into a concrete change.[563] Temporarily the first crisis I am about to explore sets into the end of NIEO, raise of neoliberalism, and finally the end of Cold War. I title it the crisis of structure. The second crisis constitutes a more disaggregated time series, while a more unitary focus. I look at ways with which the international law sorts its encounter with new subjects. This I title the crisis of subject. The last crisis is most closely connected to legal substance of international law. Through a line of examples drawn from contemporary international legal thought, I seek to provide a snapshot of international law's object or the 'law' in international law. I call this the crisis of object. I seek through these three critical *topoi* an action where the structure provides a *mise-en-scène* in which international legal subjects—both old and new—interact with objects of law internationally.[564] Is international international or are the objects of law law properly so called remains unanswered, but I seek to underline some of the idiosyncrasies of a practice many would argue is international law at present.

[563] Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 Modern Law Review 377.

[564] This display of conflicting views classified under three general headings is hardly novel, and I remain much indebted to those who have done it before me with much greater erudition, most notably, Deborah Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) 65 Nordic Journal of International Law 341.

4.1 Crisis of structure

The edifice of international law has been long in the making. As with all classifications, the one calling for a beginning of international law is like tracing the untraceable. It seems settled that an object of inquiry only emerges with relation to something that sets it apart, wherefore emergence of 'international law' or its predecessors as an independent concept is only but a continuation of a more ancient practice differently named. This has, of course, not prevented international law from having multiple parthenogenetic births, sprawling out from the minds of its single fathers.[565] Is it a Grotian tradition that international law carries, or one on loan from scholastic fathers of the School of Salamanca, or should we attribute it to the 12th century School of Toledo translators of Arabic text, or *Umayyad* dynasty that brought and spurred the environment receptive of multilingualism and one that was not repressive of sciences of the time? In the discourse of international law's history, it is commonly addressed as a characteristically European idea with a European pedigree. This discursive anchoring stands even in the face of more ancient and/or sustained traditions of regulating relations between groups of people found elsewhere. These stories of origin—whether highlighted or concealed—are foundational for the construction of international law as a practice and as a theory.

A narrative of international law and its structure often commences with a declaration to the effect of cementing this traditional story. In the most recent edition of the *Brownlie's Principles of Public International Law*, James Crawford declares the matter on the very first sentence: '[t]he law of nations, now known as (public) international law, developed out of the tradition of the late medieval *ius gentium*.'[566] He acknowledges in an accompanying footnote that 'antecedents may be identified,'[567] yet he does not expound on the idea. On the next page, Crawford is already convinced that due to the influence of Thomas Aquinas '[i]n terms of intellectual history, international law was thus European in origin.'[568] Obviously, Crawford is not alone in his re-construction of international law's origin story. In

[565] Maurice Bourquin, 'Grotius est-il le père du droit des gens? (1583-1645)', in *Grandes figures et grandes oeuvres juridiques* (Faculté de Droit 1948) considers father a collective figure: '*[l]e père du droit des gens, c'est une société en nom collectif,*' cited in Peter Haggenmacher, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture' in Hedley Bull and others (eds), *Hugo Grotius and International Relations* (Clarendon Press 1990) 133.

[566] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press 2012) 3.

[567] ibid. He lists Egypt and the 'Bronze Age world system of the Near East' alongside with general treatise on international law in antiquity.

[568] ibid 4.

Oppenheim's International Law, Hersch Lauterpacht found international law 'a product of modern Christian tradition' no more than four hundred years old.[569] In Finland, Robert Hermanson argued in his lectures that '[u]ppkomsten af den katolska västerländska kyrkan'[570] was foundational for orderly relations between states, culminating in emergence of Grotius and the Westphalian order. His reading has continued to hold sway of later Finnish textbook authors, such as, the one authored by Kari Hakapää.[571] Similarly, Franz von Liszt in his textbook claimed that

> [d]as Völkerrecht konnte daher erst entstehen, als sich mit dem Ausgang des Mittelalters neben dem deutschen Reich die groβen und selbständigen, ihrer Souveränitet sich bewuβten christlichen Staatwesen Europas (Spanien, Frankreich, England, Österreich, der skandinavische Norden) bildeten und entwickelten.[572]

When the textbooks (old and more recent) do not deal with the development or history of international law, they summarily declare international law as 'certain rules of conduct which modern civilised states regard as being binding,'[573] '[d]e regler som I statspraxis godtagits som gällande rätt,'[574] 'de Retsregler, der ordner Retsforholdene mellem Staterne,'[575] or system that 'säännöstää etupäässä valtioiden välisiä (virallisia) suhteita.'[576]

Where then resides the crisis of structure of international law, when there is such a uniformity in the assessment of international law's origin, later development, and function by authors more and less recent? For the presence or emergence of a crisis, one needs to turn to another set of authors, authors outside the European Christian community or modern civilised states. In his early-1970s book *New States and International Law*, Ram Prakash Anand provides an outline of the crisis of structure traced here:

[569] Lassa Oppenheim, *International Law: A Treatise. Volume I, Peace* (Lauterpacht, Hersch ed, 7th edition, Longmans 1953) 68.
[570] Robert F Hermanson, *Anteckningar Enligt Professor R. F. Hermansons Föreläsningar i Folkrätt* (Hjalmar Nyqvist ed, Juridiska studentfakultetens förlagsrörelse 1901) 7.
[571] Kari Hakapää, *Uusi Kansainvälinen Oikeus* (3rd edition, Talentum 2010) 3.
[572] Franz von Liszt, *Das Völkerrecht Systematisch Dargestellt* (9th edition, O Häring 1913) 15.
[573] William Edward Hall, *A Treatise on International Law* (7th edition, Oxford University Press 1917) 1.
[574] Hilding Eek, *Folkrätten: Staternas Och de Mellanstatliga Organisationernas Rättsordning* (Norstedt 1968) 3.
[575] Axel Møller, *Folkeretten i Fredstid Og Krigstid*, I (2nd edition, G E C Gads Forlag 1933) 3.
[576] Erik Castrén, *Suomen Kansainvälinen Oikeus* (WSOY 1959) 1.

> The upsurge of Asia and Africa … [is] sometimes considered as "a challenge, not only to Europe, but to the whole occidental world of the white man." This has led to what has been called a "crisis" in the law of nations and uncertainty in its contents.[577]

The crisis of structure, as Anand illustrates, lies in the belief that the new nations were uniquely incapable to comprehend even the most rudimentary notions of international law, not to mention having a capacity to uphold and develop it. Their incommensurate claims causing uncertainty or indeterminacy over the normative content of international law. To counter the claims of the Western commentators, Anand together with numerous other international lawyers from the newly independent colonies sought to illustrate the engrained tradition of international law in these states. On these accounts one finds denial of the European origin story ('[t]here was no *international* law in Europe before 1856'[578]) as well as deep histories of organised co-operation between groups of people outside Europe that constituted binding commitments. Anand weaves a narrative of deep roots of orderly conduct for Asia, while for example Taslim Olawale Elias in his *Africa and the Development of International Law* tells of Ancient treaties concluded by African powers.[579]

But while the new nations and their corps of international lawyers challenged the Eurocentric narrative, they did little to displace its structure. The European authors experienced a crisis about the threatening plurality of only partly concordant interpretations of international law and how it ought to operate. The display of deep roots of international law in the former colonies may have quelled the most vocal European criticism of their incapacity to participate on equal footing to formation and use of international law, but it did little to transform the structure of international legal argumentation. As Philip Allott noted at the time, '[t]here have been marginal changes of tone and vocabulary, but there has been preserved an underlying structure of thought'[580] in international law. Allott describes this structure having 'an almost theological character, within which there can be right and wrong deductions,'[581] even

[577] Ram Prakash Anand, *New States and International Law* (Vikas Publishing House 1972) 8–9.

[578] Muhammah Hamidullah, *Muslim Conduct of State* (2nd edition, Sh Muhammad Ashraf 1945) xiii.

[579] Taslim Olawale Elias, *Africa and the Development of International Law* (Richard Akinjide ed, 2nd edition, Nijhoff 1988). The first chapter concerns with the historical existence of states in Africa and their relations from Carthaginians to the colonial era, while the second is devoted to emergence of idea of government and rule of law in Africa.

[580] Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 British Yearbook of International Law 79, 79.

[581] ibid 89.

if those are not following as a consequence of logical reasoning. Further still, Allott argues that all writing—at the very least—on controversial matters 'must be intrinsically polemical.'[582] On this analysis, the international lawyers of new states chose the wrong war. In the end, it mattered little whether the European nations accepted their former colonies as members of the international community, if and when, the structure of the legal argument endowed the Western authors with the sole power to recognise international law's orthodoxy. While the writings of international lawyers from the new states outlined the crisis and gave it an explanation, it took a better part of a decade for the Western authors to pick up on the topic of structural crisis.

At this point, however, the crisis felt by the vanguard of international law in the late 1960s and early 1970s was already without qualifiers. It was simply a 'crisis of international law'. Its character, nature, and origin entirely unarticulated. According to David Kennedy, his 'search for a new approach to the[] familiar problems has been motivated by a feeling that international legal scholarship is in crisis,'[583] that was perpetuated by a false belief in the persuasiveness of legal argumentation on normative grounds. Rather, for Kennedy, '"[b]eing convinced", then, is a matter of giving up the fight, or of accepting the unstated moral and/or political values which lie beneath a given line of reasoning.'[584] In this sense, Kennedy has in mind a method of international law proposed by likes of Myres McDougal two decades before and harshly criticised by Allott in the decade in-between the two.[585] The structure of McDougal, according to Allott, was utilitarian and therefore a form of a policy argument that would sacrifice the legal form to appear relevant to international relations or politics debates. This would however amount to an ad hoc establishment of the rules of engagement, suggesting that 'the specifically legal character of the law would have ceased to exist. All would have become politics.'[586] In order to save the law from adhockery and from being consumed by international relations, international law had to command a specific structure that was commonly shared by international lawyers. Within this structure, there was virtually endless space for competent international lawyers to disagree with one other over substance due to international law's indeterminacy. This was the unique insight of Kennedy and other

[582] ibid 93.
[583] David Kennedy, 'Theses about International Law Discourse' (1980) 23 German Yearbook of International Law 353, 356.
[584] ibid 357.
[585] McDougal's prominence as international scholar is associated with his promotion of a policy-oriented international law. An early formulation of this approach is Myres McDougal, 'The Law School of the Future: From Legal Realism to Policy Science in the World Community' (1947) 56 Yale Law Journal 1345.
[586] Allott (n 580) 127.

scholars more or less closely aligned with 'new approaches', such as Martti Koskenniemi, Nathaniel Berman, and Anthony Carty among others.[587]

A solution to a crisis of structure was then a different structure. To spell out a new structure, it had to be newly introduced as a discourse whose background assumptions were foregrounded to highlight 'patterns of repeating contradiction.'[588] The new structure of international legal argument was hiding in plain sight, in the 'deep patterns of justification' used to establish those structures. The shared contradictions of theory and practice of international law would then mark a shared structure, but such a structure does not constitute logical or causal connections; rather, the connections that are formed are aesthetic.[589] Thus, for Kennedy and many other analysts of structure at the time 'international legal argument *seems* unstructured and indeterminate.'[590] Whether there is a lack of structure or not would be beside the point, as decisive is a feeling or sense of lack. In many ways, Allott's criticism of the traditional language of international law seems equally much to suggest that there is a structure among all the unstructuredness of international legal argument. To substantiate the claim of the missing structure, Kennedy provides a selection of cases that suggest an interpretation of an underlying international legal concept in contradictory fashion. The function of these examples is to illustrate that the international legal argument indeed is unstructured and indeterminate.[591]

After this theoretical *tour de force*, most of the early scholars associated with new approaches to international law, followed their exposition with an outline of the new structure that was construed using the old sources. The reader is reminded of the history of international law that proceeds from Vitoria to the mid-1950s using chiefly Anglo-American authors as well as some German and French scholars from the past centuries. Even if the structural crisis is clearly pinpointed to decolonisation or new international economic order, the new structure of international law is certainly not going to emerge through a newly sensitised understanding of the structure, but rather from a clearer formulation of a form of international law. In a

[587] It is difficult as always to say who really were part of anything considered a movement. It is obvious that later lists of authors associated with 'new approaches' are more inclusive than the group of authors initially, see David Kennedy and Chris Tennant, 'New Approaches to International Law: A Bibliography' (1994) 35 Harvard International Law Journal 417. A later charting of the field, long after the self-declared demise, is provided in José María Beneyto and others, *New Approaches to International Law: The European and the American Experiences* (TMCAsser Press 2013).

[588] Kennedy, 'Theses about International Law Discourse' (n 583) 355.

[589] ibid 356.

[590] ibid 359 (emphasis added).

[591] Kennedy returns to these cases as well as more general framing of the U.S. international legal scholarship in most of his works during the 1980s and the early 1990s, most systematically in David Kennedy, *International Legal Structures* (Nomos 1987).

self-assessment of his structuralism, Koskenniemi argues that his project was providing an 'explanation for how international law … could simultaneously possess a high degree of formal coherence as well as be substantively indeterminate.'[592] But such a project was highly static in its picture of where the structure and politics of the international lawyers employing international law originated. Politics is there but why did international lawyers decide to align with a given set of politics to begin with? In his own way, Anthony Carty denounces this problem as being a problem in the first place by suggesting that it is international lawyers themselves who create international law and its politics, or, using his own words

> [i]t is rather that international lawyers become international law and then revert back to being international lawyers … [International lawyer] cannot see the international legal world as it somehow actually exists, simply because that world and his way of looking at it are one and the same thing.[593]

But this escape from the structure to the psyche of an international lawyer by understanding the historical situatedness of international law was not seen as an option more widely among those who sought to re-work the structure amidst its crisis.[594]

What emerged, then, as an outcome of the crisis of international legal structure, was a specific methodological vernacular that equated to a great extent international law with the curiously binary life of international legal concepts. The inequality of international law's foundational subjects or the discrepant application of standards in different cases was not a function of material differences but a game of international law's argumentative structure. From this vantage point, it was impossible to see in the NIEO or the Law of the Sea anything but a bifurcated understanding of sovereignty (or recognition), not a direct response to demands of former colonies as suggested in later scholarship. In this sense, international law was an invented language (for Kennedy and Koskenniemi supporting de Saussure) or a literature (for Carty), whose inventors were white men, and whose work had laid the grammar for any future crises or conflicts of international law. The crisis evinced

[592] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (n 561) 1.

[593] Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 1986) 128–29.

[594] A good example of the lukewarm response from others working on the same topics at the time is David Kennedy's book review appearing the next year in *American Journal of International Law*, David Kennedy, 'Book Review: The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs' (1987) 81 American Journal of International Law 451.

and documented by Anand and Eliot did not simply register on this structural exercise for theirs was not the international law. After all, as all the early proponents of the new approach remind us, the intellectual history of international law lies in the medieval *ius gentium*, and this is the shared structure that enables international law to function as a pliable tool between universal moralism and international relations. Absent structure, international law would collapse into politics—not to a different structure of international legal self-understanding.

A structure for legal argument towards which international law gravitates might have lost some of its lustre since the 1980s even in the eyes of those who first came to formulate it. Yet, the literary flair that supported the analysis has fared better. In 2017, a blog for critical legal thinking published a 'key concept' entry for indeterminacy as developed in the wider oeuvre of Koskenniemi. On it, Jean-François Thibault reminds of the structuralist underpinnings of the notion as employed by Koskenniemi and many in his wake.[595] In his epilogue to the second edition of *From Apology to Utopia*, Koskenniemi tells of his unease with the prevalent descriptions of legal practitioner in scholarly works of international law at the time, of his professional ethos differing from that portrayed in scholarship he consulted at the time of writing the original in 1989.[596] In another recollection of the era, David Kennedy outlines the differences between his *International Legal Structures* and Koskenniemi's *From Apology to Utopia*.[597] Kennedy's description tells of a shared structure between the two, even if the rules of transformation from (base) structure to international legal argumentative (super)structure differ somewhat. Or to borrow their shared Saussurian example, they share a *langue* while displaying different aspects of it in their respective *paroles*. To understand this shared structural place and its continued impact, contrasting the indeterminacy and new approaches to international law (NAIL) to a literary style adopted by a group of originally French authors under auspices of Oulipo movement is illustrative.

I exemplify this shared intellectual space and committal to structure through the intermediary of the works of Raymond Queneau—founder of the Oulipo movement and an influential literary figure in France.[598] Queneau's novels and poetry work

[595] Jean-François Thibault, 'Martti Koskenniemi: Indeterminacy' (*Critical Legal Thinking*, 8 December 2017) <https://criticallegalthinking.com/2017/12/08/martti-koskenniemi-indeterminacy/> accessed 14 August 2023.

[596] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue, Cambridge University Press 2005) 562ff.

[597] David Kennedy, 'The Last Treatise: Project and Person. (Reflections on Martti Koskenniemi's From Apology to Utopia)' (2006) 7 German Law Journal 982.

[598] I have used as a source for my understanding of Queneau two relatively different descriptions of him, Jacques Jouet, *Raymond Queneau* (la Manufacture 1989); Jordan

through self-imposed structural demands that became essential to generation of his art. For example, in *Cent Mille Milliards de Poèmes* Queneau summons a poetry creating machine (*machine à fabriquer des poèmes*) with fourteen lines of ten sonnets included in a book that can be combined in hundred thousand billion ways.[599] Simply, a small book of endless poems. The art was the structure that allowed boundless creation, highlighting the potentiality at play in Oulipo, which, according to Jacques Bens, 'opens into a perfectly authentic modern realism. Since reality never reveals more than a part of its totality, it thereby justifies a thousand interpretations, significations, and solutions, all equally probable.'[600] It is this understanding of potentiality and of structure that will be reflected on works of early NAIL authors.

I choose as point of departure Queneau's arguably most famous work: *Exercices de Style*.[601] It repeats a story using ninety-nine different styles that range from 'dog latin' to 'mathematics.' As any description would ultimately provide an additional style to a spiralling cascade of styles, I let Queneau's translated words in style of 'Notation' to describe the novel:

> In the S bus, in the rush hour. A chap of about 26, felt hat with a cord instead of a ribbon, neck too long, as if someone's been having a tug-of-war with it. People getting off. The chap in question gets annoyed with one of the men standing next to him. He accuses him of jostling him every time anyone gets past. A snivelling tone which is meant to be aggressive. When he sees a vacant seat he throws himself on to it.

Stump, *Naming & Unnaming on Raymond Queneau* (University of Nebraska Press 1998). With Oulipo I have used Dennis Duncan, *The Oulipo and Modern Thought* (Oxford University Press 2019); Daniel Levin Becker, *Many Subtle Channels: In Praise of Potential Literature* (Harvard University Press 2012).

599 Raymond Queneau, *Cent Mille Milliards de Poèmes* (Gallimard 1961).

600 Jacques Bens in Oulipo, *Atlas de Littérature Potentielle* (Gallimard 1981) 33. The English translation of the passage quoted is from Jean-Jacques Thomas, 'README.DOC: On Oulipo' (1988) 17 SubStance 18, 20.

601 Raymond Queneau, *Exercices de Style* (Gallimard 1948). The choice of *Exercices* as an example obviously distorts the comparison to larger Oulipo movement, which emerged first in 1960. Yet, the themes explored in *Exercices* are ones that will become familiar in later Oulipo works.

> Two hours later, I meet him in the Cour de Rome, in front of the gare Saint-Lazare. He's with a friend who's saying: "You ought to get an extra button put on your overcoat." He shows him where (at the lapels) and why.[602]

The novel functions on a premise that the reader presumes each style to describe same events. The object of inquiry is known, yet every style allows for a new reading—a potentiality of understanding. In 'Surprises' we learn of moral opprobrium of said chap taking a seat '[i]nstead of leaving it for a lady!'[603] Mediational role of structure and plausible observational plurality of an event are forms of indeterminacy Queneau explores. *Exercices* shares a more general goal of Queneau's oeuvre to 'write in a living language, the language of the ordinary man. He wasn't merely aiming at transcription … but at a transformation of it, something which would become a third language, a new, viable literary language.'[604]

Juxtaposing Queneau to NAIL reveals a shared sensibility for the role of structure simultaneously constraining and enabling interpretation. The events described in *Exercices* must remain the same for reader to understand different styles, though recognising that there would be no art without the structure. While styles in *Exercises* might introduce new observations and experiences, they are bound to keep much intact. Analogically, the very existence of international law depends on its practitioners sharing a structure where arguments make sense, and different styles employed to reduce an argument to sensical elements from the excess that is real life is an arena where different styles, backgrounds, and brackets fight. In Edward Morgan's review of David Kennedy's *International Legal Structures*, this play between structures and styles was not to 'explain the rules of international game [, but] rather explain the explanations of the rules.'[605] A task of a theory of international law was to take a step back and perceive from distance, like Queneau does for a bus ride and a *rendez-vous*. Rather than seeking a meta-theory, both are

[602] Raymond Queneau, *Exercises in Style* (Barbara Wright tr, John Calder 1998) 19–20. Barbara Wright's translation is here of equal import as Queneau's work as much of Queneau's literature as well as many works of other Oulipo authors remains a creative task. A testament of this is the sizeable literature on translating Queneau and Oulipo.

[603] ibid 26.

[604] Barbara Wright, 'Introduction' in *Witch Grass* (New York Review of Books 2003) v–vi. Of similar goals for other modernist authors, see regarding Beckett, Sophie Ratcliffe, *On Sympathy* (Clarendon Press 2008) 210ff.

[605] Edward M Morgan, 'International Law in a Post-Modern Hall of Mirrors' (1988) 26 Osgoode Hall Law Journal 207, 210. It was only after deciding the theme I would pursue on this chapter that I stumbled on Morgan's work that uses in a much more sophisticated way literature to analyse Kennedy's contribution. For Morgan, the authors of inspiration are Joseph Conrad, Virginia Woolf and T.S. Eliot, see ibid 211.

ultimately efforts to understand the multitude of interpretations these events can entertain and their emergence through a choice of discourse among many.

The purpose of theory is then not to find a correct normative answer but to reveal the shared argumentative structure. Similarly, in *Exercices* no single style represents correct interpretation, wherefore few would argue that the story as a 'Haiku'

> Summer S long neck
>
> plait hat toes abuse retreat
>
> station button friend[606]

is the same or even similar to the account of events in the style reporting 'Parts of speech'

> ARTICLES: the, an, a.
>
> SUBSTANTIVES: day, midday, platform, S, bus, Parc, Monceau, man, neck, hat, cord, ribbon, neighbour, toes, time, passenger, argument, seat, hours, front, gare, Saint, Lazare, conversation, friend, opening, overcoat, tailor, button, little.
>
> ADJECTIVES: aforesaid, back, competent, encircled, engrossed, every, free, long, one, plaited, some.
>
> VERBS: to notice, to wear, to start, to interpellate, to claim, to tread, to get, to abandon, to go, to throw, to see, to tell, to reduce, to get, to raise.
>
> PRONOUNS: I, he, his, him, himself, who.
>
> ADVERBS: near, very, instead, suddenly, purposely, in, out, quickly, later, again.
>
> PREPOSITIONS: about, on, of, with, by, down, in.
>
> CONJUNCTIONS: that, or, but, and.[607]

[606] Queneau, *Exercises in Style* (n 602) 139.
[607] ibid 152–53.

A choice to prefer one over the other is predominantly aesthetic, as the factual backdrop remains supposedly intact. The early proponents of NAIL noted there might be preferred solutions to international legal disputes, yet it was not due to inherent correctness of those solutions, but for other, structural reasons that they were endorsed as solutions to international legal disputes.[608]

Early in the formative years of NAIL its *modus operandi* was disconnected from purely normative and/or political concerns of its primary subjects and expanded towards an aesthetic exploration of law. David Kennedy saw new approach to international law describing connections that 'are not so much logical or causal as aesthetic,' and defined his analytical method 'departing from logical rational methods of exposition quite drastically in favour of a more aesthetic approach.'[609] A reason for such a resort to aesthetics was a perception of a crisis of international law veering towards irrelevance that could not be logically solved. An assumption held by traditional international law 'of a closed system of an almost theological character within which there can be right and wrong deductions,'[610] was shown to rely more on aesthetic than normative or logical considerations. Traditional logic seemed to bar emergence of the excluded middle, for which retreat to aesthetics provided a solution.[611]

Whereas for Queneau style was the story, for NAIL style became a method to observe international law. The very multiplicity of voices and approaches made NAIL impossible to describe as a method. It was rather a style, a fact underlined by Koskenniemi.[612] A central observation of NAIL was that 'the legal argument inexorably, and quite predictably, allowed the defense of whatever position while simultaneously being constrained by a rigorously formal language,'[613] allowing the

[608] Martti Koskenniemi, 'From Apology to Utopia: The Structure of International Legal Argument' (Dissertation, University of Turku 1988) 8. ('What is relevant is not so much what arguments happen to be chosen at some particular time or in some particular dispute but what *rules* govern the production of arguments and the linking of arguments together in such a familiar and a conventionally acceptable way.')

[609] Kennedy, 'Theses about International Law Discourse' (n 583) 355, 356.

[610] Allott (n 580) 89.

[611] For logical possibility of such worlds, see, however, Alain Badiou, 'The Three Negations' (2008) 29 Cardozo Law Review 1877. The theme of paraconsistent and other forms of logic is explored in theory of law by Maksymilian Del Mar, 'On the Hinges of History: For a Relational Legal Historiography' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017) 67ff.

[612] Martti Koskenniemi, 'Tyyli Metodina' in Juha Häyhä (ed), *Minun metodini* (Werner Söderström Lakitieto 1997).

[613] Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 American Journal of International Law 351, 355.

practical vision of international law to enter the realm of theory. This theory of legal argument became one of the staples of early NAIL scholarship, and

> [i]t was a merit of this theory, however, that it demonstrated that to achieve … strategic goals, the context of legal practice offered many different styles of argument. It was sometimes useful to argue as a strict positivist, fixing the law on a treaty interpretation. At other times it was better to conduct an instrumentalist analysis of the consequences of alternative ways of action—while at other times moral pathos seemed appropriate.[614]

Indeed, like Queneau's story demonstrated numerous avenues to construe a narrative, NAIL embraced similar underlying multiplicity to argue in favour of its own theoretical insight. And for both, structure was a necessary condition for a shared understanding that enabled some interpretations while barring others.

But what was NAIL's cure to the undefined crisis of the times? Theoretically, the solution was reminiscent of labouring in present to a different future, in a word, a utopia. To realise proposed utopia of more cognisant and sensitive corps of international lawyers, however, relatively little in terms of concrete steps was provided. If style or an endless cascade of eclectic approaches is a method, then, what else than faith and following there is for an international lawyer to do? Alternatively, NAIL could be read as an immanent critique, but it fails to articulate its situatedness as if it 'fear[ed] the epithet "naïve" more than [it] fear[ed] the charge of apoliticism,'[615] through its avowal of all forms of closure. Which structures are relevant to a given argument, where a lawyer or an academic should end her analysis, or how to recognise oscillation or indeterminacy?[616] Certainly, these issues were brought up later with scholars associated to NAIL and in legal theory more

[614] ibid 356.

[615] Mark Poster, *Critical Theory and Poststructuralism: In Search of a Context* (Cornell University Press 1989) 9.

[616] Edward L Rubin, 'Law and the methodology of law' (1997) 1997 Wisconsin Law Review 521, 524. Rubin offers a stark critique of 'postmodernism' that could be applied to NAIL as well: 'As for postmodernism itself, it offers many valuable insights, but it is a kind of intellectual blunderbuss. It is easy to trigger, and it hits a few targets now and then, but the difficult task is to identify the precise shape of various targets and the way they relate to one another—in other words, the standard modalities of academic discourse.' Obviously, such a stance presumes as much as any postmodern theory with regard to the content of what academic discourse entails and should entail, but the general vagueness of the chosen method certainly merits itself some scorn.

generally.[617] Oulipo illustrates that holding onto a structure can be a liberating backdrop against which to explore the multiplicity of meanings. Hallmarks of new novel from Queneau's *Excercises* to Perec's *La Vie Mode d'Emploi*[618] contain a structure, yet as Levin Becker notes

> These works, all of them governed in some way by strict technical constraints or elaborate architectural designs, are attempts to prove the hypothesis that the most arbitrary structural mandates can be the most creatively liberating.[619]

The structure of international legal argument might very well reflect 'the most arbitrary' mandates by States without any resort to binary positions such as hard/soft, ascending/descending, etc. but that would necessitate saying something about that very structure as Queneau did in his '*modes d'emploi*.' A list of features not included in structure does not indicate a solution but merely locates places of its non-existence.

The darkness of law that NAIL sought to cure was also markedly dominated by white, Western men. And, curiously, the solution was to look more closely to those same figures who had distorted the view to begin with. To understand international legal structures, one was to look at works of old, white European men as the context for emergence of the narrative space. An intriguing feature in the cure of crisis was its insistence to international law as it used to be, between states, rather than international law as it was forming.[620] Kari Joutsamo, acting as a pre-examiner to

[617] Within NAIL scholars, see especially work of Outi Korhonen whose analysis of situationality has greatly informed my own thinking, see her 'New International Law: Silence, Defence or Deliverance?' (1996) 7 European Journal of International Law 1; *International Law Situated: An Analysis of the Lawyers' Stance towards Culture, History and Community* (Kluwer 2000). From more recent accounts see Alexandra Kemmerer, 'Sources in the Meta-Theory of International Law: Hermeneutical Conversations' in Samantha Besson and Jean D'Aspremont (eds), *Oxford Handbook of the Sources of International Law* (Oxford University Press 2017); Del Mar (n 611).

[618] Georges Perec, *La Vie Mode d'emploi: Romans* (Hachette 1982).

[619] Becker, *Many Subtle Channels: In Praise of Potential Literature* (n 598) 6.

[620] There are important texts and compilations of many early authors of NAIL that reflect upon these absences in their theoretical work. With regard to human rights the obvious point of reference is David Kennedy's 'Spring Break' (1985) 63 Texas law review 1377. For institutions his article on 50th anniversary of the United Nations ('A New World Order: Yesterday, Today, and Tomorrow' (1994) 4 Transnational law & contemporary problems 329.), for law and development Anthony Carty's edited anthology of collections on the theme from 1992 (*Law and Development* (NYU Press 1992).). There is a surprising silence on the role of private actors in international law, yet see Martti Koskenniemi, 'Merenpohjainvestointien väliaikainen suoja : katsaus YK:n III Merioikeuskonferenssin II päätöslauselman toteuttamiseen' (1986) 84

Koskenniemi's dissertation noted the apparent lack of international organisations and human rights from Koskenniemi's treatise.[621] Similarly, absent were already present critiques of feminism and third world. This male-dominated and Western-located culture was, obviously, also integral to Oulipo movement, despite attempts to create a language of 'ordinary man.' Initially, both NAIL and Oulipo created an inclusive language whose excluding character was merely enforced through the attempts to simulate a bridge between the authors and the structure they evinced.

The legacy of Oulipo and NAIL is better understood not through their position as direct antidotes to failures of the system, but in language they provided for the future generations. Octavio Paz's words in his Nobel prize speech regarding European literature, could, *mutatis mutandis*, be said of NAIL and international law.

> [European literature] is a dialogue that cuts across multiple languages and civilizations. Our dialogue, on the other hand, takes place within the same language. We are Europeans yet we are not Europeans. What are we then? It is difficult to define what we are, but our works speak for us.[622]

Paz articulated clearly what had become of the European literature as a discourse and aesthetic mission. The Oulipo authors explored the contours of their literary structure. For them, it was an attempt to overcome self-imposed limits, whereas for the early authors of NAIL, the structure appeared given, but the style it followed seemed 'to render [international law] either irrelevantly abstract or trivially specific.'[623] A new language of ordinary law was called for, but the question remained, as with Paz, that 'if the works are diverse and each route is distinct what it is that unites all these [modernists] poets.' NAIL came to stand as a moniker that held together international law that its authors saw as 'a mirage, a bundle of reflections.' What became of a shared structure, if all more complex reasonings made it 'impossible in principle to operate the inductive and deductive processes' that were needed to find traditional international law. Modern literary art and critical theory of

Lakimies 379. It deals with protection of pioneering private investment in deep seabed mining. None of these, though, provide new theoretical insights or advances; those are reserved for treatises on state, territory, sources, and custom. The lack of focus on institutions is also obvious in 1993 Bibliography of NAIL.

[621] Kari Joutsamo, 'Asia: OTL Martti Koskenniemen väitöskirjaksi tarkoitettu tutkimus', 4 September 1988, Attachment No. 2/15/15C/1988.

[622] Octavio Paz, 'The Nobel Prize in Literature 1990' (*NobelPrize.org*, 8 December 1990) <https://www.nobelprize.org/prizes/literature/1990/paz/lecture/> accessed 14 August 2023.

[623] Kennedy, 'Theses about International Law Discourse' (n 583) 356.

international law both revealed the illusion of the linguistic structure of tradition, while holding that the same language could be spoken differently.

In 1991, Anthony Carty called David Kennedy 'the last modernist.'[624] Carty placed Kennedy in a mode of production that manoeuvred within the 'traditional' narrative of progress-oriented moderns to highlight mode's inherent crisis. But with criticism and crisis, Kennedy's work 'open[ed] the dialogue between various linguistic and cultural traditions, between the center and the periphery.'[625] If, indeed, the international law was operating on a single structural plane of a shared grammar, as the theory of NAIL seemed to suggest, that plane was open to new discourses, new aesthetics, new searches for truth. This idea was carried over to future of theorising and perception of international law. An aesthetic theory of international law that sprung from criticism and crisis, spurred international legal theory head-first into 'postmodern.' A promise of a theory of international law liberated from straitjacket of analytical rigour was able to outlive the movement that had started it. A theory eclectic enough to shield it from critique, it was able to mount against 'traditional' forms of theory that were cemented to either positive law or some normative bind transcending the international law itself. Like Oulipo, NAIL was 'a kind of rust-remover to [theory of international law] to help to rid it of some of its scabs'[626] that would have made it difficult to proceed in the new world order that had been building up for several decades.

[624] Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 European Journal of International Law 66, 69.

[625] Wolfgang Müller-Funk, 'Broken Narratives: Modernism and the Tradition of Rupture' in Wolfgang Müller-Funk and Clemens Ruthner (eds), *Narrative(s) in Conflict* (De Gruyter 2017) 15–16.

[626] Translator's introduction in Queneau, *Exercises in Style* (n 602) 15.

4.2 Crisis of subject

The new world order that supposedly triggered the crisis of structure first to international lawyers from the Third World and later in the West, was centrally concerned about the proliferation of 'subjects' of international law. In the past, the 'family of nations' had been a circle of European states and their settler colonies who presumedly had shared values and, therefore, through their common consent upheld a system of international law binding to all of its family members. Hence the sudden emergence of dozens of new members to the family was a profound crisis due to proliferation of international legal personhood to new corners of the Earth. Underlying this analysis was an idea that subjects of international law consist solely or at least predominantly from sovereign states. Thus, in 1905 in the second edition of his *International Law: A Treatise*, Lassa Oppenheim rather summarily declared the matter:

> The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is, therefore, a member of the Family of Nations, is an International Person.[627]

The definition provided by Oppenheim is clearly circular, and despite the apparent clarity of the rule outlined, is subject to plethora of clarifications that—while appearing epiphenomenal—are expanding the scope of personhood greatly. Thus, Oppenheim can vehemently denounce non-Sovereign subjects beyond the categories of 'full, perfect, and normal' subjecthood, while maintain that when looking 'at the matter as it really stands' they appear remarkably similar to international law's full subjects.[628]

The enumeration of international persons that possessed somehow diminished subjecthood is colourful. Oppenheim lists chartered companies and individuals, monarchs and princes as entities that certainly are not subjects, while noting that there are some scholars who consider both individuals and chartered companies as subjects. Apart of these entities that would at present be most readily titled non-state actors in international law, there were a range of subjects that do not exist as such in the present international legal order, but that nonetheless occupied an important

[627] Lassa Oppenheim, *International Law: A Treatise. Volume I, Peace* (Longmans, Green and Co 1905) 99.
[628] ibid 100–01.

doctrinal position as 'subjects' of international law. The most obvious of these entities are colonies, but between a colony and a fully sovereign state was a wide gamut of limitedly sovereign entities from suzerainties to the Holy See. During the first decade of the 20th century, debate over a quasi-international or an international-lite character of public loans from private parties was heated, questioning already at the time any illusions of a simple character of what being a subject of international law entails.[629] An image of international law populated solely by states was, at latest during the inter-War period, giving way to a more complex understanding of subjecthood. Were the free city of Danzig[630] or the Cape Spartel lighthouse[631] subjects with international legal personality might be asking the wrong question altogether. Rather, is international law—or has it already for a long time—starting 'to make an intellectual transit from "international law"—a system in which states (and state values like sovereignty) are dominant but not exclusive—to some other sort of regime?'[632]

In this light, the crisis of subject evoked by the growing number of new states appears to signal something else than the simple proliferation of international legal personality. After all, the category of international legal personality was wide and expansive even before the decolonialisation. The most circumspect understanding of the crisis suggests that states are the most dominant form of international legal

[629] Ripples from these debates reached even Finland. See Thorvald Becker, 'Les Emprunts d'état Finlandais Au Point de Vue Juridique' (Dissertation, University of Helsinki 1913) and its critical examination in; Rafael Erich, 'Kirjallisuutta' (1913) 11 Lakimies 185. Rafael Erich returns to the topic in his Finnish textbook of international law, where he placates this discussion on the German tradition without providing a source. The most likely source for his coinage of Finnish words modelled after 'völkerrechtsähnlich' and 'quasi-völkerrechtlich' is Franz von Liszt's German treatise on international law and Günther Siegfried Freund's book on foreign debt from 1910, *Der Schutz der Gläubiger gegenüber auswärtigen Schuldnerstaaten, insbesondere bei auswärtigen Staatsanleihen* (Guttentag 1910). See, Rafael Erich, *Kansainvälinen Oikeus* (Lainopillinen ylioppilastiedekunta 1915) 30, 74–75.

[630] Danzig was established in Treaty of Versailles (art. 100ff.) and governed by a High Commissioner appointed by the League of Nations (art. 103). While being imposed with limitations in terms of its exercise of external relations (or 'external sovereignty'), for example the Permanent Court of Justice considered it a party of treaties—a traditional sign of international legal personality; see e.g., Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels, Advisory Opinion of 11 December 1931, no. 43 Series A/B (p. 9).

[631] See Convention Concerning the Administration and Upholding of the Light-House at Cape Spartel of 31 May 1865; Giuseppe Marchegiano, 'The Juristic Character of the International Commission of Cape Spartel Lighthouse' (1931) 25 American Journal of International Law 339.

[632] David J Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel' (1996) 36 Virginia Journal of International Law 275, 280.

personality and therefore changes in their number has the most profound impact on the production and reproduction of international law. For example, the formation of custom and emergence of norms of customary international law is more cumbersome to establish with over 190 states than with two dozen chiefly European ones. Arguably, this led to a change in generation of customary international law stressing the import of *opinio juris* and in a round-about way the increase in importance of the specially affected states that were chiefly read as powerful states of the global North.[633] This construction of the crisis sidesteps the increase in power of international institutions and their executive rule as well as transnational corporations that were characteristic features of the first few decades of the UN era. Yet, it seems to be precisely the understanding that was echoed widely in concerned voices over deleterious effects power of the numerical majority of the new states would have for the character of international law.[634]

The most notable debate on subjects and, consequently, the locus of the most profound crisis for the Western academic commentary laid in the emergence of new states. Yet, there was no shortage of other, equally significant exclusions from the sphere of international law's subjects at around the time when the most vocal criticism of postcolonialism started to emerge. Of the diverse range of critiques of international law at the time, the most pervasive was the feminist one. According to the feminist critique, most of humanity is without a representation on the international level as women's voices do not surface when questions of international law are framed. The feminist international law at the time provided at least two different venues where the women were silenced. They both resulted in the domination of predominantly male concerns in formulation of legal solutions. The

[633] Of changing tradition of customary international law, see Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757. (provides a reflective interpretative account that seeks to 'most coherently explain[] fit and substance' (at 788); of evolving function of specially affected states, Kevin Jon Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112 American Journal of International Law 191. (arguing that there has been only limited use of specially affected states doctrine first developed in *North Sea Continental Shelf* case, but that the states from the Global South ought to actively try to use it to strengthen their claims for established customary international law).

[634] For example, Gennady Danilenko, 'The Changing Structure of the International Community: Constitutional Implications' (1991) 32 Harvard International Law Journal 353 (calling the global South demands for numerical majority to signal a 'constitutional crisis' of international law); Oscar M Garibaldi, 'The Legal Status of General Assembly Resolutions: Some Conceptual Observations' (1979) 73 Proceedings of the Annual Meeting - American Society of International Law 324 (suggesting that a change in the way international norms are created would be nothing short of 'revolutionary' if they would rely solely on numerical majority)..

first was with rights themselves, most notably the human rights. The human rights were shown to have a limited capacity to penetrate the space of a family or a household. Home was and is a zone where even serious limitations and violations of women's rights are rendered legally non-existent. For example, Hilary Charlesworth, Christine Chinkin and Shelley Wright suggest that despite a near universal condemnation of torture in international law, there remains doubt whether even 'widespread and apparently random terror campaigns' against women are 'included in the international definition of torture.'[635] Private forms of torture, the torture that was not officially sanctioned remained outside the definitional scope of the assortment of regional and international conventions against torture. The critique of specific substantive rights and their limits was, however, the more modest of the two arguments spearheaded by the feminist approaches to international law.

The second form of critique argued that beyond the formulation of subjective rights, the entire regime was devised to mask systemic control and abuse of women. On these accounts, the crisis of subject is hardwired into the system of international law.

> [W]omen's subordination to men is mediated through the public/private dichotomy. What is "public" in one society may well be "private" in another, but women's activities are consistently devalued by being construed as private.[636]

Or, alternatively the bias against female subjects resides in the measurements used. If, for example, women's work is not work that would surface in the statistics and economic measurements, the decisions fuelling legal change are based on partial information. This partiality conceals women and sustains a view of agency where only men matter.

> The [United Nations System of National Accounts] and its rules and regulations govern the measurement of national income in all countries. It is my confirmed belief that this system acts to sustain, in the ideology of patriarchy, the universal

[635] Hilary Charlesworth and others, 'Feminist Approaches to International Law' (1991) 85 American Journal of International Law 613, 628.

[636] Hilary Charlesworth, 'The Public/Private Distinction and the Right to Development in International Law' (1988) 12 Australian Yearbook of International Law 190, 198.

> enslavement of women and Mother Earth in their productive and reproductive activities.[637]

The most programmatic formulation of these systemic effects is encapsulated in the idea that 'man has become the measure of all things.'[638] Quite alike the European state was cemented as a measure of statehood through the standard of civilization and its later modifications, there existed a 'male standard' against which the subjecthood of women was to be assessed. This male standard effectively concealed women from international law and/or forced the female subjects to imitate men to be recognised.

Inasmuch as there was a crisis of subject, it was a crisis that ensued from revelation that universal claims were but masks for particular traits and/or interests. The project of both feminist and Third World approaches to international law was to provincialise or decentre the structure of international law dominated by white, male, European voices. Lifting new figures or subjects from the shadow of the dominant frame would, the argument goes, allow for a better understanding of the constitution of international law. The grand abstractions of shared grammar or invisible college of international lawyers and of international law could no longer hide their lacking universality. But as with other grand ideas of the 18th and 19th century, the dethronement of these universalist ideals proved difficult. Quite like in other social sciences, there was no easy way imagining international law without these universalist abstractions, as they established the very foundation for voicing such re-imagining.[639] I turn my attention next to some of the attempts to overcome this impasse over subject of international law from both feminist and Third World literature.

The apparent difficulties in tearing down universalist aspirations or the formal language of law merit some further clarification, before I set to look more closely the crisis of subject as it unfurled. A point of depart of a sort for what follows is to understand the limits of the critique. That is, are there some necessities that the feminist and Third World approaches presume to be—falsely—contingent. There is an apparent risk in all deconstructions of the universal that the critique merely shuffles the structures and replaces one particular with another. A keen notice of this

[637] Marilyn Waring, *Counting for Nothing: What Men Value and What Women Are Worth* (University of Toronto Press 1999) 36.

[638] Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 34.

[639] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2007) 16.

risk is echoed in Martti Koskenniemi's call for a culture of formalism. He suggests that

> [t]he important task is to avoid [Kantian] imperialism [of universal reason] while at the same time continuing the search for something beyond particular interests and identity politics, or the irreducibility of difference.[640]

Thus, the goal of the feminist or Third World approach to international law cannot simply be to highlight the inherent differences or replacement of old categories with new ones. Koskenniemi does not however provide a solution how to accomplish this when the very form upon which the culture is found is subjected to a sustained critique. There have been some attempts to expand on Koskenniemi's ideas, by likes of Florian Hoffman and Jan Klabbers. Klabbers sees in culture of formalism an on-going project spanning the entire oeuvre of Koskenniemi from his dissertation onwards. For Klabbers, the role of culture of formalism is to act as a (virtue) ethical guidance to allow a way to judge both black letter law and political projects by assessing their 'conformity with basic human virtues.'[641] However, such a virtue ethical mode of interpretation can act only as a limited heuristic for any of the concerns lifted up with the crisis of subject. In the end, Klabbers's attempt to argue for a virtue ethical understanding of the culture of formalism ends to embrace the very project that produced Koskenniemi's call for such a culture to begin with, namely, a careful retelling of contextual cues seen as virtuous or non-virtuous.[642] Even after the retelling, we would remain oblivious of the fact to whom international law would appear in virtuous (or non-virtuous) light.

Florian Hoffman's reading of the same culture of formalism is clearly more critical of the value of Koskenniemi's formulation and closer to the heart of the problematique I come to describe as the crisis of subject. Hoffman establishes first his own theory of a pragmatic approach to human rights based on a reading of Richard Rorty's pragmatist philosophy. In concluding his own proposal, Hoffman touches upon that of Koskenniemi's, issuing a scathing critique of its formalism.

[640] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (n 561) 500.
[641] Jan Klabbers, 'Toward a Culture of Formalism? Martti Koskenniemi and the Virtues' (2013) 27 Temple International and Comparative Law Journal 417, 431.
[642] ibid 435.

> Formalism allows for that universality not because its inner logic would, in fact, be universal, but only because the particular language game of which it is made up allows its 'speakers' to use it as a simulacrum for universality.[643]

I think that it is however precisely the criticism of the kind provided by Hoffman against which Klabbers writes in his own account how '[t]his "culture of formalism" has little to do with black letter formalism, although it is sometimes, all too often perhaps, seen as advocating precisely that.'[644] There is some truth to Klabbers rebuttal, but it is difficult to bypass Hoffman's criticism, as culture of formalism and its later embodiments in Koskenniemi's oeuvre remain noncommittal to all attempts to define the formalism as anything but a calling. Such position is subject to collapse into nominalism where indeterminacy reigns supreme. On that plane of an argument, feminist, Third World, and, say, Eurocentric approaches to interpretation are all equally valid, each with their own attempt to pass their particularity as a 'simulacrum for universality.' The fact that a structural bias remains the only guard against a collapse into the realm of anything goes, leaves the analysis hauntingly close to an admittance of Eurocentrism as the measure of all things, even if opposed.[645]

An alternative way to formulate an antidote against universalising the particular is not through revelation of disparity between the opposites, but through casting a light on the absurdity of the present. It could be titled a genealogical inquiry or a form of immanent critique, but rather than a programme with heavy theoretical baggage, what I have in mind is closer to what Virginia Woolf accomplishes in *Three Guineas*: a reply to a letter that spells out what remains unarticulated in the original letter not shown to the reader.[646] This is often alluded when authors of feminist and Third World approaches look behind the concepts to reveal their particularity. But unlike Woolf, these attempts commonly lapse to mere re-shuffle of the concepts analysed. The goal is for more inclusive or nuanced notions, while Woolf lists material reasons in support of her decision not to align with the narrative provided by the anonymous male author of the letter: Woolf questions the politics of location imposed to her writing, to her agency.[647] Midst of all the universals imposed on her,

[643] Florian Hoffman, 'Human Rights, the Self and the Other: Reflections on a Pragmatic Theory of Human Rights' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 243.
[644] Klabbers (n 641) 419–20.
[645] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) 10. (suggesting that admitting this is a 'tragic reality' of any resistance to the system).
[646] Virginia Woolf, *Three Guineas* (Kindle edition, Amazon 1938).
[647] Adrienne Rich, 'Notes toward a Politics of Location' in *Blood, Bread, and Poetry: Selected Prose, 1979-1985* (Norton 1986).

there remains a contingency that is proper of her, that marks her difference to others and gives value to her contribution.[648] It might be called a bridge between contradictory positions,[649] but more aptly it is her body from where the situated knowledge emerges without lapsing into imperialism of universal reason while transcending identity politics.[650]

For a legal scholar, this would imply situatedness of agency, spelling out a position without harbouring any illusions of its universality nor an absolute liberty to re-shuffle all of the contingencies of the present system.[651] The first move for Woolf is to shake the foundations of apparent neutrality:

> But one does not like to leave so remarkable a letter as yours – a letter perhaps unique in the history of human correspondence, since when before has an educated man asked a woman how in her opinion war can be prevented? – unanswered.[652]

The question posed—how in your opinion are *we* to prevent war?—presumes that both the man posing the question and the woman answering it are equally capable but also equally responsible from the present state of affairs. Also, the question is made in a form that presupposes a shared community, a trope that is repeated in most attempts to formulate universals from a particular position. It is the responsibility of women that Woolf sets to denounce by showing their repeated exclusion from education, professions, and the public life.[653]

These arguments bring forth the second move that Woolf makes. She shows that the public exclusions are but a continuation of private exclusions prior to them.

> For it suggests a connection and for us a very important connection. It suggests that the public and the private worlds are inseparably connected; that the tyrannies and servilities of the one are the tyrannies and servilities of the other.[654]

[648] Raija Koli, 'Virginia Woolf Ja Kriittinen Naissubjekti' in Päivi Kosonen (ed), *Naissubjekti & Postmoderni* (Gaudeamus 1996).
[649] Brenda Silver, 'The Authority of Anger: "Three Guineas" as Case Study' (1991) 16 Signs: Journal of Women in Culture and Society 340, 353.
[650] Rosi Braidotti, 'The Subject in Feminism' (1991) 6 Hypatia 155.
[651] Here I am thinking along the lines of Susan Marks, 'False Contingency' (2009) 62 Current Legal Problems 1.
[652] Woolf (n 646) 1.
[653] Woolf makes throughout the book references to many feminist concerns that have occupied later authors and scholars. See e.g. (at 122) her analysis of the sexed nature of both science and nature.
[654] Woolf (n 646) 124.

For legal scholars, distinction between public and private has been a staple for long, surfacing in different formulations in most approaches critical to law. In international law this carries an important role in the still prevalent distinction between public international law and private international law, even if this classification has been subject to criticism for virtually the time it has existed.[655] The mode of addressing these concerns has been to a notable extent the same as one embraced by Woolf: to illustrate how the public and the private are inseparably connected. Yet, quite like in society in more general, also in international law the authorities deciding the proper frame of the narrative has proven decisive on choosing the 'correct' moniker for actions either as public or as private. These problems have not fully dissipated even with introduction of categories to describe the interconnectedness of the two, such as 'transnational' law,[656] as the power to signal either the public or the private nature of a legal relationship or a status shields the action or agent from the legal remedies or sanctions that would be available if interconnectedness was considered an inherent part of all law. This brings up the third and last step in Woolf's argumentative structure: a resistance towards those controlling the discourse.

In *Three Guineas*, Woolf articulates her position in non-binary terms. She refuses to participate using the words of her anonymous interlocutor.

> But as a result the answer to your question must be that we can best help you to prevent war not by repeating your words and following your methods but by finding new words and creating new methods.[657]

Woolf argues that the role of an observer is not that of a 'passive spectator[] doomed to unresisting obedience'[658] but an active participant capable of changing the figure or object observed. Here Woolf most clearly departs from the culture of formalism espoused by Koskenniemi and expanded by Klabbers and Hoffman. For Koskenniemi the form, even if contested, marks the ground zero of analysis. For Woolf, a duty of an observer is to resist the lulling comfort of existing words and

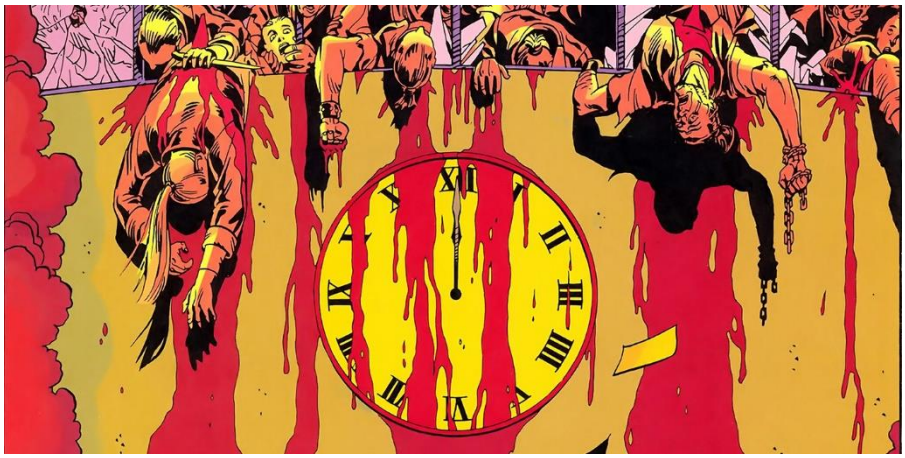
[655] These are parts of a more general debate on the purpose and function of partition of international law to public and private variants and naming of these different variants. One of the earliest attempts to conceptually delineate these anew is Alf Ross, *Lærebog i Folkeret. Almindelig Del* (Munksgaard 1942). He declares '[u]dtrykket »international privatret« er vildledende' and suggests using instead concept of »interlegel ret«. Jessup considers this concept lacking and coins his own 'transnational' moniker that has had greater lasting power.

[656] See Philip Jessup, *Transnational Law* (Yale University Press 1956); Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press 2020).

[657] Woolf (n 646) 126.

[658] ibid 124.

methods and through the resistance find new forms, not as universal replacements for the existing ones, but as indicia of a possibility to understand differently the figure. It is a striking distance from the position of impotence of law as a reason outlined by Koskenniemi.[659] Where Koskenniemi gets locked in a paradox reminiscent of the one gruesomely solved for the better of humanity in the graphic novel *Watchmen*[660] (see **Error! Reference source not found.**), Woolf steps aside from the game of narrowly defined reason in an attempt to re-define reason's



dictates.

In *Watchmen*, the human world is veering towards its end as the doomsday clock ticks closer and closer to the midnight.[661] While the clock and the Cold War events that move it play a prominent role in the graphic novel, its focus is on a group of masked heroes who used to fight against street crime and violence: the Watchmen. The novel starts with a plunge down to the pavement through the window of a high-rise apartment of one of the former members of the Watchmen. The demise of a Watchman and an attempt to find out who is behind the act is the theme that moves the novel till the very end from where the above picture is also from.

Figure 4. Doomsday clock from the Watchmen.

[659] Martti Koskenniemi, 'Case Analysis: Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons' (1997) 10 Leiden Journal of International Law 137.

[660] Alan Moore and others, *Watchmen* (DC Comics 2014).

[661] An extensive scholarship exists on *Watchmen* starting from its composition to its picture of science. To contextualise my own writing, I read Stuart Moulthrop, 'Watchmen Meets The Aristocrats' (2008) 19 Postmodern Culture; CW Schneider, 'Nothing Ever Ends' in MJA Green (ed), *Alan Moore and the Gothic Tradition* (Manchester University Press 2015); Brent Fishbaugh, 'Moore and Gibbons's "Watchmen": Exact Personifications of Science' (1998) 39 Extrapolation 189.

How does all this link to Koskenniemi's aspirational calls to 're-imagine the game, reconstruct its rules, redistribute the prizes,'[662] or demands 'to be able to say that we know that the killing of the innocent is wrong … because of who we are.'[663] In *Watchmen,* the end is nigh and the self-titled smartest man of the world Adrian Veidt has devised a plan to save it from the nuclear annihilation. His plan—which he duly executes—is to kill half of the population of New York to wake the feuding superpowers to an imagined external threat. Veidt's plan works and the nuclear destruction of humanity is averted. Former enemies direct their nuclear warheads against the imaginary external threat rather than each other. Veidt's solution is one of re-imagination, of bearing the moral burden of killing countless to save even more. The solution is a non-solution, but it is precisely the one opened by Koskenniemian analysis. Rather than, say, denouncing the humanitarian law to begin with, Koskenniemi (like Veidt), considers the form or structure of engagement too important to lose. Instead of creating new words and new methods to describe the madness (à la Woolf), the solution is to resort to redistribution and open-ended moral standards such as 'innocent'. Who in the end decides what innocent stands for? After all, Koskenniemi does not allow for himself the escape through denouncement of all forms of killing through military means—an option that fuelled the decision of the German Constitutional Court in its famed *Authorisation to shoot down aircraft* decision.[664] In a sense, Veidt simply concludes that which Koskenniemi commences.

Hence the crisis of subject is a crisis that simultaneously needs to guard against accusations of relativism and particularism, while put to a task to provide reasonable proposals to alter the status quo. A call to uphold a form, even if in a circumspect way, locks the game in a way that prevents a player to call out the rigged rules. An attempt to declare the rules themselves corrupt, as suggested by the critics of international law's concept of the subject, meets with opposition because new rules or replacement of the rules are perceived as patching a system, not fixing it fully. Those attempting to conserve the system often embrace the critics' point of view, though they highlight the unending problems that the change would encounter. This often boils down to a statement whereby all attempts for change ought to stem from

[662] Koskenniemi, 'From Apology to Utopia: The Structure of International Legal Argument' (n 608) 520.

[663] Koskenniemi, 'Case Analysis: Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons' (n 659) 162.

[664] Bundesverfassungsgericht, Judgment of the First Senate of 15 February 2006 – 1 BvR 357/05. For example, in para. 124 the Court finds 'By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.'

within the already existing system of rules. Yet, this system of rules is precisely what most critics of the concept of subject in international law single out.

The ambivalence of the project is not lost with scholars promoting either feminist or Third World approaches to international law. For example, Dianne Otto concludes her writing on diverse ways to conceptualise women's rights on international plane with the following, sobering conclusion.

> Therefore, it is premature to conclude that women's full inclusion in humanity is possible. If feminist engagement with human rights law is translated into a project committed to completely denaturalizing sex/gender and reimagining gender as hybrid and diverse rather than dualistic, then it has barely begun.[665]

She suggests that this has much to do with the genuinely open question whether we can even conceive a truly universal subject that is fully inclusive.[666] Otto is certainly not alone in finding the past attempts to include or modify law's subjects as a long and, maybe, ultimately a futile project. Even if law would embrace the new concept, would the material effects of such inclusion ensue? The crisis of subject is ultimately a question to what extent international law can be re-inscribed or inscribed in a different way. If all the moments after 1648—or any other temporalisation of rupture in international law[667]—have recorded with exhaustive attention the actions and interactions of the (European) sovereigns and made them 'a sort of law'[668] would it be possible to repeat the story with a different sort of law? Or is the location of international legal culture ingrained in the Eurocentric, bourgeoise, and male narrative entertained in English to such an extent that all countercultures are ultimately mere reflections of changing sensibilities of its dominant practitioners.[669]

Re-inscribing international law to constitute a different sort of law remains a central tenet of feminist as much as Third World approaches to international law. The desire to re-inscribe is an operational category more in general in feminist, queer, postcolonial, and/or subaltern studies. This body of research exemplifies how oddities described in the peripheral subjects are often part and parcel of the modus

[665] Dianne Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 356.

[666] ibid 335.

[667] Of these and other temporalities of international legal struggle, David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016) 1–20.

[668] Michel Foucault, *'Society Must Be Defended': Lectures at the Collège de France, 1975-76* (Picador 2003) 67.

[669] Homi Bhabha, *The Location of Culture* (Routledge 2004) 46.

operandi of the more centrally located subjects. Angela Carter illustrates this manoeuvre through the figure of Marquis de Sade,[670]

> if Sade is to be castigated for tastes he exercised only in the privacy of his mind or with a few well-paid auxiliaries, then the hanging judge, the birching magistrate, the military torturer with his hoods and his electrodes, the flogging schoolmaster, the brutal husband must also be acknowledged as perverts to whom, in our own criminal folly, we have given a licence to practice upon the general public.[671]

A desire to inscribe deviancy or a lack on the peripheral subjects while openly supporting similar practices as lawful and even necessary when perpetuated by the paradigmatic subjects has been a staple feature throughout much of international law's history. It is the story where the people in the colonies are incapable to govern as evinced by their lack of European government, yet decades of equally missing governance by the Europeans is merely a civilizing act;[672] women's reproductive and/or caring work is insignificant, the same work turned into a gig economy platform is a trade secret and a corporate innovation valued in billions.[673] The mainstream of international law, however defined,[674] seems then 'to function within

[670] Carter's reading of Sade remains controversial and attributing anyhow marginal position to a Marquis owning large plots of land and multiple castles hardly makes sense but in the most limited ways. Yet, the interplay of deviancy and marginality remains a recurring theme in much criticism of the mainstream understanding of international law. Often the (un)articulated attempt is to lift the marginal figures into a more central position either by turning the notion of subject more inclusive or by replacing subjectivity's central function in international order.

[671] Angela Carter, *The Sadeian Woman* (Virago 1979) kindle loc. 531.

[672] A contemporary reminder of the staying power of this narrative is, Patrick Wintour, 'Jared Kushner Casts Doubt on Palestinian Ability to Self-Govern' (*the Guardian*, 3 June 2019) <http://www.theguardian.com/us-news/2019/jun/03/jared-kushner-expresses-doubt-palestinians-self-govern-trump-racism> accessed 14 August 2023.

[673] See e.g. the Indian surrogacy industry at its peak grossing over $1 billion a year while at the same time Indian state supporting antinatalist policies to poor women, Nirmala George, 'Indian Surrogates Feel Hurt by Gov't Ban on Foreign Clients' (*AP News*, 24 November 2015) <https://apnews.com/ce693e91afac4b7b9169b3b6894c4357> accessed 14 August 2023. For the gig economy narrative see the proliferation of diverse care work and domestic work platforms such as Helpling (for cleaning), Sitter (for babysitting), or TaskRabbit (for diverse small household tasks).

[674] See, BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edition, Cambridge University Press 2017) ch 1. He provides an array of theoretical views competing in international law's mainstream, while noting that the origin of most authors is in the global North, chiefly in the United States.

specific paradigms of western modernity and rationality, that predetermine the actors for whom international law exists.'[675]

If the marginality and deviancy of the 'other' constitutes one foundational tenet for the emergence of the crisis of subject, another one is formed by an idea of support for the weak to help them become more like the powerful.[676] There is a full spectrum of different master signifiers that signal such support. In the human rights parlance, it is the role of a 'victim' who suffers from the evil of local barbarian practices, when talk turns to states a similar function is reserved to 'development' in its multiple modifications. Thus, when a Nepalese woman is prevented from travelling to United Arab Emirates, they are perceived as victims of exploitation who are incapable of understanding the fallacy of their desires.[677] Simultaneously as it casts the Nepalese women as voiceless victims of exploitation, it describes the men in United Arab Emirates as exploiters (i.e. the deviant and barbarian other), even if similar practices are commonplace in most affluent countries in the world to a point of being considered a service.[678] A rather similar narrative structure clearly demarcating the Southern sufferers from their Northern saviours plays out equally much in the realm of science or ethics as it does in law, placing 'we the lawyers' in a curious light. On an article on bioethics, Godfrey B. Tangwa points out the similar discrepancy in roles of victims/actors in medicine and ethics as encountered by the Nepalese women on their way to United Arab Emirates.

> I don't know whether or not it is ethically correct to use placebos in clinical drug trials … But, if any placebo-controlled experiment is correctly considered unethical in the USA, then it cannot be ethically right in Africa or anywhere else.[679]

He continues with an example of female circumcision—or female genital mutilation (FGM)—only to note that there are equally few medical reasons to support that

[675] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) 2.

[676] ibid 39ff.

[677] Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (n 196) 679.

[678] An internet search on 'mail order brides' is instructive of the extent of this legalised form. According to some accounts, the most popular sites have more than one million men looking for a bride. For example, Vietnam alone 'over 18,000 Vietnamese citizens migrate to get married every year.' See, '"Marriage Migration" Significant Factor in Trafficking in Viet Nam' (*International Organization for Migration*, 30 July 2014) <https://www.iom.int/news/marriage-migration-significant-factor-trafficking-viet-nam-iom> accessed 14 August 2023.

[679] Godfrey Tangwa, 'Bioethics, Biotechnology and Culture: A Voice from the Margins' (2004) 4 Developing World Bioethics 125, 133–34.

practice as there are for male circumcision, yet only one of the practices is universally condemned 'probably because important segments of Western society practice the latter rather than the former.'[680]

This all is at a stark contrast with the basic premise of individuals and states being formally, juristically, or even ethically equal. To bypass these concerns of inequality the differences evinced are reduced to concerns that for one reason or another do not count, allowing the establishment of a universal subject at the same time when recognising that many if not most are considered outside a full subjecthood according to that universal definition. The narrative cues here are familiar: 'No one can possibly support killing of the innocent,' 'no one can fathom not helping the poor,' 'no one can justify female genital mutilation.' Here 'no one' stands in place of the imperial 'we' that supposedly includes everyone, even if the assumed 'we' on a closer analysis would stand only for a subject imbued in the dominant frame of international law's subjecthood. While the statements in and of themselves may turn out to be widely, even nearly universally shared, what the crisis of subject shows, is that equally important to these statements is the understanding of their exclusions or dark sides where the imperial 'we' will not set its gaze. This dark side is qualitatively different from the unintended consequences that a regime or a law has, by showing that there is a structure in the way unintended consequences are commonly attributed and that precise structure follows closely the exclusions the crisis of subject has lifted up. A call for 'we the lawyers' to recognise these or other statements of international humanitarianism clouds the fact that there never was a uniform college of any lawyerly lot nor did they come from similar material or ideological backgrounds to give them a solid footing to even negotiate such common understandings. The function of the 'we' is simply to conceal the power of the 'I' as often a particularly privileged narrator of common values.[681]

Re-formulating the aforementioned, relatively common value statements of international humanitarianism indicates clearly that behind them is not a pragmatic renewal or intricate balancing, but an age-old exclusionary policy. 'No one –

[680] ibid 134.

[681] A read through of David Kennedy's *The Dark Sides of Virtue* is sobering in this sense. For example, when laying out the future for international humanitarianism Kennedy speaks to an audience as a group of commonly aligned individuals through repeated use of 'we' and 'us' in contradistinction to 'they' and 'he'. The only voice transcending this distinction is that of the author, whose 'I' instructs, illustrates, and sets. Yet, with the 'we' as much as the 'they' Kennedy is chiefly targeting his fellow Americans who balance, among others, between war and human rights. As a Finn, it is hard to recognise such balancing and I could imagine that international lawyers from Lesotho, Uruguay, and Japan would feel equally estranged, even if for different reasons. See, David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2008) ch 9.

innocent or not – should be killed', 'no one should be disproportionally rich', 'no child should be subject to circumcision'. Thus, hiding in the shadows of the apparent universals is protection of those who decide who counts as innocent, who is poor, and which harmful practices towards children matter. These are the fundaments that the crisis of subject brings forth. Yet, it breaks any illusion of a shared, even indeterminate structure of international law without providing much in terms of a remedy. It is important to understand that some of the elements commonly employed to legitimise international law transcend the system,[682] that women are not necessarily included in the definition of human,[683] or that creation of categories in international law are often counterproductive to their goals when employed by peripheral actors.[684] Through these new vectors of power (or law), the forces that were below the tepid surface of 'traditional' international law were made apparent. These forces question the universality of not only the structure and subjects of international law, but the very object of its inquiry. Whereas for the proponents of law's indeterminacy, its normativity was a space to veer towards either end of bipolar conceptual space, the crisis of subject suggests that rather than a line with varying intensities, international law is a formless and shapeless quality that attaches its normative force as a heuristic measure to privilege some subject positions over others. In this sense, international law is not only about the dark sides or fault lines of law, but it forms a more complex topography. It can either be seen as 'lumpiness' or thickening of law at places or as a multivariate flip sides of law.[685] With a loss of privileged structural grammar and an authoritarian voice, the very object of law seems to disappear. It is this crisis of object where I turn next.

[682] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011).

[683] Catharine MacKinnon, *Are Women Human?: And Other International Dialogues* (Harvard University Press 2007).

[684] Rajagopal (n 675) 133.

[685] The idea of 'lumpiness' is developed in Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press 2009). An idea of many excesses of complex legal topography is borrowed from Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press 2013).

4.3 Crisis of object

If the earlier snapshots have sought to illustrate that most narratives entertained as international law rely heavily on universality of either structure or subjecthood that does not stand a closer scrutiny, the crisis of object cuts deeper still. A steady increase in normative orders that count as significant at the international level together with the infinite multiplicity of readers and users of international law has set anew into limelight the age-old question of the status of a system that calls itself international law. The disruptive effect of first the NAIL to shared structure and then subaltern analyses of different kind to its subject has evaporated what little normative necessity there existed in the international legal order to begin with. A positivist reading of international law—the coveted mainstream account—could triumphantly be declared as the only surviving approach to international law that is able to keep its object intact or even existing. In the end, many positivists argue, that theirs is a message of law that has not been bogged down by endless politics and ideologies, or as Bruno Simma and Andreas Paulus state their mission:

> In our view, it is precisely this need to get our legal message through to other people, especially representatives of states who might not share our individual moral or religious sensibilities, that constitutes one of the main reasons for the adoption of a positivist view of international law.[686]

A position pragmatist to the boot and far-flung from what its authors title "classic" positivism at first sight undermines all critique by simply declaring that 'law is law'. It might not be *the* law but at least it allows to find *a* law. So why, then, did '[t]he formalists [become] "the great villains of contemporary jurisprudence,"'[687] if they are the only ones who can pass legal message—the law's object—to other people?

According to supporters of positivism, much of the animus has to do with a misunderstanding over what positivism stands for. Hence for its supporters the first step to redeem positivism is to reconstruct it in stark opposition to an abstract entity of "classical" doctrine. This method is as old as reformulations of positivism; thus, it is not particularly surprising to find, when reading François Geny's treatise on method of interpretation of private law from the early 20th century, that the opposition to traditional method provides a key steppingstone for the formulation of

[686] Bruno Simma and Andreas L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 American Journal of International Law 302, 303.

[687] Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press 2009) 3.

his own, more enlightened position.[688] The content of "classical" doctrine of positivism is also remarkably similar for both Geny and Simma and Paulus. To an extent, then, it is possible to align with Brian Tamanaha's argument that every contradistinction drawn between "modern" and "classical" formalism or positivism is an act of mythmaking or caricature-drawing. [689] Yet, it is the perpetuation of these myths that have very genuine effects.[690] In one sense, both the idea of evolved positivism (or formalism) and the critique of positivism partake in the construction of the same myth, but for different reasons.

On a closer analysis, Simma and Paulus's form of positivism is difficult to ascertain, while certainly capable 'for finding *a*—not *the*—correct solution to a legal problem.'[691] To what extent this has even been a target of external or internal critique of positivism is beside the point, but it sets the standard for a method relatively low. In a nutshell, what Simma and Paulus argue is that they have moved positivism from providing one correct answer to providing a range of correct answers, which seems remarkably close to the position of their critics.[692] When it comes to application of positivism the object seems to disappear even further from sight to a point where absence or presence of law is a matter of exegesis and, ultimately, a fiat. 'It is not easy to ascertain, however, where the *practice* element of custom is to be found,' state Simma and Paulus and follow with a short list of international legal materials and a reference to existence of some domestic practice. Then they declare that based on this 'one may conclude that sufficient practice and *opinio juris* are present for customary law to emerge.'[693] It is certainly true that this allows one to get a legal message through to a receptive audience, but how and why we call it an embodiment

[688] François Geny, *Méthode d'interprétation et Sources En Droit Privé Positif: Essai Critique* (2nd edition, Librairie Générale de Droit & de Jurisprudence 1919). Geny (at 65) suggests that '[a] s'en tenir aux conclusions de la méthode traditionnelle, toute question juridique doit être décidée par le moyen des solutions, consacrées positivement par le législateur.'

[689] Brian Tamanaha argues that at the very least the caricature of formalism as presented at some circles (i.e. mechanical application of norms that are evident to a legal gaze) is precisely that, a caricature, or, to use his own words 'fundamentally flawed' (13). See, Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (n 687) 13–63.

[690] Pierre Schlag, 'Formalism and Realism in Ruins (Mapping the Logics of Collapse)' (2009) 95 Iowa Law Review 195, 199ff.

[691] Simma and Paulus (n 686) 316.

[692] See e.g. ibid 306 where feminist approach is first questioned for its capacity to entertain a helpful dialogue with decision makers only in the next paragraph it to be declared that there has been an impressive change as an outcome of feminist movement. In a sense, critique has been effective, but only to an extent that it has produced new norms that can be ascertained through positivism.

[693] ibid 310.

of international law remains elusive. Inasmuch as there is reason to triumphalism for getting others to listen law, it is yet to be shown that positivism would have any firmer grasp of international law as a normative system than its critics. That is, a mere declaration that you uphold the positive international law does not, in and of itself, crystallise the precise contours of that object.

But a support for different kind of positivism or formalism from recent decades does by no means limit to the work of Simma and Paulus, nor is my point about international law's fleeting object anyhow novel either. A debate over globalism, pluralism, and fragmentation are all simply different ways to state that when talk turns to international law there is some ambivalence where it emanates from and what it contains of.[694] The most rudimentary argument promoted in a renewal of formalism is that there is a distinctive form that is law and it differs from other societal orders, that is, a return to the animating question of much legal theory—what is law? In international law the answer to this question is commonly provided through a doctrine of sources, which in an equally traditional way is often outlined by reference to the Article 38 of the Statute of the International Court of Justice. According to said article international law is to be found from international conventions, international custom, general principles of law, and as subsidiary means, judicial decisions and the teachings of the most highly qualified publicists. This provides a formally complete definition of 'international law', but as Simma and Paulus along with many others have noted, the list reflects only to a limited extent how law emerges at present at the international level. Recommendations, guidelines, frameworks, and other soft law instruments as well as all forms of private ordering are missing from the list of international law, even if the most notable features of the past decades of international law revolve precisely around such instruments.[695]

The idea of expanding list of sources and therewith of international law itself is, on this understanding, close to Lon Fuller's understanding of a legal order. According to Kristen Rundle, Fuller saw the legal order as a mutually constitutive relationship between the lawgiver and its subjects.

[694] For a critical summary of these different position in relation to international law, see Neil Walker, *Intimations of Global Law* (Cambridge University Press 2014); Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press 2012); Anne-Charlotte Martineau, 'Une Analyse Critique Du Débat Sur La Fragmentation Du Droit International' (Dissertation, University of Helsinki 2014).

[695] For scattered remarks of the constitution of private governance, see *supra* chapter **Error! Reference source not found.**. An argumentative account of the growing importance of private government especially in lives of Americans, see Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)* (Princeton University Press 2017).

> Thus, if the necessary reciprocity between lawgiver and subject that creates and maintains the distinctive attributes of a legal order disappear, so too must law, because the lawgiver has disavowed his commitment to law and is now proceeding through a different mode of ordering.[696]

This is the precise intersection where the antecedent crises of structure and subject leave international law. There is no more law in the traditional sense, wherefore 'international law' must reconstitute its primary relationship. The emergence of new subjects calls for new structures for which the new subjects can at least partially subject themselves to: 'The international law is dead, long live the international law!'[697] More provocatively, it is possible to follow the line of thinking of zombie jurisprudence of Omri Ben-Zvi and argue that 'even though the concept of law may be theoretically redundant, *we cannot truly get rid of it*; we are immersed in the legal form of life.'[698] Is the present international law the old king with new clothes or his rotting carcass animated by some dark magic?

To revive international law's object from the spiralling cascade towards indeterminacy and permanent loss of a solid ground to stand upon, there has been in recent years a growing interest towards formalism in a more limited form. Or maybe better yet, a formalism that is as much inspired by the critique issued towards its unarticulated and mythical urform by legal realists as any other legal theory at present. Hailing from a wide range of ideological backgrounds, the scholars arguing for revival of circumspect formalism or neo-formalism, commonly allude that we never truly were anti-formalists to begin with. Even the staunchest anti-formalist critic of international law presumes a shared legal field where their contributions are meaningful.[699] If 'international lawyers are all formalists'[700] as Jean d'Aspremont argues, the question remains what such formalism entails and how does it save international law's object from outright demise? The most notable attempt to reformulate formalism in recent years is authored by d'Aspremont himself. In his

[696] Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Hart 2012) 3.

[697] See of such understanding of international law and international legal community, Monica Hakimi, 'Constructing an International Community' (2017) 111 American Journal of International Law 317.

[698] Omri Ben-Zvi, 'Zombie Jurisprudence' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017) 408.

[699] Umut Özsu, 'Legal Form' in Jean D'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 631.

[700] Jean D'Aspremont, 'Sources in Legal-Formalist Theories: The Poor Vehicle of Legal Forms' in Samantha Besson and Jean D'Aspremont (eds), *Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 366.

Formalism and the Sources of International Law, d'Aspremont develops a limited formal theory of ascertainment that enables one to draw a distinction between international law and non-law.[701] The theory is limited solely on recognising international law without claiming anything over content of law so found. The basic premise d'Aspremont entertains is that there must exist a formal way to know what for international law is law for there to exist a practice of international law. I am not entirely convinced that there is such a need, and further, I am not entirely certain how modest d'Aspremont's claim in reality is.

The first immediate problem d'Aspremont's thesis has is the claim that it could cut law from its application. As Ingo Venzke points out

> the categorical distinction between acts of setting it in place expressed in doctrines of sources or in terms of legislation, on the one hand, and acts of applying the law as a matter of finding the law that is already out there, on the other, is untenable.[702]

Even without adhering to such a categorical denouncement of d'Aspremont's thesis, it appears to be unnecessary even for his own thesis to uphold that without a formal criterion to recognise law we would not have a practice of international law or its normativity. This more modest argument is put forward by Umut Öszu as he argues for existence of 'a distinct sphere of action and analysis'[703] that is international law, which, arguably, would exist even without a single object recognised as 'international law' by any formal criteria. Much like there exists a sphere of much action and analysis over dragons, unicorns, and griffins even without their proper existence in any formal sense.[704] Thus, while it hardly is an existential question to

[701] Jean D'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011).

[702] Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012) 19.

[703] Özsu (n 699) 631.

[704] This is the very language philosophical argument that seems oddly missing from d'Aspremont's work so heavily clad in Wittgensteinian language philosophy. From C. S. Peirce to Gottlob Frege and Bertrand Russell, Ferdinand de Saussure all the way to speech act theorists d'Aspremont quotes or Noam Chomsky's generative grammar to later pragmatists (e.g. Grice), socio-linguists (e.g. Halliday) to interaction theorists (Brown & Levison), language has been perfectly capable to entertain relations to chimerical figures. And, moreover, isn't this the very point Wittgenstein makes in his conclusion of *Tractatus* in the seventh thesis: *Whereof one cannot speak, thereof one must be silent*. We could not speak of international law and attribute it with any norms, if there would not predate international law to which we can target such attribution?

international law whether there exists formally defined and agreed upon legal form, the other claims of d'Aspremont might still hold true.

These other claims suggest that in order to shelter international law from direct abuse of power one needs to confine ascertainment to social practice of law-applying authorities. As such, d'Aspremont's thesis argues that (international) law commands a specific authority that is not borrowed and should not be confused with those of international relations, economy, or history: law is what lawyers do, even if the interpretation of the norms would then open itself up to other influences. Behind this building of disciplinary edifice lies a worry that otherwise formalism could be employed to carve out law and replace it with other means of ordering. This concern is well-encapsulated by Peer Zumbansen as a process where first legal form is neutralised as expert management and later transformed into formalism of a different kind.

> Formalism is no longer seen as aspiring to, or supported by, a specific or general logical coherence; instead, it becomes a fighting word against what is now deemed to be legal "intervention" into otherwise more efficient processes of social self-governance.[705]

A call to choose between different understandings of formalism is also echoed by Umut Öszu when he constates that 'the pressing question today is not *whether* to be formalist, but *how* one ought to be a formalist.'[706] For d'Aspremont, the way to guarantee a lawyerly international law through formalism is to build his theory largely on Hartian foundations with ultimately social rules of recognition.

Even the modest claim of d'Aspremont is however subject to criticism on precisely the grounds advanced by the unfolding of the crises of structure and subject. This critique is provided in a narrative analysis of d'Aspremont's thesis by Sahib Singh.[707] Singh argues that the threatening clouds that d'Aspremont evinces gathering to the sky of international law are not necessarily all that foreboding. The loss of autonomy as a fully closed system might be simply giving up on a myth (327) and the provisioned medicine is not particularly potent either—merely a kind reminder that forms matter. After all, the process of ascertainment as outlined by d'Aspremont supports 'an endlessly circular logic' (331) for which the sole remedy is to revitalise a sense of community. If this is the invisible college of international

[705] Peer Zumbansen, 'Law after the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law' (2008) 56 American Journal of Comparative Law 769, 796.
[706] Özsu (n 699) 634.
[707] Sahib Singh, 'Narrative and Theory: Formalism's Recurrent Return' (2014) 84 British Yearbook of International Law 304. Further quotations to Singh appear in text.

lawyers, a line of research showing how divided the college is, might issue a death knell to this search even before it properly begins.[708] In the end, Singh entraps d'Aspremont in indeterminacy that the whole project of formalism sought to escape by arguing that, ultimately, the choice for a theory of ascertainment through social sources thesis is 'entirely arbitrary' (334). The indeterminacy only stops through the magical incantation of circular logic (336), which is used as an intellectual arrest arguing for shared feelings 'so that the reader can have the appearance of a "ground."' (340) In the end, this and other intellectual arrests in d'Aspremont's work

> are methodological injunctions that impose [Formalism and the Sources of International Law]'s strategies of containment. This is no more or less than an ideology that must privilege the status quo, that vision of the world that it sees as 'is'. (342)

Thus, in an attempt to protect law from falling deeper into rabbit hole of indeterminacy, d'Aspremont's formalism builds a floor (structure) from his particular position (subject) to maintain a vision of the field as is (object).

Even if d'Aspremont's attempt ultimately fails to convey a full picture of formalism, his return to the social thesis and communal understanding of legal sense-making has gained wider currency past his formalism. It is the animating argument behind Koskenniemi's culture of formalism, Venzke's semantic pragmatism, Özsu's argument that law receives its authority through interaction with extralegal power, or Zumbansen's claim for law as a site of negotiation and contestation. In a sense, they all come remarkably close to a reading of Fuller provided by Rundle above: law only exists for as long as there is a dialectical relationship between its issuer and its subjects, which rests at the core of many of the theories of formalism presented in recent years. Most of them oppose private governance or transnational law as ultimately antithetical to international law properly so for the simple reason that here the (traditional) subjects of international law, the states, are not acting or are acting in a minor role. An alternative way to understand the development would be to align with the law and economics scholarship and vacate the 'legal' in favour of, say, economic considerations. But to what extent privileging the state-to-state interaction is reflective of the social function stressed by virtually all those championing formalism in its different formulations? Short of a revolution, it is difficult to conceive an international order that would be more receptive to immigrants and their

[708] See e.g. Roberts (n 562); Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press 2015).

rights, less economy-focused on its attitude to nature, or more alert to concerns over growing inequality.[709]

This leaves international law with a difficult task to navigate the space where clinging too heavily on formalism dooms a project to irrelevance and letting go will transform law into a tool unrecognisable from whatever instrumentality it is reduced to serve. As an alternative to formalist walk on a tightrope has served a full embrace of the multitude of normative instruments that somehow instruct international behaviour as 'international law'. In a sense, this is a return to a colonial order, but this time subjecting everyone but the most affluent to rigours of multiple, overlapping normative orders. As Surabhi Ranganathan argues it is characteristic of the present that capital(ist) seeks

> an arrogation of 'jurisdiction', a claim of the authority to cherry-pick which law is (good for business and therefore) authoritative and which is (not, and therefore) just obstructive 'politics'.[710]

This arrogation allows the most affluent individuals and multinational corporations to escape most jurisdictions. The dual freedoms of trade and capital have especially in neoliberal globalist narrative trumped freedom of persons without significant means to relocate.[711] But as Lauren Benton argues, already the colonial enterprise 'was in no small part the product of the politics of legal ordering.'[712] This ordering relied on a jurisdictional complexity with overlapping orders, leaving many subjects at the margins despite presence of a throng of rights.

In her research, Judith Surkis shows some of the effects of these overlapping jurisdictions in French colonial Algeria.[713] She explores the divided jurisdiction between, on the one hand, the French civil law and, on the other, the religious law applicable to Muslims and Jews. Surkis traces the impact of especially family law of the religious order to the law of property but also of liberties of individuals. For

[709] An illustrative account of states' active use of legal form to enforce a 'social function' that ostracises refugees and asylum seekers is Daniel Ghezelbash, 'Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' (2020) 68 Am J Comp Law 479.

[710] Surabhi Ranganathan, 'Seasteads, Land-Grabs and International Law' (2019) 32 Leiden Journal of International Law 205, 212.

[711] Slobodian (n 257).

[712] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press 2004) 253.

[713] Judith Surkis, 'Propriété, Polygamie et Statut Personnel En Algérie Coloniale, 1830-1873' [2010] Revue d'histoire du XIXe siècle 27; Judith Surkis, 'An Effective and Affective History of Colonial Law' in Justin Desautels-Stein and Christopher Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge University Press 2017).

example, the local religious orders recognised polygamy, while the French civil law did not. An arrogation of jurisdiction was common, and most common in favour of male subjects as Surkis indicates. Thus, a marriage concluded before French court could not be subjected to Jewish religious tribunals to decide, yet it did not prevent men from having a second wife in accordance with the Jewish law and have children born out of this, in the eyes of French law, illegal marriage to gain official status. Another example provided by Surkis refers to a young Muslim woman who sought to convert to Catholicism. While at first sight a non-controversial matter, the demands of Aïcha bent Mohammed led to a profound legal crisis as the Governor General '[i]n privileging her religious freedom … overlooked the effect of conversion on [Aïcha's] jurisdiction.'[714] An attempt by a female subject to escape violence at home was a source of disorder that should be opposed for that simple reason alone. The overlapping and conflicting jurisprudence caused 'the legal status of Algerian persons and things [to] remain[] uncertain – and hence a cause of colonial disorder and anxiety.'[715]

The idea that peripheral subjects and their rights could shake the foundations of colonial order can be with relative ease transposed to the present pluralist order: some acts are more abhorrent and antithetical to the order than others and some walks of life are subject to notably greater concentration of norms than others. Arguably, this leads to two rather distinct scenarios, both played out also in the cases of colonial pluralism. On the first account, the pluralism is seen as a fleeting moment before consolidation of norms that adhere to the interests of the powerful ones. Hence the fragmentation or pluralism may serve as a tool for the powerful states to 'return to some form of "universal" framework … once they assume control over the substance.'[716] On such a move the return to single rule (or form) marks a revival of a particular illusion of legal form as inherently apolitical and neutral, a space that can be filled with any content.[717] This would be the realm of highly technical international law from banking regulation to standards, from patents to foodstuffs. The other possibility is to uphold plurality or fragmentation, while simultaneously embracing 'a tendency to try to confer upon international law some delimited time, space and subject matter for its "proper" operation.'[718] Here the capacity to arrogate jurisdiction is tied to appearance outside the proper operation of international law that amounts to a procedural understanding of rights. I consider these instances more

[714] Surkis, 'An Effective and Affective History of Colonial Law' (n 713) 249.
[715] ibid 253.
[716] Ntina Tzouvala, 'The Academic Debate about Mega-Regionals and International Lawyers: Legalism as Critique?' (2018) 6 London Review of International Law 189, 202.
[717] ibid 208.
[718] Johns, *Non-Legality in International Law: Unruly Law* (n 685) 25.

salient for the crises of international law's object and more troublesome for the recently emerged neo-formalist arguments that seek to confine international law.

To illustrate the point, I draw a select few examples from state loans and private lenders as the *problématique* has been persistent in international law for long, even during the supposed heydays of classical formalism.[719] There are also different ways to appear beyond the proper realm of operation as the two cases indicate. The first example is that of Argentinian loan instruments and vulture funds,[720] the second a Ukrainian Eurobond loan that was solely marked by a private entity entirely owned by the Russian Federation.[721]

The Argentinian sovereign debt is a *cause célèbre* among scholars of state defaults on their loans. Argentina defaulting on its loans in 2001 remains to this day the nominally largest default by a sovereign state with more than $100 billion worth of loans restructured to reduce state's debt burden to a sustainable level. After long negotiations with its debtors, Argentina finally concluded the negotiations and opened a bond exchange in 2005, which cut the outstanding loans by more than 70%. The significant reduction in the nominal value of outstanding loans led into a relatively low participation of creditors (72%) to the original bond exchange, a fact that was only partly improved with a second bond exchange in 2010.[722] Hence Argentina constitutes an outlier among states that have relied on debt restructuring on all accounts, which explains it alone 'account[ing] for a third of the case universe, with 50 commercial creditor lawsuits filed after the default in 2001.'[723] In light of its

[719] Geoffrey Marston, 'The Personality of the Foreign State in English Law' (1997) 56 Cambridge Law Journal 374, 380ff. Marston places some of the first bond cases to the early 19th century.

[720] On focus is *NML Capital Ltd. v. Republic of Argentina*, 699 F. 3d 246 (2d Cir. 2012); there are several other cases as well both from arbitration as well as before domestic courts. From arbitral cases and their impact for further development of what 'investment' stands for, see Pietro Ortolani, 'Are Bondholders Investors? Sovereign Debt and Investment Arbitration after Poštová' (2017) 30 Leiden Journal of International Law 383.

[721] There is no final decision on the matter as of yet as it at the time of writing this case is still pending before the Supreme Court of the United Kingdom. The discussion will be based on the Court of Appeal decision *Ukraine v the Law Debenture Trust Corporation P.L.C.* [2018] ECWA Civ 2026. For the case before UK Supreme Court, see Case ID: UKSC 2018/0192.

[722] Tim Samples, 'Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law' (2014) 35 Northwestern Journal of International Law & Business 49.

[723] Julian Schumacher and others, 'Sovereign Defaults in Court' (Working Paper, European Central Bank Working Paper Series, Publications Office February 2018) 20.

centrality to debt restructuring case law it is hardly surprising that also the 'trial of the century' in sovereign debt involves Argentina.[724]

The touted trial of the century focused on the Argentina defaulting its loans in 2001 and the subsequent debt restructuring and their impact on the equal treatment of creditors. At the centre of attention was the *pari passu* clause in the holdout bonds – i.e. the bonds that never became part of the restructuring – which declared as follows:

> The securities will constitute … direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness…[725]

The U.S. courts read the *pari passu* clause in a way that, in the particular circumstances of Argentina's recalcitrant behaviour,[726] its actions must count as ranking holdout bonds differently in violation to its commitments. This finding was supported with notable injunctive measures that prevented Argentina from paying to its other debtors before it did pay to the holdout debtors, effectively leading to Argentina defaulting its loans again in the aftermath of the decision.[727] On a case note in *Harvard Law Review*, the whole legal saga is seen as 'the apotheosis of the Roberts Court's formalist approach to matters of foreign relations law'[728], where considerations of political prudence serve no role.

As a form of pluralism or an arrogation of jurisdiction the case, and dozens of others akin to it against Argentina, tell a story of liberties for some often at a cost to everyone else. Many commentators are at pains to note that refusing to participate on restructuring of loans is, '[f]airness and ethics aside … also a legal activity.'[729]

[724] Joseph Cotterill, 'Choose Your Own Adventure, Sovereign Debt Trial of the Century Edition' (*Financial Times*, 8 February 2013) <https://www.ft.com/content/9e2f2925-b009-3d62-ba54-98c46ee802f0> accessed 14 August 2023.

[725] *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d at 251.

[726] The one-of-a-kind nature of the decision is underlined in Tim R Samples, 'Rogue Trends in Sovereign Debt: Argentina, Vulture Funds, and Pari Passu Under New York Law' (2014) 35 Northwestern Journal of International Law & Business 49.

[727] Matías Vernengo, 'Argentina, Vulture Funds, and the American Justice System' (2014) 57 Challenge 46.

[728] HLR, 'Foreign Sovereign Immunities Act of 1976 — Postjudgment Discovery — Republic of Argentina v. NML Capital, Ltd.' (2014) 128 Harvard Law Review 381, 385.

[729] Samples (n 726) 59.

The sovereign debts are often issued in small number of jurisdictions, with over 80% of all cases being decided in the United States courts, most notably in New York, with the United Kingdom having a share of some 17% of the cases – rest end up in arbitration. That both the United States and the United Kingdom have curtailed sovereign immunities and gradually reduced the range of possible defences has directly played in the hand of private creditors against a sovereign. While traditionally state immunity has limited the capacity of private creditors to gain access to assets of a state, in the *NML Capital* case this proved no hindrance as all loan payments were stalled for as long as holdout creditors were not paid. Argentina had a choice between defaulting all its outstanding debt it had restructured or pay for those who had refused to restructure their loans with a simple intent to gain sizable profits. In the end, Argentina ended up settling the dispute.

But even without forcible injunctions in place, the creditors can easily hop from one jurisdiction to another—internationally and in different national courts—in order to seize assets that belong to a sovereign. A good example from the case of Argentina is that of ARA Libertad. Libertad, a school vessel in the Argentine navy, was impounded in Ghanaian port after a 'court detained the ship at the request of NML Capital' for outstanding debt payments.[730] In order to return Libertad, Argentina referred the case to the International Tribunal for the Law of the Sea [ITLOS]. The Tribunal in a provisional measures order prescribed that

> Ghana shall forthwith and unconditionally release the frigate ARA Libertad, shall ensure that the frigate ARA Libertad, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate ARA Libertad is resupplied to that end.[731]

Thus, even for a single outstanding bond payment, Argentina was subject to the jurisdiction of the United States, Ghana, and ITLOS. The other holdout bonds originating from the same restructuring event further expanded this jurisdictional complexity. All in all, many of the vulture funds that themselves locate in tax havens to be subject to minimal constraints are provided with powers to challenge any decision against their interests anywhere, clearly indicating how the courts, when setting form before other considerations, enable gaming of the system by some, equally much as the colonial pluralism of yore.

[730] 'Argentina Ship in Ghana Seized over Loans Default', *BBC News* (10 April 2012) <https://www.bbc.com/news/world-africa-19827562> accessed 14 August 2023.

[731] "ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, 332, 350 (para. 108).

In the other example chosen from the complex world of state loans is the one of Ukraine. While the debt of three billion dollars at the heart of the matter has received scant attention, the events surrounding its issuance from revolution to annexation of Crimea by Russia have remained at the limelight of international law since then. At heart of the dispute before the UK courts are notes with a nominal value of three billion dollars held by a trust (the Law Debenture Trust Corporation p.l.c.). The notes created on 24 December 2013 had a sole subscriber, the Russian Federation. Before the issuance of notes Ukraine had been through tumultuous times.[732] In late November it had pulled out from its former plans to sign an association agreement with the European Union and instead of closer ties with the EU it approached Russia. This decision by the then president Viktor Yanukovych led to a growing discontent, culminating in a wave of demonstrations that ultimately ousted President Yanukovych from power in end of February 2014. In March, Yanukovych – then exiled in Russia – asked for Russian troops to help restore order, which led first to occupation of Crimea and then, through referendum, its annexation to Russia as well as still on-going civil war in Eastern Ukraine.

A notable consequence of these events was the near collapse of Ukrainian economy, which led for a default of its repayments in 2015. To this the Trust raised a claim for payment in the Commercial Court, which duly noted that Ukraine has no defence against such claims and therefore a full trial of the matter is not needed: Ukraine has to pay its loans irrespective of the circumstances. Ukraine appealed from this decision to the Court of Appeal which reversed the Commercial Court's decision and found grounds for a full trial. At present, the parties wait for a decision from the Supreme Court as of whether the case proceeds to full trial or not. The case is pregnant with international law, but I shall only focus on the defence of 'duress' that Ukraine relies on and the idea of non-justiciability of claims closely associated with the acts of sovereigns before the UK courts. The Court in case refers first at some length the decision of the UK Supreme Court in *Shergill v Khaira*, where the UKSC found, inter alia, that

> when the court declines to adjudicate on the international acts of foreign sovereign states … it normally refuses on the ground that no legal right of the citizen is engaged whether in public or private law.[733]

After this exploration on non-justiciability, it establishes three issues that are relevant for Ukraine's duress defence: (1) is there a basis in legal analysis under English law

[732] A thorough legal assessment of the aftermath of the Ukrainian crisis from multiple angles, see 16 *German Law Journal*, No. 3 (2015).
[733] *Shergill v Khaira* [2014] UKSC 33, §43.

for Ukrainian claims, (2) is the case beyond competence of the Court even if there is a legal basis, and (3) if beyond competence, should the Court 'grant an unlimited stay of proceedings or strike out … [claim,] because as a result its claim … cannot fairly be tried.'[734]

In the argument that follows, the Court establishes first that there indeed is a legal basis despite the fact that Russia and Ukraine are sovereign states and therefore any moral and social standards cannot be assessed by the Court (§160). The Court finds, however, that international law provides sufficiently determinate standards for it to assess presence of illegitimate pressure and therefore the duress defence passes from (1) to (2) issue. When assessing second issue, the Court considers a question whether Ukraine's claim for Russia's violation of *ius cogens* norms (use of force and threat of use of force) could be meritoriously argued in full trial. The claim of the Law Debenture's representative in the case is that granting jurisdiction on the matter to a domestic court would imply meddling with 'high policy of other nations' (§168). To assess whether foreign acts of state would fall within the remit of a domestic court, the Court of Appeal referred to *Belhaj v Straw*, and most notably, on a public policy exception carved out in it. In *Belhaj*, Lord Neuberger found 'that any treatment which amounts to a breach of *jus cogens* … would almost always fall within the public policy exception.'[735] The Court of Appeal follows this with six points that stress first the Russia's willingness to subject itself to English law by organising the Notes in accordance with English law with an English forum instead of relying on international law. Then the Court follows suggesting that there is nothing inherently non-justiciable in the present case, and further still, even if there would be a concern of the foreign affairs of the UK, the policy of the UK government has been clear:

> the United Kingdom regards the activities of Russia in seizing the Crimea and assisting military action by insurgents in Eastern Ukraine against the Ukrainian government as being in clear violation of Russia's obligations under international law. (§179)

Further still, that even if all else is debatable, there are strong public policy reasons for upholding the defence of duress as there is 'no norm more fundamental … than that set out in Article 2(4) of the UN Charter.' (§180) After passing the (2) issue the Court glosses quickly over (3) issue with stringent critique against the Russian

[734] *Ukraine v Law Debenture* [2018] EWCA Civ 2026, §155.
[735] *Belhaj v Straw* [2017] UKSC 3, §168.

position and its opposition to the English court having jurisdiction over international law while remaining unwilling to subject itself to any other jurisdiction either.[736]

The case of Ukrainian debt merits, obviously, a number of different readings. As Duncan Henderson and Ben Burnham write, referring to Russian news reports, the decision can be seen as 'legal nihilism and voluntarism'[737] as much as it can be seen as a triumph of international rule of law. On the one hand, the case shows the possibility of states to circumvent constitutional order and shadow their dealings by using private vessels for public business. The fact that the Ukrainian law denied authority of the executive to negotiate a further three billion loan had no significance in the case as a private creditor cannot be subjected to uncertainty emanating from possible ex post facto domestic proceedings. It is sufficient that the state organ concluding the loan agreement has capacity, which the lawful government has. On the other hand, the case shows that even if domestic courts may provide convenient means to enforce (quasi-)private contracts, they can also pose inconvenient questions to states concerning their international acts. While the Russian Federation can for the most part shield itself from international adjudication by not granting jurisdiction to international tribunals, the decision by the Court of Appeal indicates that it acts in two roles—simultaneously as public and private—before a national court.

It is interesting to compare Russian approach with its requests for loan payment from Ukraine to its domestic response to private claims enforced in either international tribunals or in arbitration. While pursuing in its case against Ukraine an argument that domestic law matters little and denying justiciability of international law and relations before English courts, Russia seems to have no quells about its own Constitutional Court denying enforcement of the award provided by the European Court of Human Rights in its Yukos ruling. Or how granting a stay for the award issued in the other branch of Yukos saga was well within the power of a Dutch district court, while arguing against such stay actively in an English court.[738]

[736] The Court of Appeal argues that if Russia seeks to settle the matter outside English court it can subject itself to the jurisdiction of the ICJ as Ukraine promises to, yet 'Russia, however, despite instructions being sought from it, gave no indication that it was willing to proceed in this way.' (§185)

[737] Duncan Henderson and Ben Burnham, 'Ukraine v Law Debenture: International Politics and Sovereign Debt in the English Courts' (*Oxford Business Law Blog*, 22 November 2018) <https://blogs.law.ox.ac.uk/business-law-blog/blog/2018/11/ukraine-v-law-debenture-international-politics-and-sovereign-debt> accessed 14 August 2023.

[738] A good timeline and a link to all court and arbitral decisions in Yukos case is available at 'Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227' (*italaw*, no date) <https://www.italaw.com/cases/1175> accessed 21 September 2020.

This schizophrenic capacity of a state is certainly not limited to Russia.[739] Nevertheless, it indicates the willingness of states, quite like the private parties, to seek to arrogate jurisdiction by hopping from one jurisdiction to another and changing the appearance from public to private to public again at a whim. But for those analysing these arrogations, the foundational tenet seems always to be the same. Thus, it is no surprise that for Duncan Henderson and Ben Burnham the Ukrainian debt case is 'a victory for form over substance'[740] as much as the Russian Constitutional Court's decision is for Iryna Marchuk 'an example of poor judicial reasoning'[741] for it highlight the wrong form. It seems these days mark not only apotheosis of formalism for the US Supreme Court but for many of the courts – whether national or international – adjudicating international law.

The problem—or a crisis—that ensues from the conquest of form over substance is the sheer magnitude of legal forms available at present. Those commanding the capacity to arrogate jurisdiction in search of a correct form are inherently better off than those bound to single jurisdiction of their residence. In a world where legal form travels with objects and gadgets of different sort (as well as, obviously capital) yet everyone but the most affluent people are rooted in place it appears likely that pluralism will leave most in the precarious in-between position of Aïcha bent Mohammed. For all the multitude of rights lingering before us, it might be that we end up with naught in order to preserve the form over substance.

[739] Charting of states' schizophrenic approach to international law, or their hypocrisy, Robert Knox, 'Imperialism, Hypocrisy and the Politics of International Law' (2022) 3 TWAIL Review 25.

[740] Henderson and Burnham (n 737).

[741] Iryna Marchuk, 'Flexing Muscles (Yet Again): The Russian Constitutional Court's Defiance of the Authority of the ECtHR in the Yukos Case' (*EJIL: Talk!*, 13 February 2017) <https://www.ejiltalk.org/flexing-muscles-yet-again-the-russian-constitutional-courts-defiance-of-the-authority-of-the-ecthr-in-the-yukos-case/> accessed 14 August 2023.

4.4 Conclusion

At the beginning of this chapter I argued that international law suffers from three characteristic crises that explicate its functioning. I nominated these crises those of structure, subject, and object. While interconnected, all three crises provided more of a snapshot than a continuous view into the heart of international law. Each crisis suggested that a picture would be clearer if only I would look the other way: from structure to subject, from subject to object, and from object back to structure again. The outcome is a kaleidoscopic view where patterns emerge only for them to disappear again. The indeterminacy of the structural crisis paved the way for new subjects to emerge, while the multitude of subjects turned attention to the object of international law. I guess it is safe to presume that a crisis of object will transform into a new crisis of structure in the end. But while the crises might repeat, the surroundings where these repetitions renew change.[742]

The most notable residue of the incessant loop of crises is new rights. Despite the inherently critical—or to some extent submissive—approach of international lawyers both in practice and in academe towards their object, there are surprisingly few demands for removal of regulation. After all, even the neoliberal impulse for deregulation led into little else than re-regulation and the increase in number of rights. New tribunals, new institutions, and an assortment of lesser novelties are recurrent features of international law's everyday. While it might be fashionable to lament technical managerialism, fragmentation, and specialisation of international lawyers to ever-smaller niches, all the coups d'états leave us dwelling in the houses our fathers built. The kaleidoscope might have brighter colours and more shards, but the shapes are still oddly familiar. When we push 'play' it is hard to not notice that international law is stuck into the Zeno's paradox of its own making. Even an infinite regress from structure to subject to object to structure will never cross the distance. But every time the distance is cut to half, a new coupure appears that needs to be filled with new rights.

A tragic consequence from the good intentions of international lawyers is a loss of horizon. Everywhere are rights. That is why those attentive to the crisis of object, such as Jean d'Aspremont, ask for precise rules to recognise law; a clear enumeration, preferably in a written form. But the neo-formalists navigate close to critics of structure, even if they would disconnect discovery of rights from their application like d'Aspremont does. To salvage rights, a new coupure is applied, now calling for a new theory to discover law and a separate theory to understand the

[742] David Kennedy, 'When Renewal Repeats: Thinking against the Box' (2000) 32 New York University Journal of International Law and Politics 335.

content of newly found laws. But now both critics of subject and structure can challenge those seeking to save the object. For a critic of subject, a general theory of discovery of law is an anathema for all attempts to universalise a condition are likely to conceal a position ripe with power, ready to be used and abused. For a critic of structure, an idea of understanding law seems out of place, for theirs was a project to show that there is a nigh endless spectrum of understandings for any given right, and all of those are at first sight equally sensible. Taking any other position would not alleviate the crisis, for saviours of subject will encounter saviours of object and structure whenever they seek to carve a space for their own interpretation.

In the end, it might be that the only way out from the repetition is to choose to stand somewhere. This is the suggestion of Umut Öszu: we choose behind which forms we stand. It is also of course the calling of Martti Koskenniemi to reshuffle and remake. I think Roland Barthes could have well described international law's narrative (re)construction of itself when he suggested 'that a little formalism turns one away from History, but that a lot brings one back to it.'[743] International legal thought has simply moved the other direction and first had to lose sight of the form to turn to history for a saviour. To stand with an international legal form is, in the end, the calling of virtually all international lawyers. It is that epilogue which effortlessly moves from 'I' of the observer of faults, into 'we' of international lawyer's invisible college. I am not convinced this collective position exists, which is why I think we might repeat the renewal. Again.

[743] Barthes (n 288) 111.

5 Towards a Theory of Repugnant Rights

The previous chapters have all dwelled with a single animating concept of the present dissertation. The reading provided in them has been guided by a pragmatist and internal reading of 'law' associated to personhood, technology, and international law. Focusing on what I have titled the semantic question, the concepts have been treated through an idealist lens, which arguably has overstated the autonomous power of ideas embodied in law. First, I looked at the idea of a generic egalitarian humanity of human rights and the universal personhood. Both the analytical as well as phenomenological accounts explored suggested the power of an idea to act as a corrective to perceived wrongs. Even accounts critical to the prevailing notion of personhood in law were shown to uphold the concept itself as an important ideological mooring that could be adjusted to better reflect and achieve the material fulfilment of rights of everyone. I concluded my initial treatment of personhood with a short analysis of the differing autonomy of concepts of personhood. I suggested that while internationally states such as Switzerland enjoy a notable liberty to formulate their concept of personhood to reflect the material realities within, other states, especially those in the global South, are heteronomous in their definition of personhood. The narratives—or ideas shaping the idealism—are mandated by international human rights parlance, marking a greater distance between the material realities and the purported idealism of the legal form.

After personhood, I set out an idea of technology in law as a semantic category. Unlike the concepts of personhood and international law, technology as such does not have a long pedigree as a legal concept. Through examples drawn from the United States case law, I pinpointed the emergence of contemporary idea of technology to the interwar period. Since then, technology has been strongly associated with innovation and patents. I showed how, like most areas of global trade, patents have evinced calls for closer administrative cooperation, which has reduced local variation in both the procedural and substantive scope of patents. I suggested that this has made technology a markedly neutral legal instrument that can be used to promote virtually all goals. To illustrate the point, I looked at technology's role in legal articulation of sustainable development and standardisation. On both accounts, I found that the idea of a neutral technology belies the social conditions of the use of technology. Standards have led to a ritualistic adherence and gaming of technical specifications and

sustainable development goals are reached even when no reduction of greenhouse emissions are recorded for as long as technology is transferred. With the concept of international law, I explored scholarships' internal response to the noted idealism of the concept of international law. Working with examples of critical appraisals of international law starting from the 1970s, I looked at international law as a repeated encounter with the material limits of an idea. I suggested that these encounters are commonly articulated through a metaphor of crisis. Starting from formulation of the indeterminacy thesis, placing international law between apologetic formulation of state interests and utopian aspirations of normative universality, the idea of international law has been shown to be a recurrent struggle over who gets to define the indeterminate core of the order. With each round of crisis and criticism new blind spots and fault lines have emerged, indicating new zones of material influence at the ideational core of international law. The recurrence of crisis has also expanded the scope of application of the idea of international law that has been partly reflected in the mutating nomination of the field—from international to transnational to global law.

In this chapter, I turn my focus more concretely to the limits of this idealism. There are numerous ways these limits can be approached of which I have chosen two that I advance hand in hand. On the one hand, I look at logical limits to an ideal system that has fuelled much of sociological and philosophical theory for long. I use Niklas Luhmann's system theory and Alain Badiou's mathematical ontology to illustrate the point. On the other hand, I follow a materialist critique of law in the form that has gained ground in international law in the 21st century. If, as Karl Marx argues, 'between equal rights, force decides,'[744] for international law as encapsulated in Chapter 4 the focus has been on finding the rights and recognising the force with a more modest attention to material conditions presupposed by this Marxian postulate. A lynchpin for the account I present is the idea of a paradox at the heart of the global order I explore. I call this a paradox of repugnant rights. The form of the paradox is similar to the one proposed in population ethics by Derek Parfit, hence the name. As with human beings, also accumulation of rights is perceived as a net positive event, and, as I will argue, quite like with humans the outcome of such accumulation leads to a situation where the scope of liberty provided by rights as a whole is curtailed rather than expanded with each successive right. To come in terms with this foundational paradox, I outline two models or theories.

The first of the two is the one common to many critical accounts of international law. Following Luhmann, this model is seen as a form of deparadoxification. The foundational paradox of international law's fleeting status between international

[744] Karl Marx, *Capital: A Critique of Political Economy* (Ben Fowkes tr, Penguin Press 1976) 344.

relations and meta-ethics—or between will (*voluntas*) and reason (*ratio*)—is concealed through referral to structures and institutions of international law. These structures enable international lawyers to conceal the inherently paradoxical nature of international law, and it allows lawyers to continue operating as if the paradox would have no bearing on the concrete matter at hand. Yet, the edifice built to shelter an international lawyer from the stultifying abyss of paradox—the structures and institutions that provide a language for international lawyers to share—has been crumbling for a good while. As Philippe Sands argued in 2005, the election of George W. Bush in 2000, marked a beginning of 'a full-scale assault, a war on law'[745] that was joined by the other early champion of an international rules-based order, the United Kingdom. Fast forward to the present and the open admission of the Conservative Government of the United Kingdom to break international law 'in a specific and limited way' merely comes to show how little of the ramparts built to shelter the paradox remains.[746] Through an exposure to cynical uptake of its foremost promoters, the role of force in international law has become increasingly difficult to conceal, while the norms of international law appear increasingly utopian. The very success of the rule-based order and the proliferation of norms has led states to alter the system and 'manage their legal risk by avoiding admitting they are in [violation of international law'[747] quite like the manufacturers of standardised goods or the creditors of sovereign debt referred above. To resist the crumbling of the edifice, international lawyers would have to work against moralisation of international law as well as its fragmentation—an attempt that might appear all but lost at present.[748]

The alternative is to renounce the paradox at heart of international law and claim that rather than incoherent, international law is incomplete. To formulate this account of international law, I will employ the ontological theory of Alain Badiou. Here, the form marks a safety valve. The outcome is right for as long as there is a form to rely on and any acts of injustice are to be corrected through inclusion of excluded within

[745] Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Penguin Books 2006) xii.

[746] HC Deb 8 September 2020, vol 679, col 509, the Secretary of State for Northern Ireland Brandon Lewis answers a question concerning the Northern Ireland Protocol of the UK's Brexit agreement with the following: 'I would say to my hon. Friend that yes, this does break international law in a very specific and limited way. We are taking the power to disapply the EU law concept of direct effect, required by article 4, in certain very tightly defined circumstances.'

[747] Tanisha Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (Cornell University Press 2018) 24.

[748] The fact has not escaped the attention of international lawyers themselves; for the risks associated with both ethics and fragmentation, see Martti Koskenniemi, '"The Lady Doth Protest Too Much": Kosovo, and the Turn to Ethics in International Law' (2002) 65 Modern Law Review 159; Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (n 370).

the law. There is no stopgap for this measure for every act of inclusion marks a new dividing line in a process that can be continued *ad infinitum*. This is the mode of international law followed by human rights with their constantly expanding perimeter either through adjudication or through new treaties; or that of international environmental law with repeated rounds of negotiations over what states are truly obliged to do to fulfil their commitments. The legal answer that emerges from an incomplete but coherent international law is correct but never permanent. Rather, law is seen as a creature capable of evolution that grows more mature with every successive round of its application. Yet, this model leads to realisation of the paradox of repugnant rights outlined above. On areas where adjudication expands law's scope, there is nothing, to loan from Rorty, preventing a collapse to Heideggerian morality.[749] As Jeremy Waldron has indicated, a flexible morality allows lawyers to embrace clearly repugnant practices as indicated by the U.S. torture memos.[750] On those areas where international law expands through imposition of new rules through codification of some sort, the outcome is a hyper-legality where actors are at liberty to choose rules that best serve their interests.[751] It is precisely this paradoxical nature of indeterminacy that leads to the paradox of repugnant rights and a theory that suggests that this cannot be avoided.

As such, the present emerges as a paradox: there are more rights than ever, yet there are growingly numerous accounts of rightlessness—of people without any rights. This is, I argue, an outcome of how the paradox of repugnant rights plays out. It is this recognisable pattern of responses to the paradox that I title the theory of repugnant rights that I set out to criticise in the second part of the dissertation. The form of the repugnant rights paradox is eminently recognisable from many earlier paradoxes' lawyers are familiar with.[752] Say, Carl Schmitt's (in)famous formulation of state of exception, which constitutes a legal means to move beyond law.[753] On a more general level, they both are instances of law's encounter with a more foundational problem of defining a system that would simultaneously be complete and coherent. According to what has come to be known as Gödel's incompleteness

[749] See supra n 76.

[750] Jeremy Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 Columbia Law Review 1681.

[751] See e.g. Ghezelbash (n 709).

[752] See, in general, Oren Perez and Gunther Teubner (eds), *Paradoxes and Inconsistencies in the Law* (Hart 2006).

[753] Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (University of Chicago Press 2005) 5. An influential interpretation of state of exception Giorgio Agamben, *State of Exception* (University of Chicago Press 2005). A re-reading of political theology in international law from largely similar theoretical background as my own work is provided in John Haskell, *Political Theology and International Law* (Brill 2018).

theorems, a system can be either coherent or complete but never both.[754] Even though Gödel's system functions only in axiomatic formulations, it has not barred their expansion to social sciences and law – if not as solid proofs of incompatibility, at the very least as useful markers of limits of system building.[755] The lawyers' professional ideology as a harbinger of order and formality in society, however, suggests for a deeply ingrained vision of law being capable to be both complete and coherent. Yet, as Pierre Boitte clearly notes

> [e]n ce qui concerne la cohérence, la question est de savoir comment un système formel peut fournir la preuve de sa propre cohérence et ainsi assurer son autofondation, ce qui, depuis le théorème de Gödel, semble impensable.[756]

A formal and coherent system of law necessitates either a safety valve that will install it with external source of validation or it must rescind its strive for coherence.

The view of law as a formal and complete system has obviously been the centrepiece of diverse accounts adherent to positive law. Within the framework of positive law, all that remains unregulated rests beyond law, and as such is no detriment to its completeness. There remains no way for the complete law to attest its coherence, but that – quite like questions of morality – remain non-legal matters.[757] The only consistency law requires is a minimal adherence to standards imposed on recognising law as law, not on the actual content of norms themselves and even less on their systemic coherence. This, according to Gödel's formulation, is a logical conclusion from the insistence on completeness: for as long as law is capable to define what counts as law completely, it may not define conditions for assessment of its coherence. An acceptance of a formal system of law, then, bars us from condemning procedurally correct, yet abhorrent laws, but equally much it bars us from declaring a law coherent or incoherent within the larger system of law. Therefore, many positivists simply declare that they are not interested on what they title a 'social' or 'empirical' question about law. The possibility for such a neat division can readily be questioned, yet I intend to bypass the question in what follows, for, the positivist vision is not the way I approach law. I deem it imperative to assess law as it appears in its everyday application, in what I titled pragmatic way.

[754] See, in general, Panu Raatikainen, 'Gödel's Incompleteness Theorems' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2022, Metaphysics Research Lab, Stanford University 2022).

[755] For a critical assessment on limits of Gödel for law, see David R Dow, 'Gödel and Langdell—A Reply to Brown and Greenberg's Use of Mathematics in Legal Theory' (1993) 44 Hastings Law Journal 707.

[756] Pierre Boitte, 'Jalons Pour Une Théorie Critique Du Droit' (1987) 19 Revue interdisciplinaire d'études juridiques 113, 121.

[757] See Joseph Raz, *The Authority of Law* (Oxford University Press 1979).

The problem with pragmatism is that it must rely on extra-legal justification for its operation.[758] There are no internal guarantees that would allow a pragmatist to recognise law as law for the pragmatic view does not provide an answer to this ontological question. Rather, in a pragmatic vision for law, the quest is to understand the epistemological function law serves in the maintenance of order, power, politics, or whichever external lens is chosen as the justificatory basis for law's lacking completeness. Thus, to the extent law is coherent, it is coherent in its task to fulfil this epistemological task. To assess coherence, then, there must exist an agreement on the external standard and its significance. Otherwise, it is impossible to attribute (in)coherence to law or a legal system at large. It is common-sense to draw opposite conclusions from the same legal outcome for as long as the perceived epistemological function of law is changed. If law's function is to serve order it is coherent on different conditions than if law's function is to foster trust in the legal system. These two different ways of perceiving law's role in a society may collapse into one at some point in terms of immediate legal outcomes, but their conditions of coherence differ. It is for this reason that I early on pointed out liberal leaning in international law, which provides a condition to assess coherence for the analysis to ensue.

Before a 'liberal world order', 'liberalism', or a 'rules-based international order' can act as an epistemic ground on which to establish an assessment of law's coherence, they must be infused with a meaning of their own—a process that in the end would lead to question their coherence and completeness as well as those systems or orders that follow them *ad infinitum*. Thus, in the first subsection of the present chapter, I summarise an idea of this ephemeral liberalism as perceived by both its supporters and critics. Based on these accounts, I formulate an axiomatic vision of international liberalism against which the supposed coherence of the global order is contrasted. As with all axiomatic choices, my construction of liberalism marks a leap of faith. Nowhere exists an articulated agenda for the global order or a discernible object carrying such moniker. It is an inherently complex system, which resists breaking it into parts only to be later gathered. As Paul Cilliers argues, '[a] complex system is not constituted merely by sum of its components, but also by the intricate *relationships* between these components.'[759] These intricate relationships are foundational for the emergence of the paradox of repugnant rights. The provided axiomatic presentation of inherent liberal epistemology of global legal order is used

[758] It is, as will be indicated below, possible to axiomatically exclude such external considerations from the pragmatic question. This is how, for example, Niklas Luhmann constitutes his theory of a society and of law, where law itself acts as a ground and the entire dimension for assessment of questions of legality and illegality. Yet, this choice is only meaningful against a backdrop of an environment of a society whence law emerges as a specialised system.

[759] Paul Cilliers, *Complexity and Postmodernism: Understanding Complex Systems* (Routledge 2002) 2.

as a tool to indicate how an analytical model of fragmented (or plural) international law loses sight of the growingly complex global legal order. Thus, the function of coherence provided by system's liberal ethos leads into enforcing outcomes that are antithetical to the purported liberalism.

After instilling axioms that global legal order stands by, I step back for a moment to position my project in a wider theoretical framework. In the second subsection, I introduce work of Alain Badiou, especially his work in cementing mathematics as ontology and the consequences this has for creation of what Badiou titles 'worlds' or 'situations'. These 'worlds' are what Luhmann would title systems and it is through the shared interest of Luhmann and Badiou on paradoxes that I will introduce a more systematic formulation of the paradox of repugnant rights. Simultaneously, I work towards indicating the limits of the axiomatic systematization of Badiou for a non-ontological being such as law. The subsection indicates a possibility for analytical de- and reconstruction of a highly complex system such as global legal order, while remaining mindful of the inherent limitations of such a project. Throughout this subsection, I return to themes explored in earlier chapters to provide concrete examples from the dissertation's three animating concepts. I exemplify how many of the legal conundrums encountered in the preceding chapters can be construed through axioms of liberal international order within the perimeters of a Badiouan ontology. And further still, I illustrate that despite faultless ontological edifice of Badiouan thought, the call for generic humanity that is foundational to his vision, results into the paradox of repugnant rights due to inherent incompleteness of this foundational category.

In a third and final subsection, I resume to questions of personhood, technology, and international law. I indicate loci where their interaction creates repugnant outcomes with high regularity. I rely on visions of voices critical to the (neo)liberal order to pinpoint areas where repugnancy is recurrent. As argued by Etienne Balibar

> [t]he 'disposable human being' is indeed a social phenomenon, but it tends to look, at least in some cases, like a 'natural' phenomenon, or a phenomenon of violence in which the boundaries between what is human and what is natural […] tend to become blurred.[760]

The naturalising of the ill-fate of these 'disposable human beings' on a global scale is closely connected to the idea of juridification of the lifeworld. Much like for the welfare recipients in Austin Sarat's research on legal consciousness of the welfare poor, (international) law 'is a web-like enclosure in which [the disposable human beings] are "caught." It is a space which is not their own and which allows them only

[760] Etienne Balibar, *Politics and the Other Scene* (Verso 2002) 143.

a "tactical" presence.'[761] Most often they only appear on the radar of international law when their tactical choices misalign with rules of international law; thus, pirates in the African Horn attacking a European vessel have more safeguards for their human rights than an immigrant seeking to cross the Mediterranean to reach Europe.[762] Without proper tactical choices, the intricate holes in the web of international law will release the disposable human beings from its hold, leaving them into a zone of alegality or of neglect.

5.1 Axioms of liberal international order

According to John Ikenberry, liberalism associated with a handful of liberal democracies constitutes an ideology that not only spurred its proponents to power and richness but built 'liberal international order—that is, order that is relatively open, rule-based, and progressive.'[763] And while Ikenberry, the foremost champion of the liberal international order in international relations scholarship, has been growingly concerned over the continued relevance of the mode, he has not been willing to sign its demise. The hegemonic authority of the order and its guardian, the United States might be less secure, yet even recently Ikenberry has found that 'despite its troubles, liberal internationalism still has a future.'[764] Especially after 2016, the foremost promoters of the liberal international order – the United States and the United Kingdom – have rescinded their support to an open, progressive, and rule-based order in favour of a closed, regressive, and moral-based order. Both the political left and right in those countries and elsewhere have been calling an end of liberal international

[761] Austin Sarat, '"...The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor' (1990) 2 Yale Journal of Law & the Humanities 343, 345.

[762] Treatment of pirates is to be done humanely and in accordance with human rights obligations, see, for example, Council Decision 2011/640/CFSP 'Agreement between the European Union and the Republic of Mauritius on the Conditions of Transfer of Suspected Pirates and Associated Seized-Property from the European Union-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates After Transfer' [2011] OJ L 254/1. Treatment of migrants crossing the Mediterranean and returned to Libya guided by a Memorandum of Understanding (MoU) between Libya and Italy only expects the parties to 'commit to interpret and apply the present [MoU] in respect of the international obligations and the human rights agreements' (art 4), see 'Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic'

[763] John Ikenberry, *Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order* (Princeton University Press 2011) 2.

[764] Ikenberry (n 72) 8.

order, suggesting that the order is no longer liberal (or has never been one) nor is it international.[765]

For scholars of international law, the heritage of liberalism and liberal international order is equally contested as it is for scholars of international relations. International law as well as international relations share a common story of origin for liberalism of the order, variably attributed to visions of Immanuel Kant or the more sombre prognosis of a society's founding fiction by Thomas Hobbes.[766] But as with international relations, international law has been largely unable to articulate what liberalism of the order stands for. As Duncan Bell notes,

> [s]elf-declared liberals have supported extensive welfare states and their abolition; the imperial civilising mission and its passionate denunciation; the necessity of social justice and its outright rejection; the perpetuation of the sovereign state and its transcendence; massive global redistribution of wealth and the radical inequalities of the existing order.[767]

It is along these lines that I understand Koskenniemi's claim that he knows 'of no modern international lawyer who would not have accepted some central tenet in [the liberal theory of politics.]'[768] If the concept and political (or legal) ideology it supports can support everything, it is difficult to not be supportive of some of its central tenets.[769] Yet, since Koskenniemi's original thesis both liberalism, its legal codification, and its scholarly treatment have been profoundly altered, to a point where not having an articulated opinion on a liberal theory of politics as an international lawyer would be considered a professional faux pas.[770] The year after finalising his manuscript, the Cold War came to an end with the fall of the Berlin Wall. If in 1988 liberalism was a non-theorised credo of international lawyers, in the following

[765] In general for criticism on liberal order, see David Singh Grewal, 'Three Theses on the Current Crisis of International Liberalism' (2018) 25 Indiana Journal of Global Legal Studies 595, 596–600.

[766] A good introduction to the liberalism in international legal thought is provided in Daniel Joyce, 'Liberal Internationalism' in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016).

[767] Bell (n 263) 683.

[768] Koskenniemi, 'From Apology to Utopia: The Structure of International Legal Argument' (n 608) 6.

[769] Arguably, Koskenniemi can be more minimally saying that there is an essence or a core to liberalism that is shared by all international lawyers. But as Bell (n 263) 684 indicates, '[e]ven [liberalism's] supposed core has proven rather elusive.'

[770] To an extent this might be a merit of Koskenniemi's insistence on the lacking theory of liberalism as suggested in Gerry Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' (1994) 15 Australian Yearbook of International Law 103, 111.

decades it reached its crescendo as a constitutive element in international lawyer's habitus. An array of authors laid out a normative edifice for international law's liberal ethos, anchoring human rights, democracy, and rule of law as foundational building blocks of a liberal international order.[771] But as with all high peaks, the shadow cast by the unequivocal triumph of liberalism has led to a growing critical uptake of the liberal order's founding normative premises. Where the last decade of the 20th century consolidated liberalism as part of international law's vocabulary, the 21st century has brought to the fore the ambivalence of the project of liberalism and the dark sides of an international order's founding premises.

As such, there are many ways to construe what liberalism or liberal international order might denote for international law. An increasingly common way to draw a distinction between different ideas associated with liberalism in international order is through mapping different modalities to different decades. This is what Gerry Simpson titles 'two liberalisms' or to what Andrew Lang refers as periods of embedded liberalism and neoliberalism.[772] In lieu of a temporal categorisation of liberalism as successive waves, an alternative way to describe liberalism is through its impact to some or all structures of 'traditional' or 'classic' international law. Thus, Anne-Marie Slaughter proposes in her reading of liberalism a new form a sovereign (i.e. disaggregated sovereign), Thomas Franck suggests new duties for a state (i.e. democratic governance), and Fernando Téson imposes states a duty to respect human rights, a failure of which will result in a military intervention. Slaughter's, Franck's, and Téson's accounts can then be read as liberal interventions that attempt to shuffle the perceived centrality of different international legal norms or regimes; away from normative equality of states towards a tiered concept of statehood, where adherence to liberalism associated with human rights, private property, and democracy makes liberal democratic states stand *primi inter pares*. And unlike Koskenniemi, Simpson, or Lang, the latter three authors consider liberalism in the form provided as a description of the (then) current state of international law. And even further, especially in case of Slaughter, they provide a prescriptive account of what international law would look like through the liberal lens. I will in the following outline what Koskenniemi might have meant by his central tenets of liberalism as well as what later

[771] See, for example, Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 European Journal of International Law 503; Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 American Journal of International Law 46; Fernando Tesón, 'The Kantian Theory of International Law' (1992) 92 Columbia Law Review 53; John Rawls, 'The Law of Peoples' (1993) 20 Critical Inquiry 36; charting immediate responses Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' (n 770).

[772] Gerry Simpson, 'Two Liberalisms' (2001) 12 European Journal of International Law 537; Andrew Lang, *World Trade Law after Neoliberalism* (Oxford University Press 2011).

scholarship has marked as a rupture from this earlier liberalism that signalled a move to what is usually referred as neoliberalism.

While it is ordinary to refer to liberalism as an Enlightenment tradition, pinpointing its moment of origin to Locke or Kant, any sustained talk of liberalism is of more recent origin. Bell shows liberalism has been highly contingent even on its foundational ideas. For long, for example John Locke was a marginal figure at best in political theory of liberalism. Support for democracy, equality, and human rights were not what liberalism of the mid-19th century was about.[773] During the period, the re-invigorated European colonialism especially in Africa called for new legal means and methods to legitimise title and prevent feuding between European powers.[774] To device such legal means, liberal international lawyers provided inventive new interpretations that enabled a legal conquest in the name of civilization.[775] Whether the re-emergence of a tiered concept of sovereignty was merely an awakening of a dormant form of a Grotian idea as Gerry Simpson alludes or whether it was a novel conceptual innovation matters little:[776] the liberal international lawyers speaking highly from sovereign equality and more humane warfare as well as from a spate of freedoms of individuals from state oppression were instrumental to creation and maintenance of European empire in the form it emerged during the 19th century. But as Andrew Fitzmaurice suggests, even then liberalism was not univocal. There was a significant opposition to designing Africa as *territorium nullius*, whose inhabitants were not considered sovereign subjects of their land (*imperium*), while commanding rights over their property (*dominium*). This opposition was, according to Fitzmaurice, 'motivated not by humanitarian sentiment but by self-interested concern about the endurance of the European revolutions.'[777] The liberals were concerned about rights, freedoms, and democracy, but the rights, freedoms, and democracies that concerned them were their own.

As such, then, as much as at present, liberalism in international law signals a situated narrative. A noble belief in the humanitarian and philanthropist ideas was during the 19th century reserved for those considered alike, whereas savage tribes and nomads—the European idea of Africa and the Orient—were nothing alike. This perception of Europeans commanding a permanent upper hand reflects what Edward Said titles a flexible positional superiority or what Anthony Anghie has called the

[773] Bell (n 263).
[774] Andrew Fitzmaurice, 'Liberalism and Empire in Nineteenth-Century International Law' (2012) 117 American Historical Review 122.
[775] See, in general, Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (n 561).
[776] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004).
[777] Fitzmaurice, 'Liberalism and Empire in Nineteenth-Century International Law' (n 774) 138.

dynamic of difference.[778] It is also a source of the baffling incoherence of the notion of liberalism, which allows simultaneous support of, say, equality and slavery. Thus, whatever is implied by liberalism *tout court* is not something that could be readily operationalised as an analytical lens. A liberal practice of establishing private states, a liberal practice of promoting human rights, a liberal practice of humanitarian intervention, a liberal practice of perpetual peace, a liberal practice of laissez-faire global trade, a liberal practice of regulated global trade. In a sense, liberalism has been and is all that. It has been encoded in different instruments of international law over the past century-and-half in these and other modes. Therefore, the warning of historians, such as Bell and Fitzmaurice, that the concept itself has been contingent and contested for the whole duration of the modern international law does not invalidate a legal interpretation seeking to understand what those different instruments might come to mean in the present. In her defence against claims of anachronism, Anne Orford aptly notes how

> [a]fter all, as lawyers […], we are trained in the art of making meaning move across time—by learning, for example, how to make a plausible argument about why a particular case should be treated as binding precedent, or why it should be distinguished as having no bearing on the present.[779]

International law is no stranger in making the past appear in present, as if it would be the same liberalism and the same order we are continuously addressing.

This gets us closer to the idea of liberalism Koskenniemi had in mind, and one that predated the influx of triumphalist accounts spurred by the proclaimed end of history. In a sense, Koskenniemi is truly anachronistic in his choice of seeing liberalism in international law by pointing to Emer de Vattel's work; de Vattel died before liberalism as a cogent political position emerged. But this matters little. I think it is safe to assume that what Koskenniemi has in mind is something Gerry Simpson suggests is the liberal ethos of international law as a discipline, associated with 'the liberal qualities of rule of law, autonomy, rights and equality.'[780] Here states occupy the role that liberal theory domestically provides for individuals: states have rights, states are equal, states are autonomous, and states are subject to rule of law. Obviously, this has never been the whole truth on the matter. As the realist challenge

[778] Edward Said, *Orientalism* (Vintage Books 1979); Anghie (n 384).
[779] Anne Orford, 'On International Legal Method' (2013) 1 London Review of International Law 166, 172.
[780] Simpson, 'Two Liberalisms' (n 772) 540.

to international law supposes power does matter.[781] Some states are more equal, more autonomous, have more rights and are less subject to law. This is, in a nutshell, also the argument of Koskenniemi: the oscillation between the argumentative poles reflects the underlying instability of the inherent ideas of liberalism. Liberalism leads to two directions that are mutually exclusive, quite in the same way as liberalism could enable and oppose empire. What enabled Sir Travers Twiss to have more sway in creation of Congo than his opponents came down to structural biases, which are a function of power. pedigree, and history.[782] On this vision, international law is made by international lawyers in a very concrete way and each and every lawyer is capable to occupy opposing positions as fits the situation, as was pointed out above in Chapter 4. Liberalism is therefore more an ethos, a core building block that preconditions all international lawyers to participate in the same narrative game. This allows for a narrative construction of a unitary group despite a relatively widely shared realisation that 'international law is different in different places.'[783]

Yet, this precise form of liberalism is simultaneously more than an ethos or an idea. It is also a meaning moving across times through an array of treaties, regulations, judgments, opinions, and other material legal paraphernalia. In a way it is an inheritance from the past generation of international lawyers—a structure on which communicating 'international law' appears meaningful. Thus, much like a language for Ferdinand de Saussure, international lawyers speak international law of their (or our) forefathers (and they indeed are fathers).[784] Even a cursory glance on some of the introductory treatises on international law reveals the presence of past in making an international lawyer. There is the obvious reference to a number of cases heard before the Permanent Court of International Justice that are still considered relevant in some insightful way, such as the *Lotus* case;[785] a call for institutions is often construed

[781] A realist critique of international law emerged during and after the Second World War. For a swing of pendulum in valuation of international law vis-à-vis international relations, see, Josef L Kunz, 'The Swing of the Pendulum: From Overestimation to Underestimation of International Law' (1950) 44 American Journal of International Law 135. A brief argument in favour of power in international law by one of its chief proponents is, Hans Morgenthau, 'International Law and International Politics: An Uneasy Partnership' (1974) 68 American Society of International Law Proceedings 331.

[782] For a part of Twiss's argument separating personal and territorial sovereignty, see Travers Twiss, 'An International Protectorate of the Congo River' (1883) 9 Law Magazine and Law Review 1, 15ff. The role of Twiss in formulating the Congo Enterprise for Belgian King Leopold II, see Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge University Press 2014).

[783] David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 Leiden Journal of International Law 9, 17.

[784] For Saussure's account, see Ferdinand de Saussure, *Cours de Linguistique Générale* (Payot 1916). Relevance of linguistics and language to the formation of early critical accounts of international law is evident in works of Alston, Kennedy, and Koskenniemi.

[785] The Case of the S.S. "Lotus" (France v. Turkey) (1927) P.C.I.J., Ser. A, No. 10.

through the events of the end of First World War and the Treaty of Versailles,[786] there are odd references to arbitral awards of the late 19th century and the early 20th century, which supposedly guide us on everything from general state responsibility to present issues of environmental law.[787] If one extends the view to various acts of codification, such as the Reports of International Arbitral Awards (RIAA) issued by the United Nations, chronologically the first award reaches to 18th century.[788] And even if these might be more in terms of building an idea of deep roots of international law, many of the past events re-emerge in the present either in same matter or in ways that appears analogous to an international lawyer. A case in point would be a news article referring to a possibility of Belgium to refer to a privilege granted for perpetuity to Belgian fishers in 1666 by the Britain's King Charles II, if the negotiations between the government of United Kingdom and the European Union on future relations are not settled.[789] All these documents are what constitutes the liberal core of international law.

Arguably, they all are embodiments of a rule of law applicable to sovereigns that autonomously entered these arrangements. They all reflect also very different 'liberalisms,' even though the building blocks employed appear familiar. As such, nominating a 'liberal' core for international law is an act of betrayal. It speaks from international law as if the concepts would not have mutated throughout the way, as if it would not be a different matter to grant perpetual fishing privilege to fifty fishers for *Civitas Brugensis* as a token of gratitude and granting a privilege for exploitation of a technology from their contemporary forms despite clear analogies. The liberal and internationalist ethos then is a medium through which these differences are settled, the matter that fills in the gaps that the apparent contingencies of the conceptual apparatus leaves at its wake. It is a paradox of a sort; the rules of international law are said to embody liberalism, while the only possible way to understand those rules as embodying liberalism is to construe that liberalism through those rules. In this sense, I find Anthony Carty's critique of Martti Koskenniemi's interpretation of liberalism illustrative. Carty argues that while Koskenniemi seeks to hold philosophy at bay, he employs some philosophical themes and figures in his oeuvre as if those were self-evidently the choice of all international law and of all international lawyers. In Carty's words,

[786] David Kennedy, 'The Move to Institutions' (1987) 8 Cardozo Law Review 841.

[787] Third Report on the responsibility of the state under the situations contemplated by the British claims (1924) 2 RIAA 639; Trail Smelter Arbitration (United States v. Canada) (1938 and 1941) 3 RIAA 1905.

[788] River Saint Croix (United States v. Great Britain) (1798) 28 RIAA 1.

[789] Christian Levaux, 'Belgium Dusts off 1666 Charter for Post-Brexit Fishing Rights' (*Reuters*, 22 October 2020) <https://www.reuters.com/article/us-britain-eu-belgium-privilege-idINKBN2772TL> accessed 14 August 2023.

> Koskenniemi is imprisoning the profession in a number of his chosen philosophers. Others will follow, in much the same vein, particularly Hume, for whom 'reason is the slave of the passions'. Presumably Koskenniemi's disqualification of himself as a political philosopher and theorist, and Jouannet's acceptance of this, means that he thinks he is identifying simply the accepted philosophical parameters within which the profession of international lawyers in fact and in practice works.[790]

A predefined notion of what it means to be a 'liberal' fuels then the escapism from politics through a rule of law. But were King Charles II, arbitrators in *River Saint Croix* case, the judges of the PCIJ in Lotus case, and the Member States of the United Nations through Friendly Relations Declaration[791] – to name but a random collection of events – truly commanding a shared vision of liberalism with a philosophically attuned understanding of rationality, autonomy, and sovereignty?

The most likely answer is that they hardly were. A more likely interpretation is of fitting the subsequent interpretations to then contemporary understanding of liberalism; to fasten the immemorial roots of the founding leap of faith. I would be hard-pressed to accept that most international lawyers now or ever have read Hobbes or Hume. Yet, in one way or another such permanence of liberalism's core tenets has been argued to exist, if not otherwise, at least in its doctrinal description. For example, Outi Korhonen in her analysis of Anne-Marie Slaughter's liberalism ends up compering Slaughter's new account to the 'classical' liberalism exposed in Koskenniemi's *From Apology to Utopia*. Korhonen suggests that while liberalism might have mutated 'many of the core assumptions are quite visible' still in the present order.[792] Further, she argues that when

> [c]ompared to Slaughter's first core assumption of Liberalism, Hobbesian legacy seems to come very close, individual ends and choices, need for security, natural causality and psychology, as well as objective (true) interests sound familiar.[793]

In the end, there is nothing new under the sun. The New World Order of Slaughter is merely the Old-World Order with new nomenclature, while being liberal through and through. This idea of permanence of 'liberalism' as a recognisable and discernible

[790] Anthony Carty, 'Language Games of International Law: Koskenniemi as the Discipline's Wittgenstein' (2012) 13 Melbourne Journal of International Law 1, 4.

[791] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV).

[792] Outi Korhonen, 'Liberalism and International Law: A Centre Projecting a Periphery' (1996) 65 Nordic Journal of International Law 481, 519.

[793] ibid., 520.

modus operandi of international law is why I consider it an axiom, that is, 'a statement or proposition which is regarded as being established, accepted, or self-evidently true.' I am not convinced that liberalism has a truly recognisable axiomatic form nor of the fact that liberalism would be the thoroughgoing ethos of international law. The purpose of the axioms I nominate below is to illustrate how these axioms of liberal lens explicate and justify what I have titled the paradox of repugnant rights. It is not that it must be so, merely that for many international lawyers and for much international law it is so.

What then are those liberal axioms I consider explicating the repugnant outcome of rights on a global scale? An obvious choice would be state sovereignty as it appears centrally in all liberal accounts of international law both old and more recent. Another element that is widely present in accounts of international law's liberalism is that of rights and their emergence, usually addressed through sources doctrine. Outside these two, any choice is about to appear partisan to a given era of liberalism. Does a doctrine of liberal just war or that of functional international institutions constitute a core element of the 'liberalism' inherent in international law? Would protection of minorities, peoples, or—more specifically—some form of human rights protection mark a core tenet of liberalism. It all depends. Thus, while they all constitute a part of a vision of liberalism as it has or is constituted in international law, they have always remained partial and contested elements of tradition. A more permanent element of international law's liberalism is its relationship to private property and capitalism. Ntina Tzouvala argues that capitalism has been and remains a structural element of international law's ever-persistent standard of civilisation. She argues that '[t]he "standard of civilisation" […] was a historically contingent response to the need to make sense of and regulate a world shaped and reshaped by […] dynamics of unequal, yet global, capitalist development.'[794] From Tzouvala's materialist reading of international law to Franck's self-titled liberalism, or from Grotius's defence of the Dutch East Indian company to contemporary forms of global value chains, private property persists. Thus, the three axioms of liberalism that I consider sufficient to account for the paradox of repugnant rights are sovereignty, rights, and property.

5.1.1 Sovereignty

Sovereignty and its relation to states as foundational members of international community has been part and parcel of much international law. As Jens Bartelson argues, '[m]any theorists have assumed that sovereignty is a necessary condition of

[794] Ntina Tzouvala, *Capitalism as Civilisation* (Cambridge University Press 2020) 4.

political order by virtue of being the most fundamental principle upon which the modern state and the international system are based.'[795] From complex relationships of king's body in absolute personal monarchy to locus of sovereignty in a representative democracy, the question of sovereign is never far from that of state in international law.[796] Centrality of states as *the* subjects of international law has been briefly addressed above, but their role for the ideological project of international law calls for some clarification, that is, what makes sovereignty a particularly liberal idea? After all, the origins of sovereignty are commonly attributed to 16th century Frenchman Jean Bodin and to a 17th century Englishman Thomas Hobbes, neither of whom can readily be called 'liberal' in a sense that would meaningfully connect their ideas on sovereignty to an over-arching liberal narrative. What Bodin and Hobbes argue is centralisation of sovereignty to single hands or to a single body, making sovereignty an indivisible quality that commands supreme authority. They did not see sovereignty bound to territory as would be presumed by an understanding of sovereignty as an exclusive quality of a state. To an extent sovereignty is 'the most fundamental principle' of the international system, attributing sovereignty of Bodin and Hobbes any liberalism seems an apparent misnomer, especially from the point of view of international law. After all, if autonomous capacity to decide matters internal and external is the liberal strain of sovereignty, would that not equally much describe Niccolò Machiavelli's prince, or the one and indivisible Holy Roman Empire embodied in Charlemagne, not to mention sovereigns that existed beyond Europe?

Thus, it is apparent that the authors seen as central for the construction of sovereignty were not 'liberal' nor did they or their immediate work foster an era of liberal international order. It is safe to assume that the nomination of sovereignty as an axiom of liberal international order is of later origin. It is much more difficult to precisely nominate when sovereignty came to be associated with liberalism. Following Bell and Jouannet, there was no liberalism to speak of before early years of the 19th century. Yet, as argued by several international law scholars, liberal ideas – if not downright liberalism – can be found from a group of authors starting from Vitoria and Grotius, running through Pufendorf and Wolff to Vattel and Martens all of whom wrote before liberalism properly so even existed. In a nutshell, the argument of these scholars is that an assorted array of ideas associated with liberalism were supported by these early figures of the law of nations. A central of these 'liberal' ideas was the two-step move where states were first considered jural persons on the international plane and through this employment of legal fiction linked to natural persons whose liberties and freedoms were forcefully advanced by the Enlightenment

[795] Jens Bartelson, *Sovereignty as Symbolic Form* (Routledge 2014) 41.

[796] An argument for post-sovereignty has been voiced with some recurrence in international law, see, for example, Neil MacCormick, 'Liberalism, Nationalism and the Post-Sovereign State' (1996) 44 Political Studies 553.

thought writ large. Thus, a sovereign was a person and parallels ought to be drawn between the rights of sovereign internationally and rights of natural persons domestically. This allowed formulation of a basis for peaceful co-existence of nations, as the liberal sovereign—irrespective of its domestic constitution—was to abstain from impinging on liberties and freedoms of other sovereigns. Simultaneously, this advanced a view that when conflicts emerged, they were to be settled through treaties or settlements rather than feuding. In short, the lynchpin for a 'liberal' sovereignty was its association with liberal rights of individuals domestically free to pursue their interests as they best deemed fit.

This idea that Gerry Simpson titles liberal pluralism set all (European) sovereigns on an equal footing with one another, free from interference of others in their internal affairs and subject to similar rights in their mutual relations.[797] Emmanuelle Jouannet suggests that such liberal pluralist concept of sovereignty takes place 'between the seventeenth and eighteenth centuries that saw the *jus gentium* of the Ancients finally giv[ing] way to the law of nations of sovereign states.'[798] But to nominate a single author a midwife of international law in a liberal mould is hardly justified. After all, Vattel owned his idea of international society 'of sovereign, equal and independent states'[799] to Christian Wolff, whose own intellectual trajectory drew from wider Enlightenment era demands for equality.[800] In a sense, whether Jouannet – and before her, for example, Koskenniemi – is right of the origin of international law and of its source of 'liberal' notion of sovereignty is not decisive: it remains nonetheless the narrative undercurrent on the making of a discipline. A discipline premised on 'liberalism' that is construed in contrast to a feudal, religious, and absolutist past of Europe. The liberal pluralist sovereigns remain agnostic in their relations to one another, at least ideally; the mode of governance, the extent of individual liberties, or the economic organisation of a state are inconsequential for acceptance of its political sovereignty in its international relations. Another premise of this thought is that the sovereign is undivided and supreme in its external representation.[801] This aspect of liberal sovereignty is commonly at display in questions traditionally associated with fundaments of statehood; questions of inclusion and exclusion of people, matters of constitutional order, or those related to relations to other states. Here a liberal sovereign is supreme, undivided, and unquestioned.

[797] Simpson, 'Two Liberalisms' (n 772).

[798] Jouannet (n 276) 13. This transition is traced also in Hersch Lauterpacht, 'Private Law Analogies in International Law' (Dissertation, University of London 1926) 40ff.

[799] Jouannet (n 276) 18.

[800] See, for example, Nicholas Greenwood Onuf, 'Civitas Maxima: Wolff, Vattel and the Fate of Republicanism' (1994) 88 American Journal of International Law 280.

[801] A support of this position against 'modernism's authoritarian impulse' is provided in Martti Koskenniemi, 'The Future of Statehood' (1991) 32 Harvard International Law Journal 397.

But as many liberal authors immediately before and after the Cold War noted, a monolithic sovereign is an undesirable simplification of the complex formation of state's international and domestic behaviour.[802] And the moment the idea of an undivided sovereign was questioned, the same authors opened the question whether all sovereigns truly are or should be equal in their international standing. In a sense, the proposed tiered model of sovereignty was not a novel innovation of the time but had been widely in use during the classical doctrine as well. Whether demand for democratic governance is same or merely similar demand as that of standard of civilisation might be an entertaining debate, but for the nature of sovereignty they bode similar fate. Through such a lens, sovereignty cannot remain agnostic to the internal affairs of a state: there are better and worse ways of governing and those differences ought to matter on sovereign's international standing.[803] The other challenge posed by eroding unison of sovereign's appearance was the location of power and, ultimately, location of sovereignty itself within a state. Is sovereignty in the end belonging to a territorially defined *demos* that guarantees legitimacy of rule in both its internal and external manifestation, or would it be better to describe sovereign power through a disaggregated model where bits and pieces of sovereignty are occupied by different branches of the state as well as partly by private actors acting jointly or instead of sovereign on a transnational setting? The response by those proposing a new, disaggregated sovereign and those supporting the endurance of monolithic state was relatively similar. For example, José Alvarez in his critique of Anne-Marie Slaughter's idea of disaggregated sovereign, suggests that much what Slaughter deems co-operation between executives or regulatory agencies is operating on a backdrop of state-centred system.[804] Alvarez's example is from International Civil Aviation Organization (ICAO) and the standards it has imposed, suggesting that the technical-managerial mindset leads into binding norms that are very much like all classical models of state-centric international law. On this model, liberal sovereign is networked, divided, and dependant on private actors.

Yet, neither of these models exclusively describes sovereign at present. As will be explored in the second part of the dissertation, sovereignty is employed in its classic

[802] This was also the opinion of many early 19th century scholars, especially those associated with the so-called sociological school of thought. The group remains relatively undefined, but it is considered to include majority of the eminent scholars of the interwar period. See, Robert Kolb, 'Politis and Sociological Jurisprudence of Inter-War International Law' (2012) 23 European Journal of International Law 233; Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Brill 2009); Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (n 561).

[803] Rawls, *The Law of Peoples* (n 159).

[804] José Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 European Journal of International Law 183.

liberal formulation, for example, when the question turns to immigrants and refugees. At the same time, in the field of information technology, sovereigns willingly network and depend on private actors in standard-setting as well as in moderation of political speech and diverse security functions. But there seems to be a third mode for sovereignty that is not captured in either of the two liberal modes described above. It is a form of liberalism that enables sovereignty to be by-passed by creating a framework where sovereigns enable unconditionally circulation of goods and services. Here, quite like Alvaraz indicates, state-centric international law has created a system consisting of functionally separated agencies, whose decision-making follows the outline provided by Slaughter. This would be how, for example, the Technical Barriers to Trade (TBT) Agreement functions. But as shown in recent research on international institutions, the institutions themselves mould the sovereign to adjust with changes stemming from outside its monolithic or disaggregated form. As such, the sovereignty is infected with a virus that can easily cross in and out from its sovereign reach—a modality that seems to escape both liberal formulations above. Here, epistemic communities of those involved in the work of international organisations might be decisive[805] or the newly formulated sovereignty may result from ideas imposed as correctives for sovereign's past excesses.[806] In a sense, it is subjecting the liberal sovereignty to its 'Other' that for long has been occupied by the colonial encounter.[807]

The idea is certainly not novel. After all, contestation of sovereignty on its liberal credentials was part of a critique launched from, at latest, the 1930s onwards by many critics of colonialism and imperialism. It also is the central argument in Anthony Anghie's re-reading of sovereignty in international law that through constant mutations sovereignty retains its colour-line and connection to colonialism. That even those critical to emancipatory liberal narrative of international law reproduce this liberal narrative of European construction of sovereignty – whether in monolithic or disaggregated form – reveals an act of hegemonic foreclosure, which precludes some forms of sovereignty from the realm of sovereignty proper. As Anghie shows, this role has moved from infant-like Indians of Vitoria, to nomads of Vattel, to savages of Westlake, ultimately to rogue states, axis of evil, and terrorists. This 'Other' sovereign has only ever existed minimally in the folds of international law's universalist ethos. All expansion of universalism is construed in a liberal Western key, although, as

[805] Lang (n 772).

[806] See, for example, Paul Craig, 'The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility' (2015) 22 Indiana Journal of Global Legal Studies 243. See, also, the accompanied symposium issue with references to earlier globally enforced austerity measures in Asia and Africa.

[807] On international law and its others, see, Anne Orford (ed), *International Law and Its Others* (Cambridge University Press 2006).

Adom Getachew shows, transition from a vague principle of self-determination of the Charter of the United Nations to a declaration of a right of self-determination in the General Assembly's resolution 1514 was to a large part contingent on 'anticolonial nationalism as a site of conceptual and political innovation.'[808] That these and other moves towards universalism emerge liberal *ex post* merely highlights the difficulty for describing this third mode of sovereignty. More than turning multinational corporations (MNCs) into subjects as the concession arbitrations did in the 1950s and therewith promoting them to quasi-sovereign status, the present mutation fosters assets and goods to reach that status. Arguably, this could be read as a particular biopolitical mode of intervention, where safety and welfare of global humanity, is supposedly upheld through adherence to a common set of norms. These norms and assets, chiefly originating from the global North, operate in their full force only in the global South—as with the previous iterations of sovereignty analysed by Anghie.

In the second part of this dissertation, I focus on ways objects are promoted into quasi-sovereign status to the detriment of states as sovereigns and humans as the ultimate telos of international order. This marks, I argue, a further step in dilution of sovereignty in what Outi Korhonen calls peripheries of international law. In short, my argument is that technology in general and its material embodiments in particular are treated in two mutually enforcing ways. First, they act as an indicator of development of a sovereign, even though considered to belong to a private realm as briefly argued above in Chapter 4 (on environmental law). Second, as development is considered a desirable outcome, the rules and regulations governing the technologies are seen as universal norms in promotion of safety and welfare of humanity as a whole. In this sense, technological objects function as small-scale biopolitical tools and to act in violation of those norms would be to embrace a form of thanatopolitics, therewith violating the foundational, humanist creed of international order. Despite the critical potential of sovereignty as shown in outstanding research, among others, by feminist and third world approaches of international law, sovereignty in international law remains defined through its liberalism, albeit such liberalism is seldom defined. In short, the liberalism of a sovereign persists and as such it retains its position as an unquestioned axiom of international law.

5.1.2 Rights

[808] Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press 2019) 75.

Sources are what separate an international lawyer and international law from idle chatter.[809] According to Samantha Besson and Jean d'Aspremont '[i]t is not contested that speaking like an international lawyer entails, first and foremost, the ability to deploy the categories put in place by the sources of international law.'[810] Also, the doctrine of sources of international law seems to allow for an easy, non-theoretical solution for recognition of rights in international cooperation. For much of contemporary international law and for many international lawyers, an authoritative list of sources of international law are those enumerated in the Article 38 of the Statute of the International Court of Justice[811] – originally formulated for its predecessor, the Permanent Court of International Justice in the immediate aftermath of the First World War.[812] Despite the relatively recent emergence of 'sources' as a purely doctrinal category, they are seen essential for rearing future international lawyers as well as recognition of international law proper from the chaotic collection of 'law-like' norms circulating globally. In short, if it is not on the list, it is not international law.

When looking at the drafting history of this succinct list, it is easy to notice that its original drafters did not consider codifying what counts as international law for the next hundred years. The men participating in formulating what became the Article 38 were all eminent lawyers, and certainly interested in promoting legalism on the international fora, but the actual dispute over sources was not directly related to 'law.' Rather, of concern was the scope and breadth of PCIJ's jurisdiction and its impact on state sovereignty, especially that of powerful states. Thus, sources that appeared to create a constantly expansive list of rights – an evolutionary system of international law – seemed like an anathema to many of the representatives. As such, the list was perceived as an enumeration of the present status of international law in the aftermath of the First World War. It was not progressive, not pragmatic, nor particularly innovative list. But it was a list that came to define how to recognise what counts as international law for the next hundred years.[813]

What, then, does make the list in the Article 38 of the Statute of the International Court of Justice liberal in any meaningful sense? The answer appears in many ways

[809] Throughout this chapter I have gained enormously from Wouter Werner's draft chapter titled 'The Eternal Return of Not Quite the Same' (on file with author).

[810] Samantha Besson and Jean D'Aspremont, 'The Sources of International Law: An Introduction' in Samantha Besson and Jean D'Aspremont (eds), *Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 1.

[811] United Nations, *Statute of the International Court of Justice*, 18 April 1946.

[812] League of Nations, *Statute of the Permanent Court of International Justice*, 16 December 1920.

[813] In general on the work of the Advisory Committee of Jurists responsible from the Statute, see, Ole Spiermann, '"Who Attempts Too Much Does Nothing Well": The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice' (2003) 73 British Yearbook of International Law 187.

like the one proposed for sovereignty. As the sovereign is established through a social contract that binds together members of a society through consent, the law is to be based on a consent of those being subjected to such law. For the idea of international cooperation, one that animated those formulating the list of sources for international law, such consensual model for enacting international law was paramount. Only when states consented to international law, whether through conventions and treaties or through acceptance of custom, would it promote their coexistence and peaceful cooperation. This creates modes and modalities for 'law' in all liberal societies established on this mould, international society therein included which, the argument goes, differs in some notable way from illiberal sources doctrine that remains largely unarticulated. In a sense, this has led many to argue that an international rule of law must be based on positive law for it to be liberal, but if consent is a sufficient condition for a liberal moniker of law, it is entirely possible to construe consent for natural law as well, albeit such construal of consent would be meaningless for the validity of a norm. Thus, it is this more limited sense of consent providing norm with a validity that suggests of 'liberal' origins of international law's sources – or of international law's rights.

But even a cursory glance in the voluminous literature on sources of international law reveals that most what counts as valid sources before the ICJ and the PCIJ before it or what makes one appear as a competent international lawyer, has very little to do with any meaningful consent of either states or of individuals. Obviously, it is always possible to construe a narrative of second-order acceptance (i.e. states' accept the Statute of the ICJ and therethrough accept the sources doctrine), but using such a logic everything is based on consent.[814] Yet, at least since Prosper Weil's article in the early 1980s, there has been a wide recognition that while state consent is an integral element in codifying something as international law it is hardly sufficient.[815] As with sovereignty, the pluralistic international community appears to cement humanism and tolerance of cultural and social differences as more foundational norms for international cooperation than any purely technical norm. As Weil argues, such elevation of morality despite its salutary goals may erode the normativity of international law—it will not only create 'elite norms' but also blur what norms of international law consist of. It is against this development of liberal international law that Weil speaks in his article, against an idea of there being norms and norms of international law. The liberalism that led to emergence of pluralism is foundational for international law's relative normativity or indeterminacy.

[814] A similar second-order consent for natural law is easy to make: I choose to believe in something supranatural (or metaphysical) and as I freely consent on such beliefs, wherefore the dictates of natural law are based on consent that I can readily revoke.

[815] Prosper Weil, 'Towards Relative Normativity in International Law' (1983) 77 American Journal of International Law 413.

Reformers of international law during the era of decolonisation sought a genuine change; emergence of an international legal conscience surely 'ensure[s] the primacy of ethics over the aridity of positive law,'[816] but the uses and abuses of such ethical playground are markedly similar as pointed out in Chapter 4.[817] In similar vein, to claim that all states are responsible or that all human beings have rights, is without a doubt a move towards right direction, yet Weil and others at the time were prescient enough to realise that expanding rights to everyone might leave no one with obligations. To those more critical of the normativity itself, Weil's remarks can be transformed to a slightly different form: if liberalism promotes pluralism and humanism, how come it has been so closely tied to a precise form that is predominantly shaped by the West? This, obviously, is a question that seems to be at the core of the repugnant paradox briefly formulated above. If the foremost norms, those described as peremptory norms or jus cogens,[818] supposedly describe an assortment of human rights and state rights, how come that liberalism remains so tilted in favour of its formulators and against the interests of states and individuals in areas that act as norm takers? This, then again equally obviously, is the question of international law's universalism. The idea of party autonomy, positivism, and pluralism inherent to liberalism amounts to an overlapping, yet partly conflicting agenda for international law—one that has been subject to much criticism by many international lawyers from notably diverse backgrounds. This conundrum can be expressed as a form of liberal trilemma between universalism, pluralism, and normativism.[819] To separate international law from regional and strictly domestic law it must aspire to have a more universal application, hence the inherent strive for universalism in international law. In similar vein, the origin story of modern international law, often narrated through the Treaties of Westphalen, is that of pluralism—originally through the acceptance of states adhering to different Christian denominations, later between different state religions, economic organisations, and values. The peace and co-operation promised through adherence to international law is, the argument goes, only possible by accepting states as unique but equal. And

[816] ibid., 422.

[817] See also, Koskenniemi, '"The Lady Doth Protest Too Much": Kosovo, and the Turn to Ethics in International Law' (n 748).

[818] A tour de force of jus cogens in international law see Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Company 1988). For a recent authoritative formulation of peremptory norms of general international law, see, International Law Commission, 'Fifth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur', 24 January 2022, UN Doc. A/CN.4/747.

[819] This is inspired by the political trilemma of the world economy of Dani Rodrik, *The Globalization Paradox* (Oxford University Press 2011). Rodrik's trilemma is used in research of law by, for example, Jukka Snell, 'The Trilemma of European Economic and Monetary Integration, and Its Consequences' (2016) 22 European Law Journal 157.

finally, to mark a space of its own, international law necessitates a spate of posited norms to prevent it from collapsing to moralism or politics. Despite the centrality of all these different aims of liberal international law, they appear eminently incompatible to one another. How to create an international law that is simultaneously universal, plural, and formally encoded?

The feasibility of the project of liberal international law has been subject to sustained criticism for long. Despite best efforts, there has been little progress in bringing forth an international law that would be truly universal, plural, and formally encoded. Thus, there is notably affinity with this trilemma of liberal international law and one proposed by Dani Rodrik for economic globalisation. There are models that embrace universal pluralism, those that seek to accomplish universal normativism, and there are accounts of pluralist normativism. They all require different features from sources of rights, while purportedly all contributing to international law. Also, like Rodrik's trilemma, there are some prior models of international law that illustrate the choice. A universal pluralist model suggests that international law contains values that are universally shared, normally accompanied with an enumerative list of 'cultures' or 'traditions' that espouse a particular idea, signalling its universal acceptance despite the plurality of values and worldviews globally. This is most forcefully reflected in the concept of jus cogens and the promotion of universal pluralism is most notably advanced within global constitutionalism scholarship that considers rule of law and human rights as its urforms.

The two other sides of the trilemma can equally much be placed on the plane of past (and present?) international law. The universal normativism refers to a model that by many of its antagonists is described as *the* mainstream account of international law, namely, positive norms that are declared to apply universally on every State. This is the model of 'public international law' that at least in Finland is thought as international law properly so. There are norms that emerge through conventions or custom and those norms are binding upon all—universal. There is little need to address the question whether those norms reflect pluralistic community of States for both conventional and customary law are deemed emanations of State autonomy. It is a model that recognises a norm when it sees one and is, if not fully hermetically sealed from the values of its enforcers, sufficiently divorced from the power to differentiate law from politics. The last facet, pluralist normativism, argues for a multitude of norms to take into account the equally multifarious values and interests found from international fora. As a model, it closely resembles current transnational law and the related critique of fragmentation of international law. Unlike traditional public international law, there is no attempt to claim for universality of any of the given norms and in distinction from global constitutionalism there is no aspiration to claim that some values and interests would enjoy a global, pre- or post-normative (transcendent) acceptance; all norms are to be contested in the marketplace of ideas.

In terms of emergence of rights – or doctrine of sources – all three models employ a different set of doctrines. For global constitutionalism, the foundational pillars of the system are based on an idea of peremptory norms, norms whose existence cannot be questioned. As such, at its core it has echoes of Kelsenian pure legal theory, slightly modified to international cooperation; there simply are norms that are foundational for international law. Their status as positive law cannot, in the final analysis, be established. Rather, rule of law and human rights function as moral standards that cannot be violated against, that triumph against competing rights claims in case of controversy. They are norms beyond norms, yet their content in formal terms rests contested if not unclear. In public international law, the pedigree of norms is closer to that of the Article 38 of the ICJ; conventional and customary norms apply, and they apply universally. The pedigree of these norms shall not be questioned, for that would induce condition of morality or of politics into the heart of legal norms. In a sense, the formality of norms is bought with partial blindness to the conditions of their creation. If the rights are biased to interests of the powerful or reflective of the value choices (or morality) of but a handful of states, it is to no detriment of their character as rights. All norms remain equal, yet they trump any attempts to pluralism inherent to international law. And in transnational law, the norms are created on multiple levels by varied actors. The foremost value of norms lies in their capacity to reflect diverse needs and interests associated with international law. The rights emanate from within a framework summoned by the sovereign states, yet the framework merely initiates the process that has no clear direction or purpose. Norms for aviation safety or those for transnational crime do not seem to build on the same system of norms. The crisscrossing rights are tested solely for the utility they provide in a growingly complex public-private regulatory network; what remains of universalism is the past edifice of international law—be it a treaty establishing an institution, or a convention accepting agreements.

Thus, the axiomatic form of liberal rights is every bit as multiple as that for sovereignty. The rights emerge from different sources, while formally all adhering to the same liberal dicta recognised already by the jurists working for the list of sources of international law for the Permanent Court of International Justice. Different venues of international cooperation lean to different models of liberal rights, making the tapestry of international law intricate and abstract. It is possible to always return to sources, back to a list, and back to a classroom where we were taught how to appear as proper international lawyers, yet the effort to make that return is often notable. Hence, the ease with which we fall into areas, specialisations, or fragments of international law. There is a ready community of other competent international lawyers who will certainly understand that my demands to recognise ius cogens nature of human right against torture are found on a detailed understanding of that intricate tapestry, as much as my claims for internal self-determination against any allegations of torture is propelled by a similar understanding—I simply remind my esteemed

colleagues that norms are norms. And for that corporate lawyer whose company might have been involved to some of that torture, our friends in transnational law are fully competent to instruct them on limits of international liability and the power to repent and recite anew the Global Compact.[820] For that individual lost in the abyss of rights, in the receiving end of that torture, there might be fewer consoling words. After all, the rights might just not see her.

5.1.3 Property

Origin of property and its relationship to development of international law has been of concern of legal scholars since the dawn of the discipline. Does property exist solely due to consensual and contractual relationships possible in civil society or is property merely an act of capture of land, goods, or other objects? In its most traditional form, the scholars have looked back to the Roman law for justification of property rights. Roman law's distinctions between different ways of owning and acquiring property were closely studied in medieval Europe. As with all genealogies reaching this far, there is – as will be apparent – notable move from one field of enquiry to another of the concept(s) used. Despite this move from field to another, I argue, the concept of property and many of the ideas associated with it retain their definitions even within changing contexts. As such, I suggest that property (and to an extent sovereignty and rights above) is what Giorgio Agamben has called a signature

> that is, something that in a sign or concept marks and exceeds such a sign or concept referring it back to a determinate interpretation or field, without for this reason leaving the semiotic to constitute a new meaning or a new concept. Signatures move and displace concepts and signs from one field to another without redefining them semantically.[821]

Hence, even though many of the debates followed below on property were filtered through canonical and civil law as well as wider theological and philosophical writings to international law, the concept(s) retain the semantic content of these

[820] This imaginary narrative is animated by the spate of arguments for and against the U.S. practice of torture in its war on terror. See U.S. Department of Justice, 'Memorandum for William J. Haynes II, General Counsel of the Department of Defense' 14 March 2003; Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (n 750).; *Al Shimari v. CACI Premier Tech., Inc.*, 368 F. Supp. 3d 935, 970 (E.D. Va. 2019).

[821] Giorgio Agamben, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government* (Stanford University Press 2011) 4.

external influences rather than commanding a specific understanding of property proper to international law.[822]

There are diverging accounts on what is the direct influence of the earlier writings on property and how slavishly authors associated with early developments of international law obeyed the Roman and later authorities. Yet, there is a consensus that Roman law concepts, such as, *dominium* and *occupatio*, were foundational for development of international law's idea of property.[823] According to Martti Koskenniemi, it is *dominium* and an idea of liberal theory of property that marks the true inheritance of the School of Salamanca theologians for international law.[824] For Andrew Fitzmaurice, the concept of Roman law most central for the development of international law is rather that of *occupatio*.[825] In Roman law, through *occupatio* an ownerless thing became the property of the first person to take possession of them—be they wild animals or islands emerging in the sea. The laws of warfare and later those of conquest relied heavily on the ideas when an *occupatio* was legal, that is, which lands could be taken, which property seized through warfare or through establishment of colonies. Mutations in interpretation of the Roman law concepts such as *occupatio* and *dominium*, and therewith in the nature of property, played a significant role in the gradual development of international law and its primary subjects—the states.

Placing the origin of an idea to Roman law creates numerous problems with any provided interpretation of the notion of property at the heart of international law. The one most recurrently noted in scholarship is the fact that Roman law that was revitalised in Europe starting from the 10th century was not a coherent and practiced system of law unlike (classical) Roman law it sought to emulate. Obviously, neither Roman law itself was a single entity that could be easily discerned but rather a system that evolved throughout the centuries. Second, somewhat associated problem with tying the account of property to Roman law lies in the construction of continuity and influence of an idea that might have been and most certainly was used and abused to serve contemporary interests. To declare, as Koskenniemi for example does, that a precise form of an idea of property came to occupy central role for international law appears at first sight to attribute two different readings for international law. The first one applies for contemporary scholars who are bound to interpret norms functionally or heuristically with an intent to best serve their or their clients' interests, the second

[822] From these mutually overlapping connections, see Hannu Tolonen, *Luonto Ja Legitimaatio* (Suomalainen lakimiesyhdistys 1984) 267–94.

[823] An argument employing somewhat different Roman law concepts is provided in Morris Cohen, 'Property and Sovereignty' (1927) 13 Cornell Law Review 8.

[824] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 University of Toronto Law Journal 1.

[825] Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (n 782).

applies to past authors of international law whose adaptation of writings of others is rarely tainted by passions and interests. Such a gloss on the past promotes clarity of the intellectual heritage of a profession and a trade and is likely to contribute to precisely the kind of indeterminacy Koskenniemi finds in the present by granting too monolithic an understanding of a concept, such as property, in the past. When the concept of property in the past is a kernel for the present one, the multiplicity that was inherent appears in the present solely as a confusion (or opportunism, cynicism, or their ilk). On the other hand, current uptake of a liberal concept of property in international law is quite evidently much more influenced by the reading of property's historical role provided by Koskenniemi than by the certainly more fuzzy and non-linear reception of property by authors who Koskenniemi refers to. Thus, in what follows, I seek to navigate between these two somewhat opposing goals in charting what I consider to be an axiomatic form of (liberal) property in and for international law.

The reception of Roman law has been anything but linear. Therefore, choosing a point of depart is bound to appear arbitrary, even if that choice would befall to classical Roman law. After all, it was not this version of Roman law that came to occupy the ideas of 10th century glossators nor was it central to theological uptake of Roman law concepts either.[826] In a sense, at any chosen moment in time, there is always already a contested concept of Roman law. For this reason and for the sake of brevity, I start my account of property from the political writings of William of Ockham; Ockham predated School of Salamanca scholars for good two centuries, that is, the point in time where Koskenniemi's property story starts. According to John Kilcullen, Ockham's political writings, where he considers the question of property through Franciscan poverty, were written between 1328 and Ockham's death in 1347.[827] Their intent was to depose Pope John XXII whom Ockham considered a heretic. In essence, the question was whether it is possible to justly use things without commanding some right of use over them, especially items such as food that was consumed by use. To eat means to own, therefore the poverty of the Franciscan order was not genuine but they through their extensive rights of use did also have property. In the heated debate of the era, this John XXII's claim was enough for Ockham to find him heretic. Ockham's reply, according to Kilcullen, builds on the idea of property being a legal creature: in the Garden of Eden there was no property as everyone had a moral right to use everything. Only after the fall humans installed human law that stipulated on legal rights over things, yet this constitution of property through a legal

[826] On theological origins of sovereignty and economy, see Agamben (n 821). An insightful survey of the early connections between ius and dominium is Richard Tuck, *Natural Rights Theories* (Cambridge University Press 1979).

[827] John Kilcullen, 'Political Writings' in Paul Spade (ed), *Cambridge Companion to Ockham* (Cambridge University Press 1999).

right did not fully vacate the moral rights predating them. This idea of human origin of property was widely shared among the theologians before John XXII. With an additional step and a reference to a civil law idea of *precarium*, Ockham claimed that the Franciscans have a 'moral right to use things because the owners give them precarious permission, but if permission is withdrawn (for any reason, or none), the Franciscans have no right they can enforce in court.'[828]

To summarise the idea of property for Ockham, there was no property in the state of nature, which for Ockham was in the Garden of Eden. Any concept of property was therefore of human rather than divine origin. Despite the human origin of property as such, no one – not the Emperor nor the Pope – commanded the power to dictate on property without taking into account the liberties (or rights) of others. This kernel of divine or moral right in property was equally much enjoyed by everyone. Although the Bible commands, for example, children to obey their parents and wives to obey their husbands

> in many things children are not bound to obey their parents, since they are not slaves but free, or wives their husbands, since they are not maidservants but are judged to be entitled to equality in many things …, and slaves are not bound to obey their masters in all things without any exception.[829]

This, obviously, would install a right to property to everyone. This, as Koskenniemi argues, was the position of theologians lecturing and writing in Salamanca shortly after Europeans had discovered the American continents. But unlike for Ockham, the law of peoples (*ius gentium*) was perceived by Salamancan authors as a more direct tool to organise relations between Christians and others, and as a positive law it could not be violated against without a risk of calling a just war against the violator. The area of liberty and the origins of property in positive law were ideas shared equally much by the theologians and jurists of Salamanca as they were by Ockham two centuries before them. Likewise, the area of liberty of individuals over their property created also for both Ockham and the scholars of Salamanca an area that no religious or temporal power could interfere with. There was no "fullness of power" for either of them.

In a sense, then, the novelty of *dominium* in the thought of the School of Salamanca lies elsewhere. Koskenniemi's suggestion is that it rested on the newly emerged context of 'global' commerce that called for novel interpretations on the uses of private property. At the same time, he maintains that the problems associated with this more global commerce had been topical for theological writings in Europe since

[828] ibid 308.
[829] ibid 312.

the 12th century. Neither the faux universality of the right of commerce, that is, the recognition that the same rules would have applied had, say, the Incas arrived at the shores of Spain or Portugal, was particularly new. Similar concerns of universality had occupied European scholars regarding Jews and Muslims for long. The fact that, for example, Ockham denied the Pope the full power to decide on earthly matters or that the Pope lacked capacity to depose infidels from their rights merely indicates that universality of rights was a widely shared sentiment predating the School of Salamanca authors often by centuries. In the end, the main difference between the earlier authors and the likes of Soto, Vitoria, and Suárez rests in the rights of reprisal that a violation of the rights over *dominium* provided. As Koskenniemi argues, 'right of property […] together with the derivative rights of travel and trade [could be] enforced by just war.'[830] According to Koskenniemi, the use of public power to correct private wrongs against property lifted property into a category of its own at the heart of international law; it became a right enforceable by private and public powers alike—a statement for which Koskenniemi refers to Grotius. Yet, as Oona Hathaway and Scott Shapiro argue, for Grotius '*any* right that could be enforced by courts could also be enforced by war if courts were unavailable,'[831] setting into question the primordial role of the vocabulary of *dominium* as construed by theologians and jurists of the School of Salamanca in the formation of international law.

This does not imply that property would not have played a central role in the constitution of international law. Rather than deny the importance of property, much of the research on its role in shaping up and maintaining empire merely questions the simple divide between informal and formal empire, between rule by treaties and rule by contracts that Koskenniemi suggests as the primary use of the legal vocabulary attached to property. In another story tracing the emergence of capitalism, to which Koskenniemi attaches his understanding of Spanish authors' influence, Albert Hirschman suggests that

> [t]he beginning of [the story for the rapid change in attitudes towards money and commerce] does come with the Renaissance, but not through the development of a new ethic, that is, of new rules of conduct for the individual. Rather, it will be traced here to a new turn in the theory of the state, to the attempt at improving statecraft within the existing order.[832]

According to Hirschman, for Renaissance authors, quelling the passions of the powerful by directing their attention towards commerce was a means to douse the

[830] Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (n 824) 32.
[831] Hathaway and Shapiro (n 11) 23.
[832] Albert Hirschman, *The Passions and the Interests* (Princeton University Press 1977) 12.

flames of civil war upon which nobility's passions seemed to inevitably lead. In a process that first ranked the vices from more to less severe to promotion of avarice as an antidote against more destructive vices, the pursuit of personal gain departed from (public) passions and gained a meaning as a (private) interest. The same economic instruments whose righteousness did concern the theologians of Salamanca were of concern to a much wider scholarly debate in Europe that installed much more than a preconceived notion of property in international law. Thus, when Hersch Lauterpacht simply declares that '[i]t might be said that individual *interests* are chiefly economic'[833] against which the 'politics' or 'passions' of a state differed, he was speaking – with or without acknowledging – as part of a long tradition promoting the sweetness of commerce.[834] In short, through the transformation of avarice from a mortal sin to a private interest serving the state, the accumulation of (private) property transformed the mode of statecraft, installing at the very heart of the international law a dialectic relationship between state and property. As such, the choice was not either formal or informal empire, but a new model of a state that would employ new means of control to achieve co-operation.

In a similar vein, Andrew Fitzmaurice in his research on the long joint history of property and empire argues that there is no direct trajectory from one understanding of property to another. Rather, where Koskenniemi pinpoints a clear point of origin and a rupture to the past in formulation of rights of property, Fitzmaurice traces a line of gradual, often mutually exclusive mutations in the conception of property using the concept of *occupatio* as his guiding light. Throughout his thesis, Fitzmaurice pinpoints to the opposition towards narratives that have in recent decades of international legal history been attributed to men formulating theories of international law. Ultimately, the question might not be which arguments won. After all, these arguments have been reproduced by generations of international lawyers. What the opposing arguments to the triumphant one indicates however is the contingency of presumably prevailing notion of property in international law. In a peculiar fashion, international lawyers have for long admitted, for example, the role of private law analogy and of domestic legal orders in formulation of (public) international law, yet the plurality of concepts of property, among others, in those legal orders has been glossed over. In the end, our understanding of property might remain the same, yet the traces left behind allow us international lawyers to employ those traces as precedent setting in the present—precisely in ways that will appear as indeterminate. Yet, for the sake of the present argument, the details of the argument can be partly glossed over for both paths lead

[833] Lauterpacht (n 798) (emphasis added).

[834] Similar arguments from the interests of commerce and of individuals were commonplace also after the Second World War, see Erik Castrén, 'Aspects Récents de La Succession d'états' in *Collected Courses of the Hague Academy of International Law* (Nijhoff 1951) vol 78.

to the same conclusion: property has made significant inroads into constitution of international law, and it might be difficult to understand international law without paying some attention to those numerous ways in which the vocabulary of property is encoded in international law.

To illustrate the point made above on pervasiveness of property in past and present of international law, I will look more closely on two recent monographs that chart constitution of property into other instruments of international law. The books I have chosen are Jessica Whyte's *Morals of the Market* and Katarina Pistor's *The Code of Capital*.[835] Whyte's argument focuses on the common origins of neoliberalism and human rights, where a right to property plays a central role. Pistor's thesis emphasises law's role in encoding assets and therewith granting some forms of property greater permanence than others. They both argue that property has and continues to play an important role in creation and sustenance of inequality—both locally as well as globally. They also illustrate the significance property has had in formation of international law not only in the past but also at present as well as how unmutated the concept – or the signature – of property has been by the repeated crossovers from one discipline to another; while the role and idea of property has certainly mutated, it has developed in a remarkable monolithic form across disciplines.

Jessica Whyte's book looks at emergence of neoliberalism and its intimate connection to virtually simultaneous emergence of transnational human rights. She asks whether human rights were merely 'powerless companions', unable to resist the march of neoliberalism or whether, as she argues, they were cut from the same cloth with neoliberal ideology guiding much of the work of early transnational human rights movement. According to Whyte, the focus of human rights movement at large on a narrow set of civil and political rights rather than the more expansive concept of human rights initially endorsed in the Universal Declaration, is in no little part due to a critique of state initiated among the Vienna neoliberals. According to them, politics was a realm of chaos and turmoil, wherefore property and commerce ought to be placed outside the political processes.[836] In a sustained critique of social and economic rights associated with the interwar welfare states in the Occident, neoliberals rallied against popular sovereignty. Whyte shows how property and its management transformed in hands of neoliberals into individual qualities that would promote not only peace but also progress. As such, Whyte sees in neoliberals a continuation of Hirschman's sweetness of commerce thesis, but rather than being a project of state formation, for neoliberals the project was chiefly about formation of individuals not

[835] Whyte (n 257); Pistor (n 189).

[836] See, more widely, of the ideas embedded in early neoliberalism in Hagen Schulz-Forberg, 'Embedded Early Neoliberalism: Transnational Origins of the Agenda of Liberalism Reconsidered' in Dieter Plehwe and others (eds), *Nine Lives of Neoliberalism* (Verso 2020).

to rely on state in their social needs.[837] The emergent state is defined as totalitarian when it interferes with preferences of individuals, property and its accumulation as signs of virtuous choices of individuals. Whyte illustrates her point through two examples: Amnesty International's response to Pinochet's Chile and opposition to Third Worldism in human rights advocacy of *Liberté sans Frontières* (LSF).

On both of her chosen examples the role of human rights is to focus the attention to other concerns than equality. In her reading of the work of Amnesty International in Chile, Whyte argues for two connected theses. First, the early ethos of Amnesty International and the ideas of its founder were influenced by and aligned with those of many neoliberals. Second, the human rights critique against torture, killings, and disappearances perpetrated by the Chilean junta placed the economic reconfiguration of the state beyond critique, as such neutralising the inequality as a political and economic choice. Through the case of *Liberté sans Frontières* Whyte transposes the neoliberal ideas on the primacy of private property to development. She shows how the idea of totalitarian state that had been developed among neoliberals was employed against claims raised by the Third World states. The cause for poverty in developing countries was not to be found from the history of colonialism, but rather from the illiberal rules of the countries at present. By promoting a narrow set of political and civil rights as human rights, LSF paved way for its part for the emergence of human rights more widely in the international economic law. Thus, when the international financial institutions created good governance indicators wherein human rights were included, they had a backing of several human rights NGOs. The fact that on all of these indicators the focus was solely on improvement of a narrow set of civil and political rights while disregarding the economic inequality is, in Whyte's narration, a testament of neoliberal influence in formulation of human rights. She suggests, following Etienne Balibar, that '"equality is *practically* identical with freedom", as the deprivation of one always damages the other.'[838]

Katharina Pistor focuses in her book on legal practices employed to transform property into assets that grant them 'priority, durability, convertibility, and universality.'[839] Looking at private law practices in select few jurisdictions, Pistor illustrates how global assets are possible despite the apparent lack of global law and a global state. Focusing on the role of lawyers in capitalism, she highlights their role as creators rather than servants of capital. Lawyers, Pistor points out,

[837] As such, Whyte comes close to Foucault's exploration of neoliberalism, importance of which has been subject to intense debate, see, for example, Serge Audier and Michael Behrent, 'Neoliberalism through Foucault's Eyes' (2015) 54 History and Theory 404.
[838] Whyte (n 257) 241.
[839] Pistor (n 189) 13.

> craft new capital and in this process often make new law from existing legal material. Their toolkit consists of the modules of the code: the rules of property and collateral law, the principles of trust, corporate, and bankruptcy law; and contract law; the most malleable of them all. These modules have been around for centuries.[840]

In a nutshell, her argument is that 'capital rules, and it rules by law,'[841] that has managed to disconnect property from states and transformed it into a global, formless asset that nonetheless retains the possibility to resort to a state's enforcement mechanisms at will. This simultaneous universality and locality allow property (or capital) to transcend the state, transforming capital coding from public to private affair. Due to the unique position of power capital and its interests have had and continues to have over legislatures, Pistor suggests, allows lawyers as masters of the code of capital to graft rules, exceptions, and loopholes that grants priority, durability, and convertibility to their clients' property.

Arguing for a private law origin of capital, Pistor connects her narrative to a long history of liberalism. Using examples from land acquisition in the United States and revolutionary re-alignment of property in the wake of French Revolution, Pistor discusses directly with many of the animating events of (public) international law as well. Quite like Whyte, Pistor sees the work of lawyers in transformation of capital as a gradual process of decades and centuries, rather than a sudden contribution of changed politics in the capitals of the Occident. Applying a position reminiscent of Anne Orford quoted above, Pistor argues that common law lawyers, whose impact to globalisation of property has been most profound, 'constantly make new legal rights from old cloth. They need no one's approval as they embark on coding assets as capital; all they need to do is to mimic the argumentative strategies that have convinced courts in the past.'[842] It is precisely this malleability of legal argument that has provided the coding practices of property such power on and over states. A fact that private law commands a power – if not directly then through referral to principles to justice – over international law was, of course, a central argument already in Hersch Lauterpacht's dissertation. He argued that 'those rules of justice and general principles of law are, in the overwhelming majority of cases, clearly formulated by rules of private law.'[843] What Pistor's work accomplishes, then, is to show mechanisms through which these 'rules of private law' are formulated in detail.[844] But more than

[840] ibid 160.
[841] ibid 205.
[842] ibid 169.
[843] Lauterpacht (n 798) 61.
[844] A detailed argument on genesis of unruly law is Johns, *Non-Legality in International Law: Unruly Law* (n 685).

anything, Pistor shows the centrality of property and its encoding to most of law in liberal vein.

What then is the 'axiom' of property for liberal international law? It seems to be, more than anything, its disconnect from the public realm. While the early formulations of property were closely connected to empire and its justification, as argued by virtually all authors explored, the vision of property was already in the 16th century transforming towards a private quality. This, according to Hirschmann, was the subduing power of interest over more destructive (and higher) passions of the ruling elite. That peace was construed through a thesis of sweetness of commerce, provides a competing and, to me, more compelling account over purpose of international law than the moral-infused account of Immanuel Kant's perpetual peace. But for the sweet commerce to work its way, it had to be disconnected from the violent politics. By transforming economics and property into categories hors politics, Whyte argues, the Vienna neoliberals slowly mutated our understanding of human rights—away from entitlements and towards negative liberties protected, if need be, by the violent power of the state. That capital can always ultimately resort to state's enforcement (or violence) of its rights has been, as Pistor shows, fundamental for globalisation of assets. A sparse network of multilateral treaties jointly with a thicket of bilateral investment treaties has created a realm of private enforcement of privately coded property that promotes maximisation of private interests over collective ones. It is in this axiomatic form that property appears in liberal international law.

5.1.4 Conclusion

I have sought in previous sections to elucidate what international lawyers refer to when they speak of liberal international order. Martti Koskenniemi suggested more than three decades ago this liberal mode is what most international lawyers employ in their argumentation. Yet, research in history of liberalism indicates that there is no liberalism there. It is a mode of making characteristically 'Western' politics without a shape or form of its own. It is an ultimately contested concept with often contradictory meaning for its participants. Duncan Bell argues that liberalism can be associated with both support of equality and support for slavery, strive for social justice as well as its opposition. This often-complex tradition of liberalism has been commonly glossed over by critical international lawyers who have sought to chastise other international lawyers – both past and contemporary – from the dark sides of the self-claimed liberalism. Due to these difficulties in recognising liberalism, I suggested that there would, at the very least, exist some paradigmatic or axiomatic elements of the liberal international order, without which it would be impossible to address liberal international law. I named three that I consider necessary and sufficient for the formulation of the paradox of repugnant rights: sovereignty, rights, and property.

With all three axioms, I illustrate that while there exist often mutually conflicting accounts on the content of these axiomatic notions, they are commonly agreed upon to exist at the foundation of international law. Without states, rights, and property there would be no international law in the sense it is commonly understood these days. The elucidation of these axioms above does not seek to eradicate this multiplicity attributed to them. I provided the argumentative cues or precedents upon which a competent international lawyer could and likely would refer in defending their argument before an international court or tribunal. Thus, them being axioms of liberal international order and law does not imply their precisely axiomatic form. Rather, they are axiomatic in the way that they are self-evidently true while retaining their malleability as legal concepts. There is no need to justify inclusion of states on an account of liberal international law, even though there are divergent accounts on what being a state implies in international law. This is markedly different from, say, including human beings on an account of liberal international law. Both accounts are possible and have been presented in numerous forms, but only the former is axiomatic in appearing all but self-evident.

5.2 How to do things with paradoxes?

For a lawyer educated to solve conflicts, settle disputes, or ensure that none appear, an idea of a paradox at the heart of all law is eminently bothersome, albeit a necessary condition for their trade. To express the same idea in more stark terms, French sociologist Julien Freund wrote that the object of and the issue with most conflict is law.[845] A paradox, by definition 'a seemingly absurd or contradictory statement or proposition [that] when investigated may prove to be well founded or true', rests at the heart of every legal argument; after all, when law is evident and without a contradiction (or absurdity), there remains little for a lawyer to do but to enunciate law as it is and accept its content. A perfect form of law is one without paradoxes where the tapestry of law can be read without a risk of confusion. The red thread there and the blue one yonder makes clearly bound figures that never cross one another no matter how close or far away the tapestry is observed. And yet, every lawyer knows law is not without contradictions and, what is more, a law without contradictions would be a law without lawyers for anyone could immediately realise the presence or

[845] Julien Freund, *Sociologie Du Conflit* (Presses Universitaires de France 1983) 67–68. 'L'objet du conflit est en general […] le droit […] le droit dans la diversité de ses aspects […] est l'enjeu des conflits.'

absence of rights by simply opening the big book of laws.[846] Notwithstanding the professional demise of lawyers, according to most accounts of law, the internal view of lawyers is what precisely founds law as law. To remove lawyers from law is to remove the internal view. And to remove the internal view is to remove an understanding of law as law. Thus, it remains safe to say that law is found on a paradox, and it could not be in any other way.

Law is not alone having paradoxical foundations.[847] Rather, much of contemporary social theory would suggest that the whole of society is found on a paradox that there no longer remains a foundation upon which society, its systems, parts, or segments stands, while they clearly stand on something. Instead of a grand narrative unity in single *Volksgeist*, one God, an absolute monarch, or a *Grundnorm*, social theory has for long already claimed for a disaggregated, non-hierarchical, and flattened social order, where foundational questions of right and wrong, rationality and irrationality, good and bad, etc. are bound on the context rather than a universal structure binding all arguments of, say, reason to a single source. This lack of ultimate foundation has for long derogated any perceived unity and therewith universality that could be perceived in the present. This disenfranchisement with the world through increasing rationalisation was traced already by Max Weber. He suggested that the growing rationalisation of society subjects all individuals to an iron cage, one that Weber perceived as 'the last stage of this cultural development, [of which] it might well be truly said: "Specialists without spirit, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved."'[848] There is a void at the heart of the whole rationalisation and calculability that modernity implies to Weber, and it is this emptiness that has fuelled much of postmodern social theory: either to fill it with meaning or to overcome its finality. But any attempt to refill the void (or nullity) comes with distinctions of its own that a rational mind of

[846] A quest for such clearly legible and self-executing law has both motivated and scared lawyers. A classic reference of a complete law and its demise is the Prussian General Code of 1794 (*Allgemeines Landrecht für die Preußischen Staaten*), which 'runs to nearly 20,000 sentences and often includes a pointless casuistry minutely regulating all aspects of social life.' Damiano Canale, 'The Many Faces of the Codification of Law in Modern Continental Europe' in Enrico Pattaro and others (eds), *A Treatise of Legal Philosophy and General Jurisprudence*, vol 9 (Springer 2009) 164. In a sense the contemporary quest to introduce artificial intelligence tools to serve as a lawyer mark a modern embodiment of the same. A critique of such a model of 'perfectability' of the law is provided, inter alia, by Roger Brownsword in *Rights, Regulation, and the Technological Revolution* (Oxford University Press 2008); *Law, Technology and Society: Reimagining the Regulatory Environment* (Routledge 2019).

[847] As some philosophers would argue, everything is found on a paradox. An influential summary of such understanding of paradoxes are the first few essays on paradoxes and antinomies in WV Quine, *The Ways of Paradox* (Random 1966).

[848] Max Weber, *Protestant Ethic and the Spirit of Capitalism* (Routledge 2001) 124.

modernity can dissect and reveal that it is standing for particularity of some sort. This paradox, one formulated in Hegel's thought between identical yet opposite concepts of Pure Being and Pure Nothing, in one form or other rests at the heart of all modernity. And, according to William Rasch, the postmodern condition leaves us 'with the task of reconciliation—the reconciliation not of antinomies but of *ourselves* to the inevitability of antinomies.'[849] As such, law's paradox(es) can be understood through theories developed to explain other areas of society or the whole of society, for they share a common structure. And to come in terms with these paradoxes, one needs to come in terms of their inevitability.

To suggest that a law is found on a paradox does, however, suggest little. There are many ways for anything considered legal to appear paradoxical; from the relatively mundane example of overlapping normative orders leading into a conclusion that a legal duty is not to be followed due to an overriding norm,[850] to at first sight more quixotic demand to do that what is precisely prevented.[851] As such, the contours of the phenomenon of legal paradox remain elusive and providing even a taxonomy of different forms of paradoxes encountered in and by law would likely turn to be a Sisyphean task. Thus, it has been common for those who have sought to enumerate the different uses of paradoxes in law to follow the lead of philosophers of language and mathematics who have attempted to understand general features of paradoxes. At first sight, paradoxes seem to fall into two distinct categories.[852] There are paradoxes, on the one hand, that cannot be provided with a truth-value for the enunciation itself seems to imply its negation, and then there are paradoxes, on the other hand, that lead to a logical conclusion but the conclusion itself seems to deny the existence of a prior necessary condition of said conclusion.

The common examples of these two types of paradoxes are, from law's perspective, rather trivial but nonetheless illuminating. An example of the first would be the liar paradox, which in all its apparent simplicity can be summarised with one sentence: *this sentence is a lie*. If every sentence must be either true or false, then the previous sentence is neither or both. After all, all lies are untrue, wherefore if the sentence is true (i.e., it is a lie) then it is not true as it is not a lie, and, conversely, if it

[849] William Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentation* (Stanford University Press 2000) 9.

[850] See Supreme Court of Finland, 24 September 2014, R2011/989 (KKO:2014:67).

[851] See, for example, the work in recent years on the function of international humanitarian law to humanise killing.

[852] Ordinarily, the classification of paradoxes by philosophers includes three categories (semantic, set-theoretic, and epistemic) of which the third one shall not be dealt in the following. The reason to discard epistemic paradoxes lies with the prior commitment to a view of law as an eminently pragmatic field, wherefore I do not even intend to establish a formal theory for knowing law for which elucidating the epistemic paradoxes would serve.

is false (i.e., it is not a lie) then saying something is a lie without it being one is a lie. This is a paradox that Niklas Luhmann establishes at the heart of law in his systems theory, by suggesting that if conduct must be assessed as being either legal or illegal the legality or illegality of this assessment can in no way be addressed. Luhmann considers this a foundational paradox of bivalence. I will return to Luhmann's formulation below more in detail.

The other form of a paradox suggested above seems at first sight to be more easily tractable and more connected to the collective processes of language use than with the logical structure of truth. A common example of this latter type of paradox is the following: Presume that there is a god and that it is omnipotent and is therefore capable of doing everything and anything. Thus, it ought to be able to create a stone that god cannot lift – as, after all, it is able to do anything and everything – but if it can create such a stone, then god no longer is omnipotent as it is not able to do anything and everything. In short, its omnipotence allows it to create things that deny its omnipotence. Although this form of a construction can be solved by suggesting reasonable limits to what is possible, in a more systematic way the same paradox can be construed following set theoretic thinking made famous by Bertrand Russell:

> The comprehensive class we are considering, which is to embrace everything, must embrace itself as one of its members. In other words, if there is such a thing as "everything," then "everything" is something, and is a member of the class "everything." But normally a class is not a member of itself. Mankind, for example, is not a man. Form now the assemblage of all classes which are not members of themselves. This is a class: is it a member of itself or not? If it is, it is one of those classes that are not members of themselves, i.e. it is not a member of itself. If it is not, it is not one of those classes that are not members of themselves, i.e. it is a member of itself. Thus of the two hypotheses—that it is, and that it is not, a member of itself—each implies its contradictory. This is a contradiction.[853]

While Russell's and others' set theoretical thinking led to a conclusion that a set of everything (and therefore god) cannot exist, it also opened up a more profound dilemma for our knowledge over existence of anything. After all, for as long as anything can be expressed in terms of a set as suggested by set theory, the true character of all beings and not just of god becomes suspect. This ontological question posed by set theoretical paradoxes is at the heart of Alain Badiou's philosophy that will be dealt more in detail below.

[853] Bertrand Russell, *Introduction to Mathematical Philosophy* (Allen & Unwin 1919) 136.

Thus, as suggested, law seems to be subject to a more general concerns expressed by Gödel concerning all knowledge, namely, that there cannot be a system (whether of law or of anything else) that would be simultaneously complete and coherent. It is with these two sides of the incompleteness theorems, completeness and coherence, that I suggest Luhmann and Badiou provide an argument for. They both also provide an influential account how to avoid the numbing force of their respective foundational paradox. For Luhmann, the paradox is concealed by internalising it and, for law, justifying the fact that paradox remains unaddressed by moving it outside the system (*Entparadoxierung* of a paradox through another observing system). In terms of law, this is the transposition of law's coherence to the realm of politics, which allows legal system to retain its semblance of coherence and completeness. For Badiou, the paradox is solved by adhering to an eternal truth whose appearance in each context varies without a need to come in terms with the presence of void at the heart of all beings. These contexts (or situations or worlds to use Badiou's own terms) adhere with different intensity to these truths. Thus, where Luhmann preserves the closure of a system by internalising the original paradox, and for law, transposing validation to another system, Badiou's solution to the paradox is to declare that law is complete, and its incoherence is a consequence from non-classical logics at play. In a crystallised moment of eternal truth, the context is both coherent and complete, but instantly on contact with the present reality of the context, this truth becomes subject to reactionary or denialist effects that mutate law's appearance. In short, both Luhmann and Badiou tread a path that provides a stopgap to endless distinctions or re-definitions, but they reach this point from different vantage points. The choice of a biological process (autopoiesis of Luhmann) or a logical operation (set theory for Badiou) as the steppingstone for their respective theoretical explanations reflect their differing solution to the same foundational dilemma between completeness and coherence.

Both solutions, however, remain fully cognisant of the insolvable paradox at the heart of their explanation of the context (system for Luhmann, world for Badiou). The productive force of deparadoxification and truth respectively creates a norm creating machine. Thus, to either retain politics as a safety valve for law or truth as a generative force, both approaches necessitate, if not more, at the very least different laws. This self-perpetuating power of the paradox at the heart of law is fundamental to what I title the paradox of repugnant rights. The incessant (re)creation of rights generates a situation where it becomes increasingly difficult to recognise any perceived 'truth' or 'deparadoxification' of the context, leading into situations that are clearly antithetical to the reason articulated for the whole system or world. This situation, I suggest in the third subsection, has a semblance of Derek Parfit's repugnant conclusion as the paradox of repugnant rights suggests that accumulation of rights, while eminently positive in singular (say, a new safety standard that prevents children from suffocating to toy projectiles) leads to a situation where the sheer volume of laws transforms law into a tool that generates increasingly minimal positive returns while contributing

greatly to immiseration of many. I further suggest that this is a general feature of law in a liberal constitutional model, examples of which can be drawn from a variety of fields. I have chosen in the second part of my dissertation to focus unearthing such instances from the intersection of international law and technology, yet, as I argue in the present chapter, the same exercise could *mutatis mutandis* be accomplished with any and every other area of law.

5.2.1 Hiding the paradox in plain sight: Niklas Luhmann and legal paradoxes

Niklas Luhmann (1927-1997) was a German sociologist whose work in systems theory has been influential on many fields of social studies, law therein included. Luhmann's social theory can be characterised by its embrace of complexity of contemporary societies that are reflected in the divergent influences Luhmann draws inspiration from. A characteristic feature of Luhmann's oeuvre is his adherence to autopoiesis theory originally developed by Chilean biologists Humberto Maturana and Francisco Varela[854], mathematical theory of English polymath George Spencer-Brown, and theories of language and deconstruction of French philosopher Jacques Derrida. Autopoiesis and Specer-Brown's *Laws of Form*[855] were both central elements also in much of the cybernetics literature to which Luhmann's work at least in its early English adaptation was associated.[856] At the heart of Luhmann's theoretical edifice rests a Gordian knot formed by the crisscrossing influences of which he constructed his theory. Where biological systems explored by Maturana and Varela were complex, the social systems seemed to be a source of even further complexity. As the

[854] According to Humberto Maturana, 'The Origin of the Theory of Autopoietic Systems' in Hans Rudi Fischer (ed), *Autopoiesis: Eine Theorie im Brennpunkt der Kritik* (Carl Auer 1991). Varela did not contribute to the development of autopoiesis. To conclude his short summary from the origins of the theory he writes that '[s]trictly, Francisco Varela did not contribute to the development of the notion of autopoiesis.' Yet, the book that is commonly referred as the origin of the theory is co-authored by both, and even contemporary accounts provided authorship to both charted, for example, in Eden Medina's account of Project Cybersyn in Chile in early 1970s and the work of British cybernetician Stafford Beer, see *Cybernetic Revolutionaries* (MIT Press 2011).

[855] George Spencer Brown, *Laws of Form* (Julian Press 1972).

[856] For example, Cary Wolfe describes Luhmann's system theory as second-order cybernetics, see, 'Making Contingency Safe for Liberalism: The Pragmatics of Epistemology in Rorty and Luhmann' (1994) 61 New German Critique 101; 'In Search of Posthumanist Theory: The Second-Order Cybernetics of Maturana and Varela' in William Rasch and Cary Wolfe (eds), *Observing Complexity: Systems Theory and Postmodernity* (University of Minnesota Press 2000).

postmodern theory indicated, there are no privileged positions to observe a social system. If every observer is partial to their position, each observation generates additional complexity to observed object, for which Luhmann provided the system theory as a partial answer: each system has internal rules to attribute meaning to communication. This does not reduce the drive towards greater complexity, but through compartmentalisation of society to closed system, the hypercomplexity of the society at large would remain more manageable.[857] A system draws a distinction between itself and its environment, but this original caesura necessitates an acceptance of a paradox at the heart of the system—a paradox unique to each system that cannot be observed from within the system itself. This paradox and Luhmann's interpretation of its significance will be the focus of the present chapter.

In the following I peel some layers of Luhmann's paradoxes that illustrate his theory's fit for legal analysis as well as its congruence with some accounts provided for international law in the preceding chapters.[858] I find it opportune to begin from the heart of it, from the foundational paradox of all law, which for Niklas Luhmann lies in a tautological statement: law is law. On a closer analysis, Luhmann suggests, this tautology transforms into a paradox on how to draw a distinction between lawful and unlawful. 'One can', Luhmann writes, 'neither ask nor answer th[is] question (because it would lead to a paradox) as to whether the distinction between legal and illegal itself is legal or illegal.'[859] He maintains that this self-referential question simply cannot be answered within law as a social system. Luhmann suggests rather that law needs to reintroduce the other side of the distinction as internal to itself, which will allow it to make further distinctions. As has been briefly suggested above, this is certainly not the full truth on the matter as any hard legal positivist would argue, yet the analytical solution to establish limits of law, quite like the logical contradiction of Russel's paradox, is for Luhmann a sterile and stagnant vision of a system that is unable to produce adaptation to inherent complexity of any society.[860] In short, it is possible to provide an answer to the foundational paradox, but for this law ought to be both operationally and cognitively closed to the environment that surrounds it. As such, law would be able to provide a complete theory of itself, but this would come at the price of being unable to say or react anyhow on anything that happens to anyone or

[857] This hypercomplexity is explored, for example, in Niklas Luhmann, 'Why Does Society Describe Itself as Postmodern' (1995) 30 Cultural Critique 171.

[858] The fit here is not the kind of 'fit' implied in Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057. Rather a more general idea of the suitability of the chosen approach to assess the law as a social phenomenon. Thus, there will be no analysis of justification as of why the theory is deemed to be 'fit' for analysing law, at least not in the form Dworkin suggested.

[859] Luhmann, *Law as a Social System* (n 67) 177.

[860] ibid 58–60. for analytical/concrete distinction Luhmann maintains in his theory of a law as a social system.

anything anywhere and anywhen.[861] In a word, a purely analytical exercise. Thus, the foundational paradox is not only a source of irritation but the very condition of genesis for society and its (sub-)systems.

This generative capacity of paradoxes has entertained a sustained theoretical interest for long as Luhmann's own work indicates.[862] Yet, Luhmann's and others recent interest to the phenomenon stems from language philosophy, theorised collapse of grand narratives – or more generally metaphysical foundations – as an outcome of it, and the growing complexity of society that appears to produce paradoxical outcomes more recurrently. Partly for these reasons, Luhmann's social theory and its treatment has gained growing following, as it does provide a key to understand a complex society without a unifying authority acting as a guarantor of order or a path-dependant narrative towards a certain form of a society and/or a legal system. This interest has also been notable among lawyers.[863] Andreas Philippopoulos-Mihalopoulos suggests, on a more general level, that paradoxes are simultaneously multiple things, they are

> frightful things, they bring boredom, obsession, counter-productive repetition, paralysis, inability to communicate, inability to distinguish, no sense, nonsense. They are facile excuses and unlaborious shoulder shrugs, they obscure determination and encourage determinism, they force one to give up, to grin embarrassingly, to abandon battle, to take a nap under the trees. Paradoxes are too much hard work to be taken seriously and too easily unresolvable to be attempted.[864]

[861] This is also argument of Ngaire Naffine against purely legal definition of personhood that was explored in Chapter 2 above.

[862] For a brief account of paradoxes in history, see, Niklas Luhmann, 'The Third Question: The Creative Use of Paradoxes in Law and Legal History' (1988) 15 Journal of Law and Society 153.

[863] See, for example, Gunther Teubner's work at large Gunther Teubner, 'Exogenous Self-Binding: How Social Systems Externalize Their Foundational Paradox' in Alberto Febbrajo and Giancarlo Corsi (eds), *Sociology of Constitutions* (Routledge 2016); Peter Goodrich, 'Anti-Teubner: Autopoiesis, Paradox, and the Theory of Law' (1999) 13 Social Epistemology 197; Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice, Society* (n 65); Hanna Lukkari, 'Law, Politics and Paradox: Orientations in Legal Formalism' (Dissertation, University of Helsinki 2020); Rodrigo Cordero, 'The Negative Dialectics of Law: Luhmann and the Sociology of Juridical Concepts' (2020) 29 Social & Legal Studies 3. For an early critical uptake of Luhmann's theory in law, see, Jean-Pierre Dupuy, 'Sur La Prétendue Autosuffisance Du Droit' (1986) 16 Revue interdisciplinaire d'études juridiques 1.

[864] Andreas Philippopoulos-Mihalopoulos, 'Dealing (with) Paradoxes: On Law, Justice and Cheating' in Michael King and Chris Thornhill (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (Hart 2005) 218.

And indeed, paradoxes do appear to be eminently nonsensical (i.e., a god-created stone god is unable to lift) or unresolvable (i.e., is a liar lying or not) to warrant any sustained attention. Yet, as Philippopoulos-Mihalopoulos is quick to remind, the present has found paradoxes to be theoretically fruitful, for the present itself emerges as a paradox quite like the one animating this chapter: why more good is bad appears on the face of it nonsensical and inherently unresolvable. To come in terms with—or, to borrow Philippopoulos-Mihalopoulos's evocative formulation, to deal with—paradoxes calls for a closer look on the ways Luhmann construed his greater social theory and the role of paradoxes therein.

Luhmann's theory is built upon communication and epistemology, not of ontologies. At its highest level of abstraction, there are no humans or actions, simply environments and meaning that are used as building blocks for his social theory. A system is constituted through a reference to self and the greater complexity of the system emerges out of an iterative process. Thus, rather than having an international order because of sovereigns and states (ontologies or beings) or their actions, Luhmann would maintain that any system of international exists within a particular environment and as an outcome of countless distinctions that raise from the already existing environment where the new system emerges. This contingency of international law due to contextual constraints of its emergence as explored, for example, by Anthea Roberts and David Kennedy is but an illustration of this.[865] The emergent social system is closed to other systems and, as such, questions about conditions of law (or of economy or politics) are fully internal to those systems. The communications that constitute the systems rely on a set of elementary operations, but as such there is no solid foundation, no basic norm to return to. Rather, at the heart of 'law' rests a tautology ('law is law') that refuses to make a distinction and therefore, according to Luhmann, prevents an observation, which is the basic condition for his social theory. To observe law's foundational paradox, one needs to rely on observations provided by other social systems to which law remains operationally closed but cognitively open. According to Gunther Teubner's interpretation of Luhmann this means that '[f]or society, all legislation does is produce noise in the outside world. In response to this external disturbance, society changes its own internal order,'[866] and law does the same when responding to stimuli from its own outside world. The shared elementary operations of communication bound to meaning

[865] An acute reminder of this is easy to grasp from daily news feed. As of writing this paragraph, there is a heated debate over interpretation of Montreux Convention from 1936, which for Greek and Turkish international legal scholars is a familiar and much analysed treaty, while I have been entirely oblivious of its existence to this day and cannot find a single reference to it from any of the international law course books at my disposal.

[866] Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993) 71.

allow for the disturbance to be carried over from closed systems to another. Law, like all social systems, is autonomous in its capacity to reproduce themselves, while it retains its connection to other social systems on a cognitive level as that 'noise in the outside world.'

This interaction with other social systems is nowhere as obvious as it is in Luhmann's assessment of the foundational paradox of each system. These foundational paradoxes are impenetrable only to those occupying a position inside a system, whereas from the vantage point of another system these paradoxes can be readily discerned and assessed. Thus, for law (and lawyers) to gain additional insights what law implies with its tautological self-foundation (i.e., law is law), it needs the help of other observing systems, such as, politics or economics. To understand why this might be so and why tracing these interactions is difficult requires a closer look on how Luhmann perceives the interaction between the environment and a system on the one hand and between two systems on the other hand. Luhmann maintains that each system is operatively closed. This means that systems are self-sustained and able to re-create themselves through self-reference. Thus, for example, the legal system can use internal means to assess (non-)legality of an act without having to have a recourse in its normative assessment to other systems such as politics. Yet, to explain for the fact that law remains in contact and conversation with other social systems, Luhmann posits that every system is cognitively open. This openness allows systems to retain their contextual awareness, their 'adequacy to the outside world', while still maintaining that the internal operations, distinctions, and observations of the system remain closed. In a somewhat more technical formulation Luhmann himself analyses the constitution of observing systems through a reference to shared meaning on both sides of the system:

> How is it possible to observe frames? Whatever difficulties may emerge during this investigation, we will certainly need a medium that is the same on both sides of the frame, on its inside and on its outside. I propose to call this medium meaning, and thereby exclude two other possibilities—the world and truth.[867]

Meaning, Luhmann continues, is 'coextensive with the world' and has no outside, that is, every use of meaning will produce meaning.[868] He suggests, using Husserl's phenomenology, that meaning repeatedly re-emerges on the side of actual operations, but in an altered form. Here is where Luhmann locates a paradox of observing systems: 'the re-entering distinction is the same, and it is not the same,' yet rather than

[867] Niklas Luhmann, 'Paradoxy of Observing Systems' (1995) 31 Cultural Critique 37, 41.
[868] These observations are remarkably close to the foundation of Alain Badiou's mathematical ontology that will be dealt in the following section. Badiou, unlike Luhmann, does not consider truth as too narrow, but rather the whole horizon of an event.

signalling a cause of concern for the system 'it is the condition of their possibility,' as autopoiesis requires different operations applied to continuous actuality, which can then lead to different possibilities.[869] It is this incessant movement of frames of observation, which makes on a theoretical level it difficult to track down changes that result from one system to other systems or to the environment. Any observation at present will already on next instant be outdated as systems observe only synchronically, and yet different systems may conceptualise time in different ways. Thus, law's status to a present question often emerges long in the future in form of a decision of a court or tribunal of last instance, while the same question addressed via technology might have received an answer already years ago, that is, the same event in a shared environment of two systems may not share the same temporality.[870]

Yet, on such an abstract level it is difficult to discern where the distinction is drawn, what 'meaning' means, and how it retains itself on both sides of the distinction in actual systems.[871] Luhmann employs therefore a further distinction between meaning and form to move from universal meaning to a particular system; where meaning has no outside, 'form means tight couplings that construct the form […] with an outside.'[872] It is this latter, more limited scope of actual happenings that a system observes and through which it constructs its internal meaning. This way the paradox of meaning is constitutive of the whole system, while remaining concealed from the formation of forms, or, as Luhmann writes, '[t]he world is observable *because* it is unobservable.'[873] When encountering the foundational paradox, one finds in Luhmann's formulation the paradox as a transcendent figure:

> Paradox, then, is, as unconditioned knowledge, a transcendental necessity, the successor of what was supposed to be a performance of the transcendental subject. But all usable, connected knowledge will be contingent.[874]

To move from unknowable paradox to usable knowledge, Luhmann does not manage to avoid a transcendental figure. The existence of paradox at the heart of all inquiry is beyond questioning in rationalistic manner as something beyond mind's grasp – the presence of which cannot be truly observed through self-reflection. And while another observing system can expand the inquiry of any given system, the conditions of observing and making distinctions remain eternal paradoxes but also eternal truths, no

[869] Luhmann, 'Paradoxy of Observing Systems' (n 867) 42.
[870] See, Niklas Luhmann, *Observations on Modernity* (Stanford University Press 1998). This is also the foundation of Hartmut Rosa's theory of societal accelerationism, see (n 267).
[871] There are some similarities with this concept of meaning and the concept of 'signature' employed by Giorgio Agamben, see (n 821).
[872] Luhmann, 'Paradoxy of Observing Systems' (n 867) 43.
[873] ibid 46.
[874] ibid 47.

matter how much Luhmann otherwise insists that truth is partial and therefore cannot be a foundation of a system.

While Luhmann's formulation remains at some distance from the pragmatic understanding of law as has been explored thus far, the same argument with somewhat differing formulation can be found from Günther Teubner's work on, for example his account of justice's self-subversive character, where he treads a narrative of justice specific for law using two of his favourite interlocutors, Niklas Luhmann and Jacques Derrida.[875] He denies the existence of a universal concept of justice that would cover areas of politics, economy, law, etc. and argues rather for a concept of justice proper for each. In the scope of the article, Teubner cements juridical justice as the foundational paradox and provides it with a transcendental quality.[876] This transcendental quality turns justice into an act of sabotage '[a]gainst law's relentless desire for certainty', suggests Teubner, creating 'a vast space of uncertainty and indeterminacy.'[877] Law needs to come in terms with its 'ecological constraints' it has imposed onto itself and transcend onto those, push beyond the boundaries of Luhmann's operational closure, into the dark abyss with the guide of Derrida, declares Teubner. All of this to come in terms with the juridical notion of justice that would allow for the injustices to be corrected, while remaining mindful of its over-expansion, acting against 'justicialisation' of the society as a whole and against the 'imperialism of partial rationality'[878] of law. Whereas 'paradox' functions as the transcendent necessity for Luhmann's social theory at large, for Teubner's legal theory such role is reserved for justice. Justice is something that is both proper to law and beyond law—it cannot be fully analysed within law. Rather, to understand juridical justice one needs to understand law's ecological constraints, whether they stem from politics, economy, or art or something else altogether. The sheer scale of the exercise and the continuous undermining of it by the contingent nature of any observation in Luhmann's theory leads to an aporia of a sort: Teubner declares that justice cannot be reached, Luhmann

[875] Teubner has analysed Luhmann and Derrida together in his work recurrently, see, Gunther Teubner, 'Economics of Gift – Positivity of Justice: The Mutual Paranoi of Jacques Derrida and Niklas Luhmann' (2001) 18 Theory, Culture & Society 29; Gunther Teubner (ed), *Nach Jacques Derrida Und Niklas Luhmann: Zur (Un-)Möglichkeit Einer Gesellschaftstheorie Der Gerechtigkeit* (Lucius & Lucius 2008); Gunther Teubner, 'Self-Subversive Justice: Contingency or Transcendence Formula of Law' (2009) 72 Modern Law Review 1.

[876] Teubner, 'Self-subversive Justice: Contingency or Transcendence Formula of Law' (n 875) 10 writes that '[j]ustice as contingency formula is […] a justice that transcends the law. […] Justice redirects law's attention to the problematic question of its adequacy to the outside world.'

[877] ibid 13.

[878] ibid 23.

that complexity and confusion cannot be curtailed.[879] Law, like society, is a hamster wheel we cannot stop.

To locate this aporia more concretely within the context of my dissertation and the outlined paradox of repugnant rights, it is useful to look first what both Teubner and Luhmann declare of the fate of (autopoietic) law and justice, and then turn briefly to some of the critique posed to their theories. I do not attempt to provide an exhaustive account of any of these debates. Rather, I merely point to general trajectories that both the critics and the advocates of Luhmann's understanding of paradoxes seem to agree with, namely, that law's relative importance ordering the society at large is diminished while the amount of law and its complexity are continuously increasing. Peter Goodrich argues further that autopoietic theories of law lead into law being 'displaced from a position of sovereignty or governance, from the position of structuring principle of the social, to that of emblem and epiphenomenon in which the self-descriptions or narcissistic professional elaborations of law are increasingly divorced from any relation to the social.'[880] In a sense, this is a paradox of law after modernity: there is more and more law in society,[881] but it is increasingly irrelevant for the organisation of the society and of other social systems. Thus, even finding that self-subversive juridical justice, would provide us with no moral compass to navigate in society at large. This, both according to critics and supporters of autopoietic theories of law, is a feature not a bug. Luhmann nor Teubner provide a critical or emancipatory theory of law, rather they provide an analysis of law and how it (re-)produces itself in (post?)modern world.

Luhmann argues that his theory is not about 'postmodern' but of modern society, but he would accept that there is no external point of view that would allow for emancipation. Thus, for example, the iterative narrative of international law explored in Chapter 4 would, then, highlight merely different ecological constraints of (international) law being employed by observers occupying different positions and therefore making different observations and/or distinctions. For Luhmann, the idea that observer's subjectivity or observation's context is meaningful is the very

[879] This, like any categorical statement about Luhmann's project is likely to evoke harsh criticism akin to one mounted against supposed mis-readings of Luhmann's theory by legal scholars in Michael King, 'The Construction and Demolition of the Luhmann Heresy' (2001) 12 Law & Critique 1.

[880] Goodrich (n 863) 202; more recently, see, Andreas Philippopoulos-Mihalopoulos, 'The Foundational Paradox of Gunther Teubner' in *Critical Theory and Legal Autopoiesis: The Case for Societal Constitutionalism* (Manchester University Press 2019).

[881] Luhmann, *Law as a Social System* (n 67) 156 writes 'As far as law is concerned, one can feel relatively sure that—short of revolution and political coup—all previously accrued rights will be respected when the law changes.' However, even revolutions and political coups have been relatively impotent to eradicate (private) rights found on international law (see *supra* on accrued rights in international law).

condition of theory, not specifically feminist or postcolonial position: all observations are equally (non-)partisan. To maintain Luhmann's theoretical edifice and its analytical rigour in a finite world, the price from this egalitarian vision of observation is the subsequent loss of infinite categories that could stop the regress. '[I]t holds true', Luhmann writes, 'that the characteristics of today's modernity are not those of yesterday and not those of tomorrow, and in this lies modernity.'[882] For Luhmann, modernity is perpetual motion without a start or a stop. Thus, there is no truth, right, or beautiful as a quality outside partisan observation, also it does not provide any leverage to counter positions that for many would appear unethical, biased, or simply evil. Luhmann's theory is about observation, which remains the only action performed at the level of analysis. Whether society changes as an outcome of such analysis, is subject to future observations. Whether such changes are good or bad, is a question that cannot be posed within the framework of Luhmann's theory.[883] The most we can expect from law in an autopoietic system is 'the certainty of being able to form appropriate expectations at a given distance from what will factually happen from case to case', in other words, norms as 'general stabilizing function'.[884] In this sense, as a theory it is uniquely capable to illustrate the infinite regress of legal system towards greater complexity that can foresee likely legal outcome, while simultaneously being uniquely incapable to instruct as of how to act upon such knowledge. After all, personal sentiments of something being wrong, bad, or evil—or what I title repugnant—are attributes associated by observer to the observations of their own making, not qualities of legal system and its surrounding environment as such.

Luhmann expresses this feature of his theory by the existence of what he titles *double effect*. The function of law as a tool to stabilise normative expectations leads into divorce of the normative expectations held by law from that of society.

> On the one hand the organizational and professional streamlining of valid law curbs and domesticates the unorganized growth of normative presentations. […] On the other hand, the differentiation of a special system for decision-making in the legal system can have a negative effect and can make the expectation of normative expectations normatively difficult to accept.[885]

A competent lawyer is able to locate norms that will dictate the legal outcome, but there is nothing in this outcome that would ensure the outcome would have any congruence with what is felt more widely as an ethical conclusion of the dispute. It

[882] Luhmann, *Observations on Modernity* (n 870) 3. 3
[883] Luhmann, *Law as a Social System* (n 67) 152, 161.
[884] ibid 151.
[885] ibid 160.

merely stabilises normative expectations and provides to them a normative outcome that the legal system condones.

It is hardly surprising that Günther Teubner's work could be classified on same terms. In his introduction to recent anthology of Teuber's articles on legal autopoiesis, Andreas Philippopoulos-Mihalopoulos suggests that Teuber's work 'superimposes a layer onto the world, an exegetic membrane that offers both distance and a reassurance that this is how things "really" are.'[886] And yet, at any moment of conclusion, a new set of observations sets in, pointing how fleeting the moment of clarity was and is. Still, it is fair to say that Teubner is much more anchored to a material world, to an ontology, than Luhmann. The injustices he encounters and the vistas he provides are emerging from perceptible world surrounding us—not simply of distinctions, observations, and meaning, but of medications, contracts, and standards. By placing his account in the world, Teubner can summon forth its injustices by transposing 'justice' as a form of the foundational paradox. Justice as a contingency formula allows Teubner to explain growth in complexity of the legal system, while providing us with a form towards which we can aspire for. This is clearly illustrated in Teubner's sustained treatment of transnational law and its means of deparadoxification, where the Luhmann's preferred mode of deparadoxification through recourse to politics is increasingly set into question by Teubner. This marks the clearest deviation from Luhmann's treatment of the foundational paradox of law in Teubner's work, and as will be apparent, traces closely the same phenomena as have been highlighted earlier in the treatment of international law in Chapter 4.

Teubner's legal theory has, since his earliest publications, focused on private law and contracts as a force that drives law further away from politics. While initially Teubner seemed to suggest that different modes of private ordering are an anathema to the 'law' as a system – a deviation of a sort – his more recent writings have focused on private law's different means of deparadoxification rather than any perceived 'strangeness' of this mode of law. Yet, as Teubner points out,

> this means much more than a simple change of law's self-description. […] To speak with Robert Cover, who considers the jurisgenerative force of a plurality of legal orders to lie in the interaction between nomos and narrative, it is not only the narrative that changes when the way in which paradoxes are tackled is altered: the nomos itself is converted.[887]

[886] Philippopoulos-Mihalopoulos, 'The Foundational Paradox of Gunther Teubner' (n 880) 1.
[887] Teubner, 'Exogenous Self-Binding: How Social Systems Externalize their Foundational Paradox' (n 863) 33–34.

Thus, the sort of legal phenomena explored within this dissertation operate not only on multiple different levels of narrative but on multiple different nomoi. These areas of law might pay lip-service to traditional political moorings of law, but the task of legislative authorities is 'restricted increasingly to merely reformulating this law created within society.'[888] The examples of these different means of deparadoxification that Teubner explores in economy and science remain, however, superficial, and partly inaccurate. The account on economy relies on Luhmann's vision on the role of property and its legal codification but is lacking in nuance compared to more recent accounts, such as the one proposed by Pistor explored above. The same could be said of the scientific constitution.[889] In short, much of the later writings of Teubner operate at a distance from actual functioning of the transnational system he is accounting for, leading with his analysis of paradoxes close to the position he earlier has criticised, for example, the new approaches of international law from.

In a nutshell, both Teubner and Luhmann provide means to analyse the outcome of law's foundational paradox, without moving us any closer to a conclusion. On the one hand, Teubner argues that 'the desired gain in precision fails to materialise'[890] from the new modes of deparadoxification responding to impetus of transnational law, and the transcendence of justice is always self-subversive. On the other hand, Luhmann suggests a solution to the complexity caused by the infinite regress of deparadoxification through condensing, which 'presupposes and produces identities,'[891] harnessing the multitude by presuming a shared structure for producing meaning within the legal system. As such, these identities produced appear no different from Riceour's *idem* and *ipse* identities explored in Chapter 2. In a word, to work with complexity through paradoxes is to establish structures that limit complexity, which allows the system to retain its responsiveness to the multitude of stimuli generated by the growing complexity. Luhmann proposes for this reason justice as a contingency formula that upholds law's function of ensuring normative expectations, while allowing for a change to occur when applying positive law. Otherwise, he writes,

[888] ibid 34.

[889] See, for example, work of Julia Dehm on international environmental law, Julia Dehm, 'One Tonne of Carbon Dioxide Equivalent (1tCO2e)' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press 2019); Usha Natarajan and Julia Dehm, 'Introduction: Where Is the Environment?: Locating Nature in International Law' in Julia Dehm and Usha Natarajan (eds), *Locating Nature: Making and Unmaking International Law* (Cambridge University Press 2022).

[890] Teubner, 'Exogenous Self-Binding: How Social Systems Externalize their Foundational Paradox' (n 863) 42.

[891] Luhmann, *Law as a Social System* (n 67) 211.

> [t]here is good reason to believe that a system, which operates on the level of second-order observation, has the tendency to become conservative, that is, to decide the same manner as the observed observers. For it is in the nature of things that no objection will then be raised. Furthermore, if everything is contingent, that is, if everything could be different, it is equally possible to do things the way they were done before.[892]

Yet, none of this, to quote Teubner, provides the desired gain in precision. Whose justice or idea of equality trumps – or how those concepts (or forms) end up being defined – are questions that are merely hinted at. Also, overall the edifice of Luhmann's theory remains markedly Eurocentric, which sets into question, for example, whether truly the most import form for the unfolding of paradoxes of freedom and equality is 'expressed in the distinction between the state of nature and the state of civilization.'[893] Thus, while the analytical rigour of Luhmann's autopoiesis theory allows for nuanced analysis of society and its subsystems and their interaction, the outcome of it is a need for precisely those kinds of heuristic tools of approximation that embed the observer's valuations as inherent part of observation.

It is along these lines that also those criticising autopoiesis theory in law have advanced their argument. There is a range of criticism that has been voiced to autopoiesis in general and Luhmann in particular. For one, there are those who suggest the complexity of autopoiesis is not sufficiently complex, but too rigid in its denomination of systems. Their basic argument is that not only the systems move towards complexity, but also the systems themselves are more complex than those outlined by Luhmann. Another tangentially associated form of criticism targets Luhmann's theoretical presumptions that undergird his autopoiesis theory. They suggest that the biological and cybernetic processes that Luhmann relies on have doubtful credence as such, and therefore even less so when transposed to human societies. For example, Alan Wolfe in his early Anglophone criticism of Luhmann points to this:

> In particular, the development of artificial intelligence has occurred at such a rapid pace that some earlier efforts, upon which Luhmann has based much of his analysis, are now obsolete. If the systems logic he borrows from the sciences of nonhuman behavior does not quite characterize the dynamics of such behavior, it

[892] ibid 228.
[893] ibid 226.

> is even more unlikely it will serve as an adequate characterization of human behavior.[894]

Setting aside its account of societal complexity and its theoretical urforms, the main argument against autopoiesis is linked to the figure of the observer that rests at the heart of the theory. Some have suggested that the inherent epistemology of an autopoietic thought is that of a 'western, liberal, capitalist social system.'[895] In somewhat different terms, others still have pointed out that Teubner's application of autopoiesis excludes imagination and affective self-reflection from its possible registers. In short, the antihumanism of autopoiesis that founds its epistemology makes it incapable to encounter 'relationship, affect or law as species of knowing.'[896]

Yet, like I already alluded above, few of the critics in earnest set into question the key insights of autopoiesis or its description of the legal system. That law founds itself, that it serves to stabilise normative expectations, and it is capable through self-reference to sustain itself are ideas widely shared not only among followers of autopoiesis but of legal theory more in general. And further still, that law remains a paradox that it is incapable to solve, which every attempt to mend or fix merely conceals for a moment, is a sentiment shared widely at the very least among international lawyers. In short, there have been relatively few attempts to repudiate autopoiesis theory among lawyers. Its central tenets are considered reasonable, the description of law it provides recognisable. And that is where I will leave it at. It is a sophisticated theory that has had an impact on law in number of areas and is relatively widely accepted in the main. In a word, it appears coherent with law both domestically and internationally. I will, however, suggest below in the third subsection of the present chapter that the outcome from following this model of analysis especially on a global level is repugnant, and I feel that few of the proponents of autopoiesis would object such description. In the second part of this dissertation, I seek to overcome this repugnancy following partially the lead provided by those criticising autopoiesis of being antihumanist, or, maybe better still, anti-affectionate.

5.2.2 Alain Badiou's paradoxical truth

[894] Alan Wolfe, 'Sociological Theory in the Absence of People: The Limits of Luhmann's Systems Theory' (1991) 13 Cardozo Law Review 1729, 1731.
[895] Wolfe, 'Making Contingency Safe for Liberalism: The Pragmatics of Epistemology in Rorty and Luhmann' (n 856) 123.
[896] Goodrich (n 863) 212.

French philosopher Alain Badiou (1937-) is an author of a sizeable body of philosophy, plays, and political pamphlets that he has produced during his decades long scholarly and artistic career. If for some the work of German theorists like Luhmann 'is technocratic, even cynical, not to mention despairing,'[897] it is much more difficult to classify Badiou's academic philosophy within a single genre or under a single rubric. Academically, his main work is widely considered to be *Being and Event*, an attempt to establish mathematics as the foundation of ontology.[898] While Badiou had shown interest already in his earlier works to mathematics as a form of universal language,[899] it was in *Being and Event* where he formulated the most systematic account of his mathematical ontology upon which his later works in one form or another rely. If Luhmann's work can be considered abstract and complex at its foundational level, the same holds true for Badiou's work. Yet, quite like with Luhmann, also Badiou's work can be summarised with relative ease: there are truths that are universal and while subject to infinite variety, the ontological constitution of everything can be understood with a help of set theoretical axioms applied to void. The paradox in Badiou's thought that I will deal in the following is between the conditions of his philosophical thinking—politics, love, art, and science—and their realisation in the material world.[900] A philosophy geared towards finding truth is incapable of producing said truths without its conditions that are not amenable to such perfection of an idea, but rather emerge with lesser or greater intensity. As Badiou writes '[i]t is indeed the case that we philosophers work at night, after the day of the true becoming of a new truth.'[901] In a word, the philosophical edifice Badiou constructs is meant to serve as 'a general space in which thought accedes to time, to its time'[902] but it can only be thought as a condition of time-bound events that precede it. To simplify, in the following I will look at the paradox of Badiou's truth that is simultaneously immediate and conditional to preceding event.

Throughout this chapter I will employ some of the concepts Badiou has developed for his philosophical enterprise, and while the ones employed the most – event and world – have merited a book-length exposition by Badiou himself, I will use them in simplified definitions provided by Badiou.[903] Thus, when I speak of an event in the

[897] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press 1984) 11.
[898] Alain Badiou, *Being and Event* (Continuum 2007).
[899] See, Alain Badiou, *Theory of the Subject* (Continuum 2013).
[900] For a concise summary of these conditions and his philosophy, see, Alain Badiou, *Conditions* (Continuum 2017).
[901] Alain Badiou, *Philosophy for Militants* (Verso 2012) 16.
[902] Alain Badiou, *Manifesto for Philosophy* (State University of New York Press 1999) 38.
[903] Badiou has also used varying nomenclature for relatively similar ideas. This holds true especially for the concept of world that is pre-dated by the concept of 'situation'.

following, I will be speaking of 'a sudden change of the rules of appearing; a change of the degrees of existence of a lot of multiplicities which appear in the world.'[904] An appearing Badiou refers to is a localisation of multiplicities in each context, a world. An event hence is something that changes the way we perceive the world, which, naturally, leads to ask what a world is. An answer to that question is, for Badiou, two-fold. 'A world is ontologically assignable by that which appears,' he writes, 'and logically assignable by the relations between apparents.'[905] At the ontological level wherein mathematics reigns supreme, a world is an infinite multiplicity, one which 'cannot internally construct the measure or the concept of the infinite that it is.'[906] In a word, ontologically, the world resembles the way Luhmann constructs systems and their connection to other systems by being at the same time open and closed. According to Badiou,

> [t]his paradoxical property of the ontology of worlds—their operational closure and immanent opening—is the proper concept of their infinity. We will sum it up by saying: every world is affected by an inaccessible closure.[907]

This closure of ontological world is connected to the idea of a logical completeness of appearing to an extent that Badiou considers it 'the global logic of appearing [that] legislates over objects and relations between objects,' and which leads to 'the subordination of the main properties of appearing to the deepest determinations of multiple-being.'[908] In brief, the apparent world (the world of perceivable objects) is subordinated to ontological world (the infinite world of multiplicities). While everything that is, is part of the ontological world, something can remain non-existent in the world of appearing, such as the voting rights of minorities.[909] There is thus similar transcendence of the paradox as with Luhmann to explicate the relation between objects in a world. The self-referentiality of Luhmann, is simply broken in Badiou's logic through events that alter the rules of appearing for beings that already exist in ontological terms within the world. This interrelationship between worlds and events is what guides the following.

At first sight, a concern over infinite truths and conditions of philosophy does not appear to be of immediate concern to law. I will however argue that Badiou's work

> Differences in these and general development of Badiou's thinking is a matter of little importance for the present work, and therefore these alternate conceptual formulations and their inherent differences shall not be explored here.

[904] Badiou, 'The Three Negations' (n 611) 1881.
[905] Alain Badiou, *Logics of Worlds* (Continuum 2009) 305.
[906] ibid 309.
[907] ibid 310.
[908] ibid 320.
[909] ibid 323–24.

on universal ontology captures well the other facet of Gödel's incompleteness theorems, namely completeness, as it seeks to create a space of compossibility for the truths. All truths that emanate from conditions of philosophy can be formulated using the same ontology, which suggests that there could be a set of truths about all law that could instruct our application, enactment, and enforcement of it.[910] In this sense it provides a different point of depart for analysis than the one provided by Luhmann – not only in terms of being more humanist and material, but by being less concerned about coherence of truths than their compossibility within a single ontological model.[911] My focus in the following will thus be on Badiou's work that expands his mathematical ontology to the material world, which has also been focus of two of his books to follow *Being and Event* as well as those scattered remarks on law that he has provided. I suggest in the following that like concealing the paradox to establish self-referential and autonomous systems, also embracing the truth and completeness spirals to infinite regress of actually existing law as we do not have access to '"bright obvious" [that] will rise up motionless, in the stellar coldness of ultimate form.'[912] To accomplish this, I will briefly formulate Badiou's account of ontology after which I will focus on events wherein truths emerge.

Like with Luhmann above, I find it useful to begin with the most systemic features of Badiou's thinking to unearth the paradox. According to Badiou, his theory can be summarised through a triplicity: 'the thinking of multiple (mathematical ontology), the thinking of appearing (logic of worlds) and true-thinking (post-evental procedures borne by the subject-body).'[913] On the level of mathematical ontology, there are eternal truths as Badiou establishes in *Being and Event*. When the question turns to ontology, Badiou discusses his set theoretical theory of being found on a set of axioms that allow beings to be conceptualised using similar nomenclature. I will only in passing refer to this part of Badiou's system, when it is needed to clarify its relationship with law as it is conceptualised within this dissertation. On the level of logic of worlds, the focus is how those mathematical multiplicities appear in a material setting. Here Badiou addresses concerns that are closer to law, such as questions how centrally something belongs to something and what it entails to be enveloped inside 'law'. These are concerns that also Luhmann's systems theory focused on in his account of emergence of social systems from the environment by drawing distinctions. The third and final level of post-evental procedures by the subject-body is one that places Badiou's thinking closest to application of law and the subjects doing it. This is also the level where truths emerge, but in order to theorise them

[910] See, for similar argument over ontological status of law, Lukkari (n 863).
[911] Badiou is also concerned of coherence as will be argued below, but this coherence is disconnected from the ontological concern over completeness.
[912] Badiou, *Philosophy for Militants* (n 901) 17.
[913] Badiou, *Logics of Worlds* (n 905) 144.

Badiou chooses to make events 'a vanishing cause […] an abolished flash'[914] that nonetheless are necessary for truths to appear. Thus, while focus on much of the literature on Badiou is on his ontological account, it serves only secondary purpose to create a universal account of being and consolidating eternal truths that appear through events. As he accounts himself, degrees of identity and theory of relations are irreparably disjoined from the mathematics of sets, the only access between the two being the vanishing moment of an event.[915]

'[T]here is *only* a history of truths,' writes Quentin Meillassoux on Badiou's philosophy, 'insofar as all truth is strictly *eternal* and impossible to reduce to any relativism.'[916] It is this apparently paradoxical status of events in Badiouan theory, which shall be the focus in the following. An event appears in a flash, transgressing what is strictly possible for mathematical being, and it can become an event only through persons remaining true to the event after it has taken place. Whether something is a collection of disorder and chaos or a political event of, say, May 1968 depends on the subject(s) who follow the event as none of the single facts or even a bundle of them about the event is synonymous with the event, wherefore the subjects and their actions after the truth has emerged decide whether something truly takes place in the world or merely appears and dies away. Thus, quite like the truths are made in the vanishing cause of an event so are the subjects; to be a subject to truth is, for Badiou, the only mode of being a subject. Yet, a finite existence of a subject cannot hold to the infinite possibilities of an event that can unfurl to infinite directions in different contexts, which simultaneously means that a truth, once it emerges, seeks to provide for itself a genealogy as Marx suggested:

> At the very time when they seem to be engaged in revolutionizing themselves and things, when they seem to be creating something perfectly new—in such epochs of revolutionary crisis, they are eager to press the spirits of the past into their service, borrowing the names of the dead, reviving old war-cries, dressing up in traditional costumes, that they may make a braver pageant in the newly-staged scene of universal history.[917]

This is what Badiou implies with there only being a history of truths and truths being eternal. Truth persists and in persisting it opens any event to historical truths that have long since dwindled. As Meillassoux so aptly summarises, '[b]ecause they are eternal, truths can be reborn, but because they are infinite, they are not reborn under the form of a simple and sterile repetition: on the contrary, they deepen the revolutionary path

[914] ibid.
[915] ibid 149.
[916] Quentin Meillassoux, 'History and Event in Alain Badiou' (2011) 12 Parrhesia 1, 1.
[917] Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (Allen & Unwin 1926) 18.

with each of their reactivations.'[918] It is from this angle, I propose, one should seek to unravel the paradox of Badiou's truth when it comes to law.

This is also the trajectory of Badiou's own thinking, as he seeks in *Logics of Worlds* to explain how the inconsistent multiplicities of being that constitute his ontological theory can appear as one perceivable entity in our material world rather than an endlessly cascading list of constituent elements. What we see in the world is an appearance of a being that we can perceive with different intensity or consistency. It is on these accounts that Badiou's theory for the first-time approaches level of abstraction that might be cognisable to law. In one of his only legal texts, an article in Cardozo Law Review, this question of intensity of appearance is broken down to legal terms. In the article, Badiou uses an example of warfare and troops on the field to illustrate his argument on appearance in legal terms as well as the role a subject has in upholding any event. He uses the example of control over territory and presence of armies to illustrate that the world of appearance is never that of traditional (Aristotelian) logic. Badiou suggests that we should rather embrace a notion of negation that allows for three different types. First, the classical logic which obeys both the principle of non-contradiction and that of excluded middle: it is not possible to assert simultaneously a thing and its negation, and every proposition is either true or false, there is no third option. Second, an intuitionistic logic where negation obeys only the principle of non-contradiction but not that of excluded middle. And third, a paraconsistent logic, where negation obeys the principle of excluded middle but not that of non-contradiction. While Badiou holds that on the realm of ontology the classical logic holds true, 'appearing and existence present a completely different case [as] [i]n a determinate world, a multiplicity can appear more or less.'[919] This leads him to conclude that 'if the great field of the law is always a concrete world, or a concrete construction, its logic is not classic,'[920] which has a direct bearing on how an event unfurls in the legal realm. Thus, while in Badiou's system there are certainly eternal truths that apply also to law, and therefore there is a use of classical logic for the purpose of analysis, any concrete application of law cannot be reduced to such logical analysis in Badiouan system.

There are relatively few concrete examples in Badiou's oeuvre of legal events and their concrete realisation that would allow to provide an example of these three different negations, three different logics at play in a determinate world where laws are applied. The most consistent of the few available is the one over the figure of *sans papiers* in France, or the persons without legal documents that would allow them to

[918] Meillassoux (n 916) 5.
[919] Badiou, 'The Three Negations' (n 611) 1880.
[920] ibid 1881.

stay and work in the country legally.[921] To simplify, Badiou approaches the very same question that Charles Taylor has formulated through multiculturalism or legal scholars through pluralism, yet with a focus on ontology. The solution he provides is an interplay of his ontological model (i.e. Being) and the condition(s) upon which those ontologies may change. Already in his early work, Badiou tackles this problem of change, or something new emerging to change the identity of an object—individual, community, and so on and so forth. There he uses the figure of a *sans papiers* or an undocumented immigrant as someone who seeks to modify the constitution of what it means to be French, but the very instant they are accepted they cease to occupy the position of strange or new and rather become part of the existing definition. On these early formulations, Badiou's use of mathematics as the first-order ontology is still weak and the example of the undocumented immigrants can readily be read as one of Hegelian dialectic between absolute idea and its imprecise realisation at present. After these early forays, Badiou's direct discourse on the relationship of his thought to law has been limited.

Starting from *Being and Event*, Badiou attributes changes to what he titles the four conditions of truth: science, love, art, and politics. Through events that take place on these relatively imprecise categories, a new truth may emerge that permanently alters the possibilities for new subject(ivitie)s. A question did something truly new happen, remains to an extent open one: there is no given direction to truth but they are providing a space for thought to manoeuvre. Something happens but whether it will generate a change depends on the actions of those who remain true to the event. Badiou himself does not hold high hopes for true events that lead to a change. Yet, he does provide a blueprint for change using the most basic building block of his mathematical ontology, namely, the void. According to Badiou, a new event appears through the void that is embedded as part of every multiple. Thus, a legal change necessitating a wider recognition of those outside the present boundaries would draw new subjects from the emptiness (or nothingness) laying at the foundation of its constitution. Something happens that makes existing subjects recognise demands of new subjects that emerge—from the point of view of the present law—from nowhere. This is how Badiou describes the political and legal demands of the *sans papiers*. Thus, the void – or a black hole – remains a generative metaphor for all those things that the present horizon fails to register.

Yet, the calling for a void to introduce new subjects for law appears as nothing short of exception by another name. If Schmitt's exception abrogates law, the revolutionary ethos of Badiou's void seems to accomplish the same with different

[921] Another example that comes close to legal analysis would be the status of Quebec and its citizens, an example that is also widely used in multiculturalism debate initiated by Charles Taylor.

nomenclature. Even though Colin Wright tries to disentangle Badiou's event from Schmitt's exception, he not only fails in his attempt but refuses to quote the countless instances where Badiou refers to exception as an antagonistic origin for many events.[922] As Pierre Sauvêtre illustrates, exception is an integral part of the way Badiou understands the event.[923] Then, how to save law (or jurisprudence) from collapsing into nothing but an *ex post facto* justification of power, violence, or politics? Sauvêtre suggests that the image of exception for Badiou differs from that of Schmitt by highlighting its role in developing the new rather than marking an abrupt rupture in the stream of events.

> Ainsi, l'exception n'est pas la figure d'une transition vers un nouvel ordre, mais d'une construction qui coïncide dans le procès dialectique avec l'affirmation du nouvel ordre ; on doit pouvoir la penser non pas comme opération d'auto-suppression transitoire mais comme opération immanente de construction contradictoire.[924]

This, Sauvêtre suggests in his reading of Badiou, allows Badiou to 'harness' the violence inherent to exception for the promotion of a greater universality or equality. Even if the exception serves immanent rather than disruptive causes, I am not certain there remains a space for law to operate in any other than in antagonistic way. Law remains that against which the new entities are construed as, not something through which the new could emerge.

In his book on Saint Paul, one of the most substantive accounts of law in Badiou's oeuvre, Badiou clarifies the relationship between an event and law. A foundational idea underpinning all Badiou's philosophy is the claim that all events are universal, that is, open for everyone to participate; '[t]he One is that which inscribes no difference in the subjects to which it addresses itself. The One is only insofar as it is for all.'[925] In *Saint Paul*, the belief in a monotheistic god (the One) in its universalism is contrasted to the particularity of law, which enumerates the possibilities and therefore prevents the emergence of anything new. Rather, what the Mosaic law serves in Badiou's reading of Saint Paul is the source of sin and a division of ideas from agency. In short, the law of commandments creates the category of sin that a subject has an unconscious desire to break, but in breaking the law the subject is denied all

[922] Colin Wright, 'Event or Exception?: Disentangling Badiou from Schmitt, or, Towards a Politics of the Void' (2008) 11 Theory & Event N/A.
[923] Pierre Sauvêtre, 'Exception et révolution. Sur la dialectique de l'exception chez Alain Badiou' [2011] Tracés Revue de Sciences humaines 20, 107.
[924] ibid para 30.
[925] Alain Badiou, *Saint Paul: The Foundation of Universalism* (Stanford University Press 2003) 77.

agency for it is the original sin inherent to all that is responsible from the breaking. In the case of Saint Paul, the event of Christ's resurrection breaks the cycle. No longer are the categories of life and death, of sin and desire, fixed but they can be overcome through an act of grace provided by the 'Christ-event'. In an act of grace – or a leap of faith – the old laws that fixed the possibilities of becoming a subject are let go, removing the gap 'between subject and subjectivation.'[926] It is a 'law of the break with law'[927] through the Christ-event that provides consistency for the later development of the Christian dogma.[928]

But if the break with law acts as the new law, the negative or limited reading of law in *Saint Paul* is not a full picture of Badiou's treatment of concrete instances of law and regulation. In a short law review article, Badiou seems to offer a more wholesome account of law than what he outlines in Saint Paul. First, his account aligns with a relatively commonplace understanding of law's relationality: 'The general laws of a world are not laws of the things themselves. They are laws of the relations between things in a determinate world.' Further, Badiou suggests that laws define their objects more or less, not antagonistically. This would be something most lawyers would attribute to distinction between rights and principles in the liberal key, but what Badiou suggests is more related to objects law creates than the nature of the law as such. Even this much seems apparent to most who work with law: a citizen and a non-citizen are not antagonistic any more than an adult and a child are. They mark an intensity of being a subject of law. Thus, what in *Saint Paul* is argued on the level of the event is in Badiou's law review article argued on the level of appearance (or existence)—as a phenomenological entity.[929] No longer a demand for universality of the event in the same way as was articulated in Saint Paul, rather, law and an event related to it are seen in this later work having an 'unfailingly "statist" character […] enumerate[ing], nam[ing], and control[ling] the parts of a situation,' without this constituting necessarily a negative relation with the event itself. Law can function for a realisation of an event, even if it cannot itself constitute an event.

This abstract statement calls for some clarity. Badiou argues in *Logics of Worlds* that events have an intensity of appearing. A world in Badiou's later work refers to a local constellation of many beings, and even though he does not employ examples of law that I would know of, I assume that any legal order would constitute a world in

[926] ibid 81.
[927] ibid 89.
[928] Of criticism to Badiou's reading of Paul, see Mika Ojakangas, 'Apostle Paul and the Profanation of the Law' (2009) 18 Distinktion 47.
[929] This is a more general move in Badiou's philosophy as after *Being and Event*'s ontological account his next contribution to the theme came in form of an account of appearance and their intensity in *Logics of Worlds*. These both themes are intertwined in 'Three Negations'.

the sense employed by Badiou.[930] He seems to suggest as much in his brief argument about immigrants:

> We still belong to a historical era dominated by states and borders. There is nothing to suggest that this situation is going to change completely in the near future. The real question is whether the regulations [réglementation] at issue are more or less consistent with egalitarian aspirations. We should first tackle the question of how, concretely, we treat the people who are here; then, how we deal with those who would like to be here; and finally, what it is about the situation in their original countries that makes them want to leave.[931]

Thus, being inexistent in a world does not imply that the *sans papiers* would not exist materially in the world, but simply that their import is next to nothing within this particular legal order (a world). On such an understanding, the sense of embarrassment or shame triggered by catastrophic events may increase the intensity with which the inexistent beings appear and become recognised within that order. To what extent the invisible or inexistent do appear for the world depends on the operator of appearing – or the logics of the world. It is this Badiou means with 'a sudden change of the rules of appearing.' A change can be complete, intermediate, or simply virtual, a fact that Badiou reflects through three types of logics and three types of negation: classical, intuitionistic, and paraconsistent.

In Badiou's thought, then, the most fundamental paradox is the one associated with the emergence of truths through events. Truths are eternal and universal, yet they are always conditioned locally where they emerge through subjects who are committed to those events. This is what Badiou titles the immanence of truths (*l'immanence des vérités*), and one he aptly summarises as his thirty-year philosophical project, that seeks to

> légitimer qu'une verité puisse être:
>
> Absolue tout en étant une construction localisée.

[930] It might be that Badiou does make a distinction between a law and a world in ways that preclude the former to constitute a latter. In an excerpt from a collective publication cited in Thomas Nail's article there is a distinction drawn between 'a strictly juridical category' and 'a conception of the law,' but as I have no access to the French original I am not certain whether this is merely a reflection on distinction between *droit/loi* in French or some more foundational preclusion of a legal order from the world-making. See, Thomas Nail, 'Alain Badiou and the Sans-Papiers' (2015) 20 Angelaki 109, 112.

[931] Alain Badiou, *Ethics. An Essay on the Understanding of Evil* (Verso 2012) 104.

> Éternelle, tout en resultant d'un processus qui, sous la forme d'un événement de ce monde, commence dans un monde determine et appartient donc au temps de ce monde.
>
> Ontologiquement déterminée comme multiplicité générique, tout en étant localisée phénoménologiquement en tant que degré d'existence maximale dans un monde donné.
>
> A-subjective (universelle), tout en exigeant, pour être saisie, une incorporation subjective.[932]

Breaking the duality that led into Luhmann's paradox through introduction of an eternal truth that can surface in the vanishing moment of an event leads to politics of a different kind. If autopoiesis and its foundational paradox dehumanise law in the hands of Luhmann, Badiou's whole philosophy is found on a paradox that can only be solved by a subject who adheres to truth they have no means to ascertain. For the purposes of this dissertation, Badiou's philosophy leads to an equally paradoxical conclusion: there will be infinite variations of law, most of which is purely virtual and does little to promote either justice or equality, and there will still be eternal truths about law for which we should be fighting for. It is with these thoughts that I want to conclude my superficial treatment of Badiou's philosophical enterprise.

In terms of pragmatic analysis that I have entertained throughout this first part of the dissertation, I am inclined to align with Badiou's pessimism. Most law that I have explored thus far and that I will explore in the second part does relatively little to promote those greater aspirations of liberalism, such as liberty, equality, justice, etc. The technical and detailed rules of law are more commonly geared towards granting rights to property than to humans or even sovereigns. Anne Peters argued in 2009 that sovereignty is being ousted from the position of first principle of international law by humanity.[933] I suggest that rather than humanity, sovereignty is being ousted by property. This thesis, stemming from the simple proliferation of law, is a paradoxical consequence of trying to remove gaps from the legal fabric and therewith ensure upholding the function of law to stabilise normative expectations. It is the paradox of self-referentiality or that of infinite multiplicities in a finite world and one that I call the paradox of repugnant rights. And yet, the other facet of Badiou's paradoxical truth, the persistent eternal truths, is what fuels my militant opposition to this present unfolding of the paradox. It will mark the first steps towards the critique of the paradox of repugnant rights that I shall provide in the second part.

[932] Alain Badiou, *L'immanence Des Vérités* (Fayard 2018) 13.
[933] Peters (n 10).

5.2.3 Derek Parfit and the repugnant conclusion of good intentions

In the preceding chapters I have looked more closely at paradoxes in social theory and philosophy through two very different authors, Niklas Luhmann and Alain Badiou. Both seemed to underline some common tendencies of modernity, such as, the growing complexity of society, the invented history of any social event, and the missing stopgap to halt the infinite regress. As such, they are highly congruent with recent attempts in international law to explicate or theorise transnational or global law. Any value attributed to these developments has also fluctuated among the authors of international law as they did with Luhmann and Badiou. Much of international legal debate on law beyond the state has focused on charting the events, tracking the details, and bewildering the complexity of structures. As Neil Walker recently pointed out, if phenomena of overlapping legal orders still lacks a proper theorisation, it is mainly due to the scale of the observed phenomenon, and not due to lack of effort in charting it.[934] If, as it seems, there is a relatively widely shared consensus both theoretically and in practice that there is a great complexity of norms internationally, the question is obviously why we seek to complicate the matter. In the previous chapters dealing with the three animating notions of this dissertation, I have indicated some of the possible answers for this proliferation, yet I do not even purport to have any conclusive answer to it. Yet, for the purpose of the present chapter I assume that proliferation of norms is not a consequence of wanting world to be a worse place. So, while I do not have an ultimate reason why norms proliferate, I assume that there is not a single authority capable of issuing binding legal norms on transnational setting that would be animated with an intent to make things worse. They might intend to favour their own stakeholders or interest groups, they may be driven by wilful ignorance, or outright neglect of due diligence, but I remain steadfast in my belief that few if any are motivated by an intent to make things worse. I presume, thus, that all norms seek to improve something.

The assumption over the nature of norms does not preclude the possibility of disappointments or even outright rejection of rights. After all, as Luhmann noted

> [n]ormative closure, therefore, not only means operative closure—although, of course, it means this as well—but also means that norms have to be resistant to

[934] Neil Walker, 'Legalising Inter-Legality' (2022) 1 European Law Open 216.

> disappointments. The breaking of norms alone does not lead to any adaptive learning that could change norms.[935]

Or to borrow from Badiou's system, a paraconsistent logical framework in action signals that 'something happens, but, from the point of view of the world, everything is identical. So we have event and non-event simultaneously.'[936] Neither breaking the law nor upholding the law necessarily amounts to something, but this does not imply that the norms themselves would be perceived chiefly as inconsequential or negative. I argue throughout this chapter, that any model of law that embraces the growing complexity of norms without attributing them with a negative value is susceptible to the repugnant conclusion as outlined by Derek Parfit. Ruth Chang in her recent summary of the normative challenge of Parfit's repugnant conclusion suggested that

> Parfit thought his continuum argument was significant because it placed a challenging constraint on normative theorizing: the correct normative theory must be able to avoid the Repugnant Conclusion, but it is unclear how it is to be avoided.[937]

Thus, what I am suggesting in the following is, that the present models for (liberal) global law fail to avoid the repugnant conclusion, and, therefore, lead to rights that are notably repugnant. I will first argue this as a paradox and then expand it into a theory, that is, a supposition that intends to explain rights at global level, that allows to pinpoint or foresee law's repugnant outcomes. As such, it partakes into construction of that lacking theoretical foundation of global law that so many in recent years have tried to establish.

There are some caveats in using Parfit's thinking in a normative key. Parfit's argument concerning the repugnant conclusion in his 1984 book *Reasons and Persons* focuses on ethics.[938] His intention was to indicate that many of the moral intuitions we have are paradoxical in nature, as they seem to lead to counter-intuitive outcomes. The function of repugnant conclusion was to illustrate these counter-intuitive outcomes that follow from adherence to certain forms of utilitarianism. It is this function of repugnant conclusion as a warning signal that interests me most and the one that I find the most significant for any discussion over law in a global setting. The paradox I will outline below seeks in a similar fashion to force us to think what our

[935] Luhmann, *Law as a Social System* (n 67) 109.
[936] Badiou, 'The Three Negations' (n 611) 1883.
[937] Ruth Chang, 'How to Avoid the Repugnant Conclusion' in Jeff McMahan and others (eds), *Ethics and Existence* (Oxford University Press 2022) 389.
[938] Parfit (n 14). I am indebted to Mireille Hildebrandt for this critique against formulas and their apparent neutrality.

commitment to a liberal international order entails and how most of the solutions provided merely perpetuate or entrench law's counter-intuitive outcomes. Unlike Parfit and many of his philosophical interlocutors, I do not seek to advance the argument in analytical key. I am not entirely convinced that replacing, say, Eritrean refugees with Z and attributing them with a life barely worth living would improve the argument.[939] As such, I do not in the following seek to challenge the ethical arguments stemming from Parfit's analysis, but I rather use them as a lens to observe the normative repercussions of his ethics. In short, I find the many of the ethical intuitions that Parfit challenges relatively commonplace and sensible, wherefore highlighting their logical outcome in the analytical realm has significant normative and practical repercussions if we find the repugnant conclusions repugnant.

I think it bears to start from the foundation also with Parfit's theory, namely, from the formulation of repugnant conclusion, originally appearing in his 1984 book *Reasons and Persons*. To arrive at his repugnant conclusion, Parfit treads a line of other questions related to ethics that challenge many views traditionally associated with moral agency. One of the central arguments on his way to what he originally considered an inevitable repugnant conclusion is what Parfit calls the non-identity problem. The problem that Parfit outlines is that for much of ethics, it matters to whom we target our actions and, further still, if there is no known person our actions affect those actions cannot be wrong. In Parfit's view, we should rather accept a 'no difference view' that suggests it should have no consequence to morality of our actions, even if we cannot nominate a person who will be worse of in the future. Parfit assumes that the future is contingent to our choices, wherefore any future persons that, for example, suffer from our reliance to fossil fuels, are different than those who would have lived in an alternate world where we had chosen different means to produce energy. To defend his view that the morality of our action does not depend ('no difference view') on our knowledge of the actual persons being affected by those choices (their non-identity), Parfit initially embraced a view that any principle we defend ought to be impersonal, that is, a 'claim that some outcomes would be worse than others even though these outcomes would be worse for no one.'[940] Yet, to defend his position he ended up with the repugnant conclusion, namely, that

> [f]or any possible population of at least ten billion people, all with a very high quality of life, there must be some much larger imaginable population whose

[939] Arguably, it would be possible to combine Badiou's mathematical ontology with Parfit's ethics, but I fail to see the benefits of that as it would be quite distant from the ethics that Badiou himself argues for.

[940] Derek Parfit, 'Future People, the Non-Identity Problem, and Person-Affecting Principles' (2017) 45 Philosophy & Public Affairs 118, 124.

> existence, if other things are equal, would be better even though its members have lives that are barely worth living.[941]

I will in the following trace similar steps in a more normative key of (international) law and implicate that quite like the works of German system theorist and a continental philosopher, also the work of analytical philosopher amounts to the same: there is more good but it is not good.

The initial step to take is one already espoused by Luhmann and Badiou: the world is complex and impossible to predict. We may never know the future and the impact our choices have on the future will affect persons we do not know of, but who would not have been without those choices of ours. We are acutely aware of this fact about our own children, but there is nothing in and of itself in our normative choices that would be any different. Whether we do an impact assessment or other measures of an audit society to be more informed from some of these repercussions affects little, as every choice closes the door of an alternate future. The appearance of the situation in any actually existing society is infinitely complex as both Luhmann and Badiou remind, but deep down there appears to be a congruence with Parfit's ethical thought and normative choices. Operating in an infinitely complex world, however, does have a bearing on our capacity to visualise and cognise the multitude of doors we close with each normative choice. It is the reason why so many international lawyers are so acutely aware from the failings of the system without a capacity to show where precisely things went wrong. It is not some malign piece of legislation, replacing of which would amend the situation. Tracing the regulatory history of virtually any piece of legislation or legal document of some normative pedigree and one is taken aback by the amount of goodwill and benign intentions: this treaty here seeks to remove most destructive forces of warfare, this standard here provides means to protect children from suffocating, and this judgment will reinstate importance of human dignity to biotechnology. Even if down the line all these instruments might cause some negative consequences, there is little reason to suspect them of bad intentions—that is, to argue that the negative consequences were precisely the goal and not a side effect of the normative acts in question. We make choices and we precisely do not think that we need to know the norm addressees for these choices to be justified and good.[942] The norms are good because they are better than the alternative norms or not having norms at all. On this limited sense, it appears that norms and the reasons for enacting them agree with Parfit in solution to non-identity problem.

[941] Parfit (n 14) 388.

[942] This would be to a large extent also the argument of John Rawls and his argument in favour of a veil of ignorance in the ideal situation. Katrina Forrester argues that Rawls did influence work of Parfit and, in a way, the whole non-identity problem can be perceived as an analytical formulation of the veil of ignorance.

But while it is relatively easy to argue that most 'law' would solve the non-identity problem largely the same way as Parfit proposes, the answer to 'no difference view' is markedly different. Law is for all intents and purposes targeted to a specific geographical area that per definition excludes some, that is, is not impersonal. A community, however abstract and imagined, is preferred in legislation over those outside of the community, as Badiou argues through his example of *sans papiers* in France or indigenous people in Quebec. In a more limited sense, however, law commands that magnificent equality of which Anatole France it sardonically complimented for: every citizen is in abstract treated the same as is every corporation with an innovative tax avoidance scheme. It is also in this more limited sense that international law can be perceived espousing the 'no difference view' – whether perceived as means to stabilise normative expectations or as a fulfilment of law's egalitarian truth. A hallmark of modern international law is the idea of sovereign equality: all primary subjects of international law are of equal concern. It implies that there is no difference between an existing state and a possible future state: if something applies to states as a norm of customary international law it applies to them all whether they did exist the moment when said law emerged. In similar fashion, human rights apply to everyone without a distinction as do safety requirements of goods, or general principles of treaty interpretation. This implied universalism of international law has been challenged for long, and the notably different practical implications of presumed universalism has spurred many of the approaches of international law that I explored in chapter 4. Thus, it is only minimally that law can be considered adhering to 'no difference view' in practical terms, yet on level of regulatory justification or legitimation, this view carries a significant analytic purchase.

The last step before repugnant conclusion in Parfit's thought is the impersonal maxim to assess whether an act A or B ought to be chosen. In contemporary liberal constitutional rule-making such impersonal maxims are omnipresent. There is hardly an act or a statute that does not come with an extensive impact assessment. These impact assessments are minimally cost-benefit analyses that seek to maximise utility. Reading *travaux préparatoires*, administrative decisions, or judgments of courts and tribunals, the justification for any modern act of legislation or law-making is that it is the better of the two competing views or the best of the possible scenarios. With individual decisions and judgments, the mode is clearly not impersonal in a strict sense, but they carry the similar argumentative structure as impersonal acts of law and rely heavily on expert opinion, balancing of interests, statutory interpretation, etc. Irrespective of how accurate description of the actual thought processes of the persons involved it is, in the argumentative structure of modern law the reason a given course of action is chosen are not interests and passions of those making and enforcing the

rules, but the impersonal principles and maxims.[943] As such, it is relatively uncontested that law employs impersonal maxims to justify its rule and that this impersonality is a defining feature of a modern, democratic secular state created by the great revolutions of the late 18th and early 19th centuries. Together with the *ancien régime* died the personal jurisdiction of royals that was replaced by impersonal dictates of justice.

That law is familiar to non-identity problem, and that it is used to stipulate through impersonal maxims of equality or efficacy much akin to Parfit's no difference view, leads one to ask to what extent law is susceptible to the repugnant conclusion? Does it hold true of law in a modern liberal constitutional model that our choices down the line pave the way to an unavoidable conclusion that more law is better, even if it would mean less rights to persons? I have approached this question from three different vantage points thus far. Luhmann's systems theory suggested that a social system maintains itself by drawing distinctions from its environment. This process of drawing distinctions creates complexity, and complexity leads into more law. This process, as Gunter Teubner argued, is self-subversive, pushing the goal always to yet another level. More law does not amount to better or greater realisation of rights or justice, but simply to more law is the argument of Luhmann and Teubner. In distinction for the epistemological primacy of Luhmann, Badiou builds his philosophy on ontology. Yet for him as well, law – like everything appearing in the material world – is left wanting. On ontological level, there is a truth that can be described that either exists or does not exist, but within a given context, this truth embodied in law appears with greater or lesser intensity and carries only a part of the infinite that is truth. Therefore, law cannot ever be complete, but its subjects must endlessly strive towards the truth of egalitarianism that underpins all law. Accepting Badiou's philosophy implies accepting the infinite variability of law in its finite contexts, or, in more lawyerly way, an infinite amount of law that in different ways approximates the truth. And finally, Parfit's ethical analysis that employs the analytical philosophical tradition to achieve much the same. Parfit indicates that if we prefer to do good and we seek this good in an impersonal manner, there is little we can do to avoid the repugnant conclusion. I

[943] There is an extensive literature on how in practice legislation, decisions, and judgments are made, which challenges this impersonal reading, see, for example, Bruno Latour, *The Making of Law* (Polity 2009); Kennedy, *A Critique of Adjudication (Fin de Siècle)* (n 163); Sheila Jasanoff, *Science at the Bar* (Harvard University Press 1997); Timothy Mitchell, *Rule of Experts* (University of Chicago Press 2002); Susan Sell, *Private Power, Public Law* (Cambridge University Press 2003); Margot Kaminski, 'The Capture of International Intellectual Property Law Through the U.S. Trade Regime' (2014) 87 Southern California Law Review 977; Emilia Korkea-aho and Päivi Leino-Sandberg (eds), *Law, Legal Expertise and EU Policy-Making* (Cambridge University Press 2022); Mikael Rask Madsen, 'Unpacking Legal Network Power' in Mark Fenwick and others (eds), *Networked Governance, Transnational Business and Law* (Springer 2014).

have above briefly suggested that Parfit's population ethical analysis applies with equal rigour to law as an analytical category, even if such analytical categories might have a limited purchase in practice of law. Combined these three visions suggest that whether one chooses ontological view found on existence of truths or an epistemological view of society as a communicative praxis, the very real tendency of these choices is the infinite expansion of law that is necessitated either by the epistemological or ontological dictates. Placing these insights into the ethical framework of Parfit results into a paradoxical conclusion, which I have titled the paradox of repugnant rights, namely:

Rights in a liberal order are considered necessary for the maintenance of order, and their proliferation is a consequence of an attempt to improve the outcome of law in upholding its function (Luhmann) or truth (Badiou). The proliferation together with the mode of liberal law-making leads however to a situation resembling that of the repugnant conclusion (Parfit), that is, that we ought to prefer new laws even if those reduce the extent of rights due to the increase in number of rights. Therefore, there is more law but less rights.

This paradox is, in a sense, a negative reading of Luhmann's foundational paradox and Badiou's infinite truth as it bars the transcendence provided by them both. Yet, it is precisely in keeping with the logic of positive law and its immanent reason as a human creation to bar such access. The paradox of repugnant rights suggests that for as long as the epistemological foundation of law is liberal and/or its metaphysical foundation is empirical, the ethical outcome will veer towards repugnance with some certainty. An immanent critique of law that does not challenge these foundations fails to circumvent the paradox.

Yet, before reaching such a conclusion, it is necessary to look more in detail some of the solutions that have been provided to repugnant conclusion that might resolve the conclusion and provide means to circumvent the paradox of repugnant rights as well. Among the plentiful responses to the repugnant conclusion, there are some main strategies that I will briefly address in the following. I will not consider responses that accept the repugnant conclusion or ones that indicate that the task at hand (i.e., population ethics) does not allow for a satisfactory formulation. The remaining answers can be classified grosso modo in three different categories: the ways to count the happiness, the ways to measure happiness, and the ways to understand what is at stake. All these insights can be transposed to the paradox of repugnant rights formulated above, and as such would provide immanent means to critique the, at

times, repugnant outcomes of rights at play. I will also illustrate with like brevity the reasons as of why these explanations have not managed to replace concern over repugnant conclusion in population ethics and why they are unlikely to yield any better outcome in terms of the legal conundrum I have implicated.

The most immediate answer to the repugnant conclusion as to my formulation of paradox of repugnant rights is to suggest that we ought to count things differently. Rather than focus on absolute happiness at a population level, we ought to measure, say, average happiness, which *ceteris paribus*, would mean that we ought to focus on average number of rights persons have rather than their absolute number. The problem with many of these ideas arguing for different summing up of happiness has proven out to be that they do not normally succeed in avoiding the repugnant conclusion, and they introduce further problems that seem counter-intuitive. A good example of such solutions is one provided by Yew-Kwang Ng.[944] His primary solution to the challenge of repugnant conclusion is to ignore it and simply prefer the Impersonal Total Principle (i.e., preference of outcome with greatest quantity of whatever makes lives worth living), but he proposes also an alternative theoretical account that seeks to balance the present interests with the future happiness. By introducing a concave function that dampens the impact of great numbers, Ng suggests that we can avoid the repugnant conclusion and fulfil most of the conditions Parfit sets for a general theory of population ethics. I will later return to a closer analysis what avoidance of the repugnant conclusion would mean as a strategy for a legal critique, but in legal terms Ng's compromise solution is in practical terms close to the traditional critical legal theory stance, which argues against codification as a solution.[945] However, as Arrhenius' critique of Ng's compromise solution indicates, a restraint on law-making might fail to achieve its purported goals in terms of gains in rights in general. According to Arrhenius, Ng's suggestion is susceptible to what Arrhenius titles 'the sadistic conclusion', namely, that it would be better to add people with negative rather than positive welfare.[946] Ultimately, Arrhenius argues that Ng's theory 'implies that the addition of [few] people with very negative welfare would be *better* than the addition of [many] people with very high welfare.'[947] This seems obviously an absurd outcome and difficult to embrace. Arguably, the same holds true with liberal law. We

[944] Yew-Kwang Ng, 'What Should We Do about Future Generations?' (1989) 5 Economics & Philosophy 235.

[945] A good summary of the critique and a partial defence of legislative action is provided in Jeremy Waldron, 'Dignity of Legislation' (1995) 54 Maryland Law Review 633. More specifically on international law, Jochen von Bernstorff, 'International Legal Scholarship as a Cooling Medium in International Law and Politics' (2014) 25 European Journal of International Law 977.

[946] Gustaf Arrhenius, 'An Impossibility Theorem for Welfarist Axiologies' (2000) 16 Economics & Philosophy 247.

[947] ibid 251.

might consider that there are already many laws that cover most situations, wherefore we might prefer other means to address legal concerns. Yet, by doing so we may end up passing select few laws that are outright harmful to rights of many. This is an argument I explore in the second part of the dissertation.

The second way to avoid repugnant conclusion is to challenge the way happiness is measured, that is, how we should value future persons that do not exist when we make choices, persons far away from us, or, say, other sentient animals.[948] Legally such an argument has become increasingly commonplace through environmental law, while the argument stressing importance of intergenerational duties has been around much longer.[949] The argument in its simplicity is to break the spell of constantly expanding number of people and therewith growing utility we ought to consider by setting our focus on those living in present (or near and/or on humans and not on also other sentient animals). Yet, as Parfit argues many of these considerations would lead to equally counter-intuitive outcomes as the repugnant conclusion. As he illustrates through an example of everyone gaining blissful and long life in exchange of infertility: if our concern is on presently living people alone, we ought to accept such great happiness, even though it would mean an end to humankind. While there are those who argue that this indeed would be for the best, for most humans it seems counter-intuitive.[950] The fact that for law a concern over future generations is of relatively recent origin, merely illustrates that most would consider all law to be only of concern to the presently living humans, and, in a more limited fashion presently living humans within a given community.[951] A quick glance to the effectiveness of our collective response to global concerns, such as climate change, clearly indicates that law is susceptible to similar apparently counterproductive outcomes as ethical approaches that seek to curtail their application to the presently living (nearby) human beings. A focus on affluence, rights, or property at present leads to negligence of the

[948] Many of these concerns have been topical in analytical philosophy for relatively long. See, for example, an account in favour of a compelling moral duty to help also those remote from us (in whatever fashion) is Peter Singer, 'Famine, Affluence, and Morality' (1972) 1 Philosophy and Public Affairs 229.. For the ethical arguments stemming for our difference to other sentient animals see Midgley (n 207). And for the argument that we ought to care solely for the well-being of the present people see Jan Narveson, 'Moral Problems of Population' (1973) 57 Monist 62.

[949] For a succinct summary of the future generations argument and some earlier uses, see Edith Brown Weiss, 'In the Fairness to Future Generations and Sustainable Development' (1992) 8 American University International Law Review 19.

[950] On argument that there should be no more humans see David Benatar, *Better Never to Have Been* (Oxford University Press 2006).

[951] A traditional argument suggests that positive law can be changed, and therefore future generations can simply alter the laws to their pleasing, wherefore there is no need to consider future generations with most legislation. I will not attempt to argue for or against such view here, merely to indicate its existence.

future as, economically speaking, the negative externalities of actions are not immediately apparent and are not sufficiently factored in when conducting impact assessments.

The final challenge posed to repugnant conclusion is the one that questions what ought to be the value measured. Rather than happiness, the focus ought to be on who deserves something or we could focus on some notion of justice for the purpose. Law is certainly no stranger with such means of measuring the purpose of law differently. To name but a few such different heuristics of law's function outside upholding normative expectations or rights, an international tribunal might decide case *ex aequo et bono*, a common law court based on equity, or, as the judge's rules penned by Olaus Petri and attached to Finnish law books suggests, reasonableness may guide decision-making. Fred Feldman provides a good example of an argument highlighting desert and justice to avoid the repugnant conclusion.[952] He suggests that rather than focus purely on whatever makes life worth living, we ought to determine 'the rightness of actions […] by the *desert-adjusted value* of outcomes.'[953] In short, Feldman suggests that deserved good (and deserved evil) ought to be valued more (or less) than undeserved good (and undeserved evil). Therefore, the repugnancy in Parfit's original formulation of the repugnant conclusion for Feldman is its 'rampant injustice [… as] [e]ach resident of [the repugnant world] gets far less good than he or she deserves.'[954] This indeed seems to be also the legal rationale for equity, reasonableness, or their ilk: we should deviate from (statutory) law as the person does or does not deserve such legal outcome whether positive or negative. Feldman, like the legal means that address desert, however, remain silent on the nature of desert and our capacity to recognise justice. As Sionaidh Douglas-Scott argues, despite copious work on the nature of justice we are still unable to articulate what justice means. She therefore suggests that we ought to focus on injustice as we are better equipped to recognise it than justice. Quite like Parfit, we can feel unease with the repugnant conclusion or with my paradox of repugnant rights, yet still lack means to assess the standard why we feel so. We might feel appalled by the hundreds of millions malnourished or millions of children dying annually on pneumonia without being any more capable to pinpoint what elements of the legal groundwork we oppose.[955]

This leads me to my final point I want to make about Parfit's repugnant conclusion. We might, as many do, remain indifferent to it. I argue in the second part of my dissertation that this is precisely the answer of most (international) lawyers as

[952] Fred Feldman, *Utilitarianism, Hedonism, and Desert* (Cambridge University Press 1997).
[953] ibid 202.
[954] ibid 210.
[955] On legal groundwork, see Kennedy, 'The Stakes of Law, or Hale and Foucault' (n 80). On millions suffering, see, Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 European Journal of International Law 435.

well. Recent years has evinced a sizeable literature arguing that while there indeed is much work to be done everything is better than ever.[956] We are gradually moving towards a better world for everyone, and therefore we should not be too alarmed by the repugnancy we evince. This is still a better world than the other one with less laws and less interaction, even though so many lost much in terms of their rights, the number of new subjects endowed with rights surely leaves us better off. As with Parfit's Z, the area of rights any given subject commands might be smaller, but overall, the area of rights has grown. In the second part, I seek to challenge this vision and argue that many of the new rights fall into inanimate subjects that are uniquely incapable to sense any justice or injustice. The calculus of those appealing to the better angles of our nature or to the merits of factfulness is misguided in ways that accelerate our decent towards the repugnancy – whether it is in terms of population ethics or rights. The gears of modernity and liberalism are not churning towards greater bliss but towards growing repugnancy: we have more of everything, but less of what matters. More calories, but less nutrition, less poor people, but more poverty, more laws, but less rights.

5.3 Conclusion: a theory of repugnant rights

I have in this section outlined a paradox that I consider unavoidable within a liberal legal order. The paradox emerges from some of the foundational premises of that order, namely, that laws are considered good because they provide means to stabilise normative expectations as suggested by Niklas Luhmann and that the sole method of law-making is that of positive law that is enacted and enforced in a markedly impersonal fashion. These ground rules lead to legalisation of the lifeworld, a phenomenon noted already decades ago. Yet, the paradox is that with growing legalisation there are less rights for most. In this sense, I argued, the paradox follows Derek Parfit's repugnant conclusion, which is why I decided to title it a paradox of repugnant rights. In this concluding chapter of this section and of the entire first part of my dissertation, I will formulate a theory found on this paradox that explains the principles we ought to notice in practice. This is a theory that I will target with my critique in the second part of my dissertation.

I have in the previous chapters approached this problem through a theoretical lens and have sought to build the theoretical claim from bottom up. I have argued that there are certain axiomatic elements of international law without which it would be

[956] See, for example, Hans Rosling and others, *Factfulness* (Flatiron Books 2018); Steven Pinker, *The Better Angels of Our Nature* (Penguin Books 2011).

impossible to understand the present global ordering. I argued that there are three such axioms: sovereignty, rights, and property. There are other elements that are meaningful, there are other elements that are important, but no other element is axiomatic in a way that their absence would disfigure the entire image of international law. This axiomatic form, I argued, is the epistemological foundation upon which the pragmatic account I have chosen operates. Choosing a different, non-liberal mode of law, would thus provide a different outlook, but such an episteme would not be an image of the present international law: it might be that of the future or that of the past, but my critique is targeted against the present modes of law and its apparent repugnancy. Another limitation that I imposed early on to my inquiry is that no theory I could find could simultaneously be coherent and complete – I had to choose. Yet, I suggested that irrespective of the model chosen (coherence or completeness), the outcome would be the same. To illustrate this point, I chose two different theoretical viewpoints that approach the question of law—or society more in general—from these opposing, mutually exclusive ends. For the view from coherence, I used the systems theory of Niklas Luhmann, for the view from completeness, I used the philosophy of Alain Badiou. In their different ways, they both indicated that complexity cannot be avoided. In Luhmann this follows from the incessant act of drawing a distinction, in Badiou from the infinite variety of appearances that an infinite truth can have in a finite world. But both theories leave space for transcendence, something, I argue, positive law does not.

In the practical realm of impersonal law, there is no transcendent paradox or truth, which is the reason why there are but limited means to avoid the outlined paradox of repugnant rights—that is, that there is more law but less rights. To correct human law there is but humans we can have resort to, and because of the inherently benign intentions of law-making, there is little reason to oppose another law. A fix to clearly negative outcomes is amending or altering the existing law, or, alternatively, enacting new laws. Amidst all this legislation, we increasingly encounter individuals whose lives are in words of Étienne Balibar, disposable. It is a counter-intuitive outcome on an era of hyper-legality and universal human rights to encounter a growing number of human beings who are without meaningful rights. This does not mean that there would be humans who are exempt from protection of rights, who would be rightless in the strict sense. Their rights are analogous to the lives of those in Parfit's repugnant conclusions: barely worth mentioning. But as many have argued, this is still better than it used to be in the past. No longer women are property of their husbands, no longer slaves chattel belonging to paterfamilias, no longer those not sharing the Christian faith of lesser status. Everyone has rights and everyone is equal. I am simply not convinced it is enough. A better world can still be a repugnant world.

The theory of repugnant rights that I will seek to provide evidence for in the second part can be expressed in simple terms. The repugnant outcomes of rights emerge in areas where there is most law. The more there is law and the more detailed

its focus, the more likely it is that a human being is not seen as a whole, but as an aggregate of rights that pull to different directions. At its most extreme, these countless crisscrossing rights shatter the legal fiction of personhood. Once without a personhood, the parts of pieces of a human being fall into thinghood, which allows for a legal treatment quite distinct from that of persons. On a most basic level this emerges in the abandonment of those distant from us, using the traditional categories of citizenship, foreignness, and so forth. When only a few legal distinctions separate disposable human beings from dignified bearers of human rights, it is common to see a stern criticism of law. There is a sizable literature focusing on how to improve the situation of queers, refugees, subaltern, immigrants, prisoners, paperless, poor…Yet I argue that in contact with technology, the multiplication of normative orders conceals repugnant outcomes more effectively, which is the reason for a much more muted or even non-existent legal critique. We no longer notice the distinctions law creates between disposable lives and other lives, which partly naturalises this order as Balibar suggested. Simultaneously, these more nuanced violations are more often perfectly legal unlike many of the more apparent repugnant outcomes attributed to law. Thus, it is precisely on these areas of hyperlegality where the paradox of repugnant rights ought to be most apparent.

This first part of the dissertation has sought to accomplish two things. It has laid out an account of three concepts that are central for the account of law I will employ in the second part of the thesis: personhood, technology, and international law. The account provided for each is one that would be eminently recognisable to anyone working with the legal questions related to these concepts. They are, what could be called legal ground rules that allow for more detailed laws, norms, and judgments to operate. As such, their introduction in this first part provides a basis for shared understanding of these concepts that should be relatively non-controversial and non-committal. As I have been at pains to highlight, I do not necessarily share the outlined understanding of these concepts more generally, but I do presume that the account I have provided is something that is widely shared in relevant literature as I pointed out in Chapter 1 where I formulated the methodology I have employed throughout this first part of the dissertation. In a sense, the first four chapters of this first part are the shoulders of those giants I stand on. The fifth and final chapter of this first part has been dedicated to formulation of the theory of repugnant rights. A critique of this theory that emerges from an interaction of personhood, technology, and international law will be the focus of the second part of the dissertation. In short, this first part has provided the ground rules and a lens through which I shall observe their impact on the second part.

Second Part:
A Critique of Repugnant Rights

1 Introduction

'Every time we enter the outskirts of Jenjarom, especially around 6 to 7 am, the air smells like the gas exhaust from a lorry, it's especially pungent',[957] reports Ley Quan, a resident of Jenjarom in Malaysia where large quantities of plastic waste from dutiful recyclers of the global North find its permanent storage. The smell is from burnt plastic that depletes the fisheries and burns the eyes. Malaysia together with other East Asian countries are the ground zero for global waste flows and they have been so since China closed its borders for transport of new recycled waste.[958] There are several ways to backtrack the often-meandering paths the plastic waste has taken to reach Malaysia. The international legal response can be construed along the lines of the UNEP Executive Director Achim Steiner, where focus is on criminality rather than humans or nature in the receiving end. In a blockquote attributed to Steiner, he stresses how '[t]he evolution of crime, even transnational organized crime, in the waste sector is a significant threat.'[959] Alternatively, the focus can be on human and environmental damage in Malaysia and elsewhere, or on analyses how the trade of plastic is organised.[960] Or it is possible to look at the interaction of different international legal systems that lead to illegal factories burning plastic waste on a remote island.

Life of Ley Quan and many others living among waste of others was one of the many stories of law's pungent nature in the global setting that were underpinning yet unarticulated in the first part of this dissertation. They are stories that are easy to tell using many of the tropes of contemporary international law, but I felt most of them were left wanting in their description why this and countless other events felt to me so repugnant. A critical legal author would decry the distorted game between power and virtue and call for a reshuffle, a third world approach would analyse the structures and find them distorted by vestiges of colonial order, a subaltern analysis

[957] Greenpeace, *The Recycling Myth* (Greenpeace Malaysia 2018) 26.
[958] Amy L Brooks and others, 'The Chinese Import Ban and Its Impact on Global Plastic Waste Trade' (2018) 4 Science Advances 1.
[959] Achim Steiner, 'Preface' in *Waste Crime – Waste Risk* (UNEP 2015) 4.
[960] United Nations Commodity Trade Statistics Database (UNcomtrade) provides classification HS3915 for waste, parings and scrap, of plastics.

would suggest a betrayal of the local population by local elite, a positivist account would pinpoint a correct answer, and so on and so forth. They all do provide a way to perceive role of international law in enabling, regulating, justifying, supporting, or structuring the pungent smell in Jenjarom, Malaysia. Yet, I felt that none of them provided me with ways to understand why the outcome of law so predictably fell in areas that were highly regulated on multiple levels with credible enforcement mechanisms in place. Surely, there were the traditional failures of sovereignty, wars, greed, and slew of other vices that seemed to be behind most of the human misery, but then there were the lives of likes of Ley Quan who seemed to fall through the cracks of an immaculate surface. Everything was in place, but nothing seemed to work. Even though law seemed impuissant to correct these wrongs, at the very least there were accounts on the media and several NGOs working to improve the situation.

I had done some earlier research on biotechnology and information technology, which I had promised to research also in my dissertation. Unlike with my other readings in international law, on these areas of technology there were markedly few Ley Quans. Rather, even the anonymous complainants became triumphant Davids in their fight against Goliaths, as with the likes of Costeja González, whose quest to erase his past from Google searches everywhere made him eponymous with the European right to be forgotten on the digital realm.[961] The stories locally, regionally, and internationally also in biotechnology seemed to follow a similar pattern. *In vitro* fertilisation (IVF), technologies used to modify DNA, or the rights of sexual minorities to have genetic offspring all seemed to have a meaningful legal venue and effective remedies against violations whether by state, corporate bodies, or other individuals. But as I looked more closely, all these cases had an individualised legal person as their focus, even though both areas of technology had a vexed relationship with person and personal. When is data personal and what counts as a person are *the* central questions in legal responses to information technology and biotechnology respectively. It felt important to me to look first what I could find from the legal status of non-persons and non-personal, but even more to explore how law made the person and personal disappear. After all, we do not have technological capacity through synthetic biology to construe embryos or even simple cells and arguably no data is generated without some form of human interaction, wherefore both categories seemed to imply erasure of the person and the personal. It is this erasure that I shall explore on this second part of the dissertation, and through that provide an illustration of the theory of repugnant rights in action.

[961] There are numerous similar stories from the realm of biotechnology, such as the noted surrogacy cases (Baby M, Manji Yamada, etc.), uses of embryos (e.g. Evans v UK), and various aspects of intellectual property over life (Oncomouse, Oliver Brüstle, etc.).

To approach these questions, I have decided to give up on the method chosen for the first part of my dissertation. I am no longer observing law and accepting it as a semantic category upheld by those deemed legal professionals (i.e., law's internal view) that I argued is a dominant view among legal scholars and for which Luhmann provides a sophisticated model. Instead, I will use Badiou's transcendental truth as a steppingstone to justify my anger towards failures of law. Following Amia Srinivasan, I think there is aptness in anger even though it would be counterproductive response to felt injustice.[962] The prudential considerations of generations of international lawyers have not removed injustices – quite the opposite – wherefore calls for readjustment of the prizes of the system or demands to use the legal avenues seem ill-advised. I suggest that we ought to commit ourselves to a project that either gives up on some of the axiomatic forms of international law, or, alternatively, reconsiders its present commitment to positive law. To formulate such a personal project, I rely on work of Martin Hägglund and the wider debates held by those adhering to generally leftist views on international law. This category of 'left' is a markedly wide one, ranging from Marxist accounts to international law to British critical legal studies and to recent revival of American critical legal studies in a somewhat different form as law and political economy (LPE). In addition to charting out this altered view on law, I will provide a specific method – or better, a heuristic – that I will use to explore my subject matters: biotechnology and information technology. The exploration of these theoretical and methodological questions will cover the third chapter of this second part of the dissertation.

The second chapter of the second part is devoted to case studies on repugnancy. I first look more closely to the disintegrative effects of biotechnological regulation and illustrate how at some sufficient distance from the central figure of a legal person that was explored in chapter 3, the legal nexus between a person and biological matter from that person is disconnected. There are traditional examples of this, such as hair and blood as well as parts of the body that have been severed off that have been treated this way, but with biotechnology the legal cuts are much more intricate and the status of emergent entities much more volatile. At the end of the line, entities that have elsewhere been endowed with rights—even dignity—are demoted to things over which someone (and increasingly something) commands property rights, and growingly all the biological in biotechnology is transformed into digitally coded information. Starting from this digitally encoded information over individual human biology, I then present how law re-integrates information that has been disconnected from a person to generate person anew without however garnering this creation any of the rights a person would have over their own personal data. Both instances

[962] Amia Srinivasan, 'The Aptness of Anger' (2018) 26 Journal of Political Philosophy 123.

provide, I argue, a prime example from the theory of repugnant rights that can be generalised further to cover areas beyond complex setting of global technology law.

In conclusion, I will outline what such a theory would imply for law in a liberal order. In it I will look more closely those areas of international law where repugnant outcomes are recurrent and commonly recognised. I suggest that much of law's internal critique has been ineffective as it has failed to come in terms with growingly complex ground rules of international law that rely on its key contemporary axioms. As Audre Lorde argued, the master's tools will never dismantle the master's house for they narrow our vision of the possible. While law commands a power to overcome the interests of the powerful temporarily and provides a significant avenue for resistance, any victories gained by such legal means are overshadowed by the churning everyday repugnancy of (international) ground rules. Therefore, I conclude that any attempt for an immanent critique of law should either dismantle the axioms of liberal international order or prevailing positivist understanding of law. And this, curiously enough, seems to be the very thing political and legal philosophy has advocated for long. We have simply been lost in our respective attempts to amend and conserve that we have missed the forest for the trees.

2 Adjusting the gaze: technology and repugnant rights

2.1 Introduction

This chapter is devoted to a detailed analysis of two sets of global technologies, their regulation, and their impact on personhood. The technologies chosen for closer inspection are biotechnology and information technology. There are two somewhat interconnected reasons for this choice. First, is their relative import in the global trade as well as scientific endeavours. Biotechnology and its applications command a towering presence in pharmaceuticals sectors and in development of many novel treatments such as the mRNA technology used in COVID-19 vaccines. The impact of information technology is even more significant in terms of trade and economy, with many of the world's largest corporations active in the area. Second is their intimate connection to persons. While ultimately all that circulates in global trade has a more or less intimate connection to humans, many of the use cases of biotechnology and information technology are part of our everyday from food to ways we communicate.

Despite their ubiquity and intimate connection to person, there is relatively modest attention to global ramifications of their regulation to personhood. This is partly due to a bifurcation in much legal research between the positive law and its practical significance. Hence, there are accounts from normative details of, say, international standardisation relevant to information technology, but there are virtually no accounts on impact of international standards as instruments of regulation to the lives of individuals—a fact that has not been shaken even by repeated failures of standards to fulfil their designed goals. The lived experience related to regulation of these technologies has been researched, but these studies commonly focus on other questions than regulation that maintains the system. For example, a failure of a certifier to verify that production facilities of a breast implant

manufacturer are in accordance with the relevant safety standards imposed within the EU has produced a legal saga that indicates the utter disregard for the health of persons that, nonetheless, was by several courts and tribunals considered to be in accordance with the law. A detailed analysis of regulatory chains of these technologies seemed a fertile ground to assess whether the theory of repugnant rights holds true. There is abundant law but there seems to be relatively modest rights.

To direct my analysis, I employ what I title a technological gaze. As I outline more in detail in second section of the present chapter, the gaze seeks to imitate the way with which international law approaches these technologies primarily as a bundle of constituting elements that are anchored to some of the foundational – or constitutional – structures of the present international order and which further lead to more detailed regulation often passed as purely technical ordinances, which nonetheless define practice. I argue throughout that this technological gaze compartmentalises also humans these technologies are targeted for or used by. As a consequence of shoehorning individuals or parts of them into tight containers, technological gaze draws distinctions that allow parts of human to appear fully disconnected from human. Some of the familiar distinctions, such as the one between pre-embryo and embryo, reduce the other part of the distinction into things that can be treated as property. The more there are such legalised distinctions, the greater the scope of property rights at the heart of these human-facing technologies is. As I argue, the growing network of rights endowed to things enables fully legalised disregard of the rights of humans. And, unlike humans, things have a relatively free movement globally, which allows these right-bearing things to disturb rights on a global scale unlike, for example, restrictions to rights of women by Afghanistan.[963]

Once I have outlined the technological gaze, I look more in detail to two opposite directions it can lead to. When technological regulation targets humans it can either disintegrate the human into smaller segments that all are subject to unique regulation, or it can alternatively construct from disaggregated things something that resembles human in terms of rights. I call these the disintegrating gaze and re-integrative gaze respectively. In my analysis of disintegrative gaze, I focus on biotechnological regulation, and with re-integrative gaze, the focus is on information technology. While I treat them as separate categories, they commonly both occur within the very same technological regulation, and, as such, the categories serve more an analytical than a practical function. A close analysis of these technologies through the lens of

[963] This is not to suggest that one should not be concerned about rights of women in Afghanistan, quite the contrary. Rather, the argument is simply that whereas governments are local and, as such, travel only in limited fashion beyond state borders, similar limitations are not affecting technological tools that have or might have similar rights-curtailing effects.

regulation reveals the extent to which they are susceptible to the paradox of repugnant rights. I show how both tendencies (disintegrative and re-integrative) amount to virtually the same: the human at the epicentre is left with a right to consent with limited or no protection against violations of rights emanating from said consent. Also, on most situations the consent is neither free nor informed, suggesting that even the minimal autonomy right is subject to significant limitations.

2.2 Technological gaze: seeing like a gadget

In his book *Seeing like a State*, James C. Scott examines early modern statecraft and the capacity of state classifications to remake reality. His aim with the book is 'to provide a convincing account of the logic behind the failure of some of the great utopian social engineering schemes of the twentieth century.'[964] My account on how technologies interact with human beings aligns with that of Scott. Yet, where he considered authoritarian rule and a feeble civil society as necessary prerequisites for the failure of social engineering, I do not consider such requirements mandatory. Rather, the ground rules of the liberal international order together with 'administrative ordering of nature and society' and a 'high-modernist ideology' suffice, that is, a belief in simplifications as useful tools to understand the world and an ideology that highlights scientific and technical progress as measures of state. Where Scott looks at ways the early modern states accomplished such rationalisations, I assess how technological regulation reduces questions of power, discrimination, and difference into measurements and data points that provide a way to see the world through the eyes of technology—of seeing like a gadget.

The peculiar way that European science has seen persons and how that seeing has been associated with power was central to analysis of Michel Foucault. Writing about development of a specific clinical gaze in the early clinics, Foucault provided tools for many later scholars to conceptualise ways of seeing that seek to objectify their target or institute power over body.[965] While Foucault was not the first to conceptualise the gaze, his account has been highly influential from science and

[964] James C Scott, *Seeing like a State* (Yale University Press 1998) 4.

[965] See, for example, Michel Foucault, *The Birth of the Clinic* (Routledge 2003) where in preface he outlines the goal of the book as being 'about the act of seeing, the gaze.' (ix). For an early contextualisation of Foucault's gaze in wider theoretical debate on vision, see, Martin Jay, 'In the Empire of the Gaze: Foucault and the Denigration of Vision in the Twentieth-Century French Thought' in David Couzens Hoy (ed), *Foucault: A critical reader* (Blackwell 1986).

technology studies to feminism, from postphenomenology to posthumanism.[966] There has already for relatively long been a body of literature focusing on different forms of biotechnology – especially those related to different assisted modes of reproduction – employing the concept of a gaze.[967] These studies have accentuated the co-constitutive relationship between technology and those subject to it, which has underlined the non-neutrality of all technology. As such, much of what passes as studies in 'gaze' are attempts to contextualise technology: there is not technology and its consistent application to subjects and/or objects in all contexts. By contrast, the impact of technology is seen as highly context-dependent and mutable. If the scientists perceived the knowledge produced through observation and experiment to be objective because they had themselves created the experiments, a focus on the ripples such objectivising gaze on subjects and objects has been on the limelight of social studies of science. I suggest that for law both effects are true simultaneously.

The first of the two is familiar from much positive law. When describing a technological object and its area of application, law commonly refers to these objects in technical detail. The presence of provided technical details constitutes an object Y recognised by law whereas falling beyond its sphere makes it not-object Y.[968] This simplistic reduction of a world into binaries provides for easy classification of goods and services to which national, regional, and international legislation has answered. Fleur Johns describes this phenomenon in context of climate change 'as a conveyor belt operation' with little independent output from law and lawyers.[969] Technology (and science) are situated outside of law, leaving law with a sole function to encode

[966] See Anya Daly and others (eds), *Perception and the Inhuman Gaze* (Routledge 2020) for a range of philosophical perspectives on gaze. Of 'seeing culture' in (international) law, Karen Knop and others, 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style' (2012) 64 Stanford Law Review 589, 600ff.

[967] Nikolas Rose's work on biotechnology and gaze (molecular gaze) has been influential in the field, see, Nikolas Rose, *The Politics of Life Itself* (Princeton University Press 2006). An analysis of the socio-legal effects of this gaze in general, see, Alain Pottage, 'The Socio-Legal Implications of the New Biotechnologies' (2007) 3 Annual Review of Law and Social Science 321. For analyses of concrete uses of technology that come close to account presented here, see Jyotsna Agnihotri Gupta and Annemiek Richters, 'Embodied Subjects and Fragmented Objects: Women's Bodies, Assisted Reproduction Technologies and the Right to Self-Determination' (2008) 5 Journal of Bioethical Inquiry 239; Lucy van de Wiel, 'The Dataification of Reproduction: Time-Lapse Embryo Imaging and the Commercialisation of IVF' (2019) 41 Sociology of Health & Illness 193.

[968] This is reminiscent of the AI photo recognition tool developed for recognising hot dogs in the HBO series Silicon Valley. The coded application was able to recognise based on the image whether something was a hot dog or not-hot dog. In law such tasks are commonly somewhat more complex, as for example the case of definition of grey cement in the EU at the heart of the *EMC v. the Commission* indicates.

[969] Johns, *Non-Legality in International Law: Unruly Law* (n 685) 155.

this outside nomenclature using a legal form. Or as Tiina Paloniitty and Niina Kotamäki argue, the science (and technology) can become so entwined to regulation that 'one cannot decipher where science ends and regulation begins […] rendering normative decisions as technical or scientific conclusions.'[970] This mode of a technological gaze returns normative questions about right and just to questions of scientific reasonability or technological feasibility. A case in point would be the decision by the Court of Justice of the European Union in *International Stem Cell Corporation*, where the Court overruled its past understanding over the legal status of a human parthenote. The Court's argument relied on 'current scientific knowledge' according to which a parthenote is not 'capable of commencing the process of development which leads to a human being.'[971] In the case, law equalled the current scientific knowledge without any ulterior contextual considerations. As such, law was deprived partly of its independent function.[972]

The other, more contextual mode of technological gaze has a longer pedigree in law than the one deferential to science and technology. While courts at some point might have been 'urged to leave the resolution of scientific disputes to scientists'[973] there are significant swaths of technology where courts and legislators consider themselves to be the best arbitrators between science and technological progress on the one hand and other social interests and values on the other. But even in the case of a more or less direct deference to science and technology, law does contribute to the framing of questions. This framing of a question in legal terms allows technology to serve in equal measures socially progressive as well as regressive choices. Therefore, the difference between the justification endorsed by the CJEU in *International Stem Cell Corporation* and the one it chose in *Anstar* is less differentiated than it appears at first sight. In *Anstar*, the Court interpreted the scope of a technical standard and side-lined purely technical arguments in favour of a linguistic meaning – or even a form of textualism – to reach its conclusion. The difference between the two modes lies in the lexical deference court does provide to

[970] Tiina Paloniitty and Niina Kotamäki, 'Scientific and Legal Mechanisms for Addressing Model Uncertainties: Negotiating the Right Balance in Finnish Judicial Review' (2021) 33 Journal of Environmental Law 283, 284, 285.

[971] *International Stem Cell Corporation v Comptroller General of Patents, Designs and Trade Marks* [2014] ECLI:EU:C:2014:2451, §33

[972] Also, in light of the recent advances in the field, the standard imposed poses a dilemma for the patent provided, see Yanchang Wei and others, 'Viable Offspring Derived from Single Unfertilized Mammalian Oocytes' (2022) 119 Proceedings of the National Academy of Sciences e2115248119. They provide data that 'demonstrate[s] that parthenogenesis can be achieved by targeted epigenetic rewriting of multiple critical imprinting control regions' in a wide range of mammals.

[973] Jasanoff (n 943) 1.

science and technological know-how, not so much any belief in objectivity or purity of scientific knowledge in either of the two modes.

While courts might embrace either deferential or non-deferential attitude towards technology, the legislator in technical matters commonly defers to science. When regulating artificial intelligence or medical devices, the legislative structure has commonly at least two layers: the general one outlining the principles and goals of legislation and a separate technological and scientific layer that ought to fulfil the general goals. There is a mandate or a request that a committee or an agency is tasked to complete by providing scientific and technological content for values committed as part of the general legislation. The scientific and technological information provided by the committees and agencies are then induced as integral part of what law means. Although these scientific interpretations can and commonly are challenged, the definition of safety or adherence to human rights on these legal documents emanates fully from scientific knowledge and technological know-how. The chasm between the courts' legal interpretation within the legal form and legislators' encoding of science and technology creates a space where 'illegality' can persist: a technical or scientific knowledge embodied in law can be legally wrong, yet the only means to challenge it might be beyond means of those who are subject to the outcomes of these legal wrongs or the time to correct the wrongs might be inordinately long. It is such grey zones, or temporary zones of a-legality, that technological gaze summons.

An illustrative instrument highlighting this conflict between science and international law is the Sanitary and Phytosanitary Measures Agreement (SPS Agreement). The Agreement requires the use of science at the foundation of all measures adopted to promote human, animal or plant life and health by member states. These measures are public and provide a repository of knowledge on barriers to trade that are imposed by member states that may nonetheless be legal restrictions to trade, unlike direct barriers to trade, such as, high tariffs and discriminatory treatment. By imposing such science-based (or technology based as in TBT Agreement) requirements to protect health while fostering trade, the system can achieve double goal of pre-empting most legal disputes and protecting domestic regulatory capacity.[974] These science-based measures have commonly been treated as clearly distinct from non-science-based measures outlined in the SPS Agreement, such as those seeking to minimise restrictions to trade.[975] Thus, a common form of a

[974] Of such a disinfectant quality of SPS and TBT Agreements and their contribution to transparency at the WTO, see Marianna Karttunen, *Transparency in the WTO SPS and TBT Agreements* (Cambridge University Press 2020).

[975] Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (Oxford University Press 2009) 81, 139.

dispute between states has been whether the scientific evidence provided by a state does promote one of the outlined goals of the SPS Agreement or whether it creates an undue restriction to trade.[976] It is an exemplary of the tension between the technological gaze and its context of application: the objectifying technological gaze may justify domestic law, or it might not – there is simply no way of saying based on the supposedly decisive scientific and technological knowledge.

A dispute between South Korea and Japan on levels of radiation in fishery products clearly shows how the objective measures created by science and technology elide into questions of potential that are more or less murky when adjudicated.[977] The case, *Korea – Radionuclides*, is about an import ban imposed by Korea on Japanese fishery products from eight prefectures in the aftermath of the 2011 Fukushima accident.[978] At dispute were whether the restrictions imposed by Korea were concomitant with those outlined in the SPS Agreement, especially the on-going restrictions after the levels of radionuclides had fallen below the threshold levels set by Korea and recommended by the Codex Alimentarius Commission. The regulatory strategy to rely on technology and science had produced clear-cut rules (for example, the amount of caesium in fishery products not exceeding 100 Bq/kg), the legal analysis of these clear-cut rules before a court or a tribunal did not resemble a binary choice between fulfilling or failing to fulfil the criteria. As the WTO's Appellate Body suggests in the case, the earlier Panel decision had erred on the matter for conducting a binary assessment on measurements rather than perceiving them as degrees in a more nuanced risk analysis. In the Appellate Body's treatment, the exact figures produced by science are transformed into matters of degree, of potentiality. Such complexity stems equally much from science and technology, but the fulfilment of law's Luhmannian function of stabilising expectations requires normative exactitude that may on case-by-case basis be adjudicated in light of contextual cues. A problem from the point of view of those subject to norms produced through a technological gaze on the world lies in the normative force of defaults: the limit imposed, in this case, by the Codex Alimentarius creates a

[976] See, for example, World Trade Organization, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Report of the Panel*, 13 February 1998, WT/DS26/R, WT/DS48/R, as modified by the *Report of the Appellate Body*, WT/DS26/AB/R, WT/DS48/AB/R.

[977] From the case in general and its impact on SPS Agreement in particular, see, Ching-Fu Lin and Yoshiko Naiki, 'An SPS Dispute without Science? The Fukushima Case and the Dichotomy of Science/Non-Science Obligations under the SPS Agreement' (2022) 33 European Journal of International Law 651.

[978] World Trade Organization, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides (Korea – Radionuclides) – Report of the Panel*, WT/DS495/R, as modified by the *Report of the Appellate Body*, 26 April 2019, WT/DS495/AB/R.

presumption of health, safety, and security. This presumption may be overturned, but only after a challenge that is time-consuming, expensive, and subject to rigorous standing requirements.

Thus, seeing law like a gadget produces a normative system that, in theory, remains anchored to the pragmatic body of legal interpretation. In essence, then, there is little that makes the technological or scientific norms embedded in law any different from, say, rules embedded in a Criminal Code. Both create clear distinctions ('use of the following substances in production animals is forbidden' / 'a person who kills another shall be sentenced for manslaughter') that carry legally significant consequences.[979] What marks the difference between legal norms for much technology from that of Criminal Code is the granularity or subtlety of distinctions and their apparently binary nature. This creates more nuanced zones of legality and/or illegality. Thus, if a person for example in Finland kills another the act is either a manslaughter, a murder, a killing, an infanticide, or a negligent homicide depending on the circumstances. If, however, one uses a substance that promotes the growth of a production animal, but that substance does not fall within the enumerated list provided in government's ordinance on the matter, there are no apparent legal consequences. A court might later decide that such an alternative substance was nonetheless implied within the ordinance (i.e., reading science and technology like *Anstar*), but for most technological or scientific classifications such challenge is highly unlikely. Therefore, these exceedingly granular classifications act as if they were content of law, even if there were open texture goals that the ordinance ought to fulfil that might ultimately indicate a different reading on the law of the land. This ultimate point is seldom reached.

What then is referred to as a technological gaze? At the most foundational level, I am referring to an idea Martin Heidegger traces back to Aristotle and Plato of technology as 'a way of revealing' and as a 'mode of revealing', of '[t]echnology com[ing] to presence in the realm where revealing and unconcealment take place, where *alētheia*, truth, happens.'[980] According to Heidegger, such understanding of technology bars a more unmediated or 'more original revealing'. This in my understanding of law's technological gaze implies that the gaze sets our focus on the technological divisions rather than the underlying human interest.[981] As such, the

[979] Valtioneuvoston asetus eräiden lääkeaineiden käytön kieltämisestä eläimille (1054/2014) section 5 [translation TS]; Criminal Code of Finland (39/1889) chapter 21, section 1.

[980] Martin Heidegger, *The Question Concerning Technology and Other Essays* (Garland 1977) 13.

[981] Despite reference to 'law' as an actor here it acts here merely as a shorthand. I am under no illusion that law does not have an independent agency and that the way legislation and other norms emerge is a thoroughly collective human action. That law has a

gaze reverses the role between a person and a thing, where legal acts derive from our technological apparatus and are targeted towards our human person rather than vice versa and closes philosophy in a sense.[982] This reversal is most apparent in discussions on human reproduction and the impact technological apparatus has had in framing of salient questions. For example, the recent wave of restrictive abortion laws in various states of the United States indicate a willingness to deviate from long-standing common law standard of quickening to a vision enabled by medical technologies. Central to a question for legality of abortion is no longer something others than the gestating person can observe with human faculties, but a specific technological gaze that enables us to attribute signs of independent life to an entity in the uterus of the pregnant person. Law's focus is on a technologically mediated and defined objects (such as 'fetal heartbeat'[983]) that are used to impose restrictions on rights of pregnant persons. The technologically defined object ('fetal heartbeat') conditions extent of rights over one's own body ('person').

But unlike Heidegger, I am not in search of an essence to technological but rather its contingent manifestations. That same technologies and their like uses do not summon similar legal consequences everywhere is considered foundational for the emergence of the kind of repugnancy I am charting. As the technologies travel with relative ease everywhere, they enable a search for a jurisdiction where technological gaze formulates sought after outcomes. It is a form of regulatory arbitrage, but one that also allows individuals to participate. A case in point is commercial gestational surrogacy, which is to a large extent barred within the European Union due to concerns over exploitation and human dignity. At the same time, the European human rights system mandates states to accept children born out of surrogacy as legal offspring of those having recourse to surrogacy arrangements. Thus, the same technology that is widely used, for example, in Finland to fertilise embryos prevents their implantation to a surrogate, while in Georgia the technology enables the creation of the legal object of a surrogate. These differing statuses seldom surface, yet they are deeply consequential when they do. In 2022, Russia's illegal war forced millions of Ukrainians to either flee from their homes and become internally

particular way of making technology emerge is the wider claim and I seek to make it here without reference to any particular legislator or norm-giver but rather as a common trait for much of technological regulation. As such, it is not an empirical claim based on reading vast amounts of law defined as technological, but a theoretical claim that intends to explain something 'based on general principles independent of the thing to be explained.'

[982] A staunch critique of this Heideggerian reading of technology is well-captured in Badiou, *Manifesto for Philosophy* (n 902) ch 5.

[983] See for example, *An act relating to abortion, including abortions after detection of an unborn child's heartbeat; authorizing a private civil right of action*, State of Texas, 87(R) S. B. 8, https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00008F.pdf

displaced persons or refugees in the neighbouring countries.[984] Among these displaced persons were many surrogates who, as Julia Pascual writes, 'se retrouvent face à un dilemme terrible' between protecting their life or protecting their surrogate status.[985] Moving across the border to Poland would render their status that of an expectant mother rather than a surrogate carrying a child of someone else. It is such local contingencies that I consider foundational for the technological gaze.

In brief, I argue in more detail in the following subchapters that a technological gaze places things at the centre of legal relations, reducing persons to what Heidegger called a standing reserve for technology.[986] In terms of international law, this phenomenon occurs due to contingency of local responses to specific technologies. I look for two different legal strategies employed to reach these outcomes: disintegration and re-integration. These strategies approach the natural person from different vantage points, but both with the goal of disconnecting legal person from human and fundamental rights they are entitled to. To reach this goal, a person can be legally either dissected into smaller segments that after several legal distinctions loses its anchoring to personhood (i.e., a disintegration) or a verisimilitude of them can be reconstructed that carries legally relevant repercussions for a person on whose image it is created (i.e., a re-integration). They are both mediated by technologies and, as such, fall within the more encompassing technological gaze outlined above. I attribute a specific technology for each process to retain the technological background throughout. I analyse disintegration through biotechnology and re-integration through information technology, but these choices are not meant to indicate that these technologies are the only ones creating such

[984] There are few sensible concepts to capture the sense of senselessness of Russia's bellicosity of recent decades. Not only are these wars 'illegal' in the sense of being in contravention of the UN Charter but also in terms of being waged using illegal means of warfare, using excessive amounts of force, failing to establish distinctions between civilians and combatants, etc. Russia's actions also embody imperialism in the very original sense of the term, which undermines the core tenet of international order, namely the sovereign equality. Thus, in search of a better word, I refer to this insanity as an 'illegal war' albeit it captures but vaguely the scale of this dehumanising worldview deployed selectively in the post-Soviet space since the 1990s.

[985] Julia Pascual, 'Des mères porteuses ukrainiennes prises au piège de la guerre', *Le Monde* (24 April 2022) <https://www.lemonde.fr/m-le-mag/article/2022/04/24/des-meres-porteuses-ukrainiennes-prises-au-piege-de-la-guerre_6123417_4500055.html> accessed 15 August 2023.

[986] Heidegger's views on technology have been subject to extensive commentary and it has been used also to analyse some of those technologies and concerns that are explored here. For such, see, Graham Harman, 'Technology, Objects and Things in Heidegger' (2010) 34 Cambridge Journal of Economics 17; Pablo Schyfter, 'Standing Reserves of Function: A Heideggerian Reading of Synthetic Biology' (2012) 25 Philosophy & Technology 199.

outcomes or that they would be only able to produce effects towards either disintegration or re-integration. Rather, they indicate a common feature of technological regulation that, I argue, could be proven with any set of technologies.

2.3 Disintegrating gaze

At the heart of biotechnology rests the idea of commonality, of a shared condition of all things living that is minimally signalled in the DNA double helix. Outside this universal aspiration of biotechnology, there would be little to be gained by assessing its use. All biomedical interventions would account only for peeks in the unique constitution of an entity, never an example of a common character shared by all those bearing similar, universal constitutive materials. Therefore, the most lauded public display of biotechnology, the Human Genome Project, was seen charting a map of common humanity rather than a map of those individuals who had given their biological material for the analysis. There was a firm belief that all of humanity was virtually the same at the genetic level, which in strictly mathematical terms obviously was true. This however betrayed the later scientific and legal attention. Despite the vast communality, academic and legislative attention focused on the 0.1% of the sequence that differed between individuals. Herein lies the seed also for the disintegrating force of biotechnology that affects in equal measure biotechnological interventions targeting humans, animals, or plants. In the following I focus on human-facing impacts of biotechnology and its applications.[987]

The mainstay of the technological interface for much legal work on biotechnology derives from technological developments predating the postgenomic era. The assisted reproductive technologies (ARTs), most notably early forms of *in vitro* fertilisation, garnered extensive legal attention in many jurisdictions that provided early access to them.[988] As the cryopreservation of embryos and their

[987] A focus, for example, on plants would with high likelihood result into the same human-facing outcomes. Proprietary seeds for food plants as well as intellectual property rules on crop varieties have been a driving force behind plant monocultures, farmer poverty, and food insecurity in many places. The prevalence on the 'green revolution' to rely on technologies to increase food production with little attention to nutritional needs or distribution of food has received increased attention in recent years. See, for example, Krishna Bahadur Kc and others, 'When Too Much Isn't Enough: Does Current Food Production Meet Global Nutritional Needs?' (2018) 13 PLOS ONE e0205683.

[988] See, for example, Dennis Flannery and others, 'Test Tube Babies: Legal Issue Raised by in Vitro Fertilization' (1978) 67 Georgetown Law Journal 1295; Michèle Rivet, 'Quand La Médecine Intervient Dans La Genèse de La Conception, Que Fait Le Droit?' (1976) 6 Revue de droit de l'universite de Sherbrooke 199.

diagnosis advanced, the questions over 'designer babies' and a right to a healthy child were at the forefront of the legal debates surrounding these technological interfaces. Simultaneously, as the law addressed concerns on possibilities to contract, inherit, or remain liable over damage to stored embryos and gametes, the comparably ancient legal question on property in the body re-surfaced with a twist. As fertilised human embryos were used for procreative purposes, was the embryo a part of human body of the adults who donned the gametes or a new body belonging to a potential-human-being. These and other questions raised by biotechnology called for immediate legal answers that have become relatively consolidated over time. Yet, still after decades of debate, the matter remains contested, albeit there appears to be a consensus that limitations to treatment of 'body' as a raw material for biotechnology is a global, even if highly contingent phenomenon.[989]

A case in point from this contingency is the regulation over fertilised human embryos as emanations of humanity. In a minimal sense, an embryo is an embryo, and the legal definition thereof commonly derives from the standing definition provided by the scientific community.[990] While accepting such minimal understanding of embryo, the legal debate over embryos in most jurisdictions revolves around questions of morality and duty towards the uniqueness of each embryo as a potential human. This is a wider problem of legal encoding of concepts, as such legal concepts are bound to curtail the existing plurality of valuations to legally more manageable bivalence.[991] It results into a legal confusion when a singular legal definition of human embryo is employed for a wide range of rules and regulations that cover different (bio)technological uses of embryos. This confusion may emerge due to re-adjustment of legal understanding of biotechnology that

[989] Anne Phillips, *Our Bodies, Whose Property?* (Princeton University Press 2013) 9. A more foundational critique on the epistemological foundations of science and its vision of (female) body, see, Hilary Rose, 'Hand, Brain, and Heart: A Feminist Epistemology for the Natural Sciences' (1983) 9 Signs: Journal of Women in Culture and Society 73.

[990] This understanding can readily be criticised for essentialising a community of scientists that is likely equally heterogenous as that of international lawyers, but as briefly alluded above, such conceptualisation of science and scientists is a staple in much of technology regulation. See *supra* on shifting definition of human embryo before the Court of Justice of the European Union.

[991] Ex analogy to an argument made by Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 Modern Law Review 10, 12 on fiction of woman in the law failing to capture the plurality of what women stand for. For conceptual contestation before courts in biotechnology, see, for example, Julieta Lemaitre and Rachel Sieder, 'The Moderating Influence of International Courts on Social Movements: Evidence from the IVF Case against Costa Rica' (*Health and human rights journal*, 6 June 2017) <https://www.hhrjournal.org/2017/06/the-moderating-influence-of-international-courts-on-social-movements-evidence-from-the-ivf-case-against-costa-rica/> accessed 15 August 2023.

provides an alternate meaning to the previously codified understanding of the temporality and materiality of the legal object. An example from such re-adjustment is the Italian *Legge 40/2004*[992] on medically assisted procreation, which barred scientific experimentation on and limited access to cryopreservation of embryos.[993] This change did not however create a solution to already existing frozen embryos, but rather prevented their use for any other than for originally intended purposes. A donation for scientific use was barred as such uses were considered an affront to human dignity, wherefore many frozen embryos could no longer be used for anything, nor could they be destroyed. In strictly legal terms, the change was like any other change of legislation, but the new legal understanding of the objects left them lingering in a terrain of legal non-existence. In Italy, the change led eventually to an act of annulment by the Constitutional Court as Legge 40/2004 was seen to violate rights of those suffering from involuntary infertility.[994]

There is however nothing in the nature of these biotechnological rules that would suggest predictable outcomes that would align with a promissory reading of human rights. This is commonly reflected in the rules governing uses of fertilised human embryos by single parents, sexual minorities, or those seeking gestational surrogacy. While such restrictions are common, they are seldom as openly argued as in China. According to Lei Zhu, one of the main reasons for limiting access of single women to ART is that according to dictates of public interest 'childbirth outside marriage is regarded as illegitimate.'[995] Similar restrictions are a staple throughout the globe and they suggest that even if rules governing uses of human embryos are relatively lax or even non-existent, they do uphold a vision of a 'public interest' that de facto curtail liberties of minorities. While similar public interest restrictions are commonplace in legislation more in general, the difference between these and biotechnological regulation rests in the ways with which those restrictions are imposed. For example, in Finland the relevant legislation from 2007 allows for provision of ARTs to single women and women couples, yet the actual decision on the availability of those services was made in a meeting of chief physicians of healthcare districts, which prevented access to such services in public healthcare. In 2019, after several

[992] Legge 19 febbraio 2004 n. 40 "Norme in materia di procreazione medicalmente assistita", Gazzetta Ufficiale n. 45 del 24 febbraio 2004.

[993] A summary of many of the court cases and issues with said law is Vittoria Masotti and others, 'The Law on Artificial Insemination: An Italian Anomaly' (2017) 88 Acta Biomedica 403.

[994] For context of decision, see, Giuseppe Benagiano and others, 'Italian Constitutional Court Removes the Prohibition on Gamete Donation in Italy' (2014) 29 Reproductive BioMedicine Online 662. See, also, Corte Costituzionale, Sentenza 162/2004, ECLI:IT:COST:2014:162.

[995] Lei Zhu, 'Procreative Rights Denied? Access to Assisted Reproduction Technologies by Single Women in China' (2021) 8 Journal of Law and the Biosciences 1, 5.

complaints and more than a decade after entering into force of relevant legislation, the chief physicians promised to amend the rules and allow single women to receive treatment they were legally entitled to.[996] Neither the old nor the new rules are publicly available, and as is mentioned in one of the many cases concerning the matter, the chief physicians considered it not medically necessary to provide fertility treatments to same sex couples, arguing for the very same illegitimacy of same sex couples as the openly outlined Chinese family policy. That this all occurs at the level of professional practices and codes merely conceals this policy and leaves them largely out of democratic checks and balances.

Such ossification or sedimentation of professional codes of conduct into legally binding norms is a common feature on much of biotechnological regulation. These professional codes are found through introspection within the profession to provide it with a coherence as a practice, rather than through questioning of the valance of the prevailing practice.[997] Thus, for example, research on early human development focused on embryos younger than 14-days of age, which then was transformed into a legal category as a sign of restraint by the professional community. The fact that the same community for the most part lacked capacity to sustain the embryos even close to said fourteen days rarely surfaces in the debates. With recent advances in capacity, demands for expansion of the duration for research from 14 days to 28 days have also surfaced. The main argument on these proposals has been, in a nutshell, that as the capacity improves regulation must accommodate new competences to foster innovation and serve deserving patients.[998]

The purpose of regulation here is solely a function of betterment of human lot. Who could oppose greater knowledge and cures to debilitating illnesses? What often remains unarticulated are, on the one hand, the limits on the provision of a cure, even if such was to emerge, and, on the other hand, the possible and often probable spill over of changes to another area(s) of regulation. The first of these concerns is the

[996] Yhdenvertaisuusvaltuutettu, 'Voitto yhdenvertaisuudelle – hedelmöityshoitokäytännöt muuttuvat' 11. April 2019, available at https://syrjinta.fi/-/voitto-yhdenvertaisuudelle-hedelmoityshoitokaytannot-muuttuvat. This development had been predated by a decision by the non-discrimination ombudsman (dnro 80/2015 of 15.12.2016). The decision was vacated by the Supreme Administrative Court (ECLI:FI:KHO:2020:159 & ECLI:FI:KHO:2020:160) for four out of five defendants.

[997] For a particularly potent formulation of encoding the practice are principles of health care ethics, most canonically encoded in JF Childress and TL Beauchamp, *Principles of Biomedical Ethics* (7th edition, Oxford University Press 2013). For a personal recollection of the process, see TL Beauchamp, 'The "Four Principles" Approach to Health Care Ethics' in RE Ashcroft and others (eds), *Principles of Health Care Ethics* (2nd edition, John Wiley & Sons 2007).

[998] See John B Appleby and Annelien L Bredenoord, 'Should the 14-day Rule for Embryo Research Become the 28-day Rule?' (2018) 10 EMBO Mol Med.

rather mundane observation that even the first-generation ARTs remain largely beyond the reach of most, even within the high-income countries. In most states, access to *in vitro* fertilisation and/or pre-implementation genetic diagnosis is subject to personal funds or an insurance with coverage of ART procedures. In a world where women are pushed to hysterectomies for personal gain of doctors,[999] it remains difficult to perceive that an expansion of the regulatory limit for embryo research in a handful of affluent societies would all the sudden fulfil procreative dreams of everyone as commonly portrayed in the bioethical debate over benefits of extension of research to older embryos. Regulatorily the latter concern remains however more problematic as it feeds directly into the disintegrative regulatory logic of the biotechnology.

The logic to promote changes without consideration of possible spill-over effects is often simple, even simplistic. A bioethicist or a medical researcher vehemently denounces all forms of slippery slope argument stemming from expansion of an element A to cover a new, promising medical technology X. For example, when assessing whether a time frame for embryo research ought to be expanded from 14 days to 28 days, the possibility for a slide on the slippery slope towards some forms of techno-fiction (say, an artificial uterus to develop embryos as in Huxley's *Brave New World*) are unwarranted. In a limited sense, such an argument often has merits: there is no reason to believe that extending research access to embryos that are not sentient would de-sensitise us for later extension to sentient foetuses. It might, but then again so could countless other decisions. But looking past the argument for slippery slope, it suffices to take a closer look of a single argument in favour of extension of the research period and its provided justification:

> Growing human embryos in culture for a short time beyond 14 days could allow researchers to gain important insights into early body plan formation and tissue specialization. Improved understanding in these areas could also help advance knowledge of certain types of birth defects and miscarriages and of how to predict which early stage in vitro fertilization (IVF) embryos are most likely to produce a successful pregnancy.[1000]

[999] Jill McGivering, 'The Indian Women Pushed into Hysterectomies', *BBC News* (2 January 2013) <https://www.bbc.com/news/magazine-21297606> accessed 15 August 2023.

[1000] J Benjamin Hurlbut and others, 'Revisiting the Warnock Rule' (2017) 35 Nature Biotechnology 11, 1029, 1030. (the quotation is from Insoo Hyun who is interviewed together with dozen or so other experts of embryo research in this feature article).

In short, given more time to research, researchers could better understand how and why miscarriages take place and how these effect on the implantation of an embryo and, hence, a successful beginning of assisted reproduction.

The problem with the presented justification lies in the presumption that solely the perceived ontological values of an embryo ought to dictate the normative response towards it.[1001] If and when the debate is circumscribed around biological qualities and medical possibilities, it is impossible to construe other than partisan and petty reasons to object expansion of biotechnological gaze into the human embryo.[1002] Here the response is bifurcated in the incommensurate realms of factual science and value-based ethics and/or politics.[1003] That the development of those beneficial medical treatments might cause increased duty to have only healthy children, as a string of wrongful birth and wrongful life claims indicate,[1004] is but one legally immediate outcome from the expansion of factual scientific accounts of human embryo. Or, that the new medical treatments might necessitate greater need for ova and, therewith, spur unhealthy markets for ova scraping in countries that gain relatively little from the medical benefits promised with extension of the research period from 14 days, while highlighting that the process of donating ovum is voluntary and subject to informed consent by all women participating.

The failure of technology to bring about egalitarian or common treatment of all humanity subject to biotechnological attention is easily discernible in many reproductive practices that have been made possible by biotechnology. A case in point is commercial gestational surrogacy, that is, carrying a child of someone else for monetary compensation. Its regulation also illustrates well of the intended and unintended effects of human embryo regulation. After all, the process of gestational surrogacy requires creation of fertilised embryo in vitro and then a separate implantation of that embryo in a person to be impregnated. How human embryos are defined and regulated defines if and how individuals can enter surrogacy contracts. Thus, there are states that prevent all forms of surrogacy, those that prevent all commercial forms of surrogacy, those that allow for commercial surrogacy, and finally those that have no regulation at all concerning surrogacies. Many of those states that prevent all forms of surrogacy consider surrogacy to be a form of exploitation that cannot be regulated to be non-exploitative. Hence, for example in

[1001] J Benjamin Hurlbut, *Experiments in Democracy: Human Embryo Research and the Politics of Bioethics* (Columbia University Press 2017) 4.

[1002] This is the argument of Appleby and Bredenoord (n 998).

[1003] A proposal for marrying the two has been recently laid out in Miranda Mourby and others, 'Biomodifying the "Natural": From Adaptive Regulation to Adaptive Societal Governance' (2022) 9 J Law Biosci.

[1004] WF Hensel, 'The Disabling Impact of Wrongful Birth and Wrongful Life Actions' (2005) 40 Harvard Civil Rights-Civil Liberties Law Review 141.

Sweden – like in Finland[1005] –, there has been a gradual move away from all forms of surrogacy. Whereas still in 2013 a medico-ethical board found overbearing reasons to align with women's right to decide over their body and therefore allow for so-called altruistic surrogacy where no money is paid to the surrogate, in a 2016 report a committee assessing all forms of ARTs said there are no ethical ways to uphold such a distinction between altruistic and commercial surrogacy.[1006] All surrogacies should be illegal as neither women nor children ought to be bought or reduced to means to someone else's ends. As Sweden's medico-ethical board noted in its comment on the 2016 report, this new stance implies that '[m]an kan enligt utredningens mening inte säkerställa att kvinnan har fattat ett självständingt beslut,'[1007] that is, that there are no means to verify whether women's decisions are genuinely free and informed. In short, the full ban on surrogacy suggests that in all circumstances surrogacy is exploitative and, as such, an affront to dignity rather than an embodiment of female autonomy.

Yet, the very same states that adhere to such an understanding of surrogacy accept surrogacy arrangements conducted elsewhere. In some of the earliest cases concerning foreign commercial surrogacy agreements and their enforcement domestically in Finland, administrative courts were contemplating on the possibility to annul the contracts and their legal outcome on basis of *ordre public* arguments.[1008] These arguments were, however, in quick order set aside as those would have led into a legal limbo for the children in question. If Finland would not grant parenthood, but the country where the surrogacy contract has been concluded recognises such contracts, the legal outcome would be a child with no parents.[1009] This has also been to a large extent the opinion of the European Court of Human Rights for as long as at least one of the intended parents in also a genetic parent for the child(ren) born

[1005] Finnish law on assisted reproduction (hedelmöityshoitolaki) bars provision of fertility treatments to a person, if there are reasonable suspicion that the child(ren) will be given to adoption (Section 8, Part 6). On legal response to foreign surrogacy contracts in Finland, see, Tuulikki Mikkola, 'Lapsi–Vanhempi-Suhteen Vahvistaminen Rajat Ylittävän Sijaissynnytysjärjestelyn Seurauksena' (2020) 118 Lakimies 200.

[1006] Statens medicinsk-etiska råd, *Assisterad befruktning – etiska aspekter* (2013) Smer rapport 2013:1; Statens offentliga utredningar, Olika vägar till föräldraskap (Stockholm 2016).

[1007] Statens medicinsk-etiska råd, 'Remissvar ang. Olika vägar till föräldraskap. SOU 2016:1 (Ert dnr S2016/01712/L2)' 14 June 2016 Dnr 1985:A/2016/23, 7

[1008] See, Mikkola (n 1005).

[1009] Such issues have emerged also in number of other states that refuse domestic surrogacy and consider recourse to foreign commercial surrogacy a violation of the public order, see in Sweden Patrik Dahlin, 'Navid och Anneli fick barn med surrogatmamma – kunde inte få hem dottern Cleo, 6 veckor', *SVT Nyheter* (25 April 2019) <https://www.svt.se/nyheter/inrikes/svenska-foraldrarna-fick-inte-ta-hem-chleo-6-veckor-gammal> accessed 15 August 2023.

out of surrogacy.[1010] Therefore, states that consider under all circumstances surrogacy to be a form of exploitation nonetheless accept children born out of such exploitative contracts by employing a form of a child's best interest assessment. It is complex overlaps like this of the seemingly clear-cut technological regulation that rest at the heart of my repugnancy thesis. A highly medico-technical argument on public interest priorities of the use of human embryos generate a space for regulatory arbitrage through technology for some. By barring uses of technology as exploitative while accepting the outcome of such uses as legitimate, states and jurisdictions like Sweden and Finland refuse to see the exploitation elsewhere and reach this outcome through a reading of human rights.

Arguably, in a pluralist globe, the understanding of exploitation in one set of states has or should not have any bearing on value choices of other states. Even if, among others, Finland and Sweden were to assess all forms of surrogacy exploitative, it does not imply that surrogacy in and of itself would be exploitative, but a choice over this should be made locally. The reason why in my assessment technology is an important medium of repugnancy is associated precisely to this local choice. After all, if the society at large opposes (or does not need) something, it is unlikely to support development of means to achieve that which it opposes (or does not need). Yet, the contemporary ease of access to technologies globally means that such technological capacity can be easily imported to places that have found no particular use to such technologies in the past and therefore are largely indifferent to their use. This indifference does not imply acceptance (or refusal) to the use of said technologies, but rather a total inexistence of rules and regulations on the matter. Surrogacy provides a clear example of this. Many states that have acted as hubs of commercial surrogacy have initially been lacking rules and regulation. Thus, for example a Georgian company narrates its own history as also the history of surrogacy in the Caucasian country. It writes on its website how the whole concept of surrogate mother was 'practically unknown' until the year 2000 and how everything started 'by our initiative directly' with an active support of the Ministry of Health.[1011] Technology and those willing to use it commonly drive the narrative rather than any

[1010] Court's decisions have been extensively commented in research. A summary of the case law and its evolution is Lydia Bracken, 'Cross-Border Surrogacy before the European Court of Human Rights: Analysis of Valdís Fjölnisdóttir and Others v Iceland' (2021) 29 European Journal of Health Law 194. For a critical uptake of the chosen approach as enabling 'system shopping', see Máire Ní Shúilleabháin, 'Surrogacy, System Shopping, and Article 8 of the European Convention on Human Rights' (2019) 33 International Journal of Law, Policy and the Family 104.

[1011] 'Our History' (*Georgian-British Centre for Donation and Reproduction*, 2020) <https://surrogacy.ge/en/about/history> accessed 15 August 2023.

idea of a pluralist cultural debate entertained in wildly different fashion the globe over.

For my argument, however, it is relatively insignificant whether Georgians, Ukrainians, or Indians consider surrogacy inherently exploitative or not, as little as it matters that Finns and Swedes seemingly do think it is. Of focus are the intricate technological rules and regulations that make treatment of humans in one form or another to appear natural. That it occasionally leads to eminently repugnant outcomes is, obviously, but one among the many possible consequences. The repugnant part of this order rests not with the prevalence of repugnant outcomes, but on the fact that when repugnant outcomes occur there are no immediate norms that could be challenged. That among the sea of legal rules all rights of an individual have been contracted out, and only legal routes that remain are bound to things that carry out the negative outcomes, not on the persons facing those outcomes. It is on this minimal understanding that humans are disposable or become a standing-reserve for technologies. That a choice by the chief physicians in Finland on medical priorities of the assisted reproduction might lead to a death of a surrogate in India or to a 'terrible dilemma' between protecting oneself from war or facing a life with someone else's child are for the most part ironed out of existence. A death of a surrogate is a natural risk that is associated with all pregnancies, and a curtailment of freedom of movement of a surrogate is a consequence of contractual obligations and state sovereignty. In strictly legal terms, these are most ordinary, everyday events.

But behind the ordinariness of these events is an unordinary number of legal instruments.[1012] These legal instruments are difficult to discern as they are associated with things rather than with individual persons or subjects of international law that have been the more common areas of interest of international law. Among this plenitude of legal instruments, the focus in legal literature has been chiefly on person-to-person or person-to-business relationships as well as on different regulatory approaches chosen by different states. Thus, there is a substantial amount of research on different forms of liability of ART clinics, of legal consequences of actions of parties that fall beyond liability regimes, as well as assessment of different

[1012] An example from some of the rules, norms, and regulations that go into making an IVF practice can be glimpsed from European Commission, 'Guidelines for conformity assessment of *In Vitro* Fertilisation (IVF) and Assisted Reproduction Technologies (ART) products', January 2012, MEDDEV 2.2/4. Guidelines outline dozens of standards, other guidelines, procedures, and primary legislation that an IVF or ART product ought to fulfill. A full IVF cycle requires several products and facilities, multiplying this number.

legislative policies chosen at a national level by different states.[1013] But there is notably less legal attention to technological interfaces that enable these complex choreographies of procreation. Questions concerning, for example, how technologies used to carry out forced abortion clauses are regulated or how state-of-the-art medical devices end up in states that otherwise provide no access to such services, remain often unanswered.

Yet, it is only through the presence of these technologies that any of those detailed contractual clauses governing over the relationship between the intended parents and the surrogate makes sense. A common industry practice is to provide regular medical check-ups for the surrogate and to pass that information to intended parents. The contrast with health care provided to other pregnant persons in same state is often stark. Thus, while a Georgian surrogacy clinic promises to intended parents that '[t]he surrogates undertake regular, at least monthly, pre-natal check-ups involving blood and urine testing, ultra-sounds, psychological and general medical and welfare checks,'[1014] both quantitative and qualitative studies on the causes of high maternal mortality rate in Georgia have found out the pre- and post-natal care to be insufficient, expensive, and unprofessional.[1015] And further still, '[b]oth in rural and urban areas, good quality medical equipment seems to be frequently unavailable.'[1016] A mortality rate around twice as high as in the neighbouring countries and three times that of the Europe is obviously due to multiple causes, but technologies are important enough to factor in both as negative and positive reasons for maternal health and welfare.

In short, the state-of-the-art medical facilities that host the surrogates are a necessary condition for the existence of surrogacy services. Such facilities are to a large extent missing for everyone but the affluent foreign clients and surrogates in

[1013] From the extensive literature, see, Hillary L Berk, 'Savvy Surrogates and Rock Star Parents' (2020) 45 Law & Social Inquiry 398; Deborah L Forman, 'Abortion Clauses in Surrogacy Contracts: Insights from a Case Study' (2015) 49 Family Law Quarterly 29; Courtney G Joslin, 'Surrogacy and the Politcs of Pregnancy' (2020) 14 Harvard Law & Policy Review 365; Katherine Drabiak-Syed, 'Currents in Contemporary Bioethics: Waiving Informed Consent to Prenatal Screening and Diagnosis? Problems with Paradoxical Negotiation in Surrogacy Contracts' (2011) 39 Journal of Law, Medicine & Ethics 559.

[1014] 'Surrogacy in Georgia' (*Global Surrogacy*, no date) <https://globalsurrogacy.baby/surrogacy-countries/georgia/> accessed 15 August 2023.

[1015] Elina Miteniece and others, 'Barriers to Accessing Adequate Maternal Care in Georgia: A Qualitative Study' (2018) 18 BMC Health Services Research 631.

[1016] ibid 10.

many of the central hubs of gestational surrogacy.[1017] Yet, there is an odd lacuna in legal scholarship on gestational surrogacy on regulation of these technologies that constitute the only meaningful material backdrop for the whole of gestational surrogacy. Most accounts do not, for example, cover rules governing trade in services, intellectual property, or certification schemes of medical facilities and equipment. These rules nonetheless constitute a core for meaningful provision of health services. Before there can exist an abandoned child, a contested right to family life, or a contractual liability of a clinic on storage of frozen embryos, the detailed and technical rules on services and technological objects must be in place. These technical rules provide a significant regulatory shelter against claims of violation. For example, a certified medical facility can refer to its certification as a shield against claims for damages to health and welfare of the pregnant person that are deemed typical for pregnancy, even if those would be life-altering, life-threatening, or lethal. In a sense, much of research on transnational surrogacy anchors discussion on the prevailing notion of individual autonomy and regulation of technology. It fixes the objects of inquiry as if they were natural categories rather than outcome of intricate technological rules and regulations that specify and classify those objects.[1018]

The silence over technology and the prevailing model of liberal autonomy obscures these implicit arguments in much legal literature and case law on transnational surrogacy. These virtually universally recognised background assumptions are seldom questioned. It might be that there is nothing to question in the model of autonomy or in that of technological regulation, but as unanalysed assumptions their impact on rights—and personhood—of surrogates, children born out of surrogacy, and others remains for the most part concealed. Yet, as I indicated in earlier chapter on technology, much that passes as regulation of technology is a

[1017] To an extent even the U.S. could be classed here. While there is no shortage of state-of-the-art facilities in the country to serve the general population, the maternal mortality rates are significantly higher than most comparable countries, and there is a marked difference in outcomes based on socio-economic factors, such as, wealth and race. For a survey on these disparities, Gopal K Singh and Hyunjung Lee, 'Trends and Racial/Ethnic, Socioeconomic, and Geographic Disparities in Maternal Mortality from Indirect Obstetric Causes in the United States, 1999-2017' (2021) 10 International Journal of Maternal and Child Health and AIDS 43.

[1018] See, however, Sonja van Wichelen, 'Law as Antikinship: The Colonial Present in Global Surrogacy' (2022) 8 Catalyst 1. Van Wichelen analyses the impact a possible future harmonisation of private international law on surrogacy would have. She suggests that while such harmonisation would provide transparency for those in Global North it would be force formalism elsewhere that would not be followed. While she does not analyse technological regulation as such, she points to the fact that this new transparency through formalism would carry over values and norms of the Global North.

form of ritual that shelters the manufacturers of technology and certified providers of services from liability. As such, these technological rules are incapable to address any of the profound ethical questions associated with the use of said technologies. Their function is to define a product or a service, not answer the question whether adherence to technical specifications of a technological device ought to shield a provider of commercial surrogacy from responsibility and/or liability from the standard-abiding use of technology that nonetheless might prove lethal. They are also markedly practical instruments meant for use to provide legal and technical certainty over the nature of objects. The legal outcome is part naturalisation of the consequences of their use (i.e., pregnancy is always a risk to the pregnant person), part legal solutionism that seeks to eradicate the most obvious shortcomings of the consequences of the use of technology without addressing concerns emanating from technology.

It is this pushing aside of technology and (vast) industrial undertakings that produce it (and autonomy of the individual) that truncates the foundational assumptions underpinning regulation of gestational surrogacy. It feeds to perception of gestational surrogacy as another form of contractual freedom all individuals enjoy. Such understanding of the role of technology in surrogacy has a profound impact on the interests and rights that end up being protected. The foremost interest secured is what Robin West calls intentional procreation—that is, a liberty to choose if, how, and when to procreate.[1019] The rights protected are associated with failures to uphold such intentions—whether technological or not—and not rights that are jeopardised by upholding them. Thus, gestational surrogacy contracts commonly stipulate on consequences to surrogate if they fail to abstain from substance use, miss an appointment with medical practitioner, or even fail to communicate with intended parents during pregnancy. Any harm caused by, say, caesarean section, delivery, complications, or possible miscarriage to the surrogate are left to insurers if mentioned at all. These harms are beyond the contract, albeit they would not exist without such contract. Yet, due to the underpinning assumption on personal autonomy and contractual freedom, the quotidian functioning of surrogacy cannot constitute a violation of (human) rights either. This truncation of technology law out from regulation of surrogacy makes it difficult to fully understand how well hedged against any responsibility those directly benefitting from surrogacy as a commercial practice are.

[1019] Robin L West, 'Intentional Procreation' (2021) 23 Journal of Contemporary Legal Issues 7. West's article is a review of Dov Fox's book *Birth Rights and Wrongs* (Oxford University Press 2019) where Fox promotes an argument in favour of liability for flaunting such procreative dreams by others. See, also, Dov Fox, 'Reproductive Negligence' (2017) 117 Columbia Law Review 149.

'Reproductive specialists are savvy enough to secure liability waivers for even implied breach,'[1020] writes Dov Fox when accounting for practices of clinical negligence in the U.S. In other jurisdictions, a liability of a healthcare provider from negligence and extensive damages have been provided from frustration of the ability to bear and to rear children, but there is a notable absence of cases involving a surrogate. Most cases that are initiated by a surrogate are related to custody of the child(ren) born rather than on questions over the health and welfare of the surrogates. This despite the fact surrogacy contracts contain stipulations that, for example, the Supreme Court of Spain considered to be treating '[t]anto la madre gestante como el niño […] como meros objetos'[1021] with extensive limitations to surrogate's everyday life for an undefined period. This recent Spanish case, like the ones before it, are related to registering of a child born through gestational surrogacy and offers no restitution for the surrogate from her treatment as a mere object. It is in a striking contrast to a decision Lady Hale provided in *Whittington Hospital NHS Trust v XX*, a UK Supreme Court case on whether general damages for pain should 'include the cost of making surrogacy arrangements with another woman to bear a child for her to bring up[.] In particular, should it include the cost of making commercial surrogacy arrangements abroad?'[1022] Lady Hale answers to these questions on the affirmative. The judgment of Lady Hale is established on an idea that the sole difference between a surrogacy contract in the UK and one in California is that the latter is enforceable while the former is not. In addition, damages awarded for commercial surrogacy in another country are possible for as long as 'the foreign country has a well-established system in which interests of all involved, the surrogate, the commissioning parents and any resulting child, are properly safeguarded.'[1023] To what extent a contract in Mexico found out to be an affront to dignity differs from one in California is ultimately a decision each jurisdiction makes independently.

What do the apparently divergent interpretations of the Spanish and the UK Supreme Court then imply for the gestational surrogacy? I see them enforcing the norm of intentional procreation outlined by Robin West. These cases spare little thought to right and interests of the surrogate beyond a notational reference to have them and the born child's rights to be respected. The different understanding of the two supreme courts on what constitutes public order locally is, then, the only

[1020] Dov Fox, 'Privatizing Procreative Liberty in the Shadow of Eugenics' (2018) 5 Journal of Law and the Biosciences 355, 363.
[1021] Tribunal Supremo, STS 1153/2022 [2022] ECLI:ES:TS:2022:1153.
[1022] United Kingdom Supreme Court, Whittington Hospital NHS Trust v XX [2020] UKSC 14 §1
[1023] ibid. §53

difference between the two decisions. As such, they do not challenge the underlying assumptions of gestational surrogacy that could alter the treatment of surrogates and children born out of surrogacy in the future. Rather, these decisions reflect what Katrina Forrester argues is a more widely felt problem of social theory shaped by the Rawlsian legacy.

> By beginning with an account of society as a game or a cooperative venture for mutual advantage, and avoiding an adequate account of the structural tendencies of capitalist society, liberal egalitarians have come erroneously to believe that the institutions their visions of justice defend and promote can satisfy their own commitments to justice and equality. This is a mistake that arises from a truncated social theory.[1024]

A fleeting attention to underlying assumptions leads to what I take to be an erroneous belief of the European supreme courts that through gradual shifts and enforcement action the exploitative practices will disappear. Particularly troublesome this belief is for its lack of attention to surrogates, if, as the courts seem to argue, their rights are what transforms an exploitative practice into an acceptable form of autonomous choice. The role of technology in this constellation is in making intentional procreation an interest to be protected by enabling complex and globe-crossing reproductive webs.

The disintegrative potential of biotechnology resides in its attentive focus on the minute differences. If within the gestational surrogacy they are embedded in the contractual language, there are other areas with a more public manifestation of these differences. At the core of the legislative approach to various formulations of biotechnology has and remains to be an attentive demarcation between the benign uses and the gross malpractice. Often the line between the two is vacillating, yet once legally established its normative force and certainty are no longer cast in doubt. The legal examples from the past decades are numerous. A line drawn between, on the one hand, a chattel-like pre-embryo and, on the other hand, an embryo older than fourteen days of development with heightened respect and rights. A federal funding embargo for creation of stem cell lines, while accepting use of existing stem cell lines. A ban on patenting naturally occurring genetic material whereas by all intents and purposes similar synthetic material remains patentable. A moratorium against altering human germline, versus replacement of embryotic mitochondrial DNA. These and numerous other definitions of the borderline between legally sanctioned interferences and illegality swirl around the concept of person. Each successive

[1024] Katrina Forrester, 'Liberalism and Social Theory after John Rawls' (2022) 44 Analyse & Kritik 1, 18.

demarcation acts as a centripetal force, throwing out parts of personhood that will remain susceptible in a newly issued legal nomenclature to be perceived as property—a thing to own rather than a person to cherish. Opposition to these novel classifications is commonly framed as conservativism or even outright discrimination against the scientific ideal of equality embodied in the promise of these newly minted technological objects.

In a sense, the closer to meaningful insights from the molecular level of humanity (or life in general) biotechnology reaches, the more it escapes from the clutches of the human container. In strictly legal terms, this distancing takes place through new classifications, definitions, and specifications. Most of these are highly technical and even those applying them commonly fail to distinguish such new legal objects. And even if application of rules is uniform locally, it takes widely divergent forms globally. Jasanoff and Metzler, building on Jasanoff's earlier work,[1025] argue that 'changes in the definition of what life is, when it begins and ends, and when it acquires or loses humanness have profound implications for a constitutional order,'[1026] explaining this global divergence in response to new technological objects through differences in constitutional orders. As indicated above through regulatory responses to (gestational) surrogacy, these constitutional differences lead to vastly divergent treatment of surrogacy. Yet, as was also apparent in the context of surrogacy, most of these 'profound implications for a constitutional order' are pointillistic rather than holistic. While a ban on surrogacy as a practice against public order is relatively common such prohibition does not have any legal effects either to foreign surrogates or children born out of surrogacy. Their life or humanness as equally much novel categories of law does not seem to carry similar profound implications for a constitutional order. Rather, they are placed in antecedent categories with which these new definitions of what life is merely intersect but never interact.

This interaction between stability and change in legal categories creates gaps where humanness is lost. Persons outside the scientifically circumscribed ideal are deemed wanting or, alternatively, that part of every human is no longer within the protective sanctuary of rights. Thus, a child born with a disability after recourse to ART is treated as defective goods for whose provision the negligent person ought to remain liable, even though those who have recourse to ARTs have a higher risk of

[1025] Sheila Jasanoff, *Designs on Nature* (Princeton University Press 2007).
[1026] Sheila Jasanoff and Ingrid Metzler, 'Borderlands of Life: IVF Embryos and the Law in the United States, United Kingdom, and Germany' (2020) 45 Science, Technology & Human Values 1001, 1005.

conceiving children with birth defects due to parental reasons.[1027] Arguably, these cases may indicate a false understanding of the non-identity problem,[1028] yet I suggest that these claims are an outcome of narrowing of the scope of personhood. Obviously, there are many parents who are willing to have any genetic offspring irrespective of the adverse health conditions. But the legal answer, even if confused and incoherent, considers a choice of non-healthy embryos for implantation as against not only child's best interest but also against society's best interest. The centripetal force of legal regulation of biotechnology throws away from the scope of personhood proper 'defective' embryos and, therethrough, 'defective' humans.

Yet, the rightlessness does not stop here. The finer the grain, the more nuanced the exclusions of persons becomes. For the biotechnological gaze, gametes and embryos constitute but a first and most visible layer of personhood to disintegrate. A second stage marks interferences to genetic constitution of the first layer. Whether through replacement of the mitochondrial DNA of an embryo—requiring two ova instead of one—or more controversial CRISPR editing of embryo's DNA, the technological more concretely interferes with personhood before there is a person. If the first layer signalled burden to female body and destruction of disabilities, the second layer disintegrates humanity into even smaller fragments. These alterations of the embryo in human populations remains largely unchartered terrain, despite the fact that already several jurisdictions approve of mitochondrial DNA transfer and there have been first, even if unapproved, CRISPR modifications on germ line cells as well.[1029] There remains sizeable uncertainty on outcomes of these transfers, yet unlike the failure to notice or medical malpractice, legally there exists no remedy against these tests. Moreover, the only 'cure' provided through for example the mitochondrial transfer is to have greater quantity of healthy embryos.[1030] To protect a non-existing right to genetic offspring, the genetic offspring born through these

[1027] Michael J Davies and others, 'Reproductive Technologies and the Risk of Birth Defects' (2012) 366 New England Journal of Medicine 1803.

[1028] IG Cohen, 'Regulating Reproduction' (2011) 96 Minnesota Law Review 423.

[1029] First regulatory changes were made in the United Kingdom, see, The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015. From the later regulatory changes elsewhere, see T Ishii and Y Hibino, 'Mitochondrial Manipulation in Fertility Clinics: Regulation and Responsibility' (2018) 5 Reproductive Biomedicine & Society Online 93. The use of CRISPR in China on twin girls in 2018 caused an uproar, some of which is charted in David Cyranoski, 'The CRISPR-Baby Scandal: What's next for Human Gene-Editing' (2019) 566 Nature 7745, 440..

[1030] On ethics of mitochondrial DNA transfers and CRISPR, Sarah Fogleman and others, 'CRISPR/Cas9 and Mitochondrial Gene Replacement Therapy: Promising Techniques and Ethical Considerations' (2016) 5 Am J Stem Cells 39; of the risks involved with mitochondrial transfers, David C Samuels and others, 'Preventing the Transmission of Pathogenic Mitochondrial DNA Mutations: Can We Achieve Long-Term Benefits from Germ-Line Gene Transfer?' (2013) 28 Hum Reprod 554.

processes is used as participants to lifelong clinical trials. The problem with these processes does not so much reside in their 'unnaturalness' or human desire to replace deities—rather, the concerns are much more mundane. They permanently and intentionally subject some persons to fulfilment of other persons' life goals, or more philosophically, their ends. Obviously, anyone who decides to have children is to some extent subjecting some future persons to untold misery,[1031] yet something seems in the legal world to move when there is an intention to introduce them with further possibilities of misery for no ethically apparent reason. Law prohibits infecting someone with a disease or illness,[1032] yet intentional negligence of these effects and promotion of innovation appears to liberate the biotechnological gaze from such legally imposed constraints.

Even further down the line, the human genome has escaped the human container through development of human-animal chimeras of various kind. Japan recently became the first country to allow for full-term development of chimeras with an intent to create animals that could function as repositories for organs to humans.[1033] As some have noted, there are apparent reasons for greater duty of care towards entities that embody parts of humanity or forms of life that are artificially created by humanity.[1034] Legally none of these concerns surface. Human being and therewith legal personhood are disembodied and with the disembodiment the rights anchored to that particular container dissipate.[1035] This is apparent in the dataification of human.[1036] It is also a realm where the information streams of biotechnological and

[1031] This is the argument of anti-natalist philosophers, such as Benatar (n 950).

[1032] See M Nowak and E McArthur, *The United Nations Convention against Torture – A Commentary* (Oxford University Press 2008) 66.

[1033] On attempts and advances to create human organs through chimeras, see Alejandro De Los Angeles and others, 'Generating Human Organs via Interspecies Chimera Formation: Advances and Barriers' (2018) 91 Yale J Biol Med 333.The Japanese guidelines, see Ministry of Education, Culture, Sports, Science and Technology (Japan), 「特定胚の取扱いに関する指針」等の全部改正について, http://www.mext.go.jp/b_menu/houdou/31/03/1413932.htm; reporting in English at 'Hybrid Embryos, Ketamine Drug and Dark Photons' (2019) 567 Nature 7747, 150. A like recommendation provided by the industry, see International Society for Stem Cell Research (ISSCR), *Guidelines for Stem Cell Research and Clinical Translation of 12 May 2016*, p. 8 (Recommendation 2.1.5.).

[1034] For creation of life, see e.g. T Douglas and others, 'Is the Creation of Artificial Life Morally Significant?' (2013) 44 Studies in History and Philosophy of Biological and Biomedical Sciences 688; for ethical concerns related to chimeras Julian Koplin and Dominic Wilkinson, 'Moral Uncertainty and the Farming of Human-Pig Chimeras' (2019) 45 Journal of Medical Ethics 440.

[1035] An argument for embodiment of personhood in the age of biotechnology, see Beers (n 250).

[1036] This realisation is not anyhow novel and is made with far greater erudition by Irma van der Ploeg, *Machine-Readable Body* (Shaker 2005).

informational gaze converge. In a sense, it is the becoming of the network or information society where the information streams effortlessly intermingle to articulate something from the undefined humanity. From the early 1990s efforts to employ artificial intelligence to recognise DNA sequence features[1037] to the present where multi-agent system 'approach proposes to capture the dynamics of individual patients, including their responses to received medications as well as their behavioural interactions within a larger societal ecosystem.'[1038] Humans have become mere data points manipulated in order to produce new types of medication, treatments, or any other promissory pasture of the future. These depersonalised repositories of humanity however are subject to notable biases that undermine their application for these coveted goals. That most DNA data is from white male populations questions the efficacy of any treatment or tool for ailments of others.[1039] A failure of a state-of-the-art treatment is never anyone's fault, even if it is based on effective erasure of most of the humanity it is supposed to serve. It is the final milepost of biotechnological gaze and its disintegrative potential.

At this final milepost, where humans are reduced to points of data that can be coded and re-coded, the re-integration of human parts into a human resembling container can commence. There has been a growing interest in recent years to technologies that would enable such material construction of humanity, most notably in the field of synthetic biology. Even though full-fledged creation of a synthetic human remains but a dream of science fiction, already for relatively long laboratories around the world have been able to create life synthetically. And quite like with stem cells and embryos in the past, the research ethical distinction between an animal test using, say, mice and humans does not translate particularly well in law. A patent application including humans would likely be found in violation of public order, but as development in science has indicated, such limitations are rarely efficient and are likely to be circumvented. Further still, as with commercial gestational surrogacy, the possibility of regulatory arbitrage and leakage of transnational governance or regulatory structures remains a possibility that thus far no global regulatory system has managed to curtail. Thus, when an Israeli company informed from its intents (and limited success with mice) in creating synthetic human embryos of up to 60

[1037] Richard J Mural and others, 'An Artificial Intelligence Approach to DNA Sequence Feature Recognition' (1992) 10 Trends in Biotechnology 66.

[1038] Pavel Hamet and Johanne Tremblay, 'Artificial Intelligence in Medicine' (2017) 69 Metabolism S36, s37.

[1039] For 'whiteness' of the available genomic data, Amy R Bentley and others, 'Diversity and Inclusion in Genomic Research: Why the Uneven Progress?' (2017) 8 J Community Genet 255; for gender bias more in medicine, K Hamberg, 'Gender Bias in Medicine' (2008) 4 Women's Health 237. Of data's overall biases against women, Caroline Perez, *Invisible Women: Exposing Data Bias in a World Designed for Men* (Vintage 2020).

days of gestation, there appears to be but limited regulatory options available.[1040] A synthetic human embryo does not fall within the protective shelter of traditional public order, wherefore patents and general IP rights over the processes of their production are possible. This allows the company to protect its processes and create a proprietary possession of human organs it intends to generate in the first phase. Harvesting synthetic human foetuses of organs might trigger some ethical concerns, but legally they are things possessed and commodities that can be sold, even if their origin lies in the long line of biotechnological disintegration of the human body.

The end of the line for the disintegration is the turn of the human condition into nothing short of an array of data entries. For legal imagination the move is a recursive sorites paradox where a paradigmatic person sheds away qualities until those qualities become unrecognisable from a thing. Unlike with other epistemological systems, it is unlikely that there are limits of the knowledgeable in the realm of law.[1041] It is possible to accurately pinpoint every transition from 'person with rights' to 'thing to be possessed'. It is possible to map the legal disintegration from personhood to thinghood under the biotechnological gaze, yet a move to opposite direction remains barred. Once an entity is disconnected from the personhood container there are no legal means to reconnect it. A parthenogenetic embryo can no longer stand for human embryo, a genome no longer belongs to anyone, a data point is personless. Re-purposing those disconnected parts for human causes transposes them into the register of property where all rights are perceived as liberties where personal freedom ought to reign supreme. The technological enables perception of these growingly small containers of 'life' in stead of a person. Therefore, the outcome of the new treatments, new medicine, new procedures, new tools is never about persons. Yet, the objective gaze of science conceals the fact that the planet contains all sorts of people who never are subject to that gaze as persons but only as things to be possessed.[1042] They will never see those new treatments, but they with high likelihood are about to carry the burden of providing it with the raw material.

[1040] See Antonio Regalado, 'This Startup Plans to Create Realistic Human Embryos' (*MIT Technology Review*, 4 August 2022) <https://www.technologyreview.com/2022/08/04/1056633/startup-wants-copy-you-embryo-organ-harvesting/> accessed 15 August 2023.

[1041] T Willamson and P Simons, 'Vagueness and Ignorance' (1992) 66 Proceedings of the Aristotelian Society 145.

[1042] Using a formulation Steven Collins from a discussion recorded in AR Peacocke and Grant Gillett (eds), *Persons & Personality* (Blackwell 1986) 96. ('It occurred to me that the planet probably contained all sorts of people who thought quite differently from the way "we" *normally* do.')

2.4 Re-integrative gaze

It is a banal observation that information technology is everywhere. It permeates everyday life in personal computers, portable, and wearable devices.[1043] And even those who do not have personal access to information technology are subject to it in public and private spaces as well as in the administration of their relationship with state, regional, and local government. To suggest that law provides an inadequate response to changes brought about by information technology to society is an equally mundane statement. Tools of information technology have transformed into extensions of human faculties, and as such there are many applications that rest beyond the purview of law. But even in a more limited sense law has been found lacking as an instrument to address societally perceived impact(s) of information technology. This is partly because of missing holistic assessment of information technology's influence on law. Rather, it is perceived as one of the locales on which events and actions occur. Consequently, all of law is also law of information technology.

The omnipresence and mundaneness of information technology has led to some unexpected legal consequences due to different logics of the 'online' and 'real' world. Hence, in Finland a district court recently heard a case on suspected incitement to hatred by a prominent politician for a text she wrote originally in 2003, which had been beyond the prescriptive period had she not maintained access to the publication online. As such, the doctrine embraced by the Finnish courts extends the temporary scope of actions to virtual perpetuity for as long as the act can be considered on-going due to its presence online, which, in terms of for example incitement to hatred, differs significantly from responsibility of printed publications.[1044] Simultaneously to a virtual suspension of the prescriptive period for prosecution, many online acts are instantaneous or nearly so, which has had an impact on everything from banking regulation to biodiversity rules.[1045]

[1043] There is for one twice the number of mobile devices to that of humans on the planet.

[1044] A summary of the legal proceedings and the process thus far is provided in Päivi Happonen, 'Helsingin käräjäoikeus hylkäsi Päivi Räsäsen syytteet kiihottamisesta kansanryhmää vastaan, "Puheet olivat osin loukkaavia, mutta eivät vihapuhetta"' (*Yle Uutiset*, 30 March 2022) <https://yle.fi/a/3-12381488> accessed 15 August 2023.

[1045] Banking regulation was an early adopter for technological rules governing the virtual disappearance of time, see, for example, Bruce Zagaris and Scott B MacDonald, 'Money Laundering, Financial Fraud, and Technology: The Perils of an Instantaneous Economy' (1993) 26 George Washington Journal of International Law & Economics 61. For risks of instant online access to illegal wildlife trade, see, for example, WWF Asia-Pacific, *Going Viral: Myanmar's Wildlife Trade Escalates Online* (WWF 2021).

The extension and contraction of legally relevant time is but one immediate outcome of information technology. Since the early days of commercial internet, there has been a concern over de-territorialisation of law that has in recent years transmuted into a concern over extraterritorial reach of some jurisdictions.[1046] From the concern over limitations to freedom of expression by the U.S. scholars to the Great Firewall of China of the noughties and from the avoidance of domestic jurisdiction through cloud storage to regulatory avoidance of cryptocurrency trade. A case in point is the long analysis on correct jurisdiction by the High Court of Justice of England and Wales in *Tulip Trading Ltd v Bitcoin Association*.[1047] The court had to assess where are assets of a company that is incorporated in the Seychelles, owned by another Seychellois company, owned by an Antiguan company whose shares are held in a trust whose trustees are an Australian citizen who has been resident in England since 2015 and his family members. Falk J concludes that she 'would have been satisfied that England is the appropriate forum for trial,'[1048] but only because no other jurisdiction had closer link to the case, not because it would be particularly evident that English law would have intimate connection either to the matter.[1049] The fact that immaterial assets held on an empty holding company allow for regulatory arbitrage is an outcome of information technology's de-territorialisation—one that supposedly international law could solve.

These concerns spurred by information technology over time and space of law have in part diverged attention away from the fact that virtually everything that is produced through use of information technology is of and about person. While writing this chapter, the Court of Justice of the European Union passed a judgment that expanded this even further. It declared that the nature of (personal) data is contextual, wherefore all data can be not only personal data but also particularly sensitive. As law is out of joint both territorially and temporally it is difficult to read the contextual cues. Thus, it is safe to assume that at least according to the European

[1046] The concern over law's reach predates widespread adoption of computers and internet by some margin. See John M Eger, 'Emerging Restrictions on Transnational Data Flows: Privacy Protection or Non-Tariff Trade Barriers?' (1978) 10 Law and Policy in International Business 1055. For extraterritoriality, see Mireille Hildebrandt, 'Extraterritorial Jurisdiction to Enforce in Cyberspace? Bodin, Schmitt, Grotius in Cyberspace' (2013) 63 University of Toronto Law Journal 196.

[1047] *Tulip Trading Ltd v Bitcoin Association* [2022] EWHC 667 (Ch)

[1048] ibid. §167

[1049] Falk J summarises this nexus to English law for the assets stemming from the fact that they are managed and controlled from England, even if '[t]he claim […] appears largely to depend on management and control having been manifested by the fact that [the claimant] and/or his wife *did not deal with* the assets, but had the ability to do so.' [§151, emphasis added]

data protection practice—one that has been widely emulated the world over—all that is produced through use and application of information technology is about a person. Yet, I argue, precisely this all-encompassing nature makes for a fertile soil to commodify person and detach person from personal in ways that lead to particularly repugnant accumulation of rights. This is what I will explore in the following through the re-integrative gaze of information technology.

A foundational legal fiction behind the re-integrative power of informational gaze is the presumption of anonymity of the data used. It is a data of no one and of everyone. Most jurisdiction around the world impose limits for the use of personal data, often following the model embraced originally in the European rules on data protection, wherefore direct use of personal data to (re-)construct a persona or an avatar for the diverse information technology applications is often considered a burden to be avoided. The supposition that data gathered from persons can be anonymised is echoed in virtually all privacy policies a user of digital services is about to read. A recurring bifurcation of data into 'personal' and 'non-personal' in these policies often belies the fact that there are no legal bases for such distinction. For relatively long, data scientists have shown the limited promise any method of anonymity may provide for a personal data dataset. From Latanya Sweeney's early evidence from the illusory anonymity of the U.S. health records, through pinpointing individuals through Netflix data releases, to recent research on mobile phone, credit card, and other datasets have conclusively shown that most anonymous data sets are not anonymous in a strong sense. In the U.S. system, the felt collapse of anonymity has amounted to numerous calls for regulatory change but led to notably little new legislation.[1050] Despite the disappearance of anonymity, the legal presumption of its existence has been upheld. In Europe, the General Data Protection Regulation (GDPR) was widely reported as a sea-change in privacy law and a markedly modern approach to data protection. I will briefly assess how anonymity of data is created within the European Union and how it contributes to masking of the personal and individual as bases for creation of impersonal synthetic persons.

Anonymous data within the European Union is defined relatively thinly. The only reference in the GDPR to anonymous data is in the recital 26:

> The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a

[1050] Paul Ohm, 'Broken Promises of Privacy' (2009) 57 UCLA Law Review 1701; Ira Rubinstein and Woodrow Hartzog, 'Anonymization and Risk' (2016) 91 Washington Law Review 703. For new legislation on state level, see California Consumer Privacy Act (2018).

> manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.

Further content on the means as of how to achieve the non-identifiability are provided in a separate opinion issued by the former Article 29 working group. According to the Opinion, even anonymous datasets may contain residual risks of reidentification, wherefore 'anonymisation should not be regarded as a one-off exercise,' but rather a continuous process.[1051] A reliance on an open-ended process carries a notable risk for adherence in the real-world scenarios of data processing, as some of the most stringent critique of the European model of data protection has pointed out.[1052] With regard to anonymous data sets or expansion of assumed consent as a justification for data processing has, in recent years, revealed their limits for the realisation or upholding of privacy and autonomy. For example, the French data protection authority's decision concerning digital advertising in real-time bidding suggests that a downstream transfer of data—a practice of virtually all websites—is antithetical to the data protection regulation.[1053] This practice continues to this day, despite a clear denouncement of its legality by a competent authority and a string of similar claims throughout the Europe.

Facing a foundational criticism on the open-endedness of its constitutive concepts, the European data protection debate has veered towards re-conceptualisations and re-imaginations over what are the actual rights being protected through data protection. Quite alike the U.S. scholarship, the EU scholarship has admitted that many of the foundational aspects of the data protection regime are little more than myths. One of these attempts has been to re-define the proper scope of the data protection from being limited to the strictly private individuals to the privacy violations emanating from bundling the individuals into shapeless and formless groups. Within the group privacy framing, of concern is no longer whether the processing itself has a valid basis or whether data is anonymous, pseudonymous, or personal.[1054] Rather, of interest are the inferences drawn from the datasets and implications those inferences have to members of the group and therethrough to individuals constituting them. For example, Sandra Wachter and

[1051] Article 29 Data Protection Working Party, *Opinion 05/2014 on Anonymisation Techniques*, 0829/14/EN adopted on 10 April 2014, 4.

[1052] Bert-Jaap Koops, 'The Trouble with European Data Protection Law' (2014) 4 International Data Privacy Law 250.

[1053] Commission Nationale de l'Informatique et des Libertés (CNIL), Décision n°MED-2018-042 of 30 October 2018 ('Vectaury').

[1054] Linnet Taylor and others, *Group Privacy: New Challenges of Data Technologies* (Springer 2017).

Brent Mittelstadt argue for a specific right to reasonable inferences to safeguard individuals from harmful effects of big data analytics.[1055] These and other re-formulations of the proper scope of data protection all suggest that, at its core, the data drawn from individuals is seldom stored in an attempt to construct a 'full picture' of an individual, but rather data is processed to construe a synthetic image of an individual to justify direct inroads to rights of individuals the synthetic images are a simulacrum of. It is not so much a failure of the law's capacity to effectively address these uses, rather the very constitution of personal life has been so profoundly transformed by the digital and online experiences that the bodily and unique anchoring of rights to a living, breathing human being seems antiquated source for legal analysis.[1056]

If and when the universalised parameters derived from the unique conditions fail systematically to notice, to follow the previous example of health, some illnesses in some populations or, alternatively, overdiagnoses them, these systemic failures are unlikely to account legally for anything. They do not constitute a case of medical malpractice as, overall, the medical outcomes might be identical or even better after the recourse to AI tools. The persons whose uniqueness never fuelled the re-integrative informational gaze are lost in a technological vortex that swirls too fast to be tractable for law or for any of the victims of the technological excess. This is the mask of humanity in the era of big data: a disaggregated array of insights that could be unearthed, while concealing that the constitutive array is partial at best. The image of human captured in big data is reminiscent of the vision Vilém Flusser had for a city, where an individual is divisible and calculable before all else. 'It is first in the city,' Flusser argues, 'that the self arises as the other of the others.' The role of an individual is to serve as a sign for otherness constituted from 'a swarm of disposable parts' that blurs the I of an individual and concretises the 'we'.[1057] But unlike Flusser's eminently emancipatory view for the city, the big data's swarm of disposable parts does not have a communality and gravitational pull like that of a city. The immateriality that is central for Flusser's imagination of a relational city as a place, is precisely the quality that allows the centripetal force of technology to elude its destructiveness. Ultimately, then, Flusser's is a world where representation rather than materiality matters, and on such world

[1055] Sandra Wachter and Brent Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) 2019 Columbia business law review 494.

[1056] Some of the concerns the new digital world creates are often addressed through a narrative set into future. For example, Hildebrandt (n 280) ch 1; Brownsword, *Law, Technology and Society: Reimagining the Regulatory Environment* (n 846) ch 1.

[1057] Vilém Flusser, 'The City as Wave-Trough in the Image-Flood' (2005) 31 Critical inquiry 320, 325.

> everything is calculated, and swarms of pointlike bits are indescribable. These can however be calculated, and the algorithms encoded into images. Thus is the world, and we within it, become indescribable, but it is calculable and because of this is capable of being represented once again.[1058]

But as with the construction of medical artificial intelligence, the informational gaze might remain immaterial, but its partial masking leaves many without a face or a persona to fall into.

That humans become mere interfaces acting on as agents or being acted upon as resources marks the penultimate form of informational gaze. In this world of Flusser's being is anodyne, yet adaptable to serve any role. There are endless masks to be worn in a city, but in Flusser's world, they are to be used to seek communality rather than division. In a more contemporary reading provided by Luciano Floridi, the immateriality of humans-as-interfaces is readjusted for the present era of political division.[1059] For Floridi, the indescribable yet calculable immateriality of 'human interface' is the primary tool of populists to wield power. They reduce politics into a game of gathering most masks and seeing individuals as mere interfaces to gather power. In a sense, while Flusser's analysis carries an emancipatory potential, Floridi considers individuals as eminently adaptable to exclusive and destructive agendas. The most potent mask in Floridi's world is a shadowy one that betrays ultimate interests of its bearer.

> Today, in a world in which citizens are seen and used as interfaces, change by stealth may be achieved by the use of political marketing itself to gain attention, approval, and votes, by using topics, policy suggestions, promises, and a rhetoric that mimic those of the polluting politicians, without any actual intention of giving real course to the corresponding actions once in power.[1060]

It is a nihilistic world of wearing a mask solely to conceive, not to participate in the city, while arguing that it is for the best of everyone. If the partial gathering of big data and conjecture of that as a whole of humanity is the dynamic of difference of the digital era, Floridi's suggestion is a digital equivalent of the civilising mission—a white man's burden of more contemporary kind.

If becoming an interface marks the penultimate stage of an informational gaze, its ultimate goal is to synthesise the person to a point where the person become a

[1058] ibid 328.
[1059] Luciano Floridi, 'Marketing as Control of Human Interfaces and Its Political Exploitation' (2019) 32 Philosophy & technology 379.
[1060] ibid 387.

mere pass-through: not a resource to ulterior goals or an agent but a message subservient to felicitous maximisation of both resources and agency of those communicating. The re-integrative synthesis leads first to Flusser's description of self as other of the others but does not stop there. It ends to a terrain best captured in Jorge Luís Borges' short story 'Everything and Nothing'

> There was no one in him; behind his face (which even in the poor paintings of the period is unlike any other) and his words, which were copious, imaginative, and emotional, there was nothing but a little chill, a dream not dreamed by anyone.[1061]

And yet, in this no one (or no thing) resides a multitude: 'Nobody was ever as many men as that man, who like the Egyptian Proteus managed to exhaust all the possible shapes of being.'[1062] Quite like Shakespeare of Borges' story, the synthetic person summoned through informational gaze is simultaneously of everything and nothing. It does not however remain neutral in its endowment of everything and nothing.

The intensity of everythingness and nothingness varies, while the extremes are often embodied in the same individual. Those who are the most surveilled remain also those whose presence can be reduced to nothingness with relative ease. The oscillation between the two poles is easily understood through the figure of a refugee. While staying in a refugee camp, every action of a refugee is monitored often with a benign goal to verify that everyone receives their fair share of scarce commodities. From traditional personal data, such as name and a country or place of origin, also diverse biometric markers are stored to ensure persistent identity of an individual for governing purposes.[1063] Simultaneously, these troves of data over everything in refugees' lives easily transform the refugees themselves into no ones if not no things. They are governable to a point where their misdeeds are punishable while their presence is negligible.[1064] This dual nature of being wholly registered and listed, while remaining invisible – and its opposite, of remaining barely registered yet highly visible – is well-captured in the stark contrast between the list of documented deaths of refugees and migrants attempting to reach Europe and the list of CEOs held accountable from the financial crisis they triggered. One of the lists runs 56 pages, the other is empty. The faultless recording in long lists desensitises from the

[1061] Jorge Luis Borges, *Everything and Nothing* (New Directions 1999) 104.
[1062] ibid 105.
[1063] For an emancipatory narrative in favour of 'digital humanitarianism', see Patrick Meier, *Digital Humanitarians* (CRC Press 2015).
[1064] From different ways to accomplish the reduction of persons into entries on a recursive list, see Fleur Johns, 'Global Governance through the Pairing of List and Algorithm' (2016) 34 Environment and Planning D: Society and Space 126.

individual suffering: a line in a list of 34,361 similar entries is inseparable from the one preceding or succeeding it.

The synthetic reconstruction of a person intensifies into a tight, almost material, knot before it surfaces for legal imagination. This entanglement of data has been a foundational image for much of the early and later discussion on data as a means of control and governance. Early on, the use of data in delivery of social security benefits was perceived to prevent bias in decision-making: having a 'complete' view of a client would enable the public officials to provide decisions informed by facts rather than superstitions. To enable such decisions, there was an acute demand for more extensive data storage and retrieval from welfare clients. In this sense, the poor were the first synthetic persons who were seen not as individuals they were but as representatives of data points of and from them that were seen representative of their 'neediness'. Hand in hand with the accumulation of data points, came guilt and criminality that was equally impersonal—even if highly personal to those losing their benefits—while enforcing the demands for greater accountability of welfare clients. This intensification of surveillance and control on poor and 'suspect' members of society is a constitutive element of the surveillant assemblage.[1065] The synthetic production of a person makes decision-making impersonal, concealing the inherent biases and pitfalls of technically codifying the lifeworld. In a nutshell, transforming everyday occurrences into data points loses, adds, and alters those occurrences. A person re-integrated from the data is, at best, a partial image, at worst, a distorted image of the person it supposedly stands for. And like the picture of Dorian Gray, the synthetic person is concealed from everyone, making it difficult to notice its possibly gruesome features.

None of these insights in the process of re-integration are particularly novel. For a long, researchers have been acutely aware from diverse forms of biases embedded in data, whether manually encoded or natively digital. Raw data is, indeed, an oxymoron.[1066] Despite the best efforts and a bulk of research, the legal process of re-integration endows the synthetically construed persons with an aura of objectivity that no personal recollection or recorded event alone would merit. A testament to this overt reliance on informational gaze as factual and penetrating to the core are more directly accessible through the failure of the system than its quotidian functioning. And there are failures aplenty. In Denmark, the police found that one in every three cases where it had used telephony metadata retained by mobile phone

[1065] Kevin D Haggerty and Richard V Ericson, 'The Surveillant Assemblage' (2000) 51 British journal of sociology 605.
[1066] Lisa Gitelman (ed), *'Raw Data' is an Oxymoron* (MIT Press 2013).

operators the legal conclusions drawn were in disagreement with the stored data;[1067] in the United Kingdom, the use of facial recognition to catch suspects has a failure rate of some 80%;[1068] or Australia's reliance on algorithms as part of its 'robo-debt' system to seek payment of overpayments failing to function as advised, leading to despair, anxiety, and economic turmoil of those most precarious in the society.[1069] These examples are but a tip of a proverbial iceberg. The might of data clouds the judgment of those using it, despite best efforts and articulate guidelines advocating against a reductive reading of humanity to dataified traces of it.

A synthetic person assembled through the re-integrative motif of an informational gaze remains at arm's length from a living person I might encounter at a grocery store. Or maybe better, it remains captive of a single role or a mask worn by that person in the grocery store, quite like me whose only access to those persons is limited to passing them and their cart. A synthetic person can be seen wearing all masks while being committed to none of them. In a sense, the multitude of persons created through the informational gaze stands for an eminently postmodern image of personhood. Lacking all unison, a synthetic person summoned through informational gaze is an embodiment of the famous 'on the internet, nobody knows you're a dog' cartoon. It has the emancipatory potential that a self-identification and non-binary identities promise, yet the legal re-integration of a synthetic person effectively curtails this promise. Not everything in law is about data, even if the lifeworld of most everyone might have shifted towards an onlife world. Adjudication—or legal gaze more in general—forces the multitude to be reduced to a single, monolithic personhood that may be fully construed using digital data, whether it is in form of a algorithmic recidivism risk or pinpointing physical presence through proxy of telephony metadata, the legal form of a synthetic person is unique and solid. That the legal gaze solely focuses on some, does not remove the potential for an instantaneous synthetic creation of others, yet the law in action tends to uphold synthetic multitude of most, while forcing a pre-defined mask on some. The re-

[1067] Peter Thomsen, 'Teleskandalen: Politiet fandt »uoverensstemmelser« i en tredjedel af sagerne' (*Berlingske.dk*, 30 June 2019) <https://www.berlingske.dk/content/item/1382801> accessed 15 August 2023.

[1068] Pete Fussey and Daragh Murray, *Independent Report on the London Metropolitan Police Service's Trial of Live Facial Recognition Technology* (University of Essex 2019).

[1069] Teresa Hinton, *Paying the Price of Welfare Reform: The Experiences of Anglicare Staff and Clients in Interacting with Centrelink* (Social Action & Research Centre 2018); Terry Carney, 'The New Digital Future for Welfare: Debts without Legal Proofs or Moral Authority?' (2018) 1 UNSW Law Journal Forum 1.

integrative power of informational gaze dictates who is to remain invisible behind endless masks and who is laid bare as a bearer of a single, unique, and solid mask.[1070]

This game of masks carries over a more ancient trait of legal personhood debate, reaching all the way back to the Roman law. It is first in the tradition of Roman law where *persona*—personhood or personality—first attaches to a particular legal status. As Marcel Mauss indicates, the origins of the law's conception of *persona* derives from theatrical uses of masks to play different characters. To what extent present day personhood is reflective of this ancient tradition has been subject to some debate, but the allegorical use of legal personhood as a mask has persisted to the present. Whereas traditionally personhood was anchored to the idea on the partiality of the mask, of personhood reflecting only a legally meaningful person, the dis-integrative and re-integrative gazes of biotechnology and information technology have presumably access to the being behind the mask. The biotechnological gaze reduces the being into ever-smaller constitutive elements, to the point where the glue of personhood no longer holds the pieces together. From distance everything looks the same and there remains no reason to uphold masks to conceal nothingness (or everything-ness). For informational gaze and its re-integrative power the mask holds a different promise. As a creator of masks, the informational gaze commands the reality as a provider of legal truths from the wearer of whichever mask it has conjured.

To cocoon this act of masking in a more colloquial form, I use another loan from those more skilled in writing than me. In a short article on wordless speech, Dario Fo draws from tradition of *commedia dell'arte* through 'a demonstration of *grammelot*'—a word devoid of meaning, referring to a method to convey sense without uttering a meaningful word.[1071] Essential for successful *grammelot* according to Fo is 'to establish clearly the rhythms and cadences of the language to which you construct a *grammelot*.'[1072] This is the terrain of the dis-integrative process, where a being is reduced to rhythms and cadences that can later be employed to re-integrate them into a *grammelot* of a sort, a synthetic person. It does not suffice to merely master the idiosyncrasies of the language one is about to turn into meaningless babble; for there must be some central topoi that are 'conveyed clearly and precisely.'[1073] For the biotechnological and informational gaze to function, it is central to convey an idea of objectivity and systematicity of their processes. The

[1070] On entanglements of partial information and persons, see Louise Amoore, *Cloud Ethics* (Duke University Press 2020); on entanglements of material and digital world in making of digital, see Kate Crawford, *Atlas of AI* (Yale University Press 2021).

[1071] Dario Fo, 'Wordless Speech' in Joel Schechter (ed), *Popular theatre* (Routledge 2003) 104.

[1072] ibid 105.

[1073] ibid.

landmarks of the advances of both technologies are these central topoi: for biotechnology these are the Human Genome Project or Louise Brown as the first *in vitro* fertilised baby, for information technology these are pervasiveness of these technologies in our everyday and, say, successes of artificial agents in beating humans in their most coveted games, whether it is chess or go. With these landmarks in place, most *grammelots* of dis- and re-integration make sense. 'The hundreds of tales stored in our minds,' of successes and triumphs, 'contribute to enabling the brain to make sense of a new story, even when recounted without intelligible words.'[1074] That is why stories of even deeper intrusion to the human constitution are immediately sensible, as is construal of synthetic persons to an image which appears sufficiently familiar to enforce our past tales.

But for a start, it is important to provide a closer look on the regulatory logic, and partly history, of information technology. There are, as with most technology, two tracks of rulemaking. On the one hand, there are technical rules and regulations that are developed by corporations and encoded into binding rules through standardisation processes. On the other hand, there are rules governing use of information technology and its products that are for the most part set nationally and, in the case of Europe, regionally. The technical rules constitute the backbone for circulation of needed technology, while the regulation of the use of technology stipulates which uses are outside the remit of regulation altogether, which uses are sanctioned, and which ones are banned. The 'technological' of the information technology is, then, relatively uniform globally. For example, there is but a single technical protocol for sending and receiving data over the internet, and there is but a limited number of wavelengths that are used by mobile devices or Wi-Fi routers. Whether some forms of communication or connection are limited or whether a wavelength is set for unlicensed use or subject to restrictions are then questions that are answered domestically. To simplify, the material boundaries of technology are set globally, its local applications domestically.

To trace the overarching re-integrative rationale of information technological regulation, a focus on the material boundaries of technology appears more salient one. Most of the states employ technological capacities in one way or another to control and monitor their citizens, yet the modes of control differ. They range from central government penetration to everyday life ('Big Brother') to information gathering to support welfare policies ('soft Sister') up to more recent forms seeking to combine the two through specific social sorting.[1075] Yet, all of them rely on

[1074] ibid 106.

[1075] Pieter Wagenaar and Kees Boersma, 'Soft Sister and the Rationalization of the World: The Driving Forces behind Increased Surveillance' (2008) 30 Administrative Theory

technological capacity that partly pre-dates current information technologies (such as provision of ID-cards) but for the most part rely on vast datafication that has touched all areas of life with growing intensity since the 1960s.[1076] Thus, while legislators' actions do matter for the constitution of local differences, the capacity of information technology to re-integrate pieces of information into persons emanates from the underlying technological regulation that has been and remains markedly transnational. Even a cursory glance on said technological regulation illustrates how intertwined is the capacity to re-integrate a person through information technology and the constitution of material regulation of networked technologies.

Before exploring the technical regulation more in detail, I briefly summarise the elements that are foundational for the re-integrative gaze. Many of these elements are not particularly modern, but they have been intensified by technological advances in recent years. There are three elements in particular that are worth noting. First core element for re-integration is the existence of data. The emergence of data gathering as a method to centralise government and tax collection predates first applications of information technology by centuries. Second core element is the creation of a (quasi-)permanent identity. As with the public registers, a personal identity as a legal and administrative quality emerges already early in the centralisation of state functions that relied on what James C. Scott calls legibility that includes, inter alia, permanent last names and population registers. Third core element lies in the capacity to generate groups and categories based on available data. These categories enable distribution of legally sanctioned benefits, punishments, entitlements, and their like without direct recourse to individual. The existence of a stable identity as a core truth to which data is anchored allows creation of groups without a need to return to individual. Thus, when the medical research community hails the Nordic countries' national registers for their 'ability to link administrative, health, and clinical quality databases at the individual level[,] provid[ing] virtually unlimited possibilities for epidemiological research,'[1077] they refer to a form of re-integrative gaze I am interested at. I look more closely at

& Praxis 184; Kees Boersma and others (eds), *Histories of State Surveillance in Europe and Beyond* (Routledge 2014).

[1076] It was early on noticed that this gathering of information does render some persons suspect, mischievous, or illegal, see, for example, James Rule, *Private Lives and Public Surveillance* (Allen Lane 1973); Gary T Marx and Nancy Reichman, 'Routinizing the Discovery of Secrets: Computers as Informants' (1984) 27 American Behavioral Scientist 423; Graham Greenleaf, 'The Australia Card: Towards a National Surveillance System' (1987) 25 Law Society Journal.

[1077] Morten Schmidt and others, 'The Danish Health Care System and Epidemiological Research: From Health Care Contacts to Database Records' (2019) 11 Clinical Epidemiology 563, 579.

technical regulation of information technology that is foundational for each of these three elements in turn.

2.4.1 Technical regulation for storing and gathering data

The global data generated annually is expected to be around 220 zettabytes by 2026—an amount of data that is relatively difficult to conceptualise.[1078] On the one hand, all known written books would take but a fraction of that space, while, on the other hand, a single human's vision produces during a person's lifetime on a conservative assessment some 0.04 zettabytes of data making a collective human vision at any given point of time alone vastly larger data repository even without taking into consideration any other 'data' associated with human vision. Thus, all the data in the world is a massive repository while simultaneously providing but a highly circumspect picture of the lifeworld of humans. It allows for modelling of humans and their interaction to an extent, yet that modelling will always be reductive to the existing complexity of human interactions. The amount of data stored has, nonetheless, increased rapidly in recent years and decades as clearly indicated by the ease with which most modern laptops could hold all known books. At the heart of this capacity is the standardisation of data representation and storage. While books come in many different languages, all characters stored using information technology rely on a single standard, and more importantly still, while life and our experience of it is multisensory and complex in ways we remain largely unaware of, data on an information system is stored in either as a zero or as one (or as with quantum computing both simultaneously).

An idea of breaking actions into sufficiently small fragments so that they can be executed with little to no contextual awareness was not born with information technology. Rather, the idea is commonly attributed to the birth of economy in works of Adam Smith and Adam Ferguson, where greater specialisation of labour to execute a single task was seen as a key to untap untold productivity, albeit at the expense of the worker.[1079] That automation became the standing image of

[1078] IDC, *Global DataSphere Forecast, 2022-2026*

[1079] Lisa Hill, 'Adam Smith, Adam Ferguson and Karl Marx on the Division of Labour' (2007) 7 Journal of Classical Sociology 339; John Brewer, 'Putting Adam Ferguson in His Place' (2007) 58 British journal of sociology 105; Stéphan Vincent-Lancrin, 'Adam Smith and the Division of Labour: Is There a Difference between Organization and Market?' (2003) 27 Cambridge Journal of Economics 209; Stefano Fiori and Enzo Pesciarelli, 'Adam Smith on Relations of Subordination, Person Incentives and the Division of Labour' (1999) 46 Scottish Journal of Political Economy 91.

industrialisation is also widely known.[1080] The precursors of punched card were used to instruct mechanical looms and Charles Babbage, the inventor of first 'computer', was impressed by achievements of Joseph-Marie Jacquard of automatic loom fame. As Sadie Plant writes, '[t]he Jacquard cards made memory a possibility,'[1081] which then was used by Babbage in his plans for the Analytic Engine. This memory was employed then for the punched cards used for the 1890 U.S. census and later as the foundation of IBM's dominance in the field of information technology. To what extent such a linear narrative is truthful account of events matters relatively little: it is the story that came to guide regulation of technology, whether it is truthful or not. As IBM at present describes the technology, these cards 'held nearly all of the world's known information for just under half a century.'[1082] It also paved the way for other producers as the first movers created de facto industry standards, while simultaneously limiting competition through patents. In a sense, the path to follow in storage of information was made almost two hundred years before first programmable computer with but minimal regulation of any kind directing these first steps.

Technical regulation through standards first emerged at the turn of the 20th century. New networked technologies, faster mobility, birth of engineering, and advancement of science provided reason and means to impose shared technical norms for widely distributed or connected things. Networked technologies like railroad and telegraph paved the way for a new model of technical regulation. For example, adoption of a standard unit of resistance and production of a standard coil were essential for transmission of telegraph messages over long distances. But they also enabled contractual clauses to define the quality of goods – a role standards have in procurement to this day.[1083] While railroads and telegraph provide an example of international—or rather colonial—effort to standardise, much of the technical regulation of early information technology occurred at a corporate level. According

[1080] On uptake of machinery in industry in 18th and 19th century, Maxine Berg, *The Machinery Question and the Making of Political Economy* (Cambridge University Press 1980). For its false necessity, Charles Sabel and Jonathan Zeitlin, 'Historical Alternatives to Mass Production: Politics, Markets and Technology in Nineteenth-Century Industialization' (1985) 108 Past and Present 133.

[1081] Sadie Plant, 'Future Looms: Weaving Women and Cybernetics' (1995) 1 Body & Society 45. Sadie Plant connects her reading of Ada Lovelace to more general contours of computer technology in *Zeros + Ones: Digital Women + the New Technoculture* (Fourth Estate 1997).

[1082] 'The IBM Punched Card' (*IBM100*, IBM Corporation 3 July 2012) <http://www-03.ibm.com/ibm/history/ibm100/us/en/icons/punchcard/> accessed 15 August 2023.

[1083] On present practices, see, Maria Anna Corvaglia, 'Public Procurement and Private Standards: Ensuring Sustainability under the WTO Agreement on Government Procurement' (2016) 19 Journal of International Economic Law 607.

to Lars Heide, the expanding use of punched cards by private businesses compelled punched card innovator and a progenitor of IBM Herman 'Hollerith to standardize his various ad hoc punched-card systems.'[1084] A design chosen in 1907 stayed in use till 1928 and was adopted as a standard also by other manufacturers.[1085] While in the past Hollerith had customised his products to the needs of the U.S. census, having many smaller customers made such an approach untenable. The machines used to read, sort, and feed punched cards had to become uniform to keep Hollerith's business profitable. As a virtually sole provider at the time of functional punched card systems, these company standards became de facto standards of data storage and retrieval for decades to come.

Underpinning this technical regulation of storage was a system for encoding information. As with the looms before and the models of Babbage's Analytical Engine, the operators of telegraph lines noted the inherent limitations of transmitting each word with a unique signal. Because '[c]urrent transmission speed was greater than an operator could match'[1086] there was unused capacity of wires carrying the telegraphs. To improve the transmission rate, a French telegraph operator Emile Baudot replaced earlier alphabetic code with a 5-bit binary alphabet that reduced letters to zeros and ones, of presence or absence of an electronic pulse.[1087] This mode of conceiving the world as a set of abstracted and simplified mechanical movements, and later electromagnetic pulses, was already prevalent by the time information technology emerged with transistors and information theory. Thus, when Claude Shannon in 1953 defined 'actual information of a stochastic process as that which is common to all stochastic processes which may be obtained from the original by reversible encoding operations,'[1088] he referred to

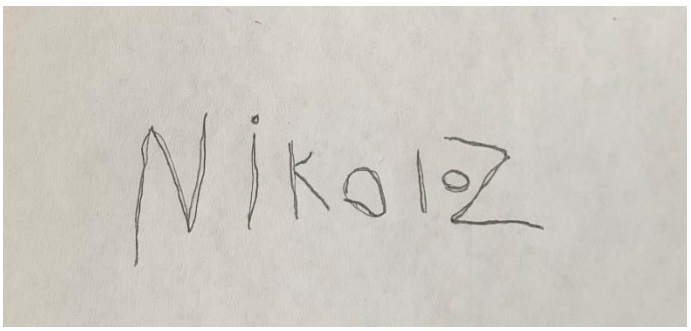


Figure 5: A picture of handwriting

[1084] Lars Heide, *Punched-Card Systems and the Early Information Explosion 1880-1945* (Johns Hopkins University Press 2009) 58.
[1085] ibid 59.
[1086] Patrice Carré, 'From the Telegraph to the Telex: A History of Technology, Early Networks and Issues in France in the 19th and 20th Centuries' (1993) 11 Flux 17, 20.
[1087] ibid.
[1088] Claude Shannon, 'Lattice Theory of Information' (1953) 1 Transactions of the IRE Professional Group on Information Theory 105.'

transformation of English writing into Morse code as a natural example of same information using two different encodings. The loss of information from encoding, say, handwriting to Morse code is something Shannon did not consider salient – a practice that continues to this day.[1089] Even though most persons versed in handwriting using Latin alphabets would recognise in Figure 5 that the author of handwriting is just learning to do so and is likely a young person, the Morse code for it will look the same even if the handwriting would be done by a professional calligrapher. The loss of identity and uniqueness through generation of automatic looms or transformation of handwriting to electronic pulses was not a concern of Jacquard any more than it was for Shannon.

The information theory that emerged from the work of Shannon perceived the act of translation from 'original' as different ways of doing the same. Technical regulation of encoding and storage of information sought to transform lifeworld into events or objects that could be stored as binaries, but it also carried a perception of a world where each object carries but one, immediately obvious meaning. A letter 'N' is a letter 'N' whether encoded as '-•' or as the handwritten letter above. To an extent this is obviously true. Yet, what is reduced and added through an act of translation remains largely invisible. In this sense, 'Shannon's theory', Lombardi and others write, 'is purely quantitative: it ignores any issue related to informational content.'[1090] This was also basis for the emergent standardisation of information technology. Focus was and has been not on who does the encoding or even how it is accomplished, but on abstract codes that is titled the 'actual information'—information that has been erased of all human traces. For technical regulation this has meant successive uniformity of material aspects of physical storage from 80-character punched cards and half inch magnetic tape onwards. In terms of encoding, everything from audio to image was reduced to a bit form that was a representation of the 'actual information'. That these modes led to removal of oddities, impurities, and inefficiencies was defined as their primary intent. Most of this early technical regulation is found in patent applications of leading manufacturers that later became de facto industry standards due to network effect of the economic clout of the manufacturer.

Starting from the 1960s onwards, however, there are more and more unified efforts of corporations first nationally and later internationally to collectively set technical ground rules through standards. Thus, in the 1960s emerge the first

[1089] See, however, JR Pierce, 'The Early Days of Information Theory' (1973) 19 IEEE Transactions on Information Theory 3. Pierce suggests that 'the structure was not great enough to lead to anything very valuable' (p. 7).

[1090] Olimpia Lombardi and others, 'What is Shannon Information?' (2016) 193 Synthese 1983, 1989.

encoding standards with information technology in mind (e.g. ASCII). They reflected the needs of first users of computers and naturalised their needs as the 'ordinary' and 'efficient' way of using computers. Thus, the fact that ASCII encoding of letters into uniform binary code remained functional encoding of language only for English was a seemingly natural consequence of the origins of said standardisation in the U.S. In a sense, the complexity of natural languages was reduced to those immediately useful to the designers of new information technological edifice. An opposite choice was made with audio (and later video) encoding, where the analogue sound was transformed to digital by employing random noise ('dither') to it. The continuous analogue sound is transformed into discrete bits with added noise that renders the digital sound virtually like to the analogue original for the human ear when replayed. These and other sound modulations were eventually transformed into consortia and official standards that affect to this day all sounds we hear through different digital media.

The act of reducing complexity or adding noise to conceal loss are but some of the ways with which technical regulation came to define what Shannon's 'actual information' stood for. These choices, whether of choosing a coder/decoder (a codec) for video and sound compression or of using Unicode rather than ASCII with Latin extension are substantiated in extensive literature. As information is a purely quantitative matter, the choice is defined by concerns over effectiveness, speed, cost, or interoperability. When an assessment of a technical regulation is done subjectively, the subject seen as a standard closely aligns with those who have drafted the standards. Hence, International Telecommunication Union's (ITU) document outlining subjective test methodology for assessing speech intelligibility clearly declares that '[t]he method described here applies to North American English.'[1091] Also, ITU notes in the recommendation that testing of intelligibility of communication should be done on single words as 'sentence-based intelligibility tests are inefficient.'[1092] These subjective methods are, in turn, used for example in standards issued by ETSI. Thus, whether a communication over LTE network is intelligible is based on 'actual information' transmitting single words of North American English.[1093]

[1091] ITU-T, *Subjective test methodology for assessing speech intelligibility. Series P: Terminals and subjective and objective assessment methods*, P.807 (02/2016), 1. This method resembles to some extent one presented to assess predictability of English in Claude Shannon, 'Prediction and Entropy of Printed English' (1951) 30 Bell System Technical Journal 50.

[1092] ITU-T, *Subjective test methodology* 3

[1093] See, for example, ETSI, Technical report on LTE; Mission Critical Push to Talk (MCPTT); Media, codecs and Multimedia Broadcast/Multicast Service (MBMS) enhancements for MCPTT over LTE, ETSI TR 126 989 V13.1.0 (2016-08).

Most of these modes of understanding information are innocuous and well-intended. Yet, the consequences of these choices are tangible in myriad ways. A powerful illustration from limitations of standard measures of understanding that are hard wired into encoding of information are diverse biases that algorithms have encountered in recent years. For example, in the light of the ITU recommendation on assessing speech intelligibility through proxy of North American English, the fact that there is sufficient difference in dialects of North American English for speech recognition software to have large racial disparities in their performance sets into question to what extent the quantitative vision of information was ever tenable or neutral.[1094] Encoding matters, even if the translation would at first sight carry the same information.

For anyone to trace these technical ground rules that are embedded in all technical gadgets circulating around the globe would be a gargantuan task. Ultimately, the technical regulations of storage and encoding do not mark so much the common as they do the uncommon. Thus, my machine-readable passport issued by the Finnish state adhering to the International Civil Aviation Organization's guidance reveals that my surname is odd enough to 'confuse machine-reading equipment, resulting in less accurate database searches' by using characters 'not available globally', that is, in English.[1095] While Joneses can keep up being Joneses, Selkälä transforms into Selkaelae and my partner's, ნიკოლეიშვილი, turns into Nikoleishvili. The actual information encoded is not the actual information to anyone except those whose name can be spelt out using the 26 characters defined on page 16 of *Machine Readable Travel Documents. Part 3: Specifications Common to all MRTDs*.[1096] It is safe to assume that most data stored is subject to similar distortions, while treated as mere translation of the same to a different format.

All those zettabytes of data are then, by their very design, translating the multitude to singularity. This single nomenclature depends heavily on choices made decades, in some instances centuries ago. These choices have sedimented into technical rules, recommendations, and guidelines to voluntary standards and material design choices. Those choices are embedded equally much in obscure technical documents intended only for manufacturers of goods using a given

[1094] See, for example, Alex DiChristofano and others, 'Global Performance Disparities Between English-Language Accents in Automatic Speech Recognition' [2023] arXiv:220801157 [cs]. The authors suggest as part of the discussion onto noticed discrepancies in speech recognition that 'historical hindsight indicates that the problem is more systematic, related to the more fundamental nature of the use of standardized language to divide and provide the benefits of control.' (p. 9)

[1095] ICAO, *Machine Readable Travel Documents. Eight Edition, 2021. Part 3: Specifications Common to all MRTDs* (ICAO 2021) 15

[1096] ibid. 16

technological solution as they are in instructions provided by an international organisation to its member states. The ubiquity and mundaneness of these choices conceal them for the most part. The fact that machine readable travel documents are a no umlaut zone or that intelligibility of a communication is measured in single words uttered in North American English harms only few. Nonetheless, the data encoded with a core condition of intelligibility and actual information being defined by a small, albeit expanding, group of engineers has been shown in other contexts to be a recipe for failure. It is these failures that are a formula for repugnancy.

At first sight the encoding of data and its legibility contributes only tangentially to repugnant outcomes or to emergence of paradox as outlined. However, legibility and encoding constitute a key element in sorting out things – and persons.[1097] The efficacy of passport reading, for one, erects virtual borders of various kind. These borders, despite their virtuality, effectively curtail the movement of those whose names could confuse the machine-reading equipment.[1098] As Dimitri Van Den Meerssche argues these virtual barriers feed into injustices and inequalities.[1099] These inequalities ultimately manifest, for example, within the European context into clandestine crossing of the borders – not through the high-tech edifice of biometrically verified identity, but through dark seas in leaking rafts.[1100] That such spaces of rightlessness or of legal black holes proliferate hand-in-hand with greater efficacy, transparency, and legitimacy of digital information is no happenstance. Rather, it is the desired outcome for virtual sorting. These encoding practices allow for disappearance (virtuality) of borders for some, whilst enforcing their materiality on others. As Btihaj Ajana convincingly argues, for many migrants these virtual borders do not disappear even on legal entry, but the sorting they enable is carried by migrants everywhere.[1101] The legibility achieved through mundane technological regulation creates not only precarious legal status but also desperate attempts to hold

[1097] Bowker and Star (n 495).

[1098] See, in general, Didier Bigo, 'Security, Exception, Ban and Surveillance' in David Lyons (ed), *Theorizing surveillance* (Routledge 2006).

[1099] Dimitri van den Meerssche, 'Virtual Borders: International Law and the Elusive Inequalities of Algorithmic Association' (2022) 33 European Journal of International Law 171.

[1100] See, Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law' (2018) 29 European Journal of International Law 347; Dimitry Kochenov and Sarah Ganty, 'EU Lawlessness Law: Europe's Passport Apartheid from Indifference to Torture and Killing' (Jean Monnet Working Paper, 2022).

[1101] Btihaj Ajana, *Governing through Biometrics* (Palgrave Macmillan 2013); see also Louise Amoore, 'Biometric Borders: Governing Mobilities in the War on Terror' (2006) 25 Political Geography 336; Louise Amoore, 'The Deep Border' [2021] Political Geography 102547.

onto that status. This is the sort of mediated repugnancy that detailed technological regulation is particularly prone to create.

2.4.2 Technical regulation of identity

'Protecting American personhood has meant subjecting individuals and groups to as much accuracy, fairness and objectivity – computational neutrality – as possible,'[1102] argues Meg Leta Jones. The idea of accuracy and objectivity as safeguards against discrimination but also as means of control is foundational to James C. Scott's idea of legibility. He argues that emergence of centralised government called for the creation of a unique identity to everyone so that a designated person could be targeted by state policies and interventions. A legible identity for a centralised bureaucracy is an acontextual and unique identifier. It is acontextual as it does change depending on the role I occupy vis-à-vis the state; I remain Toni Selkälä both as a father and as a son. It is unique in a sense that I cannot have in the eyes of the state more than one official name, even though I am at liberty to change that name at any point. As such, my name(s) constitute a set of all official identities I have held throughout my lifetime. They are not, however, the ground truth for state legibility nor are they that for legibility of technological devices either.

Names as a category of state legibility has always been subject to important limitations. Many of the early systems of centralisation of government for purpose of tax collection did rely on names, but only on names of the owner class. Thus, a study on names and surnames of Finns in the 16th century finds only one woman from a dataset of more than thousand persons.[1103] A like blindness of the state affected cadastral codes in Eastern Finland. A slash-and-burn agriculture and a change of dwelling with the rotation of swidden made land a bad register for people, as it had been a bad way to chart population in Japan in the 8th century.[1104] But as Scott and others argue, states develop their technologies of legibility, culminating in the present near-perfect legibility of all persons living in countries like Finland each sporting a unique identity code given at birth the change of which is exceptional and

[1102] Meg Leta Jones, 'The Right to a Human in the Loop: Political Constructions of Computer Automation and Personhood' (2017) 47 Social Studies of Science 216, 230.

[1103] Unni Leino and Pietari Uv, 'A Comparison of Naming Practices in Eastern and Western Finland in Late 16th Century' (2020) 55 Proceedings of the Known World Heraldic and Scribal Symposium. The only women mentioned is 'Karin Hansdotter, former unwed wife of Johan, Duke of Finland (after 1568, John III of Sweden).' (p. 2)

[1104] Leila Lehikoinen, 'Finnish House Names and Their Connection with Surnames' (2005) 3 Onomastica Uralica 1; LL Cornell and Akira Hayami, 'The Shumon Aratame Cho: Japan's Population Registers' (1986) 11 Journal of Family History 311.

cumbersome administrative procedure.[1105] Such basic assumption of a core, nigh immutable identity is foundational for the capacity of information technology to re-integrate pieces of data to resemble a 'person'.

Identity has been a central category for modern states.[1106] This is reflected in nature of regulation on identity and its construction. An initial thrust for recording identity of people was, especially in Europe, to enable the state to gather resources to support warfare. For taxation, an individual was not necessarily the unit of observation, but focus was rather on households, dwellings, and land. Thus, the control over these was central area of contention between the absolute monarch and the feudal lords. With the advent of more representative modes of government central focus to identity gravitated towards individuals. At present, rules governing identity are stipulated at the highest level of norms, from international treaties to national constitutions. Everyone is to be granted with a citizenship and an identity at birth. On a more technical level, identity is commonly encoded in documents that verify the identity of a person. These documents commonly follow stringent technical rules to ensure their uniformity. Thus, for example a person's Finnish identity number is defined on Section 2 of Government Decree on Population Information System that is far-flung from the solemn language of the Finnish Constitution or that of, say, Convention on the Rights of the Child. These technical rules and regulations, however, reflect the granularity of data that a modern state associates to most of its citizens for identity purposes—from name of close relatives to past and present addresses and biometrical data.[1107]

It is from like granularity and multiplicity that the re-integrative gaze of information technology commences. The point of origin for constructing a digital identity of a person is seldom one of those favoured by states, such as biometric data or personally identifiable information. Rather, at heart are seemingly random events registered by an intermediary – whether a real-time ad broker or a tracking cookie.[1108]

[1105] James C Scott and others, 'The Production of Legal Identities Proper to States: The Case of the Permanent Family Surname' (2002) 44 Comparative Studies in Society and History 4.

[1106] See, in general, Jane Caplan and John Torpey (eds), *Documenting Individual Identity: The Development of State Practices in Modern World* (Princeton University Press 2001).

[1107] This approach glosses over the significant distributional effects of identity documents. In many places, access to identity is a necessary but often difficult first hurdle to be seen by the state in terms of benefits and rights. A good illustration from these in Indian context is Tarangini Sriraman, *In Pursuit of Proof: A History of Identification Documents in India* (Oxford University Press 2018).

[1108] The word cookie is used here to capture all the diverse techniques used for tracking users online. The scope of such technologies is vast and for the most part they are unavoidable due to their sheer scale.

These events are presumed to relate to a person, even if that person remains unknown at the time of data-gathering. The purpose for gathering such disarrayed data rests on the idea that there is a person behind all agency, even though for long almost half of all online traffic has been by autonomous programs. The persistent identifiers of the online world, such as cell phone identifier or media access control address (MAC address) are often carried with these random bits of data. Thus, at first stage, an identity of a person for information technological gaze is associated with the existence of their technological objects, not of them, whereas the process for a state is the opposite: first a person, then an identifier.

All this role reversal has, however, relatively modest impact on rules governing use of data. As alluded above, the General Data Protection Regulation of the European Union as well as other data protection statutes modelled on it do consider even weak association to a person as personal data. For example, in *Breyer*, the CJEU deemed a dynamic IP address stored by a government website to be personal data, even though access to information about person to whom said address belonged at a given time was only at disposal of the communications operator.[1109] And further still, there was no evidence, nor could there be that the visit to a website was done by Mr. Breyer and not a relative, a friend, or a family member who had access to his device. As such, the presumption of a device being personal and therefore data gathered from such device being personal data provides a robust shelter against (ab)uses of even disarrayed data. There are requirements for consent to be included in a dataset (opt-in), a call for minimising the amount of stored data, etc. that are enforceable and, at least to an extent, effective.[1110] While enforcement remains under-resourced, sporadic, and ineffective and there are significant differences between countries, the dominant model of personal data protection provides rights to persons against most uses of their data.[1111] Thus, my focus in the following is on relational data. It is a subcategory of data that is protected effectively through rules governing the use of personal data, but which nonetheless leaves many persons affected without efficient legal remedies.

[1109] Case C-582/14 *Patrick Breyer v Bundesrepublik Deutschland* [2016] ECLI:EU:C:2016:779

[1110] This much does not hold true for example for refugees whose irises are scanned for access to food and other basic necessities, see, for example Christina zur Nedden and Ariana Dongus, 'Getestet an Millionen Unfreiwilligen' (*Zeit Online*, 17 December 2017) <https://www.zeit.de/digital/datenschutz/2017-12/biometrie-fluechtlinge-cpams-iris-erkennung-zwang> accessed 15 August 2023.

[1111] There have been repeated calls from the side of the European Union for Member States to increase funding for enforcement of the GDPR. See, for example, European Commission, *Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation* [2020] COM(2020) 264 Final.

Relational data and its importance for identity is widely recognised by states. My register information by the Finnish Population Information System contains, for example, information about my children, parents, and partner. They are personal to me only in context. A name of my child is obviously not my personal data if there is no other connection established between me and they. The same is true of much relational data. I have no say over the decision of my children to have a genetic test and share that information with the world, even though it evidently also reveals something about me. The relational and contextual nature of data provides one of the many avenues to repugnancy for the re-integrative gaze. I will briefly outline some consequences stemming from the fact that both place and time are out of joint with data, and how these consequences can be person-affecting without providing any legal shelter for the person affected due to their initial classification as relational or non-personal data. For the temporal impact of data, I look more closely genetic data stored in biobanks, and for the de-territorial impact of data, I outline some general contours of data used for developing artificial intelligence models.

Genetic data and samples in biobanks

At the dawn of the 21st century, genetic information seemed like a cached trove of secrets with huge health and economic benefits, and the Nordic countries were at the forefront of this genetic revolution. This held true especially with Iceland and its whole population databank. The law governing the newly found biobank had no provisions on eventual death of the person whose data was stored into the biobank. And as the Icelandic Supreme Court declared at the time, '[a]ccording to the principles of Icelandic law, the personal rights of individuals lapse on their death insofar as legislation does not provide otherwise.'[1112] These principles together with the new whole population biobank had left Ragnhildur Guðmundsdóttir rightless. Her father, Guðmundur Ingólfsson, had died in 1991, and his data had been stored in the Health Sector Database created through the Health Sector Database Act No. 139/1998. While the person themselves had right to remove health data from the database, Guðmundsdóttir had no such rights over his father's data even though such data had a direct impact on her. As a matter of fact, no one had such rights.

The Court faced a dilemma. There was no person to erase stored medical information, yet there were persons (Guðmundsdóttir and his two brothers) for whose rights storing said information had a direct bearing. The Court sided with

[1112] Icelandic Supreme Court, *Ragnhildur Guðmundsdóttir v The State of Iceland* [2003] 151/2003, no pagination. From the case and its immediate aftermath, see, Renate Gertz, 'An Analysis of the Icelandic Supreme Court Judgement on the Health Sector Database Act' (2004) 1 Script-ed 241.

Guðmundsdóttir and ordered removal of the data. While this eliminated the immediate problem associated with the Icelandic biobank, it did little to address the more general conundrum concerning data of deceased (or of those who never were). A case in point is the Finnish Act on Biobanks enacted in 2012.[1113] Although the act was enacted almost a decade after the decision of the Icelandic Supreme Court, it does not grant a right to revoke consent to anyone but the person whose biological material and information thereof is stored in a biobank, nor does the GDPR provide direct remedies as it does not cover data of deceased.[1114] And Finland is hardly alone. In a systematic review of data retention policies regarding post-mortem use of genetic and health-related data, most European countries were found to be the same.[1115] Arguably, the storage of genetic data of a deceased next of kin are no detriment to rights of their immediate relatives, as the European model of data protection is effective once a person is identified or identifiable. Thus, the moment someone uses the stored genetic data to target a living person, the data protection rules do apply with full effect, even though they would never reach the original data. Problem solved.

Yet, the chosen regulatory model addresses only consequences. It is in a stark contrast with the outlined goal of the GDPR, the core principles and key provisions of which focus on prevention of risks associated with unwanted processing of personal data. As the genomic data is by definition relational, yet solely 'of' the person who has provided the sample, the emphasis on an identified individual as locus of rights cannot address claim rights of those on whom data is about but not of. After all, there is no claim to require that personal data of someone else be removed. And while a claim like that of Guðmundsdóttir might prevail over personal data of deceased, rules and regulations concerning the use of data accrued from a sample shelter all algorithms and models developed based on such data. Thus, the Finnish Act on Biobanks dictates that a removal of a sample from a biobank bears

[1113] Biopankkilaki [Act on Biobanks] (688/2012)

[1114] The new proposal for amended Act on Biobanks leaves the rules on this regard unchanged, see, Hallituksen esitys eduskunnalle laiksi biopankkilain muuttamisesta [Government proposal on Act Amending Act on Biobanks] (HE 247/2022 vp). It also provides more direct pathways for the storage of embryotic and foetal samples that are related to no legally existing person and, in case of a miscarriage or a death on delivery, of data that will be of no person ever to have existed. For rights of deceased according to GDPR, see, GDPR recital 27, and, in general on the development within the EU and its Member States on rights over personal data of deceased, see, David Erdos, 'Dead Ringers? Legal Persons and the Deceased in European Data Protection Law' (2021) 40 Computer Law & Security Review 105495.

[1115] See Marieke AR Bak and others, 'Stakeholders' Perspectives on the Post-Mortem Use of Genetic and Health-Related Data for Research: A Systematic Review' (2020) 28 European Journal of Human Genetics 4, 403.

legal effect only *ex nunc*, allowing all accumulated data of that sample to be part of results generated from its use for as long as the sample was part of the collection.[1116] And while for example Finnish biobanks are largely public, their modus operandi is to transfer data of samples to private corporations that use such data for training of their models,[1117] or an individual transfer of data for third party service providers to gain additional insights on personal genetics.[1118] There is also a growing concern on data protection practices of many processors of sensitive health data. Thus, when the crown jewel of British health care transferred health data of patients to an AI company or a Finnish mental health service provider's client register was captured and sold online, the concerns are much wider than those associated with an individual, leaving individual rights not only ineffective but to a large extent pointless.[1119]

In case of the biobanks, the biological sample stored within is the thing against which a person can have rights, as in the case of Guðmundsdóttir. There are no personal rights, as there is no person. Any legal rights that there might be stem from an object preserved technologically. Thus, much of the nuanced technological regulation is associated with the complex transformation of, say, blood running in your veins into a blood sample that counts as property. This is where the bulk of regulation of biobanks and biotechnology in general resides, but that remains mostly

[1116] Biopankkilaki, §12.3

[1117] See, for example, the Finnish Auria Biobank's agreement with Roche to provide with samples and medical data of cancer patients in 2016 and a later acquisition of Flatiron Health for $1.9 billion 'cache of over 2 million cancer patients' electronic health records'. Citation from Justine Petrone, 'Roche pays $1.9 billion for Flatiron's army of electronic health record curators' (2018) 36 Nature Biotechnology 289, 289. For agreement between Auria and Roche, see, 'Roche ja Auria Biopankki sopivat tutkimusyhteistyöstä' (*Roche*, 3 March 2016) <https://www.roche.fi/fi/medialle/uutiset/roche-ja-auria-biopankki-sopivat-tutkimusyhteistyoestae.html> accessed 15 August 2023.

[1118] From U.S. perspective, see, Christi J Guerrini and others, 'Who's on Third? Regulation of Third-Party Genetic Interpretation Services' (2020) 22 Genetics in Medicine 4; on views of users of a popular service 23andMe Aviad E Raz and others, 'Transparency, Consent and Trust in the Use of Customers' Data by an Online Genetic Testing Company: An Exploratory Survey among 23andMe Users' (2020) 39 New Genetics and Society 459; on social license for data-sharing in European context Shona Kalkman and others, 'Patients' and Public Views and Attitudes towards the Sharing of Health Data for Research: A Narrative Review of the Empirical Evidence' (2022) 48 Journal of Medical Ethics 3.

[1119] For Finnish Vastaamo-case in English, see, Susanna Lindroos-Hovinheimo, 'Serious Cyberattack Raises Questions About GDPR Application in Finland' (*Verfassungsblog*, 5 November 2020) <https://verfassungsblog.de/serious-cyberattack-raises-questions-about-gdpr-application-in-finland/> accessed 15 August 2023; for data sharing between NHS and DeepMind, see, Julia Powles and Hal Hodson, 'Google DeepMind and Healthcare in an Age of Algorithm' (2017) 7 Health & Technology 351.

out of legal focus. There is a general ISO standard on biobanks, there are standards for medical gases used for storage of samples, there are regulatory approval processes of laboratory devices used to isolate the sample, these are international, regional, and domestic rules for legal definition of a biological sample, there are domestic or local rules concerning safety procedures of laboratory, there are industry and profession-wide professional standards that are enforced through diverse disciplinary bodies that may have direct legal consequences, and so on and so forth. Yet, as the focus of these rules is on the conduct of persons doing the transformation of blood to a sample or on devices they use, for the person whose blood is in question, the only legal relationship is a consent form. A valid consent transforms a body to property with consequent loss of status.[1120]

In a biobank, data is associated with the sample that constitutes the ground truth and a locus of rights. The samples are understood in terms of property, or as commonly argued by research biobanks and researchers, as a medium to realise a right to science through a gift. The extent of property rights is seldom directly addressed, even though biobanks serve important economic interests, and their establishment is partly justified through their positive impact for economy. Thus, it is hardly surprising that most claims for benefit sharing between those providing samples and those receiving the economic benefits have been unsuccessful. The sample donor has limited rights to remove sample, but not the data – and other interested parties have virtually no rights. As recently as in 2021, fifty years after non-consensual removal of a tissue sample from her cervical cancer, the estate of Henriette Lacks sued Thermo Fisher Scientific Inc. over the 'intellectual rights property to their grandmother's cells.'[1121] According to the complaint, the company has made 'a conscious choice to sell and mass produce the living tissues of Henrietta Lacks' despite the knowledge of the tissue's problematic origin.[1122] A property right over a thing and data trumps most rights of persons.

And while somewhat effective claim rights might exist for the residents of high-income countries, the lack of global rules and regulations on treatment of data in general and health data and biological samples in particular leaves persons from low- and middle-income countries (LMIC) virtually rightless. Biobanks located in LMICs have been a source of substantial medico-ethical debate, but they are also legally

[1120] And, as is case in Finland, older samples are transferred without anyone's consent.

[1121] 'Henrietta Lacks' Estate Sued a Company Saying It Used Her "stolen" Cells for Research' (*NPR*, no date) <https://www.npr.org/2021/10/04/1043219867/henrietta-lacks-estate-sued-stolen-cells> accessed 15 August 2023.

[1122] *The Estate of Henrietta Lacks v Thermo Fisher Scientific Inc.*, Civil Complaint and Request for Jury Trial, D. Md. No. 1:21-cv-02524-DLB (filed 3 October 2021)

troublesome.[1123] The main legal challenge of biobanks in LMICs is and has been the fact that they are mostly used simply as vessels to transfer data and samples from the LMICs to laboratories and researchers in the high-income countries, even though there are little to no legal safeguards in place for the use of samples and data.[1124] The ethical guidelines, such as the World Medical Association's influential Declaration of Helsinki, have been ineffective to ensure even minimal respect of the rights of those providing samples for biobanks.[1125] Legally, the samples collected from around the world for example for the International Biological Program's Human Adaptability (IBP-HA) section in the 1960s and the 1970s are in the possession of those laboratories they are stored.[1126] The ethical conundrums associated with these samples has had but a limited impact on their use in research, and on rare instances where samples have been withdrawn, they have been done due to claims of an indigenous population in a high-income country. The idea of life, death, or personhood of people whose samples are stored are secondary to proprietary interests of those who store them. The storage, use, and tempering of one's identity receives no legal shelter and can be used for perpetuity. Whether the outcome is repugnant depends on the value associated with the samples of ancestors, but legal the storage and use are under most circumstances.

Most of the repugnant outcomes in recent decades on uses of genetic material are related to plants and food.[1127] The use of genetic use restriction technologies and other means of biotechnology to generate proprietary seeds was and remains to be one of the most visible debates on transforming genetic information into property

[1123] Some of these concerns are outlined in Buddhika Fernando and others, 'Advancing Good Governance in Data Sharing and Biobanking - International Aspects' (2019) 4 Wellcome Open Research 1.

[1124] See, for example, Jantina de Vries and others, 'A Perpetual Source of DNA or Something Really Different: Ethical Issues in the Creation of Cell Lines for African Genomics Research' (2014) 15 BMC Medical Ethics 60. From a privacy and data protection angle concerning Nigeria, see, Simisola O Akintola and Dorcas A Akinpelu, 'The Nigerian Data Protection Regulation 2019 and Data Protection in Biobank Research' (2021) 11 International Data Privacy Law 307.

[1125] For a wide range of examples, see, Doris Schroeder and others (eds), *Ethics Dumping: Case Studies from North-South Research Collaborations* (Springer 2018).

[1126] See, in general, Joanna Radin, 'Latent Life: Concepts and Practices of Human Tissue Preservation in the International Biological Program' (2013) 43 Social Studies of Science 484.

[1127] A summary of some of the legal means to lock-in food production to proprietary seed variants is provided in Jack Kloppenburg, 'Re-Purposing the Master's Tools: The Open Source Seed Initiative and the Struggle for Seed Sovereignty' (2014) 41 Journal of Peasant Studies 1225, 1227–32.

that has direct bearing on humans.[1128] The fault lines in both the plant and human genetic ownership remain largely the same. A main reason why genetic concerns have not reached everyday applications in human biotechnology has much more to do with the fact of ethical guidelines and lacking technical capacity than with law's dictates. There have simply been very few occasions where ownership over genetic coding would have, thus far, led to similar exclusion(s) as early proprietary plant seed technology did.[1129] In this sense, the prospect of proprietary human organ harvesting using artificial wombs or affecting in proprietary way to human germline through CRISPR technology are but some of the technologies that could, in the future, produce equally evident person-facing effects as IPR protection for seed variants did and does.[1130] That the outcome could be gruesome or repugnant for some due to regulatory arbitrage or property-based exclusions is highly likely.

Training models for artificial intelligence

On 3 March 2022, a United States district court set an order that marked a settlement between the Federal State Commission of the United States and Kurbo Inc. and WW International Inc.[1131] The two defendants had collected personally identifiable information from children in violation of Children's Online Privacy Protection Act ('COPPA'). The court's order is in most ways an unremarkable, technical enumeration of the injunctions set for the defendants and their duties to report adherence to the court order. On page eight of the stipulated order, the court does, however, provide an injunction that stands out from many similar orders around in the United States as well as globally. The defendants are to 'delete or destroy any Affected Work Product, and provide a written statement to the Commission, sworn under penalty of perjury, confirming such deletion or destruction.' The Affected

[1128] From the point of view of international law, see, Anne Saab, *Narratives of Hunger in International Law* (Cambridge University Press 2019) ch 3. In context of farmers' rights movement, see, Karine Peschard, 'Seed Wars and Farmers' Rights: Comparative Perspectives from Brazil and India' (2017) 44 Journal of Peasant Studies 144; for historical account of their emergence, see, Valbona Muzaka, 'Stealing the Common from the Goose: The Emergence of Farmers' Rights and Their Implementation in India and Brazil' (2021) 21 Journal of Agrarian Change 356.

[1129] Cases such as those against breast cancer test sets of Myriad Genetics based on patented gene sequences remain rare. To an extent focus by pharmaceutical companies has been on production and development of technologies of delivery (for example those associated with mRNA vaccines) rather than content of delivery.

[1130] On ethical issues and scientific prospects of using CRISPR technology, see, Henry Greely, *CRISPR People: The Science and Ethics of Editing Humans* (MIT Press 2022).

[1131] *United States of America v Kurbo Inc. and WW International Inc.* [2022] N.D. Cal No. 3:22-cv-00946-TSH

Work Product the court refers to is defined for the purpose of the order as 'any models or algorithms developed in whole or in part using Personal Information Collected from Children through the Kurbo Program.' In short, the settlement between the FTC and the defendants requires for destruction of artificial intelligence models trained using illegally gathered data. An FTC commissioner recently summarised the point of such algorithmic disgorgement by arguing that 'when companies collect data illegally, they should not be able to profit from either the data or any algorithm developed using it.'[1132]

While the statement of the FTC commissioner seems non-controversial, FTC's measures are novel and controversial. On most instances, illegal data gathering leads to removal of data, not the fruits of the poisonous tree they sprouted from. A prevalent view in European data protection discussion has for long been that models as such are not personal data, and therefore they fall outside the purview of data protection rules and should rather be regulated through intellectual property regimes.[1133] As with the genetic or genomic data stored in biological samples, the regulatory reach is with the initial use not with the secondary uses. Inasmuch as the sample donor has no rights over data gathered using their sample, personal data protection provides no rights over uses of legally processed personal data to train artificial intelligence models. Thus, even illegal gathering of personal data cannot reach the model, as the legal argument does not consider the model to anymore reside within the legal framework of personal data. And as most of the world's jurisdictions follow the European model, they treat algorithms and models taught using personal data largely the same.[1134]

The fact that a model has used some data or another, whether sensitive or not, is obviously not in and of itself a violation of rights. Your personal data might have overall a negligible impact and you might never encounter the algorithms and models

[1132] Rebecca Kelly Slaughter and others, 'Algorithms and Economic Justice' (2021) 23 Yale Journal of Law & Technology 1, 39.

[1133] See Michael Veale and others, 'Algorithms that Remember: Model Inversion Attacks and Data Protection Law' (2018) 376 Philosophical transactions of the Royal Society of London Series A: Mathematical, physical, and engineering sciences 1 (suggesting that such understanding of data protection is outdated in light of development of machine learning); Raphaël Gellert, 'Comparing Definitions of Data and Information in Data Protection Law and Machine Learning: A Useful Way Forward to Meaningfully Regulate Algorithms?' (2022) 16 Regulation & governance 156 (arguing that different meaning of personal data in machine learning and data protection explains the shortcomings of data protection to address machine learning/AI).

[1134] On global reach of European data protection model and some reasons why, see, Giulio Vittorio Cervi, 'Why and How Does the EU Rule Global Digital Policy: An Empirical Analysis of EU Regulatory Influence in Data Protection Laws' (2022) 1 Digital Society 18.

that have been taught using your personal data. Yet, in recent years there has been a growing tendency to rely on artificial intelligence or algorithms in support of decision-making, and in many cases as the first stage of a decision-making procedure. These applications focus on patterns of behaviour that are classified. Falling under a given category or classification carries with it consequences that range from harmless to lethal. The fact that my book purchase data is used to suggest me books others with similar purchase patterns have bought ranges to harmless, or some would even say beneficial models. On the other end of the scale are models used for example to launch a signature strike – 'a drone attack that targets "groups of men who bear certain signatures, or defining characteristics associated with terrorist activity, but whose identities aren't known'.[1135] The algorithms fed with personal data of persons previously classified as terrorists and a person's resemblance with that model. On such modelling, persons are (or at the very least were) reduced to things they carry, as a former drone operator revealed:

> "People get hung up that there's a targeted list of people," he says. "It's really like we're targeting a cell phone. We're not going after people – we're going after their phones, in the hopes that the person on the other end of that missile is the bad guy."[1136]

A concern over models, then, is one over classification, and the impact belonging to a category can have. That there are no legal means to erase oneself from such benign or harmful categories is a repugnant outcome from reduction of identity to unique entries of data.

The signature strikes provide a concrete illustration of the sort of semi-persistent identifiers on which information technology relies on. As the early accounts of signature strikes illustrate, the initial identifier was the SIM card carried on a mobile phone to authenticate mobile telephony devices. The technical regulation of SIM card illustrates the regulation needed to create such persistent identifiers globally. As with much other international technical regulation in the field of information technology, the rules originate from international, private, and public authorities. For example, the ITU-T Recommendation E.118 on the international telecommunication charge card stipulates how a number is stored on a SIM card, an ETSI TS 102 221

[1135] Kevin Jon Heller, '"One Hell of a Killing Machine": Signature Strikes and International Law' (2013) 11 Journal of International Criminal Justice 89, 90. The part quoted by Heller is from John Sifton, 'A Brief History of Drones' [2012].

[1136] Jeremy Scahill and Glenn Greenwald, 'The NSA's Secret Role in the U.S. Assassination Program' (*The Intercept*, 10 February 2014) <https://theintercept.com/2014/02/10/the-nsas-secret-role/> accessed 15 August 2023.

standard sets the physical and logical characteristics of SIM cards, which then relies on ISO/IEC standards on universal coded character set (e.g., ISO/IEC 10646:2020). These then further link with telephony networks and their standards (e.g., GMT, UMTS, LTE, etc.). Frequencies allocated to those networks for operation are then again set nationally or regionally (e.g., Directive (EU) 2018/1972 establishing the European Electronic Communications Code) in accordance with the rules set globally in WTO's Basic Agreement on Telecommunications. In short, the creation of a persistent identifier requires extensive regulation.

But, as with the biobanks, the other side of the equation governing over the uses of personal data in creation of a model hangs on consent, contract, or a legal duty. Whereas the objects that allow for the emergence of persistent identity are tightly regulated, the persons on whom the data is of and about are left with but a set of generic and often unenforceable rights. The reason the rights remain often illusory relates to the piecemeal construction of a person and de-territorialisation of processing: a credit card transaction here, an internet connection there, and a social media message yonder. All of these are, from the personal point of view, separate actions governed by separate contracts and commonly by distinct legislation as well. It is precisely the lack of a holistic view of a person that makes re-integration of a person without personal so effective. As most existing legislation treats non-personal and personal data differently and does not provide access to models and inferences made using non-personal or even legally acquired personal data, there is little legally that prevents from use, launder, or acquisition of data to create a model outside, say, the European Union jurisdiction that nonetheless has direct bearing on a person within the European Union without their knowledge. Therefore, much that stands for data protection and its robustness in the European model of data protection provides but a weak shelter against piecemeal feeding of an algorithm or a model that can have negative personal outcomes despite being targeted towards group-level classification. Difference to the things that govern the generation of an identifier is stark: for an identifier there are directly enforceable laws to protect each separate object from violations.

A closer look to the way the personal rights against inference are construed illustrates the point well. In a recent judgment of the Grand Chamber of the Court of Justice of the European Union, the Court found that publishing information of certain public officials online to fight corruption in government is a serious infringement of the rights of those holding such offices. The Court held that 'publication of those data is liable, for example, to expose the persons concerned to repeated targeted advertising and commercial sales canvassing, or even to risks of criminal

activity.'[1137] As such, the court does consider there to be an inherent harm stemming from public data. It goes further and concludes that the Lithuanian legislation on the matter does not strike a fair balance between competing interests, and therefore violates the Union's data protection law. But the Court goes further. It answers on the affirmative also to another question referring directly to inference of 'special categories of data' from the filings. The Court disagrees on the matter with the opinion provided by the Advocate-General, and finds that the provisions of the GDPR governing special category of data 'cannot be interpreted as meaning that the processing of personal data that are liable indirectly to reveal sensitive information concerning a natural person is excluded from the strengthened protection regime prescribed by those provisions.'[1138] In short, the Court finds that if an inference of, say, sexual orientation is possible based on data, such data belongs to special category of data, for which more rigorous demands of use apply. Based on available research on finding out sensitive information using minimal data, it is safe to assume that in theory at least most every data can be sensitive.[1139]

The fact that most everything can be personal data has been a source of some consternation among European data protection scholars for quite some time.[1140] That now most of all data can also belong to a special category of personal data is making the data protection regulation even more stringent for any processing of personal data. Yet, it is precisely with this stretching out of personal data to cover everything that most abuses collapse into nothing. For example, the data gathering practices of large online corporations, such as Meta or Alphabet, have for long had a strenuous relationship with the letter and certainly with the spirit of GDPR.[1141] That little has

[1137] Case C-184/20, *OT v Vyriausioji tarnybinės etikos komisija* [2022] ECLI:EU:C:2022:601 §100

[1138] ibid. §127

[1139] See, for example, Latanya Sweeney, 'Matching Known Patients to Health Records in Washington State Data' [2013] SSRN Electronic Journal; Tim De Chant, 'Catholic Priest Quits after "Anonymized" Data Revealed Alleged Use of Grindr' (*Ars Technica*, 21 July 2021) <https://arstechnica.com/tech-policy/2021/07/catholic-priest-quits-after-anonymized-data-revealed-alleged-use-of-grindr/> accessed 15 August 2023.

[1140] Nadezhda Purtova, 'The Law of Everything: Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 Law, innovation and technology 40.

[1141] As of writing this the Irish Data Protection authority has just imposed fines for Meta on its advertising practices. The European Data Protection Board (EDPB) issued a binding decision on 5 December 2022, which Irish DPA later put into effect together with an administrative fine. Meta had changed its legal basis from consent to contract as a legal basis for processing, but as EDPB notes, there are no objectively necessary reasons for behavioural advertising, wherefore the practice is in violation of the GDPR, see, EDPB, *Binding Decision 03/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR)* adopted on 5 December 2022, §111ff.

changed in their practice has much to do with the apparent gap between what law is in purely academic meaning of the word and what law is in its everyday practice. There is widely shared consensus among researchers of data protection and growingly also with responsible authorities that for example real-time bidding of advertisement violates the GDPR, and yet the practice is commonplace to a point where the CJEU openly admits that the mere presence of your name together with history of acquisitions worth over 3,000 euros may expose you to repeated targeted advertisement. And while requiring such transparency for fighting against corruption is setting the balance astray, requiring such for access to most available websites is apparently not.[1142]

Thus, despite the stringent edifice of the European data protection, it is relatively easy to collect substantial amounts of data for training of a model that remains beyond the purview of data protection regulation. And through such gathering of data one can, according to the very court enforcing it within Europe, be exposed to 'risks of criminal activity'. Against such exposure there are no sensibly effective methods. The means to challenge decisions concerning, for example, a faulty police triangulation algorithm, facial recognition in public spaces, work or welfare filtering, or credit score or access to credit are and have been shown to be mostly lacking. Nonetheless, within the European Union the situation is in many ways better than in most other jurisdictions for there is at the very least a theoretical possibility to challenge the use and gathering of personal data, albeit a slow and cumbersome one. In many locales around the globe such rights are non-existent. As charted by a growing number of researchers, much of what counts data these days partakes in extraction of value from everyone to the benefit of a small cadre, while surveilling, controlling, and supressing many. This is what has been increasingly called as 'data colonialism' among research- and NGO-community.[1143]

'The discourse around "data mining", "abundance of data", and "data rich continent" shows the extent to which the individual behind each data point is

[1142] There might be a turn of tide with newly adopted decision in Meta cases, even though it remains at the time of this writing too early to say. Nonetheless, the practice persists as I write this. There are several pending cases that will address this question in one way or another, see, for example, Case C-252/21, *Meta Platforms Inc. v Bundeskartellamt* [202?] ECLI:EU:C:2022:704. The opinion of the advocate-general in said case aligns with the interpretation provided by EDPB.

[1143] See, for example, Jim Thatcher and others, 'Data Colonialism through Accumulation by Dispossession: New Metaphors for Daily Data' (2016) 34 Environment and Planning D: Society and Space 990; Kadija Ferryman, 'The Dangers of Data Colonialism in Precision Public Health' (2021) 12 Global policy 90; Nick Couldry and Ulises A Mejias, *The Costs of Connection: How Data is Colonizing Human Life and Appropriating It for Capitalism* (Stanford University Press 2019).

disregarded,'[1144] argues Abeba Birhane on her account of data colonialism in Africa. Yet, the mined data is of someone and always carries some information that can be used for identification. Alternatively, similar results can be reached through use of mandatory electronic or biometric identifiers common to distribution of aid and access to services. Aaron Martin and Linnet Taylor posit that there is an 'inevitable risk of function creep from identifying to controlling, which […] is most likely to occur through the tendency of digitized and linked identification systems to expose their subjects to other forms of control.' [1145]Thus, when for example Facebook maps the population of African continent to increase its legibility for corporate and state purposes, there is an inherent risk of control (or worse) against which the individuals made legible have no legal redress. If only access to online services that provide, for example, the only available banking services is through a connection provided by Facebook (or Meta), there is no meaningful way to abstain from use either. That such digital identities are sold by the states in return of investments or used for software that is then sold back again to governments who sold the data are but some of the repercussions of these practices. And as with the fear of international lawyers of yore, the focus in most research in high-income countries has been on the use of these models at home turf to control and suppress minorities and dissidents.

The technical regulation of identity is, then, bifurcated between, on the one hand, intricate and detailed norms over protocols, devices, transmission signals, and wave frequencies that are directly enforceable and commonly under direct state control. On the other hand, there are rules governing the personal data as a technical category, which is subject to notable leeway and ambiguity, understanding the concept of personal too tightly or overtly widely, and, therefore, missing the forest for the trees. The outcome is that the most effective way to alter encoding of identities is through gadgets. Any rights persons may have cannot alter their treatment, even when such treatment is directly affecting to their most fundamental human rights. A case in point are refugees and immigrants who are subject to extensive technological means of identity verification, ranging from iris scans to monitoring movement of refugees approaching European borders. Often the private corporate interests and the humanitarian goals intersect, feeding into systems later employed outside the 'test bed' of refugees and migrants. After millions of iris scans and countless faces and fingerprints targeting migrants and refugees, systems are ready to be launched for use by the security and control apparatus in the high-income countries. At this point,

[1144] Abeba Birhane, 'Algorithmic Colonization of Africa' (2020) 17 Script-ed 390, 397.
[1145] Aaron Martin and Linnet Taylor, 'Exclusion and Inclusion in Identification: Regulation, Displacement and Data Justice' (2021) 27 Information Technology for Development 50, 51. 1

the data devoured by the model is beyond most means of legal challenge: they are legally gathered and/or the models are not within the remit of existing legislation.

Persons are re-integrated into digital verisimilitude of their physical bodies to a sufficiently meaningful extent that measures can be targeted to persons and, increasingly, groups found to be suspect for whatever reason. Whether this is extension of the permanent state of exception on a global scale or a continuation of the colonial and racial control of subaltern bodies matters little. Some of the most foundational rights of persons are cast out and the rights of these persons are vacated and placed to gadgets storing data about them and on tools and methods created to mark their digital replicas with (quasi-)permanent and personal identifiers. A meaningful avenue to rights and legal redress is no longer held with the persons but are placed to their digital replicas that nonetheless cannot exercise any rights as they are but a part of global digital infrastructure that is subject to property rights over things, not rights of persons. Even the globally most robust digital rights leave individuals with only modest means to challenge such re-integration and its concomitant reduction of rights to virtually meaningless guardianship over that which does not matter. While more efficient enforcement and new rules and regulations could amend the situation, the de-localised nature of present cloud empires makes local, even regional responses targeting individual harms markedly inefficient. The gathering of data at scale that affects everyone online cannot be addressed through individual claims. The multitude of rights conceals the fact that they are all uniquely insufficient to address the harm at large.

2.5 Conclusion

In this section I have looked at some of the ways technological regulation creates conditions for emergence of repugnancy in law. I have focused on technological aspects that are far-flung from the most immediately repugnant outcomes in order to highlight the fact that much that passes as harmful is not a consequence from a set of chosen political preferences of states, and therefore not a form of apologetic adherence to powerful or less powerful states' desires. At the same time, I have pointed out that most of the rules and regulations that generate such repugnancy are not utopian formulations of everyone's rights and uniqueness of human aspirations. Rather, the norms I have stressed are technical, managerial, and mostly under the radar of international legal scholarship. As such, the traditional critical stance of indeterminacy, realist position of power politics, nor utopian understanding of commonality provide a particularly accurate understanding of the repugnancy created through technological regulation.

Rather, I have throughout the present section indicated the benign intent behind much technological regulation. Choices are driven by desire to promote those precise goals that international law more in general strives for: interoperability, consensus, sharing of best practices, and due diligence. Yet, the outcome, I argue, is subjecting humans to gadgets. This follows from the simple multiplication of instruments protected by law that can simultaneously be used for curtailing rights in small but significant ways. A network effect of a mobile telephony terminal standard paired with attribution of unique identifiers to subscribers is what made signature strikes, one of the most troublesome parts of the U.S. drone wars, a practicable reality and one that allowed for reduction of persons to their cell phones. To place responsibility from these strikes to an international standard-setter in a working group or a cell phone operator clearly abdicates the responsibility of a state actor from its questionable activities, but the example indicates the pathways that the operationalisation of technology for the purpose of reification of humans employs.

Technological norms are detailed. A traditional critical stance, which locates international law's conundrum to a level of language and its indeterminacy is not capable to address highly determinate law of technology. The ontologies of technological gadgets for law are precise, unlike traditional concepts international law has occupied itself. What a state is in international law might be ultimately an empty ontological container, but a similar argument falls flat with material and circumspect existence of a nano-SIM card. The extra judicial qualities of such a card are multiple, but legally there is little in terms of leeway: the size, the technical features, and other material elements of the object and its ontology are precise. There is no debate to be had what norms apply to a nano-SIM nor whether there is a different intensity of being a nano-SIM card. There is a majestic equality of technology law, which guarantees that all nano-SIM cards carry equal rights. A state may push the envelope in defining a combatant for the purpose of international humanitarian law, and such indeterminacy of norms may justify a state targeting a nano-SIM card as a proxy of a combatant. The outcome is repugnant, yet the critique of indeterminacy is unable to address the very material things that makes the execution of such repugnancy possible.

The international law on technology appears more fertile soil for a traditional realist analysis of state power and its projection to other areas. Yet, as the trends in standardisation and technical norms at international level more in general indicate, states are increasingly side-lined from the decision-making processes.[1146] States do project their power in ways visioned by realists among international lawyers, but it

[1146] A classical example of state role in setting standards is involvement of U.S. government in protection of interests of pharmaceutical companies in drafting TRIPS agreement, see, Sell (n 943).

transmits through more traditional avenues.[1147] For example, Finland does not seek to address technical rules governing transfer of frozen gametes in its effort to curtail acceptance for commercial gestational surrogacy nor do I know of any single state that would. States may rationally promote their public morals or trade interests through policy choices, but they retain an arm's length approach to technical rules. To read non-interference as means to maximise interests would suggest that all states would have similar or like interests in advancing all technologies, which either provides no additional analytical insights or is simply wrong. Alternatively, to read international law only as that what takes place between states removes most what counts as international law at present beyond (or below) international law, making it a matter of a vanishing cause. For example, the institutions created through international law would no longer count as international legal matter. And that other part of rationalism, namely, the state violation of their obligations opposing their interests, is entirely absent as well in the realm of technology. The different models globally compete in the extent technologies should be used, not in the constitution of the technology itself.

In short, I have sought to indicate that while many of the phenomena that I do describe have received attention that has been even critical at times, I am not familiar with accounts where those critical insights would have been targeted against the regulation of technologies. And what is more, I fail to see how the traditional methods of critique employed by international lawyers could provide such insights. Thus, for long international lawyers have turned to private international law, international institutional law, transnational law, global law, and their kin to explain the role non-state actors have in international law. And while all these fields of inquiry have produced notable critical insights on international law below and beyond a state, their focus has seldom been that of technical rules. For one, business and human rights scholarship constitutes a truly global approach to law and often addresses technology – whether as a new ground, such as platforms, or as means to perpetrate human rights violations – but here neither the focus is on the role played by the actual technological rules. Manufacturing technology can be a human rights or an environmental disaster, use of technology in value chain might constitute a serious violation, and so on and so forth, yet the emphasis is on governance of corporations and efficient enforcement of their malfeasance—not on the impact technological norms has in reducing rights-claims to those minimally limited to things.

[1147] See, for example, Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press 2005), where they define international law as emerging 'from states acting rationally to maximize their interests, given their perceptions of interests of other states and the distribution of state power.' (at 3).

It is for these reasons that I ask throughout this chapter to readjust the gaze and perceive the legal relations as they emerge to and through a technological gadget. Such a reading, I argue, accentuates the neutralising power that technological regulation has to rights-claims of human beings targeted by such technologies. Inasmuch as technologies differ in their interaction with persons, they all employ a similar logic of regulation. This logic of regulation seeks to separate a person and rights commanded by a person by using clear-cut distinctions that appear at first tangential or even spurious to protection of rights of a person. Yet, the more rules and regulation there are governing the interface of technology and person, the more the vision over what counts as a person is clouded. A trade in children is clearly illegal, a trade in service that leads to a child is not; gathering personal data without consent is illegal, using that data to train an AI model is not. The difference between the two appears minimal, but the legal crafting that separates the two is intricate and commonly voluminous. Each individual step on the way can be traced and justified, but within a boundedly rational setting it is impossible to foresee all future trajectories that might intersect with those steps.

The intersections are multiplied by the fact that technology creates complex, overlapping categories of time and place. The time can be frozen, or it could be accelerated, and as Norbert Wiener noted the time of machines is not that of ours. The same applies to technology in general. Quite as Parfit formulated his repugnant conclusion through immediate paradox over the identity of future persons, the legal problem of repugnancy could be formulated using the immediate paradox of the identity of future legal relations. There are endless such relations, they change with each rule and regulation, and due to this endless interaction are impossible to model, even though we could in theory trace origin of each interaction. The nature of technological rules and regulations as highly detailed is what separates them from more traditional forms of international law or law in more general, for they seem to allow little leeway for a different reading: they are anchored with a meaning even when the surrounding society might be subject to continuous acceleration. Therefore, technology provides such an illustrative example of benign repugnancy of law—a well-intended regulation that leaves some without enforceable rights.

3 An angry gaze: towards a critique of repugnant rights

3.1 Introduction

'Right now, Ukraine's grain silos are full. At the same time, 44 million people around the world are marching towards starvation,' declared Executive Director of World Food Program David Beasley in early May 2022.[1148] He has since continued to alarm everyone from the severity of the crisis on global food security.[1149] This comes as no surprise to anyone familiar with global food security and the role of law in it. For more than two decades, a special rapporteur on the right to food has charted failures in food security. As food functions like a commodity, it is subject to similar speculation as every other commodity in the global economy. Writing in 2009, the then acting Special Rapporteur on the Right to Food Olivier de Schutter, noted how 'resource-poor but cash-rich countries have turned to large-scale acquisitions or rent of land in order to achieve food security.'[1150] The price of food security for some is the growing insecurity of the others. That one of the world's largest exporters of grains is attacked and unable to deliver food, and others are reacting, leads the commodity market to response like markets do: the price of commodity increases. This vision of free trade long in the making in international law creates poverty and food insecurity, but it cushions the cash-rich countries from hunger.[1151] Thus, in

[1148] 'WFP Calls for Urgent Opening of Ukrainian Ports to Help Rein in Global Hunger Crisis' (*World Food Programme*, 6 May 2022) <https://www.wfp.org/news/wfp-calls-urgent-opening-ukrainian-ports-help-rein-global-hunger-crisis> accessed 15 August 2023.

[1149] Edward Wong and Ana Swanson, 'How Russia's War on Ukraine is Worsening Global Starvation', *New York Times* (2 January 2023); see also WFP, *War in Ukraine Drives Global Food Crisis* (WFP 2022).

[1150] Olivier de Schutter, 'Large-Scale Land Acquisitions and Leases: A Set of Core Principles and Measures to Address the Human Rights Challenges' (11 June 2009).

[1151] See, in general, Anne Orford, 'Food Security, Free Trade, and the Battle for the State' (2015) 11 Journal of International Law & International Relations 1.

Finland the news focus on price hikes a consumer might expect to see with a passing remark that starvation can lead to unrest in Middle East and North Africa.[1152]

I have thus far argued that international law occupies a central position as a system that transmits material objects around the globe, and together with those objects carries norms that are sheltered from most scrutiny due to their sheer complexity, diverse origin, and, ultimately, the reliance in language of science and technology to neutralise even the most gruesome outcomes. I consider this to be an injustice. It is an injustice just as food insecurity or hunger are injustices. It is an injustice quite like death from an easily curable illness is an injustice. For relatively long, international lawyers have been acutely aware from the injustices of the system. For equally long, international lawyers have shown allegiance to the system that has failed so many so badly. Year after year, special rapporteurs, prosecutors, judges, arbitrators, and officials of international organisations have appeared before institutions and bodies to voice their concern. They speak – cool and composed – from death, torture, hunger, and poverty as injustices that states, and international organisations ought to correct. They wield the sharp sword of their wit to pierce the veil that shrouds the everyday practices that uphold these injustices, and they indicate the international legal instruments, documents, and judgments that require a different course.

On this chapter, I question the feasibility of this mode to initiate a change. I question whether yet another account of atrocities committed, of failures to uphold international law really will turn the tide. I argue that there is no shortage of knowledge of injustices, if there ever has been. I first turn to international law's charting of injustices done on its name. I show how systematic charting of injustices has been part and parcel of international law for long and point out that there is a widely shared consensus even on factors contributing to those injustices. But I also indicate that this charting of injustices has led to relatively little. The awareness from presence of international legal structures that uphold injustices has not led to a change of those structures. The imaginative capacity of international lawyers has merely contributed to a different distribution of misery, to a temporary abrogation of one norm only to have it replaced by another one contributing to the very same

[1152] 'PTT: Ruoan hinta voi nousta Suomessa nopeammin kuin koskaan EU-aikana – Euroopasta ruoka ei lopu' (*mtvuutiset.fi*, 29 March 2022) <https://www.mtvuutiset.fi/artikkeli/ptt-ruoan-hinta-voi-nousta-suomessa-nopeammin-kuin-koskaan-eu-aikana/8389890> accessed 15 August 2023. The remark is likely made to indicate that Europe might encounter waves of migration from the region rather than due to some grave concern over well-being of humans in the region.

misery.[1153] I ask, then, whether we should turn from knowledge to emotions – from erudition to anger – as an antidote. I show that not only is anger an apt response to the injustices upheld by international law, but anger would also motivate to action and to a more active charting of an actual change than any other available alternative. It would, however, expose international lawyers to a more foundational question over identity and value of work with international law.

3.2 Injustice and international law

International law is evolving through a repeated series of crises, as I argued following Hilary Charlesworth in the third section of the first part. Surely enough, as Charlesworth points out, the crisis mode has been triggered by war and human suffering several times, but the response and the crises themselves have chiefly focused on state action, not on the human suffering. The failure of international law to respond to hunger, death, and suffering from slowly or even quickly evolving crises is wholesale.[1154] There is no crisis of international law because pneumonia kills 700,000 children under five every year or that hunger and related causes kill 15,000 children every day.[1155] There is no crisis due to tens of thousands of people

[1153] This attitude of settling for reform rather than striving for revolution—or to employ my own nomenclature changing the axioms of international law—is central to thought of Rosa Luxemburg. As aptly summarised by Serena Natile, Luxemburg 'insisted that we cannot counterpose reform and revolution but that there is a necessary link between the two, as the struggle for reform is a means of achieving revolutionary transformation. Leaders who support legislative reform in opposition to revolution are not choosing a different method by which to achieve the same goal but are opting for a different goal, namely a cosmetic modification of the existing system that does not fundamentally change the mechanisms of power distribution within it.' See, Serena Natile, 'The Revolutionary Potential of Transnational Social Security Law: Lessons from Rosa Luxemburg' (*Critical Legal Thinking*, 12 February 2022) <https://criticallegalthinking.com/2022/12/02/the-revolutionary-potential-of-transnational-social-security-law-lessons-from-rosa-luxemburg/> accessed 15 August 2023. For Luxemburg constitution marked a rupture with a past—a revolutionary act—that was set into force through legislation, see, Rosa Luxemburg, *Reform and Revolution* (Foreign Languages Press 2020) 62.

[1154] Sonja Starr, 'Extraordinary Crimes at Ordinary Times: International Justice beyond Crisis Situations' (2007) 101 Northwestern University Law Review 1257. An account more focused on role of human rights and international law in general, Susan Marks, 'Human Rights and the Bottom Billion' (2009) 1 European Human Rights Law Review 37.

[1155] 'Childhood Pneumonia: Everything You Need to Know' (*UNICEF*, 8 November 2022) <https://www.unicef.org/stories/childhood-pneumonia-explained> accessed 15 August 2023; Emi Suzuki and Haruna Kashiwase, 'New Child Mortality Estimates Show that 15,000 Children Died Every Day in 2016' (*World Bank Blogs*, 19 October 2017)

dying when seeking sanctuary from the affluent societies in Europe, Pacific, and North America. These are concerns of sovereign nations and their failure. There is no crisis of international law associated with lacking access to medicine due to intricacies of patent law or over failure of all oxygen concentrators in subtropical climate. There are concerns of property and its ways. Even when international law calls for crisis, its actions are – as Charlesworth pointed out – rushed and simply lousy law, as in the case of climate crisis and its response. A crisis of international law is an event, not a process, and, therefore, much that I consider repugnant in law does not surface as an acute moment of crisis for the international legal system.

The fact that the law's everyday repugnancy does not surface as a crisis of an order does not prevent its attribution as an injustice. A sense of inherent injustice of international law has a relatively long pedigree even within the modern international law's paradigm, and it has been articulated forcefully by successive generations of scholars, especially about colonialism's impact on the state and the people in former colonies.[1156] However, on many of these accounts of international law's inherent injustice, the focus is on the system that impoverishes the states or limits their capacity to operate differently, rather than on the role of international law in guiding the more everyday violence of these states.[1157] Philip Alston, for one, suggests that among those who outlined the new international order there was modest interest to some of the most grave injustices. Alston argues that we ought not to consider the terrain of new globalised world order to be an even one. Rather, in visions of many of those who were advocating for global order, such order is 'consonant with one particular, rather narrow, vision of the role of the international community in

<https://blogs.worldbank.org/opendata/new-child-mortality-estimates-show-15000-children-died-every-day-2016> accessed 15 August 2023.

[1156] See e.g., Evgeny Pashukanis, 'International Law' in Peter B Maggs (tr), *Selected Writings on Marxism and Law* (Academic Press 1980) [suggesting that quite like in private law, international law 'assumes that subjects are formally equal yet simultaneously permit real inequality' that is due to imperialism]; Ryan Mitchell, 'The Korean War and the Ontology of Intervention: Chen Tiqiang's "Who Is Undermining International Law?" (1950)' (*Legal Form*, 3 May 2019) <https://legalform.blog/2019/03/05/the-korean-war-and-the-ontology-of-intervention-chen-tiqiangs-who-is-undermining-international-law-1950-ryan-mitchell/> accessed 15 August 2023 [suggesting that international law serves vestiges of imperial aspirations of US and UK as they wage war in Korea]; Anand (n 577) [suggesting that newly independent states were not heard in the process of making rules, thus making them Western and colonial].

[1157] Arguably, most of these accounts seem to presume that if there were no structures like those addressed, the problems would evaporate, maintaining an equally myopic vision of colonialism as end-all of evil as those accounts that do not address the colonial origins of international law at all. On the risks of attributing no agency—in good or in evil—to people living in the postcolony see, Mbembe (n 275).

response to challenges of globalization.'[1158] This narrow vision commonly aligns with images of outright 'evil' from which law can provide a shelter from. Therefore, we have a disparate set of actors on all levels of global co-operation working on terrorism or crimes against humanity and genocide and a much less visible traction for vaccines, food, or water. It does not mean that the former ones or the rules concerning trade would not be important – they certainly are – but the gravitas they carry in the public and professional imagination pulls the air out from more quotidian forms of injustice that are often more egregious.[1159] These everyday evils are explained through sovereign failures; failures in providing means to acquire food and water to provide people with sustenance, failure to avoid conflict, failure to build up resilience, failure to implement the rule of law. The sovereign lens through which much of the contemporary international law perceives itself domesticates these problems, even though the normative order that upholds those problems would be thoroughly global.

'It is now time to enquire more closely', declares Sionaidh Douglas-Scott, 'into the ways in which complexity, fragmentation, pluralism of laws and globalisation can perpetuate injustice.'[1160] Arguing against 'breathless enthusiasm' towards private, technical, and flexible law, she suggests that legal theory ought to look more closely how 'political dilemmas have been reduced to technical solutions.'[1161] She perceives this problem further accentuated in a global or transnational setting, where

> [t]he poor, who make up these 'innumerable singular sites of suffering', are most of the time unable to challenge the forces responsible for their oppression—for which their own, often powerless or failing, states they are unlikely to find redress against oppressors or exploiters who occupy out-of-state, offshore areas of control, out of reach of justice.[1162]

In a sense, the suffering poor out of reach of justice act as a veritable call to expand the horizon of our standards of justice. The presence of suffering that could be

[1158] Alston (n 955) 439.

[1159] A good example is the war in Ukraine. There is no shortage of proposals for mobilising international law through, for example, special court to adjudication Russian aggression, etc. Yet, it is unlikely that during any day of the conflict there have been as many casualties as hunger kills daily, and the death toll is not after a year anywhere comparable to that of children under five dying of equally preventable pneumonia. This, like anything that follows, is not to derail international legal focus on ending all forms of misery, merely to indicate that the focus has been lopsided to visible crises whereas the quiet and constant ones remain to a large extent unnoticed.

[1160] Douglas-Scott (n 69) 146.

[1161] ibid 167.

[1162] ibid 190.

averted calls for a revision of the horizon where rights are at present allocated. Douglas-Scott argues against what she titles Schmitt's exceptionalist jurisprudence precisely on these grounds: reliance on Schmitt and the sovereign prerogative to impose an exception incapacitates jurisprudence to 'handle shocking events such as Guantánamo.'[1163] To what extent Guantanamo signals an exception can be questioned, but Douglas-Scott's analysis of the hold of exceptionalism over jurisprudential imagination is convincing. For as long as it is possible to call these exceptional times there is little that prevents states from abrogating rule of law temporarily—or as the years since the 2001 terrorist attacks have indicated with relative permanence. Thus, she argues that 'Schmitt must be rejected as offering a jurisprudence of shame,'[1164] for it signals an abandonment of law and hope for justice.

The embarrassment flows from an excess of law, leading to an anathema of law's perceived systemic telos or its underlying worthiness. There is much law but little justice. Douglas-Scott's reply to the fluidity and complexity of the law after modernity is to uphold the rule of law as a tool to weed out injustice. Her image of the law circulating beyond state is, however, wildly different from the one I seek to uphold; the prime candidate for a pluralist legal order for Douglas-Scott remains throughout her book the European Union, even when the evocative sources of shame she employs derive from a global inequality that hardly surfaces in its most egregious forms within the EU. For Douglas-Scott, law is pliable to causes of power as well as for promotion of justice and welfare—a tool for worthy and base cravings alike. Yet, much of the technical regulation that I focus on appears to lack such evident moral dimension that would allow bending it to serve immediately any other purpose than that what it is designed for. That the outcome from adherence to these norms might lead to systemic failure is not a function of irregularities in the rule of law, as suggested by Douglas-Scott, but from the interaction of small, barely noticeable injustices embedded throughout the system.[1165] Similar mechanisms leads Itamar Mann to suggest for presence of legal black holes; they are not black holes emerging

[1163] ibid 241.
[1164] ibid 242.
[1165] I am fully in agreement with her on the corrective function of the rule of law if and when the stringent procedural hurdle can be overcome. A good example from the force of the rule of law to come in terms with the injustice perpetrated in name of law is a string of recent cases concerning the status of Western Sahara before the Court of Justice of the European Union. On them, the foundational injustice was condemned, even if timidly, yet I remain at doubt whether similar claims would be meritorious against ill-designed certification standard for medical air concentrators.

from the abuse of the rule of law, but rather from the effective functioning of the rule of law itself.[1166]

Douglas-Scott also encounters the problem of black holes midst abundance of law. She compares present-day legal pluralism to the image of *Carina Nebula*,

> a vast complex of dust, stars, gas, forces and energy […which] [w]ith its hugeness, its mysteries and multiplications, its black holes (to which contemporary law has not been immune), it might be compared to the contemporary legal landscape.[1167]

But rather than exploring the imaginary that the *Carina Nebula* summons, Douglas-Scott proceeds to explain it away, replacing the image with a geographical structuring of complexity bound by known rules where '[t]here are no black holes.' This image of symmetry and structure remains 'an aspiration, not a representation of reality.'[1168] Thus, when faced with the enigma of human rights in the transnational (or global or international) frame, Douglas-Scott takes the leap of faith. The rule of law commands a power to hold the meek and the powerful on account, albeit there are systemic failures she readily admits (e.g., the non-prosecution of bankers after the 2008 financial crisis). Even as the rule of law fails, it serves as a worthy calling that should not be abandoned in the face of challenges it does and has encountered. For persons beyond the jurisdictional limits, the proposed solution of Douglas-Scott for the black holes, namely, the rule of law does not seem to provide any solace. If a person always remains beyond the pale of the rule of law that could liberate her and end the injustice perpetrated to her by the rules of others, I am not fully convinced a meta-principle of critical justice will console her. If I remain invisible inside a legal black hole of the unbearable mass of collapsing rights (or wrongs), a principle to articulate correct content of those rights does not make me more visible.

There are even further reasons to doubt that beyond the challenges posed by concerns of access to justice, promotion of rule of law as a solution for injustices works. The idea of rule of law is ambivalent and its modus operandi of holding the powerful on account is domestic rather than transnational. According to Stephen Humphreys, when the rule of law is promoted in transnational setting, it could 'perhaps best [be] viewed as a sort of theatre, a morality tale staged as a spectacle'[1169] where many of its basic mechanisms 'contradict outright some core principles

[1166] Mann (n 1100).
[1167] Douglas-Scott (n 69) 105.
[1168] ibid 122.
[1169] Stephen Humphreys, *Theatre of the Rule of Law* (Oxford University Press 2010) 9.

regularly asserted under the rule of law rubric.'[1170] The rule of law is rather a tool to nudge states towards a particular mode of governance and economy rather than an instrument of justice. Humphreys suggests that instead of perceiving the rule of law as an emancipatory mode of justice, it has a 'rhetorical hostility to welfare'[1171] built up on 'a powerfully entrenched set of dichotomies [that] over the last century has naturalised this hostility.'[1172] As such, Humphreys account on the emergence of specifically transnational mode of rule of law promotion hangs on a mode of drawing distinctions markedly like one analysed at large by Luhmann in his systems theory: a system develops in complexity through a set of distinctions that conceal the foundational paradox.

At root, rule of law's hostility to welfare stems from a reflexive anti-history of its early proponents that has enabled a form of critique of welfare as something antithetical to the rule of law. According to Humphreys, in initial formulation of Dicey the critique is found on an idea that policy is an anathema of 'proper' rule of law, in a sense the other side of its foundational paradox.

> Rights are conceived in opposition to policy; they are permanent where policy is contingent, they are known where policy is opaque, they are rule-bound where policy is discretionary.[1173]

While Humphreys notes that this hostility was considered misguided by much of the legal commentary, among the economic circles this vision took hold in the works of emergent neoliberals, such as Friedrich Hayek. In recent years, research in history has tied side-lining of social rights on a global scale to powerful thrust of neoliberal vision whose groundwork was laid down by Austrian interwar economists.[1174] Arguably, similar reflexive anti-historical attitude pervaded much of the new approaches to international law that came to define the research agenda in international legal academia from the end of Cold War to the present.[1175] Where Dicey chose to close his eyes from the then emergent welfare state and the discretionary force occupied by state administrators, most of the early NAIL literature refused to see the profound changes in the fabric of international law and

[1170] ibid 12–13.
[1171] ibid 59.
[1172] ibid 60.
[1173] ibid.
[1174] See, Slobodian (n 257); Moyn, *Not Enough: Human Rights in an Unequal World* (n 198); Whyte (n 257).
[1175] I have charted these 'new' modes of international law in the first part. As noted, these shortcomings were already suggested by contemporaries, but they have kept hold up till the 2010s, and to a certain extent, present.

kept on charting for its welfarist origin long after such projects had lost track of the international law as practiced.[1176] This can be perceived in the opposition to visions of the 'new world order' by likes of Slaughter charted above,[1177] but also the virtual absence of important institutional changes that had already by the 1980s laid out the groundwork for the future power of, say, international financial institutions.[1178] International law as a discipline thus constructs much of its criticism with equally anti-historical premises as Dicey did in his promotion of the rule of law. This has left the human rights of the 'bottom billion' and the injustices of their everyday life without much international legal analysis let alone critique. In short, the fixation on sovereign as premeditated first by the new approaches to international law and later by the search of genealogies to the concepts deemed central to this limited vision of international law, international law has been incapable to articulate everyday injustices it upholds.

The reflexive anti-history of the rule of law and its promotion distorted the vision of its functioning at the transnational level. A selective choice between different facets of the rule of law led to creation of a chimeric rule of law on transnational level that had little to do with the notion of the rule of law as a guarantee against abuse. Similarly, while a focus in international law on a set of norms that operate chiefly between states on basis of multilateralism has faced mounting critique, much of said critique and defences laid out against it have been found on a vision of international law that is hardly representative of the multitude of modes of international law.[1179] As Fleur Johns and Anastasiya Kotova pointed out at the beginning of the most recent Russian attack in Ukraine, the international law is far from dead.[1180] There is a functioning rules-based international order, whatever that implies. It simply is not operationalised any longer through those structures, institutions, and actors that much of the critical and other international legal

[1176] Jouannet (n 276). Jouannet declares that international law 'has also been considered a form of "welfare", a right of intervention intended to secure the happiness and well-being of world's peoples.' [p. 2]

[1177] See, supra part 1, chapter 5.1.2.

[1178] See, however, Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 Harvard International Law Journal 443.

[1179] See, for critique of multilateralism and international law as a mode of regulation, for example, Goldsmith and Posner (n 1147); a critique against this law and economics based 'new realist' critique, Jens David Ohlin, *The Assault on International Law* (Oxford University Press 2015); an alternate vision of what international law does regulate, Johns, *Non-Legality in International Law: Unruly Law* (n 685).

[1180] Fleur Johns and Anastasiya Kotova, 'Ukraine: Don't Write off the International Order – Read and Rewrite It' (*the Interpreter*, 4 March 2022) <https://www.lowyinstitute.org/the-interpreter/ukraine-don-t-write-international-order-read-rewrite-it> accessed 15 August 2023.

scholarship consider 'international law'. The initially misaligned focus in international law's reassessment after the Cold War has faced, itself, a sustained critique already for two decades from those promoting a 'leftist' international law. By looking at that tradition, it becomes apparent that much that has counted as 'critique' in international law, has been a hortatory exercise upholding an equally anti-historical understanding of international law as the rule of law analysed by Humphreys. This has rendered scholarship on international law mostly harmless within the 'new world order' as it refused to recognise its presence and impact for relatively long and rather called for a reinvigorating structures that upheld the very phenomenon criticised.

The attention and focus on singular events and sovereign rights rather than systemic injustices and individual suffering has been subject to a growing criticism from those promoting some form of 'leftist' international law. While there has been a sustained tradition of socialist and Marxist accounts that can be described as coming from the 'left', the new 'left' tradition that has emerged since the end of Cold War is much more tightly bound as a Western critique of the liberal tradition and acts as an immanent critique. As such, the alternative it provides is coterminous with the one provided in the first part unlike the more long-standing tradition of, say, socialist, religious (for example Islamic), or general Marxist international law. This does not imply that such an immanent critique would provide a more privileged vantage point to the injustices produced by international law, it will merely indicate that the critique is possible using the axiomatic forms of the liberal international order as outlined in Chapter 5.1. of the first part. In a sense, this re-reading of international law on the left has focused on what Susan Marks argues is the defining feature of capitalism that spurred the rights of man, that is, 'the phenomenon of market compulsion – the systemic obligation to carry out activities that sustain life in and through the market'[1181] an argument that Ntina Tzouvala extends to the heart of modern international law through her analysis of standard of civilisation as 'a historically contingent response to the need to make sense of and regulate a world shaped and reshaped by these dynamics of unequal, yet global, capitalist development.'[1182]

A focus on property rather than sovereignty as a defining feature of international law is itself reminiscent of decolonial readings of international law, as argued in

[1181] Susan Marks, *A False Tree of Liberty* (Oxford University Press 2020) 7.

[1182] Tzouvala (n 794) 4. According to Jedediah Britton-Purdy and others, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129 Yale Law Journal 1784, in the context of the United States this leads into 'a conversation shaped by depoliticization and naturalization of market-mediated inequalities.' (p. 1790)

Chapter 4.2. of the first part. The difference with the more recent left critique lies with the purpose of the critique. For example, the TWAIL critique of international law sought initially to illustrate that economic governance was a means to control, shape, and structure sovereigns reminiscent of the earlier mandate system.[1183] If there were effects on individuals, those were drawn using broad strokes with focus on differing argumentative structures that upheld differences between a set of states variously nominated Western, developed, or the global North and its counterpart.[1184] The new left critique stems from an appreciation of inequality of individuals as a driving force of difference in (international) law, and attributes much of this inequality to capitalism rather than more traditional understanding of unequal treatment stemming from power differences. In short, the root causes for international law's differential treatment of states and ultimately of individuals are somewhat different, albeit virtually all critical approaches to international law these days point to the significance of protection of property in forming and shaping international law. At the same time, a shift of focus in international law more in general from relations between states to concerns over globe with a range of different actors (or subjects) of interest, has increased the relative importance of individuals over corporate bodies, such as states, corporations, international organisations, or communities.[1185] These changes have brought up individual human beings as innumerable singular sites of suffering or disposable human beings that Douglas-Scott and Balibar were referring to. This could be read as a materialist critique of an idealist understanding of international law, a call to not 'take international legal ideas and interpretations at face value, but instead to delve deeper and ask about the material conditions of their emergence and deployment.'[1186] This anchoring of international law on the left to materialism defuses much of the critique that has been targeted against other international legal projects that have sought to highlight

[1183] See, for example, Anghie (n 384).

[1184] There is however research that combines TWAIL and political alignment with 'left' that does consider the presence of individuals. A case in point would be the work of B. S. Chimni, say, his research on refugee law and the image of a 'normal' refugee in BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350. He presents his theory of international law combining elements of TWAIL, critical, and feminist approaches with Marxism in, Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (n 674).

[1185] See, however, Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2014). Klabbers argues that an international lawyer studying non-traditional subjects of international law 'can be challenged in terms of subjectivity: as [such subjects] are not regarded subjects of international law, the legal scholar may have to address claims that he or she could have spent his or her time better.' (p. 39)

[1186] Susan Marks, 'Introduction' in Susan Marks (ed), *International Law on the Left* (Cambridge University Press 2008) 3.

humanity or humanitarianism as the new ethos of international law. That human beings, and increasingly nature, constitute material conditions also for international law thus marks a core reason why international law on the left has brought up question of injustice so forcefully as underlying social process that international law's conceptual apparatus conceals.

Yet, with all the analytical rigour and theoretical sophistication, the international law on the left has failed to produce an account to come in terms and to overturn charted injustices.[1187] Analyses of the commodified international legal concepts seeking to reveal their social context and historical genealogy provide detailed information from the genesis of injustices, but they move us no closer in challenging or changing the perceived injustice.[1188] It is almost as if the sole purpose of the critique would be to indicate intellectual sophistication rather than initiate a change in the world. Obviously, it is important 'to question the hegemonic ideological coordinates' within which actions occur, but as I suggest briefly below, such accounts do circulate widely and pinpoint to remarkably similar locales of injustices of international law. E. P. Thompson's observation that for law to be effective at least on occasion it must appear just has allowed too many to read the promise of occasional justness into the international legal form rather than decry its repugnancy.[1189] And further still, as I outlined in Chapter 4.3. in the first part, the legal form itself has shown to many a great promise, albeit such promise commonly overlooks the capacity of only some to effectively arrogate jurisdiction and choose the form. While having an illegality or injustice heard and overturned before an international and/or domestic tribunal or court might in the end be possible for most,

[1187] It is relatively commonplace to argue on these accounts that only a lawyer could imagine that law alone could change the world, while progressing with a charting how law creates conditions of misery. This generates a vicious circle with limited ways to escape the self-imposed chains.

[1188] See on this China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2004).

[1189] From occasional justness of even the most repugnant systems, see Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015). Dembour argues that there is a focus on progressive case law that conceals the countless cases where draconian measures towards migrants are upheld by the European Court of Human Rights. As Dembour argues, the European human rights system considers migrants first as aliens and only then as humans, which distorts Court's reasoning. Thus, for every celebrated case of progress (*M.S.S. v. Belgium and Greece* in Dembour's analysis) there are countless other cases where the default position of denial of rights is enforced, leaving many migrants in Europe into a legal limbo.

the recourse to legality under the spell of oppressing illegality is often a toll too high to pay for most without notable means to sustain the illegality.[1190]

'The author of the communication is Luis Inácio Lula da Silva, a Brazilian national born on 27 October 1945 and former President of Brazil from 2003 to 2010.'[1191] So begins a recent decision from the Human Rights Committee of the United Nations. In the decision, the Human Rights Committee finds that Brazilian state had violated due process guarantees of a former president of Brazil by releasing material produced in corruption investigations to media before formally initiating charges against him. The sentence passed on Lula da Silva were quashed by the country's Supreme Court five years after initial accusations in 2021 and in 2022 the Human Rights Committee found that his rights had indeed been violated. For a former president, the outcome was damaging but not life shattering.[1192] He could outlast the injustice and illegality unlike many of the more usual suspects of injustice. Yet, it is not even at the level of former presidents and their highly publicised legal turmoil that law on the left operates. A suggestion that the task of the political left is to take 'law-making seriously to bring benefits to poor and marginalised groups'[1193] or even more categorically that any understanding of inequality is to be understood 'by reference to the lived experiences of the masses of working people'[1194] commonly fails to elaborate how international law creates those conditions. The poor and the suffering are a canvas upon which the grand strategy of the left is depicted, but the only means to reach them is through an analysis of state's conceptual

[1190] On the limits and promise of strategic uses of international law, see Shubhangi Agarwalla, 'Using International Law in Strategic Litigation with Dr. Itamar Mann' (*International Law and the Global South*, 2 August 2021) <https://internationallawandtheglobalsouth.com/using-international-law-in-strategic-litigation-with-dr-itamar-mann/> accessed 15 August 2023. See also my own digression in Chapter 1.1. of the first part over rightness and wrongness of a decision.

[1191] Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2841/2016* on 27 March 2022, UN Doc. CCPR/C/134/D/2841/2016 (Initial Proceedings)

[1192] Lula da Silva has returned to politics and seeks to challenge the incumbent president in upcoming presidential elections in October 2022. See Sam Cowie, 'Brazil's Lula Launching Presidential Bid to Unseat Bolsonaro' (*Al Jazeera*, 6 May 2022) <https://www.aljazeera.com/news/2022/5/6/brazil-lula-launching-presidential-bid-to-unseat-bolsonaro> accessed 15 August 2023. Lula was elected as president, yet the transition of power led to upraising of supporters of Bolsonaro on 8 January 2023.

[1193] BS Chimni, 'Karl Marx, Douglass North, and Postcolonial States: The Relation between Law and Development' in Paul O'Connell and Umut Özsu (eds), *Research Handbook on Law and Marxism* (Edward Elgar 2021) 331.

[1194] Radha D'Souza, 'Transcending Disciplinary Fetishisms: Marxism, Neocolonialism, and International Law' in Paul O'Connell and Umut Özsu (eds), *Research Handbook on Law and Marxism* (Edward Elgar 2021) 339.

apparatus.[1195] This marks the paucity of the left critique to the currently existing liberal order, suggesting that everything short of a revolution is not going to promote the cause.

A growing body of literature on international law on the left approaches international law chiefly in statist terms. Most accounts set their focus on re-imagining state or sovereignty or, alternatively, illustrate ideological colour of the present international cooperation. Decades-worth of research on transnational law (and more recently on global law) has indicated that the statist focus is hardly reflective of the international law at present. Endorsing the state-centred position embraces thus an equally anti-historical stance as has been employed in promotion of rule of law. It provides a critique of international law as a body that has not existed in decades if it ever has. The left accounts that take these challenges seriously are also chiefly focused on charting the systemic failures without providing a way to understand what that international law is that turns the lives of marginalised groups or that of the masses of working people miserable. Thus, it is hardly a surprise that much what counts as a left position appears as ethically sound or 'good' positions only if the value premises of the project are endorsed, making it subject to pragmatist or empiricist critique that was outlined already by early opponents of legal realism.[1196] If the only reason to endorse a given legal interpretation is that it better reflects some good cause, the value of law for the argument is questionable. Partly due to this, an oft-repeated alternative in the left critique boils down to abandoning law altogether—a nihilist position. According to this argument, there are no uses of law that would not align with liberal legalism, which is the reason to stop arguing with the help of international law altogether.

A case in point is Linarelli, Salomon, and Sornarajah's recent book that 'is preoccupied with the ways in which international law operates at the service of injustice.'[1197] In many ways, I share the view endorsed by its authors: we should avoid facile bifurcations (market v. state, free trade v. protectionism, etc.), many radical projects fail to overcome the system they oppose, and we should prioritise welfare of individuals over aggregate increase in wealth to name but a few. They highlight throughout the book the individual and collective misery that is determined by the present structures of international law, and especially its ingrained vision of the present form of capitalism being without alternatives. Drawing attention to the

[1195] On such staging a play in international law, see, Wouter Werner, 'Framing Objects of International Law' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press 2019).

[1196] See Chapter 1.1. of the first part.

[1197] John Linarelli and others, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press 2018) 1.

depoliticization of economy and international law's treatment of economy, it participates to more than two decades long debate over re-emergence of political economy in international legal scholarship.[1198] The formulation of its research question—'how international law is producing, reproducing, and embedding these ills and narrowing the frame of alternatives that might really serve humanity'[1199]—is to a large extent mine as well.[1200] As such, it is precisely the form of a critique that benefits the poor and questions the hegemonic ideological coordinates. Or, challenges the repugnant and predetermined outcome of international law in practice. To reach this outcome, Linarelli, Salomon, and Sornarajah align their approach to international law with an idea of non-ideal theory of justice that should underpin international law.

At the heart of international law is a Thrasymachian trap argue Linarelli, Salomon, and Sornarajah. What is international law is defined chiefly through power as Thrasymachus argued. International law does not have a conception of justice because it conceptualises justice as a matter of politics that can only occur within a sovereign, but not between sovereigns. A vision of a purely domestic justice allows, or even necessitates, an international law where a sovereign should use all its power to promote the welfare of its constituent members without due regard to welfare of others. They claim that international law remains a system of order rather than one of justice. Without an idea of justice, international law is bound to perpetuate injustices globally. As I have argued above, Linarelli, Salomon, and Sornarajah also base their argument for a concept of justice for international law to a contemporary reading of international law. The traditional distinction between us and them can no longer function as a basis for international law because international law has for long penetrated deeply within domestic affairs, they argue.

> International law should be understood as a necessary institution within the panoply of institutions that are needed for states and their peoples to flourish. […] The regulatory character of international law has more to do with basic structure of a domestic society than even some core areas of domestic law and

[1198] Of the growing body of international law and political economy, see John Haskell and Akbar Rasulov, 'International Law and the Turn to Political Economy' (2018) 31 Leiden Journal of International Law 243.

[1199] Linarelli and others (n 1197) 34.

[1200] This same has motivated much of critical international scholarship more or less evidently. See, for example, Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 596) 607–10 for a recollection of Koskenniemi over his reasons to conduct his research.

> regulations. […] States cannot do what they do for domestic constituencies without international law.[1201]

The outcome of this more embedded international law ought to be, they argue, an international law that meets the demands of justice that are required for purely domestic legislation. To correct the past injustices perpetrated through international law, the authors argue, it is not enough to provide restitution. Rather, the past is to provide a source of critique and a means to correct the present, a present that 'moves justification of international law [… to] morality based in justice.'[1202]

As others have noted, the move to a global justice based on morality in a pluralist world might prove a challenge too much: how are we to accomplish justice on a global scale when there are growing injustices domestically?[1203] This morality, according to the authors, calls for a right to justification for everyone targeted by international law, that is, everyone. The solution proposed is a promotion of moral equality resembling Rawlsian veil of ignorance, which, as I indicated above in Chapter 5.2.3. of the first part, leads to a repugnant conclusion. The inherent logic of improvement in the morality-based justice precisely leads to aggregation of norms that do curtail the space of rights as I argued throughout Chapter 5. Linarelli, Salomon, and Sornarajah recognise this problem of justice in passing, but never return to it. I take that this is precisely the dilemma Teubner refers to as that of self-subversive justice: with every step closer you keep on pushing justice further. This is also the reason why Douglas-Scott chooses to address law through injustice rather than justice, as we are eminently more capable to recognise injustice than to formulate a robust standard for justice. And what is more, when Linarelli, Salomon, and Sornarajah do chart the work of international law's immiseration, they distance themselves from the everyday suffering to indicate at arm's length how international economic law does hamper states' capacity to regulate leading them to uphold unjust law. That international law should embrace a principle of anti-misery—that is, a principle suggesting that '[i]t is reasonable for a person to reject any legal arrangement for the global economy that would impose or perpetuate misery in her

[1201] Linarelli and others (n 1197) 53, 54, 55.
[1202] ibid 67.
[1203] See for like critique in Julia Dehm, 'Book Review: The Misery of International Law: Confrontations with Injustice in the Global Economy by John Linarelli, Margot Salomon and Muthucumaraswamy Sornarajah' (2018) 19 Melbourne Journal of International Law 763; Nicolás Perrone, 'Book Review: The Misery of International Law: Confrontations with Injustice in the Global Economy by John Linarelli, Margot Salomon and Muthucumaraswamy Sornarajah' (2019) 22 Journal of International Economic Law 289.

economic or social situation'[1204]—implies that we could foresee the misery unfolding from, say, accepting a technical standard for measuring and consider *ab initio* its inherent injustice. Such demand presumes either that most everyone is acting in bad faith when devising diverse international legal instruments or that we ought to command a capacity to create international law that is not susceptible to ritualistic or instrumentalist uptake. On the level of analysis pursed by Linarelli, Salomon, and Sornarajah, I find adherence to such principle not only unrealistic but simply impossible. Their account provides solid support for our reason to feel anger over the present state of international (economic) law as well as a worthy goal for a better future but leaves us with modest tools to reach it.

An attempt to formulate a blueprint out from the view of only endorsing grand strategy (i.e., focus on people and their struggle, question state apparatus, etc.) with little in terms of tactical maneuvers has, however, received some well-placed attention. Robert Knox outlines an account calling for a clear definition of strategy (an overall goal) and a set of particular tactics to move towards the strategic endgame.[1205] Knox suggests, as I have done above, that much of the criticism launched from 'critical' position legally results in 'the public political interventions [being] basically […] "liberal".'[1206] In a word, without an overarching strategy to guide the work, the critical takes of international law amount only in enforcing the existing liberal consensus. But as Knox suggests, there is no escape from this conundrum simply by abrogating law as '[e]very action that we take is already enmeshed in juridical relations.'[1207] As the decades of work from international law on the left has indicated, there is a grand strategy and a widely shared goal that international law should strive for. Yet, in terms of tactical manoeuvre to reach these strategic goals there are few suggestions, and Knox himself suggests that a scholar's task is ultimately limited on this account.[1208]

I have throughout the present section argued that international law has an intimate relationship with injustice that has been brought to the limelight of scholarly attention through work of scholarship on the left. Much of that scholarship indicates that when the veneer of liberal international order is scrubbed, an edifice of rampant injustice is revealed underneath. In short, international law fails to take human suffering seriously. I showed that many of the traditional liberal tools for defusing this crisis, such as promotion of the rule of law, fail to function on a transnational

[1204] Linarelli and others (n 1197) 73.
[1205] Robert Knox, 'Strategy and Tactics' (2010) 21 Finnish Yearbook of International Law 193.
[1206] ibid 210.
[1207] ibid 223.
[1208] ibid 228.

setting as their promotion imbricates those structural injustices that critical legal scholarship has laid bare. The readjustment of focus on the misery brought about by international law has also accentuated individuals, classes, groups, collectives, etc. over the traditional focus of international law on states and international organisations. Despite clear coordinates and a widely supported strategic goal to alter the course of international law, this scholarship has provided only few accounts even remotely close to the suffering that animates it. Thus, while the strategic goal of these critical accounts is evident, they fail to articulate a tactic to proceed towards said goal. All too often, scholarship provides only *cynicism* (everyone is motivated by self-interest and the best we can do is game this), *nihilism* (there is no possibility for a different system wherefore the whole enterprise ought to be abandoned), or *submission* (slight modification of the system will provide significant gains, even if it does not cure the ailment) as an answer. And anger over the miserable situation.

3.3 Anger as an antidote

While writing this the war in Ukraine has lasted for more than eight years and the most recent escalation of hostilities for almost a year. There are countless other conflicts—frozen or burningly hot—around the globe, and for all of them international law designed to promote peace is impotent. For most followers of international law, there is nothing new in the situation. The tools of the trade are not as efficient as we wished for and when used they are commonly employed in an unequal and unjust ways. But while we might be in a state of stupefaction with sovereigns and their traditional projection of power through war, this is not, nor has it ever been the whole picture of international law. As most scholars today would argue, international law permeates to all areas of life. The fact that all too many are facing hunger or lack access to water is equally much a failure of international law as is a war waged between two sovereign subjects. And while the hurdles international law has set against warfare might do little to thwart recourse to power in settling disputes between states, the most recent wars have all indicated international law's capacity to alter even relatively swiftly other ground rules of the game, affecting the lives of millions. That international law can lead to opening of borders to migrants, swift moves towards decarbonisation, and profound alteration in the ground rules of the international economic law is an indication that another international law is possible.

There is nonetheless no indication on the durability of these changes nor their wider reach beyond theatres of war. The borders remain closed for most migrants, the haste to decarbonise is only a regional response, and the transnational

corporations were only willing to give up on their economic interests because the perceived losses were assessed to be greater than gains. This does not challenge the fact that these changes were possible, and they were commissioned through international law. A refusal to do them more universally, more proactively merely indicates the paucity of tactics employed by those who have laid out the strategic goal of a less miserable international law. Or, alternatively, that a change from the chosen path is difficult and not susceptible to moral arguments against which there are always already answers; that the most common form of answer is belief in the capacity of trade and markets to correct its inherent faults, and that their expansion rather than contraction is the way forward, merely indicates what those charting for change should expect. It might be that the old tools are the best and that an act of adjustment is all that it takes: a little bit of bargaining there and some shadow of the law here.[1209] That prudent choice, however, seems to get us nowhere. As I charted above, the misery behind the surface of international law has long been recognised and for long there have been suggestions to wage the struggle differently. And yet, as Linarelli, Salomon, and Sornarajah illustrate, there is little evidence that change would be imminent.

In short, there are apparent ground truths that are shared by most who chastise international law from its role in upholding—or even directly contributing to—misery and suffering. One such ground truth is familiar from politics more widely, namely, the belief that everyone deserves an equal respect. Such egalitarianism does, by no means, argue for equal distribution of wealth, happiness, or any other measurable metric globally, but to a more minimal requirement of non-maleficence and non-discrimination of our actions. This ground truth, I argue following Alain Badiou, can act as a universal truth of our aspirations when imposing a critique of clearly repugnant outcomes of international law, functioning as a stopgap—an interruption—on the sliding scale towards repugnancy. Yet, as Badiou would quickly remind, this infinite and universal truth is contingent to the context wherein it emerges. Hence, international law can be subject to numerous different formulations of this ground truth, while all those formulations can equally reflect the egalitarian truth, which is simply to say, that there are many ways to remain true to egalitarianism. Therefore, Badiou's concept of truth only allows us to analyse the intensity of its presence in each context without providing us with tools to initiate a change. After all, a change in a world of Badiou is always deriving from subjects and their committal to truth. Altering the logics of the world of international law, then, would require the present subjects to alter their course or of new subjects to

[1209] This is an argument Nicolas Perrone makes in his review of the *Misery of International Law*, referring to tools employed by the American realists to break down the concentration of wealth and power that was the American Gilded Age.

emerge that would re-adjust the intensities with which different truths manifest in international law.

But how then to become a subject to truth and alter the intensity of being in a world? In a hard-to-read entry to *Theory of the Subject*, Badiou links the emergence of subject to justice.[1210] In this early account of the subject,[1211] he rereads Sophocles' tragedies that many critical lawyers in recent decades have drawn their inspiration from. Rather than aligning with Sophocles' tragedies in Oedipus and Antigone, Badiou suggests we should understand subject through the requirements of justice set in Aeschylus. Badiou argues that *Oresteia* introduces a way to overcome the infinite dialectic between law and nonlaw (or positive law and tradition) and therethrough 'allows for the advent of the new.'[1212] The new to which Badiou refers in his meditation is a court imposed by Athena to interrupt the circle of endless violence initiated by the murder of Agamemnon that was followed by a matricide committed by Orestes. Only by imposing such an interruption the mechanical continuation (or worsening!) of the same is replaced by a new order. A similar request through courage and justice is called for by the paradox of repugnant rights. Accepting the mode of gradual improvements and slow progress acknowledges and perpetuates misery of international law without an end. Unlike the tragedy of Antigone, there is a way out of misery without death, Badiou argues, and that way is paved through courage disputing the existing order. This dispute then brings forth a recomposition that in Aeschylus' tragedy results in establishment of justice.[1213] Only through courage, then, justice can emerge as a constitutive category of a subject.[1214]

To call for an interruption of the repugnant slide of international law and/or law in more general then requires two things: a recomposition of international law that we are looking for and the courage to demand for it despite the repeated failures. Is the formulation of international law emerging on the various accounts charting its injustice a project that could act as a recomposition of international law? I personally feel that they are. An international law that actively seeks to challenge the grievous logic of gradualism that pushes so many to misery is, for me, a genuine recomposition of international law that stems from an immanent critique of the way we conceptualise value and worth of international law. The question over projects worthy of our committal is deeply tied to our understanding of how we see our life,

[1210] Badiou refers to justice as a 'constitutive category of the subject', see *Theory of the Subject* (n 899) 159.
[1211] The entry is dated to 9 May 1977.
[1212] Badiou, *Theory of the Subject* (n 899) 163.
[1213] ibid 167.
[1214] Badiou concludes that 'we must exceed the pregnant form of the return by way of courage.' (168)

or how we see ourselves as subjects. The worthiness of a cause and our committal to it constitutes us as the persons we are, and the very fact that we can fail in our projects is what makes them so precious. We commit our finite life to a cause over other, alternative pursuits. Any failures or disappointments in those pursuits feels an immeasurable loss because we do not have means to regain time lost. For me, the traditional academic distance over the subject matter and re-shuffling of the prizes of this debate signals an anxious surrender to the mechanical repetition of the same liberal modes that have failed us over and over again. This is the response seeking to replay Antigone against Creon time and time again. Yet, to formulate an alternative on which one is truly committed calls for a vulnerability of the kind the erudite scholarship of critical kin is terrified of. It exposes us to a failure, a keen realisation of the waste we have made of our time writing about a different kind of international law that fails to materialise rather than spend our energies advocating for a gradual change, for a modest re-reading.

A committal to a project of life, whether political, scientific, religious, or amorous, is at the heart of Martin Hägglund's *This Life*.[1215] Hägglund argues that it is the finite nature of our existence and the preciousness of our time that makes our commitments to anything meaningful. Thus, there is a difference between 'being a father' in factual sense of having a child, and 'being a father' in a sense that defines you as a human being. I argue that in a similar way, promoting a critical uptake of international law requires a readiness to commit to such project, not only in terms of charting the outcomes of present distribution, but also in terms of paving the way for an alternative. It should be both our practical identity and a deep question of our existential commitment, as Hägglund says.

> The point, however, is that you are bound by your commitments rather than by necessities dictated by your material needs. To be free is not to be free from any practical identity, but to be free to engage the demands of having a practical identity. Such freedom includes the demanding question of whether you are succeeding or failing in your practical identity and the equally demanding question—a question of your existential identity—which concerns whether you should hold on to a given practical identity or have to let it go. There are no given answers to these questions of our practical and existential identity, which is why the actualization of freedom requires that we have the time and the material resources to engage them as the demanding questions that they are.[1216]

[1215] Martin Hägglund, *This Life: Secular Faith and Spiritual Freedom* (Pantheon 2019).
[1216] ibid 262.

It is for the freedom of everyone to engage with such questioning of practical and existential identity that ought to be at the epicentre of international law, a revaluation of what we value. This requirement is simultaneously modest and impossible within current perimeters of international law. Strictly in material terms, we already have resources needed to enable everyone to engage with such freedom.[1217] Provision of such possibilities to everyone would require, however, challenging what Susan Marks called the capitalist compulsion at the heart of human rights. This would undermine the presence of property as axiomatic to international law, and therefore would mark an abandonment of international law as we understand it at present. Hence, the impossibility.

It is safe to say that undermining the role of (private) property in international law has been largely a futile task. While it might well and truly be so that legal imagination is needed to persuade everyone to rightness of your answer, there are limits to such persuasion.[1218] If our imagination is ingrained with a vision of a separation of state sovereignty and private property, there is modest space for alternatives to emerge.[1219] The 'very success of Western capitalism depends on the development of general national systems of legal enforceability'[1220] which the imagination of colonial officials carried around the globe. These days the rights of property, as I have argued throughout this dissertation, commonly surpass even minimal notions of 'humanity'. For example, when the IPCC warns from the existential threat to whole of humanity due to climate crisis, it lists legal instruments that protect the property rights of private investors as one significant hurdle to our continued existence as a race.[1221] In the face of such overriding evidence from the

[1217] According to the United Nations, there is excess in food (https://www.fao.org/sustainable-development-goals/goals/goal-2/en/) and freshwater (https://unesdoc.unesco.org/ark:/48223/pf0000380721) globally that could be sustainably used to eradicate both hunger and water scarcity. And while homelessness has increased in recent years, the root causes of it have little to do with our capacity to provide housing for everyone (https://undocs.org/E/CN.5/2020/3).

[1218] In his most recent work, Martti Koskenniemi traces the travels of legal imagination that shaped international law. He suggests early on in *To the Uttermost Parts of the Earth* (Cambridge University Press 2022) that 'Legal persuasion takes place in the context of controversy: out of some number of possible ways of acting law is used to justify one against others. Imagination is needed to find the winning justification, to hit at the right vocabulary.' (at 4)

[1219] Koskenniemi makes this argument in the Part III of *To the Uttermost Parts of the Earth* as well as in more succinct form in 'Sovereignty, Property and Empire: Early Modern English Contexts' (2017) 18 Theoretical Inquiries in Law 355.

[1220] Simon Deakin and others, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45 Journal of Comparative Economics 188, 189.

[1221] IPCC, Climate Change 2022: Mitigation of Climate Change. Working Group III (WMO 2022), Chs. 14 & 15.

futility to rebel against property and its interests, it is eminently naïve to suggest we should do so, rather than prudently argue for some concessions during the next round of negotiations. The passing notes of the millions suffering not due to neglect but due to active making of international law are often told as a backdrop for the argument to ensue, they refer to values their authors find meaningful, but for which they find no place in the present. That we too soon give up on these values to play a game of intellect, betrays a committal to eradication of injustices. The courage to leave the circle of injustice feels at times overshadowed by the need to appear critical and understanding towards the rules of the game—to understand better the present system and our practical identity as competent international lawyers. It appears reasonable to be prudent.[1222]

Yet, only by exposing ourselves to the ridicule of naïveté and childish beliefs of an egalitarian order one can remain true to correcting those injustices that are widely perceived. After all, there is relatively modest evidence that prudence ever gets anywhere. The year of writing this dissertation marks fifty years from the first intergovernmental climate conference in Stockholm. Still, despite the mounting evidence and countless reasoned pleas, we are collectively on the course to a situation where large swaths of our planet will be uninhabitable. Rather than considering new international crimes against those polluting, subject to similar frailty as the international criminal law system, we should be angry.[1223] We should be angry that international law has made life of so many human beings so much worse and continues to do so to this day. But, like decades of critical race theory and feminist legal theory has indicated domestically, feelings such as anger (or rage) are effectively suppressed in much of legal thinking. As Robin West wrote more than three decades ago

> rage informs the feminist sense of justice. We are enraged, and we are moved to act, by our identification with the gendered injuries that distinctively destroy

[1222] Similar argument is advanced in Gerry Simpson, *Sentimental Life of International Law* (Oxford University Press 2021).

[1223] On the crime of ecocide, see Stop Ecocide Foundation, 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (June 2021); on the criticism against the recently coined definition, see Karnavas, 'Ecocide: Environmental Crime of Crimes or Ill-Conceived Concept?' (*Opinio Juris*, 28 July 2021) <http://opiniojuris.org/2021/07/29/ecocide-environmental-crime-of-crimes-or-ill-conceived-concept/> accessed 15 August 2023.

> women's selfhood and security, typically with the full endorsement of legalism.[1224]

West points out that anger and emotions in general are valid responses to injustice, yet they are commonly subdued. She suggests that feminist authors are instead asked to research '"neutral", hard-law topics in which [they] do not have such a "personal take".' I argue that such calls for neutrality are common within international legal scholarship in general, and especially with regard to the most vulnerable. The more devastating the injustice, the more jejune paying any attention to it seems to be. In a sense, many arguments in international law appear to admit that, for example, it is devastating that tens of thousands of children are dying of malnutrition in Afghanistan, but focus instead on a structural argument advanced by A Long Time Ago Deceased Person that supposedly explains to us why.

There are however certain limitations in West's feminist reading of anger and legal theory. She, for one, associates the sense or feeling of injustice to only those who themselves have suffered the injustices, which in international law would mean those who are the most precarious. To ask them to articulate a case for justice when living without basic sustenance or under threat to their life and limb, feels – at least to me in my relative privilege – a task too much.[1225] Yet, in recent years there has been a growing body of arguments about anger (and rage) that do not consider first-hand experience with injustice as being a necessary condition to articulate such injustice. In this sense for example Amia Srinivasan's argument for aptness of anger appears eminently more suitable for international law. Srinivasan argues that

> the thought that we can only be aptly angry about things that are sufficiently close to us in space and time, or to which we have some specific personal connection, can shade into a troubling moral parochialism.[1226]

There are causes, Srinivasan suggests, that allow or even call for solidarity, but feeling anger over the lost investments of hedge funds seems to be 'the wrong

[1224] Robin L West, 'Love, Rage and Legal Theory' (1989) 1 Yale Journal of Law and Feminism 101, 102–03.

[1225] This is not to argue that there would not have been important contributions by many of those who are subject to such abject misery, merely that there should be no demand for them to act as sole voice for justice and only capable persons to do so. See, for example, Aeham Ahmed, *The Pianist from Syria* (Simon & Schuster 2015); and Behrouz Boochani, *No Friend But the Mountains* (House of Anansi Press 2019). Yet, also with autobiographical narratives of the blight, it is important to note that most will never have a chance to be heard and to be seen, which to me marks the most oppressive form of injustice—suffering and dying in terror that no one knows of.

[1226] Srinivasan (n 962) 130.

thought altogether.'[1227] Arguably, the widely shared wrongness of the injustice of international law suggests that it is not such a wrong thought but rather a justifiable call for solidarity.[1228]

Yet, there is a reason to remain mindful which calls for solidarity are genuine. John Berger's brief analysis of photographs recording agony brought by the Vietnam war illustrates these concerns well. He argues that rather than motivating action, such photographs may trigger a sense of personal moral inadequacy in the observer. These feelings of the consumer of photographs 'may now shock [them] as much as the crimes being committed in the war.'[1229] This personal feeling may then be shrugged off or it can lead to acts of penance, yet

> [i]n both cases, the issue of the war which has caused that moment is effectively depoliticised. The picture becomes evidence of the general human condition. It accuses nobody and everybody.[1230]

I feel that international law's self-renewal through crises spurs similar responses as those photographs of agony Berger refers to. Charting injustices of international law tends to depoliticise and universalise them, making them responsibility of everyone and of no one. And more poignantly, such mapping of injustices poses a question why nothing has changed in those arenas international lawyers do command a unique capacity to initiate a change. If we are the initiators of imagination or providers of legitimacy to law, why do we not act upon the injustice we supposedly remain so concerned of? To provide yet another summary of atrocities and lines crossed, international lawyers generate a sense of crisis for the system, while forgetting that those whose lives (and deaths) produce the international law's very own 'photographs of agony' have little to gain from acts of penance supposedly done in their name.

While there is a reason to remain mindful of uses of injustice and of anger it induces by someone like me, there are reasons to embrace such emotions as well.[1231] Writing in the first issue of the American Journal of International Law in 1907, Elihu Root called for 'reasonableness and good temper' as essential qualifications of an international lawyer.[1232] A variation of these same emotions have since been

[1227] ibid 131.
[1228] In literature on technology calls for solidarity are relatively uncommon, but see Dan McQuillan, *Resisting AI* (Bristol University Press 2022).
[1229] John Berger, *About Looking* (Vintage 1980) 44.
[1230] ibid.
[1231] I am, to use the expression of Myisha Cherry, a rage renegade.
[1232] Elihu Root, 'The Need of Popular Understanding of International Law' (1907) 1 American Journal of International Law 1, 2.

associated to international lawyers—and lawyers in general—by countless others. But as John Gardner argued more than a century after Root, '[b]eing cool, calm, and collected is just another place on the emotional map, with no special claim to rational efficiency.'[1233] There is nothing in and of itself in good tempered reasonableness that will make legal argument better or one voiced in anger that would make it worse. And even in the case it would be counterproductive to voice anger, there may be reasons to do so. '[G]etting angry is a means of affectively registering […] the injustice of the world,'[1234] Amia Srinivasan argues, wherefore there is a genuine normative conflict between competing interests in voicing anger even when such anger might deter some modestly more positive outcome. The reasons provided by Srinivasan for aptness of counterproductive anger align with those provided by Berger for apt responses to photographs of agony. Those who are concerned over counterproductivity of anger suggest, Srinivasan argues, that 'the primary locus of responsibility for fixing the problem lies with the victim rather than the perpetrator,' which for example in context of rape ends up treating ubiquity of rape 'as a fixed fact, rather than a contingency for which men bear moral responsibility.'[1235] Thus, where Berger saw the moral unease encountered by the observer of war photography, Srinivasan accentuates the moral unease of those encountering the anger. Both the observers of anger as well as of agony attempt to deflect their own complicity in contributing to conditions that generate anger and agony by referring to moral unease (or inadequacy) the feelings of others evoke in them.[1236] A call for reasonableness bars other affective response to atrocities, directly harming those for whose situation anger would be the apt emotional response.

'In seeing anger in its varieties, we can appreciate that anger […] is not necessarily destructive,' writes Myisha Cherry, '[i]f it is, it is only destructive to oppressive systems and not to life as we know it.'[1237] As Cherry argues, our vision of anger ought not to be limited to its destructive aspects, but we rather ought to see it as an apt response to some forms of political injustice—racial injustice for Cherry, repugnant and systemic injustice of international law for me. Yet, precisely due to the multitude of emotive responses captured by anger (or rage), it is important to

[1233] John Gardner, 'The Logic of Excuses and the Rationality of Emotions' (2009) 43 Journal of Value Inquiry 315, 326.
[1234] Srinivasan (n 962) 132.
[1235] ibid 133.
[1236] See also Kate Manne, *Down Girl* (Oxford University Press 2017) for what she titles himpathy, a tendency to overemphasise the feelings and experiences of rich and powerful men, and Myisha Cherry, *The Case for Rage* (Oxford University Press 2021) for an account of what she titles white empathy, giving primacy to motives, agency, and freedom of white persons.
[1237] Cherry (n 1236) 12.

focus on forms of anger that are more likely to contribute to the change and target my energy accordingly. To guide my anger, I will briefly outline Cherry's account on transformative anger – or Lordean rage as she calls it – and pinpoint how such anger is the right emotive response to the repugnancy of international law. This way, I can target my angry gaze on those structures that uphold the present misery, not in abstract or in a fashion of 'either-or', but as a devoted commitment to a different political order for international law—for a different truth to manifest. I believe such well-placed and well-targeted anger is precisely the courageous move towards justice called for by Badiou that can provide an interruption to the gradual slumbering towards repugnancy. It is also a universal move, as Audre Lorde reminded: 'I am not free while any [one] is unfree, even when [their] shackles are very different from my own.'[1238] An anger towards repugnancy cannot satisfy itself with alleviating the lot of a single person or a group facing injustice, but it must strive for eradication of such injustices universally.

Following an argument originally espoused by Lorde, Cherry focuses on rage that is not 'destructive since it is [not] indifferent to the sufferings of others.'[1239] Rather, for Lorde as for Cherry, rage seeks to liberate everyone. In a sense, it is a benign form of a what is commonly seen as a destructive emotion, even though also it can fail and consume a person fully. Such consumption of a person to a single cause is, nonetheless, precisely what Martin Hägglund perceived as a sign of our finite existence: if we spend all our life, fueled by Lordean anger, pursuing a world of lesser injustice, we might regret it, but it is this idea of loss that makes our committal to any cause meaningful to begin with. Lordean rage can be prudentially inappropriate while being morally appropriate.[1240] Nevertheless, overall, the Lordean rage for Cherry is chiefly a positive and transformative force. And Cherry is not alone, Samatha Stanley et al. found out that feeling angry over climate change, or eco-anger, 'may be uniquely adaptive response to the climate crisis, as it is related to *lower* anxiety, depression, and stress'[1241] and commonly leads to more action to change the course. Thus, feeling anger over systemic injustices is not only an apt response, as Srinivasan argues, but it is also conductive to change and beneficial to the individuals involved. Yet, motive matters. Anger that limits itself to personal concerns or seeks to harm others does not pass the muster, yet as indicated above,

[1238] Audre Lorde, *Sister Outsider* (Penguin Books 2007) 132–33. Lorde refers to women in her quote, but I interpret her promoting a more universal case for correcting injustices, even if her own focus remains committed to racial and gender concerns.
[1239] Cherry (n 1236) 25.
[1240] ibid 37.
[1241] Samantha K Stanley and others, 'From Anger to Action: Differential Impacts of Eco-Anxiety, Eco-Depression, and Eco-Anger on Climate Action and Wellbeing' (2021) 1 The Journal of Climate Change and Health 100003, 3.

international law's injustice is hardly such concern. How then to be angry in ways that matter?

The solution Cherry provides moves through emotions. She argues that emotions, quite like knowledge and power, are encoded and socially defined. While certain emotions, such as anger, may be accepted to some, they are precluded from others. Thus, Cherry suggests that using Lordean rage as a response to racism challenges these emotive mappings and sets into question their valence and the associated evaluations of persons involved. A right of an affluent white male for anger indicates, according to Cherry, that they are treated as worthy of respect, while black persons are expected to remain calm and composed as they are not worthy of respect and therefore cannot justifiably encounter feelings of indignity and justified anger. In short, a display of anger by those who are not expected or entitled to indicate such feelings in public, topples – or at the very least challenges – the systemic injustice of racial discrimination in contemporary United States. There are similar examples of expected or justified emotions in international law. Perpetrators of atrocities ought to show remorse, their victims' grief, refugees and migrants arriving to another country – especially a high-income one – ought to display thankfulness, and so on and so forth. Yet, anger does not seem to appear on the map of international law's emotions.[1242]

Yet, display of international law in action is no stranger with emotions—even to anger. The events are simply not narrated through the emotions, but rather through legal instruments or institutions challenged. It is safe to say that many movements opposing (neo)liberal economic policies, such as those culminating in protests against World Trade Organization in Seattle or those against the financial system at large in Occupy Wall Street movement, were in part fueled by a kind of anger Cherry calls Lordean rage. Also, diverse environmental organizations and civil society

[1242] There has been a growing interest to emotions in international law in recent years, but therein limited interest to anger and rage. On emotions, see Susan Bandes and others (eds), *Research Handbook on Law and Emotion* (Edward Elgar 2021); Vesselin Popovski, 'Emotions and International Law' in Yohan Ariffin and others (eds), *Emotions in International Politics* (Cambridge University Press 2016); Amalia Amaya and Maksymilian Del Mar (eds), *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Hart 2020); Jessie Hohmann, 'Value in the Emotional Register' in Isabel Feichtner and Gordon, Geoff (eds), *Constitutions of Value: Law, Governance, and Political Ecology* (Routledge 2023). There is however a notable exception to this rule in a brief account of rage in Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16 Wisconsin International Law Journal 353. She suggests that in context of third world accounts of international law (TWAIL) '[a]ttempting to get beyond rage has its own dangers. It may be that the only way to control the rage is to lose sight of the reality, a reality that demands a response.' (at 417-8)

groups, such as Fridays for Future and Extinction Rebellion, are widely perceived as angry responses to insufficient climate action by states. Anger has also spurred protest movements seeking to question domestic legislation and policies enacted in response to international law. The protests against Iraq war of 2002, London riots of 2011, India's farmers protests in 2020-2021, Arab Spring of 2008, or Argentine protest against country's agreement over debt with International Monetary Fund in 2022 are but some of the angry responses to—real or perceived—injustice of international ordering. It appears that there is space for anger in international law, and it seems to target phenomena that also academic international lawyers employ as indicia of international law's misery.

Unlike the feminist or racial anger, anger in international law may not resort to shared experiences, of a shared epistemic foundation fuelling anger. Climate movement, protests against soaring food prices, or peasants' movement against gruelling working conditions stem from different backgrounds, and refuse the sort of a universalist approach that, for example, Cherry founds her argument upon. Yet, they all indicate that anger can function as an efficient strategy against failures of international law. Voicing anger provides visibility, motivates participants, and, at the very least, forces recognition of the angry claims, even if it would not lead to immediate uptake of those claims. Anger can also function as a local tactic to alter the systemic shortcomings of the international normative order by challenging one (or multiple) from the three constitutive elements of the liberal international order (sovereignty, rights, and property). Thus, the climate movement can be seen to challenge the role of sovereigns in negotiating the future (for example, even mainstream policy institutions calling for public action beyond and below governments[1243]) as well as the relative insignificance of protecting property (for example, variations of the 'there is no economy on a dead planet' -slogan).[1244]

But even if anger can motivate a work for a different future on an individual level that can lead to collective action, international, transnational, and global law remain insulated from such action. While there is a recognition of a wider range of norm-givers internationally, there are no forums for those subject to immiseration of international law to alter it. This, according to Anthony Carty, stems from the lacking constitution of international law, or international lawyers' incapacity to 'conceive of the idea of the subjects of international law as homelands of the peoples[, which] is

[1243] Ruth Townend, 'Governments Face Losing the Battle against Climate Change' (*Chatham House*, 15 February 2022) <https://www.chathamhouse.org/2022/02/governments-face-losing-battle-against-climate-change> accessed 15 August 2023.

[1244] I could not find an example of a movement that would oppose rights, indicating the pervasiveness of the liberal belief in rights. As I suggested in the first part of the dissertation, this amounts to proliferation of norms and, eventually, to repugnancy despite good intentions.

why, also, international law can have no framework of fairness and humanity.'[1245] But, are not then we, the international lawyers, equipped with the imagination to make or break an international legal argument, in an altogether different position from the rest? Most accounts of international law as a normative system position international lawyers at the epicentre, as the imaginative groundswell for content and meaning for norms. And as repeatedly shown throughout this dissertation, international lawyers at large evoke injustices as a call for a different future. But we always stop short of getting angry. What would a collective kneeling down in anger over international law's immiseration and repugnancy look like? What would a collective refusal to go to our offices, and rather gather on the streets with placards calling for change require? Of asking for a revolution rather than working for a reform?

These are the questions of strategy and tactic international lawyers ought to consider. Our wit and erudition have done little to correct the course of international law. It has grown to a body of notable technical finesse and great complexity, whose intricate rules lead to legal outcomes that are not only repugnant but also hermetically sealed from any legal challenge. We have spent endless hours to master this system, or our small niche therein, and we have become masters at defending those very rules that define us as international human rights lawyers, as international humanitarian law lawyers, as international economic law lawyers—as international lawyers. It is precisely those norms of our interest that carry the utmost, perennial, constitutive, or foundational importance for the functioning of the whole. It is this, that, or the third lens of theoretical acumen that should be privileged over the others. And on this fight over the turf to sell our solution, we have all become snake oil salesmen, providing solutions that patch the past solutions with new ones that for certain are for the best. Rather, we should all be angry. We should scream from the top of our lungs to the ghouls our collective imagination has summoned forth. For it is our erudite imagination that allowed for the suffering and death of all those countless human beings, for upholding this repugnant order whose norms and processes we have become enamoured.

3.4 Conclusion

[1245] Anthony Carty, 'International Law and Nervous States in the Age of Anger, the Collapse of Legal Formalism and a Return to Natural Law' in Rossana Deplano and Nicholas Tsagourias (eds), *Research Methods in International Law: a Handbook* (Edward Elgar 2019) 199.

This concluding chapter of my dissertation has sought a way out from the paradox of repugnant rights I outlined in the first part of my thesis. I return from the realm of technology to the very traditional fora of international law to show the rampant injustice that everyday functioning of international law upholds. Many of these injustices have been recognised for long, but they have been off from the radar of international law's acute attention, from the sphere that produces its repeated crises. These invisible atrocities of international law are, nonetheless, much more destructive than most of the self-declared crises of international law. Terrorism, illegal wars, or even a global pandemic pale in comparison to the misery and death brought about by malnutrition, poverty, or lack of access to medicine – for all of which international law also contributes to. Yet, these grave injustices generate no new crises to law. Rather, the response has been a formalist defence of the benign nature of the norms, or the sheer impossibility to change the course due to weight of the abundant norms.

To break the spell, I turned to research on uses of emotions – especially to anger – as a response to injustices. Relying on accounts put forward in recent years by feminist and race studies scholars, I suggest that an affective response through anger would provide a more apt response to international law's injustices than charting anew the norms violated or imagining a new theory to assess even more foundational reasons for the failure. I fail to see the failure in knowledge or in faulty assessment of power, and rather suggest that the emotive register that has been chosen as 'proper' to international law does not allow to topple the injustices. Quite like women and racialized persons, those on the receiving end of international law's injustices have shown anger, but due to the peculiar nature of international law, much of that anger has been easy to set aside. Therefore, I suggest that international lawyers ought to be angry, as they (we?) command a unique position in imagining international law. The spell can be broken, but only by being angry to their (our?) collective failure.

The solution to the paradox might then lie not so much in imagining a different order than admitting that we never really cared. If we cannot imagine being angry over injustices done in the name of international law, it might lead to a realisation that being an international lawyer was never constitutive of our identity, or if it was, it was an identity that never sought to eradicate injustices. Either we never truly believed in stories of international law's humanism, or we knew they were all just that—stories. It might very well be that this simply is a profession and performing duties as an international lawyer was never more than finding a way for our client to act in a way that maximizes their interests. If international law is a game of intellect, then I see no way to avoid the analytical conclusion of the first part of the thesis: international law is repugnant, and it will remain so for the conclusion is

unavoidable. Shuffling the prizes and redistributing power changes only the face of injustice.

Alternatively, international law and lawyers are truly appalled by the injustices. Injustices stand against all that international law is for. International lawyers, as foremost practitioners of international law, are uniquely capable to reorient its course. And for a failure to do so in the past and to act at present, we ought to be angry. We should no longer act in our capacity as interpreters (or meddlers) of politics to a discourse we know fails so many. After all, both those who uphold the system and those that provide it its staunchest critique agree upon the point that international law 'is probably the branch of law in which one category of lawyers […] has the greatest influence in crystallising and completing legal rules.'[1246] Realising this should not require as blatant a disregard for international law as displayed by the Russian Federation in recent years. And unlike in criminal law, where everyone deserves a defence, nothing in international law's fabric would be torn would we collectively refuse to co-operate with states, organisations, and corporations employing international law for a cynical uptake, postponement of changes, or a simple violation of norms supported by sophistry.

Thus, there are ways for international lawyers to display their anger in a constructive way. The kind of anger that promotes change also motivates people to act. It then provides a tactic to fulfill the strategic goal of correcting injustices but targeting the anger will call into question one or more of the axioms of liberal international order it currently stands by as systemic cause(s) for felt injustices of the system. The role of property has received notable attention among international lawyers through critique of capitalism, yet there is nothing in and of itself in property that would make it any better or worse source of our anger than sovereignty and rights. Yet, as I suggested in the first part, I believe a change in any of the foundational axioms would profoundly alter international law. This would break repugnancy of the present constellation. It would be unlikely to lead to perpetual peace and ideal justice but imposing such requirements on anything as a precondition for change is tantamount to argue that change is never warranted. International law's change is warranted.

[1246] Alain Pellet and others, '"I Resigned Because Russia Had Become an Absolutely Indefensible Client": An Interview with Alain Pellet' (*Völkerrechtsblog*, 4 July 2022) <https://voelkerrechtsblog.org/i-resigned-because-russia-had-become-an-absolutely-indefensible-client/> accessed 15 August 2023.

4 Parting words: In search for conclusion

It is always hard to say goodbye. Particularly hard it is when you need to say goodbye to something that is much more than the couple of hundred pages that holds it. Maybe this is the enigma of arrival of which V.S. Naipaul writes: you need to part in order to arrive. But where I started with innocence lost, I am not entirely certain I can end with an innocence regained. The tracks I have covered have taken me from the promise of dignity to its wholesale abandonment, both animated by the same humanity. If in my innocence I truly ever believed in law, the distance covered has parted me with all such illusions. Or, I think I should be more precise. It has left me disillusioned before the law as I see it, not disillusioned from the capacity of law itself to correct wrongs. I might be an idealist, but I prefer to stay that way.

I have in these pages attempted to show that technology is a potent tool that law unleashes. As a relational entity, technology interacts always with something. In a partial realisation of Heidegerrian nightmare, some of the humanity has become the material consumed by technology as an outcome of this interaction. I don't intend to infuse international law as a system with any logic that would direct its operation; the system is simply so complex that no one can have a command over all its bits and pieces. Despite this collective ignorance from the precise outlines of international law, some are more knowledgeable than others. As with all services, legal – even international legal – advice is for sale to anyone with pockets deep enough. This has allowed some to draw a map more accurate than others from the mountains and valleys of international law. Finding a peaceful valley where to construct a techno-utopia has proven to be foundational for success of technical dreams. Sadly, the most peaceful valleys are always already populated.

The power of technology shown in this dissertation resides in its power to domesticate the population of the peaceful valley. The technology blinds with its promise of sunlit uplands, making it all too easy to look the other way when it produces its magic. The outcasts of this technological utopia are the prisoners fervently clicking on images to teach human-like artificial intelligence or citizens of Zimbabwe whose images feed our non-bias. For the most part these temporary blind

spots are benign—no one is harmed all that severely for all that long. But it is the beast it feeds that grows hungrier as it satisfies its gluttony. It is the increasingly accurate facial recognition software that jails millions in open-air prisons and re-education camps in China or smooth algorithmic surfaces that discriminate without anyone, but the unfortunate applicant of a benefit or a vacancy, ever noticing it. The momentary blindness fuels rightlessness by turning execution of some rights automatic; a millennial dream of effective enforcement materialised has turned out to be precisely the nightmare all science fiction authors predicted it to be.

In a different corner of the technological narrative, I show how sensible choices to liberate services and embryos has made purchase of humans a reality. In Joanne Ramos's novel *The Farm* the human merchandise is only available for the most affluent, in reality it has become growingly affordable as the women providing their bodies for surrogacy are pushed to more and more precarious position in order to promote their welfare. It is not obviously the fault of the well-intentioned legislation, it is merely a logical outcome of a system where nothing else than a change of legislation in the target country is instantiated. To uphold the European dignity and family, the Europe looks the other way when Georgian women subject themselves to an exploitation and possible criminal sanctions to fulfil the Western dreams of genetic offspring. It is repugnant that in the ocean of rights, some end up drowning without a life raft with dozens of high-tech vessels live recording the events, which leads me to my last point.

The power that enables the technology to transform humans into rightless things is best understood by looking at the walls erected to protect the West from the rest. The technological excess is only possible because the personhood does not travel, neither as an analytical concept nor as the human carrying that status. Or, to stay truer to the facts, it does travel with unprecedented ease and volume but the travellers are not those who are sucked by the gravitational pull of international law's black holes.

Figure 6. A strip from Positive/Negatives graphic novel.

Technology or things never faces similar emptiness we humans are so familiar with. It is these things that international law carries with great velocity and allows them to settle everywhere and nowhere. From this omniscient position, technology can be used by some to create great empires of wealth, while the price is paid in a loss of humanity, both conceptual and real. These are the first steps in my journey towards a critique of repugnant rights.

I personally think that the next steps on the ways of providing this critique are obvious. It is to provide a closer look on the modus operandi of technological excess that grinds humans into molecules and constructs them anew in its own image. The fault is not with technology, nor with international law, nor with the wide range of domestic laws. It is in the way they interact, but while this interaction on a single

instance looks merely an insular cruelty, it is the very system that is geared towards it. While international lawyers bicker over forms, the only object that ever constructed anything in the human world, the human themselves, are lost from sight. In the grand critique of personhood and technology, humans are material actants well occupied to seize the network and tilt the balance. We are sadly more deficient than our theories give us credit for. The very charm of rights as tools to correct wrongs is what leads to their demise if my modification of the traditional critique of rights holds any closer scrutiny.

But as said, I want to believe in a better world. I think that the zero-sum game of utilitarianism to which Parfit's repugnant conclusion traps us can be escaped, not through retreat to another analytical concept but to a retreat to the material world where we live and interact. A first step to the right direction is to accept that the good intentions of rights we cherish might, in the end, doom most of us to downright misery. Let us not be miserable, but rather break the spell. There is already a first picture from inside the black hole. Let's look at it, unwavering. And mad.

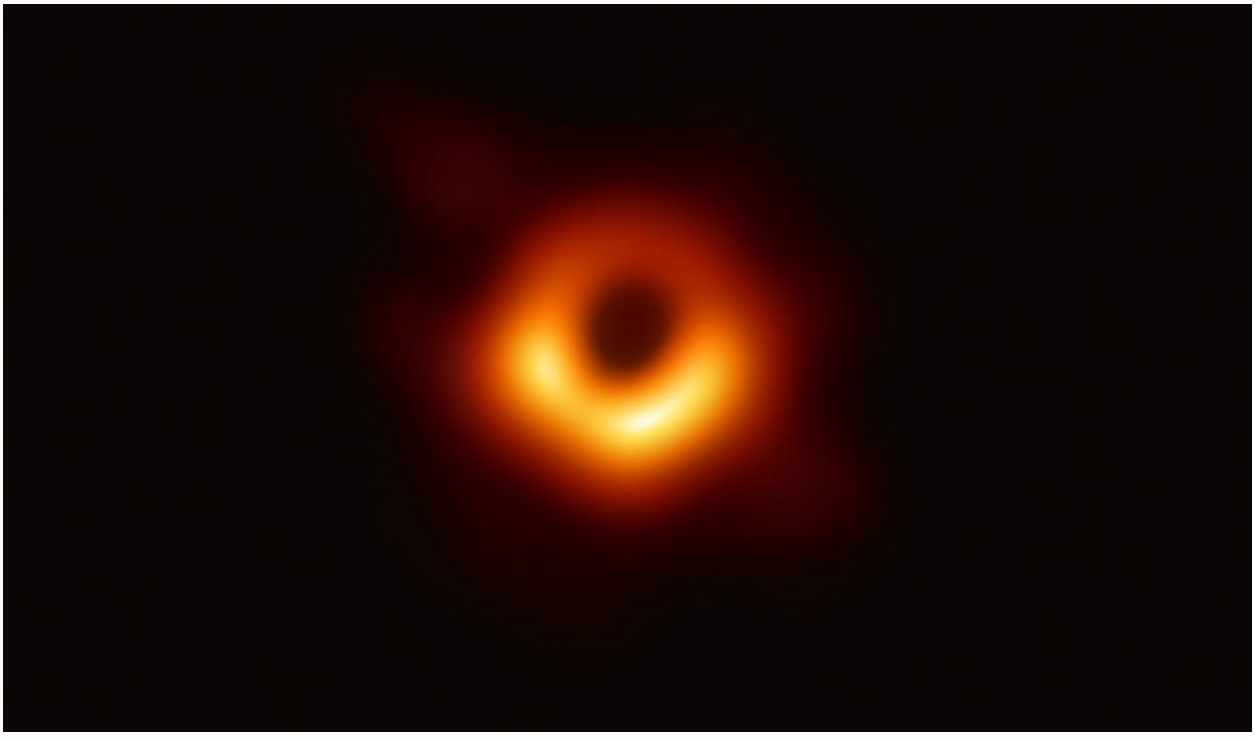


Figure 7. Picture of a black hole.

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