doi:10.1017/aju.2020.16

SYMPOSIUM ON PROSPER WEIL, "TOWARDS RELATIVE NORMATIVITY IN INTERNATIONAL LAW?"

WHAT IS POSITIVISM TODAY?

*Mónica García-Salmones Rovira**

This essay focuses on the understanding of positivism in Prosper Weil's time, its trajectory since, and how that trajectory reflects changes that have occurred in global society in the intervening years. The world to which Weil spoke is neither in scientific nor in political and cultural terms the same as ours. Key positivist notions, such as neutrality or Weil's critique of the ideal of the unity of the international community and of the invocation of higher moral values, appear to chain sound normative principles while letting loose real power. At any rate, Weil's ideas have not survived globalization or the critical and historical turn taken in the discipline of international law. And yet "Towards Relative Normativity?" arguably owes its lasting significance to its grasp of the weight of the authority of law in international society.

It Was Never Neutral

"Towards Relative Normativity?" is a classic, and surprisingly modern in certain respects. But it is undeniable that the school of positivism to which Prosper Weil belonged has lost much of its once absolute authority in the discipline.[1] To mention one of several non-positivist studies on normativity, Karl-Heinz Ladeur's political analysis that a court charged with achieving a stable order will, ostensibly, be less flexible than (international) actors who pursue a particular right goes further towards explaining the volatility of today's international legal order than does Weil's abstract attack against relative normativity.[2] The current dynamic of international law, involving numerous international courts, organizations, and actors who not only interpret but also constantly develop law, is incommensurable with Weil's type of self-conscious and cognitive-static international positivism.

Moreover, the phenomenon of relative normativity is not new. Matthias Goldmann studies the way in which over centuries different expressions of relative normativity, such as *ius cogens*, obligations *erga omnes*, and myriad types of soft law, have been articulated; he concludes that "throughout the history of modern international law relative normativity has been the rule rather than the exception."[3] In this constellation, Weil's piece vindicating spotless normativity appears almost like a unicorn offering an improbable remedy against the poisonous

* *Adjunct Professor of International Law, University of Helsinki.*

[1] For this argument, see Mónica García-Salmones Rovira, *Faith, Ritual and Rebellion in 21st Century (Positivist) International Law*, 26 EJIL 537 (2015); *see also* MÓNICA GARCÍA-SALMONES ROVIRA, THE PROJECT OF POSITIVISM IN INTERNATIONAL LAW (2015).

[2] Karl-Heinz Ladeur, Was bedeutet die "Normativität" des Rechts in der postmodern Gesellschaft?.

[3] Matthias Goldmann, *Relative Normativity*, *in* CONCEPTS FOR INTERNATIONAL LAW 740 (Jean d'Aspremont & Sahib Singh eds., 2019).

© Mónica García-Salmones Rovira 2020. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

https://doi.org/10.1017/aju.2020.16 Published online by Cambridge University Press

power of politics.[4] It is likely that this has been one of its main charms during the last decades. But whether "as a conceptual *uni*-verse" or as "an unrelated *pluri*-verse," international lawyers no longer seem able to prevent engagement with one or another form of global legal thought, including the political, cultural, and sociological principles sustaining them.[5] Pure normativity does not seem to penetrate far enough and, to paraphrase Lassa Oppenheim, the late twentieth century positivism articulated in "Towards Relative Normativity?" belongs in a museum, where the tools used to do science in the past are preserved.[6]

This is especially the case for Weil's understanding of neutrality, which has parted company with any scientific connotations that it might once have possessed. The French lawyer noted that "[b]oth religious and ideological neutrality are inherent in the basic concept of international law."[7] The most superficial historical perspective makes this statement quite revealing of the presentism of Weil's text. In the very complex intellectual history of the twentieth century, neutrality was—for a short period before the end of the Cold War—the new ideology of a group of well-positioned international lawyers. Arguably, this was roughly during the period when Kelsen's "pure theory" had been internalized by a sufficient number of international lawyers, most but not all of whom were Europeans, and the existential perils of the Second World War and the Cold War seemed far enough away.[8] Weil, an administrative lawyer by training and practice (with expertise also in investment law and the law of the sea), surely felt comfortable with this separation of law and politics. Nevertheless, he was also aware of the difficulty involved in maintaining the happy equilibrium of neutrality. A former president of the World Bank Administrative Tribunal, he stated that "the judge reviews merely the legality (*légalité*) of a decision and not its wisdom (*opportunité*). The difficulty for all administrative tribunals is to draw such lines."[9] The correct standpoint of an administrative judge was to remain apolitical, and in a similar way the natural standpoint of international law, as expressed in "Towards Relative Normativity?," was to be neutral.

Normativity was at once the result of voluntarism and the expression of the neutral character of international law: "Without this positivistic approach, the neutrality so essential to international law qua coordinator between equal, but disparate, entities would remain in continual jeopardy."[10] However, this sort of argument about the neutrality of international law has always been problematic. What in theory seems quite plausible and almost commonsensical—that if all countries agree on a norm of international law, then that norm is neutral—fails to stand up to close critical scrutiny. There seems rather to exist an opposition between the attributes "consensual" and "neutral." Either the norms of international law are consensual—and Weil hoped to maintain them as such—and hence result from certain power and epistemological struggles and structures; or, alternatively, they are neutral. But how can they be simultaneously consensual and neutral? Moreover, is it possible in a society of moral human beings to have neutral norms? Would that even be a good thing? One might rejoice at the fact that the Universal Declaration of Human Rights was not neutral and probably regret that the Declaration of the Berlin Conference that prompted

[4] Those who drank out of the horn of a unicorn were immune to poison and diseases such as epilepsy, as told by Cstias, the ancient Persian historian. *See* Odell Shepard, The Lore of the Unicorn 26 (1930).

[5] David Roth-Isigkeit, The Plurality Trilemma: A Geometry of Legal Thought 223 (2018).

[6] Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AJIL 313 (1908).

[7] Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 420 (1983).

[8] Hans Kelsen, Pure Theory of Law (1967).

[9] Prosper Weil, *Questions Conclusives*, *in* Problems of International Administrative Law: On the Occasion of the Twentieth Anniversary of the World Bank Administrative Tribunal 193 (Nassib G. Ziadé ed., 2008).

[10] Weil, *supra* note 7, at 421.

https://doi.org/10.1017/aju.2020.16 Published online by Cambridge University Press

the Scramble for Africa did not provide a neutral outcome in ethical terms.[11] Quite frankly, no one either back then or now would claim that these declarations were neutral, even if consensual. In addition to this reasoning, several waves of critical legal thinking that now form part of the mainstream have rendered untenable any claim that international law is neutral.

Furthermore, Weil's purported ideal of religious and ideological neutrality unrealistically depicted an unlimited number of moral and religious conceptions of society relative to which international law would appear to establish a neutral benchmark. Nowadays, the possible moral conceptions involved in building a peaceful, just, and sustainable international order seem anything but limitless. The most pressing issue in current international law may be mentioned here as an example: environmental degradation. Far from there being infinite alternatives, natural scientists argue that the viable moral and political choices can be counted on the fingers of one hand. In a minimalist mood, the choice for a society to be adopted through international law today might be between whether we continue to legitimize, through law and its enshrined rights, the double standard of indiscriminately seeking unlimited wealth *and* seeking a principle of fundamental political and material equality, or whether we decide substantively on one over the other. In practice, the latter does not mean a sort of utopian communism, whatever its virtues, but taking seriously the principle that the international arena is a political space with the concomitant limitations that adhere to it.

Another example, taken this time from investment law, may help to clarify this idea of the political space. Much has been written lately on the shortcomings of the current investment law system. Some proposals advocate a new design for investor protection that would entail granting investors both rights and corresponding responsibilities. In a similar way to participants in any political commonwealth, investors would see their property rights protected and would also be responsible for their own misconduct.[12] The debate is taking place and the choices are open, but they are not infinite. In a sense, accepting a limited scope to make decisions on the basis of politics as to which actions are better for all is a sign of the maturity of the discipline of international law.

More generally, it seems implausible now to think of international law as a neutral conductor akin to a well-functioning electrical circuit. The principle of the neutrality of method, rooted in natural sciences, was long ago abandoned in the sphere of the social sciences.[13] And even in terms of religion, many have lost faith in the secular, as David Kennedy wrote provocatively some years ago.[14]

The International Community Is Finally Here

Weil's warning against those "seeking to create today the law of tomorrow's international society" and against actors who try to instill in "today's international society the concepts appropriate to a different society" proved that he was not such a committed Kelsenian after all.[15] Kelsen, to be sure, was a political realist, but if Weil were committed to the pure theory type of normativity, he would not have shied away from transferring into international

[11] Universal Declaration of Human Rights, G.A. Res. 217, UN GAOR, 3d Sess., UN Doc. A/810 (1948); General Act of the Conference of Berlin, Feb. 26, 1885, C 4361 1885 (General Act), *in* Edward Hertslet, The Map of Africa by Treaty, vol. 2, No. 128, at 468 (3d ed. 1909).

[12] *See* James Gathii & Sergio Puig, *Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law*, 113 AJIL Unbound 1 (2019); *see also* José Amado et al., Arbitrating the Conduct of International Investors (2018).

[13] For an example from the discipline of international relations, see Steve Smith et al., International Theory: Positivism and Beyond (1996).

[14] David Kennedy, *Losing Faith in the Secular: Law, Religion, and the Culture of International Governance*, *in* Religion and International Law (Mark W. Janis & Carolyn Evans eds., 1999).

[15] Weil, *supra* note 7, at 442; *see also* Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts (1920).

https://doi.org/10.1017/aju.2020.16 Published online by Cambridge University Press

law an ideal of the administrative world that he knew well: centralization. Instead, in 1983, Weil considered with great caution the "aspiration of greater unity" and the "will to transcend the traditional international society," which was one of "juxtaposed egoisms."[16]

Forty years later, that "greater unity" that Weil feared would be pressed on the rest by some naïve or interested international actors has arrived. There is no need to relate here all of the historical events and to describe the intensity of communication and technology, which international law has done much to regulate and promote and which has made the world small. Moreover, the closeness of the countries and peoples of the world has not prevented the "juxtaposed egoisms" mentioned by Weil, and we observe how those "juxtaposed egoisms" continue to thrive by old and new means. If anything, we have nostalgia for the wish to "forge an international community for the common good," which is something, incidentally, that Weil did not criticize but chose to analyze with sobriety and critical distance.[17]

However, his trepidation in the face of "greater unity" makes one wonder whether he was targeting the right culprit. The theoretical problematization in "Towards Relative Normativity?" of whether the international community does or does not have a personality seems terribly irrelevant today, and the doubts about "who or what is this community?" speak of another era. On the contrary, what now feels difficult, even sometimes burdensome, is the impossibility of evading the reality that the international community exists, and the potential responsibility towards it: consider Lampedusa, the Mexican border, the Antarctic, the "failed states" and their populations. Peoples living, respectively, in materially deprived conditions and in conditions of materialism stare at each other in puzzlement—not, arguably, with hostility, but certainly not with indifference. We are acutely aware of the fact that some of us travel abroad at least once a month while others starve, and that young people in many places go to school, study at a university, and find a job, while in many others they cannot do any of those things. Statistics concerning broken families, unemployment and overemployment, high suicide rates, and the loneliness of old people and of children stand as evidence that so-called developed countries also have their share of problems.

The Praxis of Politics

Moreover, it has been a long time since the once powerful image of two ideologies—the neutrality of positivism and the idealism of natural law—slugging it out matched perceptions of what is important in international law. Nowadays this conflict appears reductive of the real issues at stake, and more a remnant of a Eurocentric *problematique* than an insightful theme.

It is also worth noting that the turn towards history in international law has contributed to the education of the regular international lawyer, who now analyzes the complexity of legal phenomena and theories such as positivism and natural law more critically. History is no longer purely the territory of erudite jurists. Studies of natural law taking a wide historical perspective now show how many radically different forms of natural law exist. Before it was introduced into a *ius gentium* that became increasingly idealist, the core of natural law was about *being* just. Natural law was praxis and thus action resulting from practical reasoning.[18] It amounted to one of the expressions of God in the world—the good human being—and not to idealistic principles. The desire to rationally monitor the content of natural law in order to adapt it to the different political objectives of kings, princes, nations, and empires took shape in the writings of the early fathers of international law, Hugo Grotius and possibly Francisco de Vitoria

[16] Weil, *supra* note 7, at 422.

[17] *Id.*

[18] Thomas Aquinas, The Summa Theologica (1947), Q. 91, Art. 2, First Part of the Second part.

https://doi.org/10.1017/aju.2020.16 Published online by Cambridge University Press

before him, and remained an influential theme for several centuries after that.[19] Thus began the paradoxical path of natural law being posited by the natural international lawyers. The positivist critique of natural law in the late nineteenth and twentieth century was accordingly devastating, and not altogether unjustly so.

Strikingly, however merciless the ideological struggle had been, much of the critique directed against natural law of any kind from the perspective of scientific and economic positivism melted away when confronted with outright injustice. One of my favorite Hans Kelsen quotations, for what it reveals of his complexity, is to be found in an article in which he discusses the retroactivity of the law of the Nuremberg trials:

> Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force.[20]

After decades of political struggle for scientism and against ideology, Kelsen seemed to come to terms with the fact that positive law was not by itself enough to address the challenges thrown up in the international order. Perhaps due to a certain law of the evolution of sciences roughly to the effect that every necessary stage requires testing, the principles put forward in Weil's piece were impervious to Kelsen's insight. Thus in 1983 Weil would regret that "normativity is becoming a question of 'more or less,'" referring to norms of *jus cogens* and international crimes. In this manner, the idea of pure normativity had arrived in international law, too. As we have seen, its reign would not be long.

Positivism has since become moral, social, and political. H.L.A. Hart had already done the difficult work of opening up positivist reasoning to accommodate moral values and principles.[21] Lately, the value of excellence in interpretation and subsequent persuasion of legal positivism has been explained on the grounds of what I understand to be akin to truth statements about reality.[22] Even Weil's very plea for preserving the normativity of international law seems to match one of the fundamental principles of a political constitution: that it instils and maintains a sense of reverence in the (global) population.[23] On the other hand, inspired by the twentieth century natural law theoretician Lon L. Fuller, social constructivists such as Jutta Brunnée and Stephen J. Toope refer to "the practice of legality" in an attempt to ground the authority of law on the social substance of shared and agreed understandings beneath its formal sources.[24] In our small globe, would Thomas Aquinas, Hans Kelsen, or Prosper Weil regard themselves as natural or positivist international lawyers? Or neither?

[19] This argument is made in Mónica García-Salmones Rovira, *The Impasse of Human Rights: A Note on Human Rights, Natural Rights and Continuities in International Law*, 21 J. Hist. Int'l L. 518 (2019).

[20] Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, Int'l L. Quarterly 165 (1947).

[21] H.L.A. Hart, The Concept of Law (1961); W. L. Waluchow, Inclusive Legal Positivism (1994); Kenneth Einar Himma, *Inclusive Legal Positivism*, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law (Jules L. Coleman et al. eds., 2004).

[22] Dennis Patterson, *Theoretical Disagreement, Legal Positivism, and Interpretation*, 31 Ratio Juris 260 (2018).

[23] On the dignified and efficient parts of a constitution in Walter Bagehot's work, see Walter Bagehot, The English Constitution 44 (2d ed. 1873); Kevin Theakston, *Walter Bagehot: The English Constitution*, *in* Volumes of Influence (Kevin Theakston ed., 2011).

[24] Jutta Brunnée & Stephen J. Toope, *International Law and the Practice of Legality*, 49 Victoria U. Wellington L. Rev. 429 (2018).

https://doi.org/10.1017/aju.2020.16 Published online by Cambridge University Press