INTERNATIONAL LAW AND THE FAR RIGHT:

Reflections on Law and Cynicism

Martti Koskenniemi

> "Cynicism is enlightened false consciousness. It is that modernized, unhappy consciousness, on which enlightenment has laboured both successfully and in vain". (Peter Slotedijk, *Critique of Cynical Reason* (1988))

PROLOGUE

Peter Sloterdijk's famous analysis of cynicism reminds us of one of the traps that lie on the road to enlightenment, namely the situation where we find ourselves with all of its critical tools and none of its promised liberation. We have arisen from what Kant called our "self-incurred immaturity" resulting from blind belief in authority – and yet the world where this ought to have led us to treat each other always "as an end, and never merely as a means", remains as distant as when we began.[1] Instead of bringing "freedom", the ability to critique anything and everything has been turned into the expressionist employment of the most radical anti-enlightenment tropes and alignments so as to hit back at those whose theories brought us nothing but misery. The ideals of universal solidarity, equal value and vulnerability, born with the imperative of critique, proved excessively ambitious. Failing to reach them, we did not fall back to where we started, but to a different place. Disenchantment could not be undone. When faith was gone, it could not recreated by wishing we still had it. But even as faithless, we could always turn the tools of critique against those who still suggested we believe them. What we had learned, after all, was that their "knowledge", was just their power. They were the source of our misery and now

---

[1] The definition of enlightenment as escape from "self-incurred immaturity" is of course from Immanuel Kant, 'An Answer to the Question: "What is Enlightenment?"', in *Political Writings* (H Reiss ed. 1991), 54 and the maxim "*So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, and never merely as a means*", is from Immanuel Kant, *Groundwork of the Metaphysics of Morals* (M Gregor ed. 1998), 38 [4:429].

remain its symbol. The last thing we shall do with the tools of criticism, then, is to demolish their power. Thereafter, it will be *our* turn to express *our* power, and once we have done this, *we shall have no need of their hypocrisy*.

This is a classical, powerful image of one type of critique of reason and enlightenment. Although Sloterdijk used it to analyse the cultural and political worlds of the 1930s and 1970s, its themes resonate with the present "backlash" against the rationalism and universalism that is often linked with internationalism and globalization as well as the institutions of a liberal-democratic polities – courts, bureaucracies, the media, political parties and processes, perhaps the idea of "liberal democracy" itself. Rationalism, universalism and the rest of the ideology that opposes enlightenment to "myth" have been with us for a long time. But so have concerns of the "dialectic of the enlightenment", the fear of the totalising, instrumentalist and de-humanising implications of enlightenment itself turned into myth and returned to us as an economic and disciplinary techno-nightmare. Some of the best social thought of the 20th and early 21st centuries has focused on the failures of the enlightenment that were not brought about by its detractors but by its internal dynamics, the way its *critical* impulse was set aside by the pursuit of its economic, scientific and technical ambitions.

In the following my interest is less in attacking or defending the philosophical or the historical enlightenment than in making a contrast between a political *cynicism* that Sloterdijk identified as an important 20th century legacy and that I find visible in today's reactionary activism, and a *scepticism* that uses the critique of enlightenment rationalism for progressive change. There is much reason to be critical of many aspects of technical and economic globalization, including its human rights ideology, the architecture and operation of its legal and political institutions and its "low-level democracy".[2] The far right surge rejects those institutions as a part of an elite conspiracy against the "people" whose authentic interests it pretends to advance, often by seeking to empower an authoritarian

---

[2] For that latter theme, see Susan Marks, *The Riddle of All Constitutions. International Law, Democracy and the Critique of Ideology* (2003).

leader. An adequate response to that project will have to start from a (sceptical) critique of the way global institutions have failed to deal with the injustices of the world in the past decades. And it has to struggle against the cynicism of the far right by encouraging critical engagement with the systems of knowledge and politics that inform the work and the distributive choices of those institutions.

I

Like most professionals, international lawyers have worried over the present "backlash" in Europe, the United States and occasionally elsewhere against internationalism, "globalism" and international institutions. But I do not think international law has been seriously challenged. Neither Donald Trump, the Brexiteers, the Orban or the Kaszinsky government, the Modi, Duterte or Bolsonaro regime have had an axe to grind with basic principles – sovereignty, non-intervention, treaty-making, immunity, sending ambassadors to foreign countries.[3] Of course there are the occasional attacks on the European Court of Human Rights and the Trump regime continues its policy of obstructing or leaving various international institutions. But human rights have always been controversial and obstructionist US behaviour is nothing new (think of the League of Nations, the Law of the Sea, UNESCO, International Criminal Court...) Treaty-making in special fields such as environmental law has slowed down and until recently, only Chinese diplomats referred to Article 2(7) of the UN charter and the reservation of "matters of domestic jurisdiction". Now that claim is heard more often. But it is a *legal* claim. Making it is not to target international law but a certain understanding of it.

The target is liberal internationalism, of course – global governance institutions and the ideologies upholding them. While I do not think that "classical international law" with its emphasis on sovereignty and formal treaty-making are threatened, the "project" of international law and its ideological *ambiance,*

---

[3] Others have said the same – e.g. James Crawford speaks of the "necessary international law" that has stood rather unchallenged. 'The Current Political Discourse Concerning International law', 81 *The Modern Law Review* (2018) 1-22.

especially in the form it received in the 1990s certainly are. We know the 1990s as the period of optimism following the fall of the Berlin wall, the demise of real socialism and the emergence of a sense that suddenly history and progress were once again on their way. Many people believed that this meant that the world was becoming increasingly more "liberal" – a reference to a set of political and cultural values that had become increasingly prominent in the secular West since the 1960s. In the 1990s, many things had suddenly become possible that had been blocked by the political antagonism of the Cold War – setting up global free trade regime and a system for adjudicating political leaders for crimes against their own populations, intensification of the work of human rights treaty bodies and the rise of the idea to subordinate the most varied aspects of late modern life to "global governance". The number of UN Security Council resolutions skyrocketed and people were saying that the body was "finally" working as it should. A blockage had disappeared that had obstructed history's natural, "cosmopolitan" flow. Remember the UN world conferences? Rio 1992, Vienna 1993, Cairo 1994, Copenhagen 1995, Beijing equally in 1995, Istanbul 1996.[4] Environment, human rights, women, social development, housing… All this hurly-burly underpinned by a new vocabulary of globalization, even "constitutionalization" of something many referred to as a "New World Order".[5] The surface may have appeared economic or technical, but the insiders' ambition was greater; a new way to think about the world beyond domestic politics was breaking out. In an emblematic work, published during the last moments of the decade, Tom Franck from NYU drew attention to the "*emerging triumph of individualism*" that was laying the "*foundations of universal constitutional democracy*".[6]

But little seems left of that ambition twenty years later. Suddenly there is nationalism, even racism, attacks on foreigners, migrants and women,

---

[4] For a good overview of these events, see J.A. Lindgren Alves, 'The UN Social Agenda against "Postmodern" Unreason', 28 *Thesaurus Acroasiarum: Might and Right in International Relations* (Athens, Sakkoulas 1999), 51-108.

[5] E.g. Deborah Cass, *The Constitutionalization of the World Trade Organization* (OUP, 2005); Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005).

[6] Thomas M. Franck, *The Empowered Self: Law and Society in an Age of Individualism* (Oxford University Press 1999). 281, 285

international "elites", judges and academics almost everywhere. Domestic leaders touting nationalism and tradition across the world target the homilies of the 1990s. If the attacks are not directed against international law in its basic, statist version, nor are they evidence of any clear or coherent program of legal reform either. I do not think the backlashers know or care that much about international law. One of the features of the backlash is its *opportunism*. It picks up any theme that might be capable of energizing the right-wing constituency, never mind how relevant *you* might think it is. The website of FOX news is full of acrimonious attacks on Obamacare and George Soros side by side with stories about crocodiles eating babies and UFOs having landed northern Arizona. Of course, no international theme is immune to opportunist attacks – this might be about a WHO women's reproductive health program or the latest decision on the hate speech in a human rights court, a new multilateral trade treaty or a climate change measure.[7] It all depends on what things are in the air. Do not expect a reasoned reform project from the backlashers. To produce such would be to capitulate, to concede to the legitimacy of the institution to be reformed. A real backlasher does not concede to anything, least of all to speaking the language of unelected international bureaucrats with which they flag their superiority.

My claim is what I will call the backlash is not about this or that institution or policy. It expresses a *status anxiety* and takes the form of a *cultural war* against the values and priorities associated with the "international" or the "global" that became dominant in the 1990s. It receives its force from the failure of globalisation to live up to its promises, the intuition that behind all that rhetoric something else was happening, some people were winning while others were losing, and while some injustices were addressed, others were being created. But energy created by this perception is being expended in the kind of cynical manoeuvrings laid out above. Therefore, it cannot be dealt with by suggesting that international institutions should do their job better. Suggesting more reform will just confirm the impression of elite autism: "*There has been no end to reform in the past 30 years – and we always find ourselves defeated*." I say defeated and

---

[7] For some examples, see Harold Koh, 'The Trump Administration and International Law', 56 *Washburn Law Journal* (2017) , 413-469.

not "left behind" to highlight the sense of an enduring conflict in society where the winners have consolidated their victory by the institutions they rule. These institutions present themselves as representatives of reason and enlightenment. They speak the languages of science and technology, ostensibly employed at the service of universalism and human rights – of treating everyone "as and end and not as a means". Every grievance is already being dealt with by those institutions. Social agendas, corporate responsibility, empowerment and sustainability projects proliferate. There is not a problem for which some group of global experts would not already be busily seeking remedies. Of course resources are scarce, of course priorities must be made and reforms take time, of course the world is a really complex place so you cannot expect results over night… And yet, some people, perhaps many people but still just a small percentage, have much to gain from the system as it is.

The impression is that of lack of alternatives, the endless ability of ruling institutions to absorb grievances without doing much about them.[8] This impression has been captured by far right reactionaries who have turned it into a call for revenge and reversal. Legitimate grievance is captured by cynical reason. The point is not to govern better – after all, none of the available blueprints and projects produced by the "best" think-tanks and research institutions is invulnerable to critiques routinely vented by competing think-tanks and institutions. They are all part of the same conspiracy. None of them can be trusted. There is thus no point in offering anything institutional or technical. Instead, the call is to something apparently much simpler, something already tried and tested, namely to return to an imagined moment before globalization, neoliberalism, human rights, feminism, environmentalism, the moment when fast cars, steel and space travel framed the universe of imagination.

I will proceed as follows. I begin with a rapid sketch of the transformation that took place in world of international law from the 1960s to the 1990s

---

[8] For a characteristically insightful depiction of this experience, see David Kennedy, 'Law, Expertise and Global Political Economy. The 2018 Montesquieu Lecture' 23 Tilburg Law review (2018), 109-120.

"Globalization" based authority on its skilful employment of systems of knowledge that knew no boundaries, were managed by world-wide institutions and created social hierarchies expressed in the mastery of expert-languages. This was accompanied by the emergence of a universal politics of human rights that was deeply intolerant of older values and hierarchies, especially those of white male privilege. Both knowledge and politics became "enlightened". I will then distinguish between the legitimate economic grievances of the 1990s and the consequent emergence of far right attitudes that instead of focusing on the patterns of economic distribution have directed popular *ressentiment* against the cultural transformations accompanying them. The more the political debate focused on culture and identity, the less critical power it had on global inequality and the structures sustaining it . The far right arose on the strength of a cynicism that will do nothing to redress existing injustice. The breadth of its appeal underlines the urgent need for alternatives. I will suggest that international lawyers ought to re-examine their commitment to present global institutions. Like all institutions, they operate under ideas and assumptions that are contestable and revisable but that tend to be taken as natural and obvious by the people who work in them. Law offers a powerful vocabulary to consolidate those ideas and assumptions – but also to challenge them and the way they are understood and implemented. To fight cynicism, injustice need to be addressed better than has been done with existing institutions and conventional assumptions. This, I will suggest, requires rethinking the power and role of expert knowledge in global institutions and the ways in which political contestation operates within them.

II THE PROBLEM WITH THE 90'S

First - what is international law? In a book almost 20 years ago, I traced its emergence to the Victorian liberalism of the late-19th century, the effort by a handful of international-minded bourgeois *avocats* to spread liberal legislation in

Europe and to civilize the colonies.[9] The Great War and the League of Nations limited this ambition to functional cooperation and peaceful settlement; international law was institutionalized in foreign ministries as an effort to square domestic sovereignty with a pragmatic international legal order. During the Cold War, the profession needed to keep its ideological ambitions in check while it sought to consolidate European political boundaries, support economic collaboration and coordinate decolonization. The constructive ambitions received direction in Europe with the Schuman plan, and all that came after.

But in the 1960s was a time of greater ambition. My generation grew up with the fizz and sputter of Radio Luxembourg. Capitalism changed gear; there was *soixant-huit*, Vietnam and Woodstock. The truths of earlier generations – their patriotism, their legalism and their Cold War spirit – became old hat. Wolfgang Friedmann's 1964 book *The Changing Structures of International Law* provides a wonderfully perceptive account of that moment in international law. Sketching what he called a move from a law of *co-existence* to a law of *cooperation* he used the vocabulary of interdependence and expansion to stress the fundamentally *international* nature of that moment: technological progress, environment, trade, development: "...beside the level of interstate relations of a diplomatic character there develops a new and constantly expanding area of co-operative international relations". This would begin from the regional level – much attention was given to the European Communities. But EC was a "movement" that was to be seen as "a possible precursor of a future integration of mankind".[10]

Forget about the Cold War, think about "the silent spring", the imperative of development, the boundlessness of technology, the spread of a culture of individualism... "[T]he national state, and its symbol, national sovereignty, are becoming increasingly inadequate to meet the needs of our time", Friedmann

[9] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law* 1870-1960 (Cambridge University Press 2001).

[10] Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964), 19.

wrote.[11] The 60s was tough on traditional values, national, religious, agrarian, bourgeois. It appreciated plurality and individualism. And human rights:

> "…the necessity to protect the individual as such internationally, even against his own state, has become an accepted postulate of international lawyers, and the recurrent subject of international debate".[12]

"Even against his own state" – it was not surprising that a refugee from Germany to Australia and finally the US would make this point. Now flash forward to the 1990s. The end of the Cold War, the rise of the EU, intensification of international cooperation in trade, development, environment technology, resource management, even democracy, all of such developments outlined and celebrated in another work by Tom Franck, *Fairness in International law and Institutions,* based on his lectures at the Hague in 1994.[13] The theme of "fairness" was in many ways representative, as Franck himself observed in another work, of the concerns of that decade.[14] With the increasing complexity of global regulations, hard-and-fast rules (what Franck called "idiot rules") would have be set aside. Situations were too varied; the automatic application of bright-line rules would too often result in injustice. [15] "Creative indeterminacy" was needed in the law to leave law-appliers room to apply it "fairly". There would be less predictability. But if only we could trust the law-applier that would not be too great a cost.[16]

But could one really trust those anonymous, distant and alien appliers of international law, the operators of "global governance"? Was it a mere coincidence that the expansion of such governance paralleled the spectacular growth of inequality at home and abroad? Already long ago, theorists of democracy expressed their worry about this lack of trust in democratic

---

[11] Friedmann, *Changing Structure,* 365-6.

[12] Friedmann, *Changing Structure*, 376.

[13] Thomas M. Franck, *Fairness in International Law and Institutions* (OUP1998).

[14] Thomas M. Franck, *The Power of Legitimacy among Nations* (OUP 1990).

[15] I have discussed this in many places at greater length. See e.g. Martti Koskenniemi, "The Fate of International Law. Between Technique and Politics", 70 *The Modern Law Review* (2007), 1-32.

[16] Franck, *Power of Legitimacy,* 53, 50-66.

institutions, politics and politicians. A "republican" commitment to the public good seemed to be visible nowhere, everyone appeared to be thinking of their own interests. The endless talk about the "democracy deficit" of the European Union or the "legitimacy" of the WTO hardly convinced domestic constituencies. Reputation for "fairness" needed to be achieved, it could not be presupposed.

In the 1990s much decision-making power on matters affecting domestic constituencies in the West was transferred to international bodies. International lawyers were thrilled to see the emergence of the WTO, the ICC, sustainable development, responsibility to protect. They were busily travelling to where the "international" was being polished and reconstructed as the "global". But the audiences at home were often unimpressed. What they saw was austerity, the disappearance of contestation and a new technocracy wedded to what the historian Timothy Snyder has called the "politics of inevitability", lack of alternatives to chosen policy.[17] Now the "backlash" views that as a betrayal. All the talk about governance of an interdependent world was a camouflage erected by unelected bureaucrats to perpetuate their privileges. The immediate target is the 1990s but deep down the enemy are the transformations of the 1960s that opened the West to the world outside and reversed the hierarchies of white male privilege. "Taking back control" addressed the status loss directly. It was about restoring a system of control familiar from a previous generation, control by white men over their women, their families, and societies, a time when *cosmopolitan elitists, feminists, Jewish philanthropists, gay journalists and African refugees did not tell us how to think or what to do.*

III A PROBLEM OF KNOWLEDGE

What irritates the backlashers to no end is that global power does not at all present itself as values or preferences – as conventional politics – but as knowledge; international experts rule because they are experts, because they *know* that climate change is true, that increasing prison sentences have no effect

---

[17] Timothy Snyder, *The Road to Unfreedom. Russia – Europe – America* (2018).

on criminality, and that the greatest to suffer from Brexit are its supporters. *Check the facts*! That exchange is patronizing, and hierarchical in form; there is no conversation, only surrender is available. On the one side, truth, on the other ignorance. And yet, as the experts themselves know very well, opinion and choice exist at both ends. Positivism died long ago, replaced by the more complex tools of structuralism and hermeneutics, all the fuzzy science that tells us that "facts" always appear in regimes of knowledge which, though true on their own terms, are no longer solid when we compare such regimes with each other, or look deep inside their constituent elements. If there is anything international lawyers have learned from the debate on "fragmentation" it is this: what one may want to say on a given problem depends on which type of knowledge one uses to look at it.[18] And as soon as one has found the relevant knowledge, one will find that it is divided into an orthodox and a heterodox view. The backlashers have noticed this, and their leaders use it to show that what passes as "fact" is no different from opinion, that the resulting humiliations and deprivations are born with the bad faith of the experts, their cynical use of their opinions as fighting words to consolidate their authority. "Austerity" is a choice, not a necessity.

Global law is about the governance of complexity. Environment, trade, investment, development, security. Each regime is about knowledge, yes, but also about value: each has a powerful ethos or a project, a policy to advance. To be a trade lawyer is also to think trade law and its objectives – free trade – as good. To have been educated in environmental law is also to have internalised the importance of the goals that environmental law seeks to advance. But both often deal with the same issue. Which to choose: Trade or environment? Security or privacy? Global governance is a clash of knowledges, clash of competences, rival descriptions of the world and of the blueprints those descriptions help produce and sustain.[19] A natural resource may be described as an object of exploitation or

---

[18] 'Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law, Report Of The Study Group Of The International Law Commission' (UN Doc A/CN/4/L.702 18 July 2006). See further Anne-Charlotte Martineau, *Le débat sur la fragmentation du droit international. Une nalyse critique* (Brussels, Bruylant 2015).

[19] The debate about fragmentation has of course repeatedly highlight this. I have discussed the matter in more detail in Hegemonic Regimes", in Margaret Young (ed.), *Regime Interaction in International Law. Facing Fragmentation* (Cambridge University Press, 2011), 305-324. See also

protection; a domestic policy decision both as "development" and "protectionism". Global politics has become a politics of knowledge: once you know which regime will deal with a problem, you already have a good idea of how it will be dealt with. Is crisis in Central Africa a human rights problem or an economic development problem? The answer depends on whom you ask, the High Commissioner of Human Rights or the World Bank? And is post-conflict governance in Kosovo a matter of security, of adequate housing and employment or of educating girls? Peace-keeping professionals, social development experts and human rights activists will each provide a different answer, each with equal conviction. Truth is not one but many. And they are in struggle.[20]

The backlashers have noticed this. The trade expert want more trade, and the environmental scientist more protection, the interior ministry wants more surveillance, the justice ministry less. It is all so predictable. Imagine a discussion between a police officer, a human rights lawyer, a teacher and an architect on social policy. The police officer will want to eradicate insecurity in the streets, the human rights lawyer points to poverty in the community. The teacher would prefer expanding the education of the girls while the architect has in mind a housing project. Each has a complex technical vocabulary to defend their view. And each believes that the available resources would be best used if directed to *their* field, if their project became a project for that society itself. The unavoidable impression with the outsider is that the *certainty* each side claims for its knowledge is only a sham. What the experts are *actually* doing, is trying to monopolise available resources and prestige. No doubt, experts may often be brought into consultation with one another, to debate their varying objectives in meetings at Geneva, New York or any other such global centre.[21] But the backlashers know that however the debate will go, they will have no say in it. They have none of those languages. Instead they have one recollection, namely

Kerstin Blome et al, *Contested Regime Collisions. Norm Fragmentation in World Society* (Cambridge University Press 2016).

[20] As extensively analyzed in David Kennedy, *A World of Struggle. How Power, law and Expertise Shape Global Political Economy* (Princeton University Press (2016)

[21] For the "operational" and "regulatory interactions" between such expert groups, see Jeffrey L. Dunoff, 'How to Avoid Regime Collisions', in Blome et al. *Contested Regime Collisions*, 58-70.

that "*whatever the expertise – we will always lose in the end; whatever the policy, it is bound to treat us as an ignorant underclass*".

Well, you might think, should not the government make those choices? But modern government is just a local version of an international negotiation. The environment minister represents an environmental knowledge that is utterly global; the trade ministry is a kind of local bureau of the WTO or the Bretton Woods system – and the justice minister will remind everyone of the protections the human rights treaty system offers to women, children, refugees, disabled and so on. Domestic departments operate on the basis of systems of knowledge that have nothing "domestic" about them. No wonder. Their personnel were once Erasmus students and are now constantly on travel to Brussels, Washington, Beijing…. All governance today is global governance. No surprise the backlashers feel alienated; they do not sit at those meetings; even if they did, they would not know what to say.

But not only have expert languages colonised everything and it seems impossible to choose between them. They are also utterly split within themselves. I used to take part in the public debates concerning the treaty on transatlantic trade and investment (TTIP) and its follow-up, the EU Canada (CETA) initiative. The question often arose whether private-public arbitration in those treaties might enhance investment – whether it made economic sense for a state to accept the possibility of being sued by an investor in an international arbitration process. There were always two economists. One of them claimed that the presence of such clauses invariably attracted investors – while the other retorted that they made no difference whatsoever.[22] Once they had made their points they then began to attack the respective "models" they had used to come to their opposite conclusions. The feeling of disbelief and frustration in the audience was tangible – "*must we really take a stand on the relative merits of economic models in order to decide whether to support investment agreements or not?*"

---

[22] For an intelligent discussion of the conflicting evidence, see Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017), esp. 155-179.

Of course they would not. And of course, models do not work like that. As the Harvard economist Dani Rodrik reminds us, "The correct answer to almost any question is: It depends. Different models, each equally respectable, provide different answers".[23] From this the backlashers have drawn the conclusion that there really is no difference between expert "knowledge" and opinion, truth and bias. You could always find an economist, a lawyer, an engineer, to defend whatever needs defending. What the expert says is just cynically dressed as knowledge so as to lift it outside political contestation *so as to exclude me*!

The media loves experts. It gives us 35 seconds to give our view on the state of the economy or the environment, or the relations between great powers or the ways to resolve the Syrian crisis. And we yield against our better judgment. As good experts we *know* the complexity and uncertain status of what we know. But we cannot show that uncertainty in public, even as privately we talk about it all the time. It is as if there were two kinds of expert knowledge, *expert knowledge at day and expert knowledge at night*. Imagine an interdisciplinary conference. During the day, performances full of self-confidence: here is what I know, the latest datum from my research institution. Impressive, powerful, even exotic. But then at night, after the conference dinner, two glasses of burgundy and a private conversation: "*Oh my field is in crisis, you cannot imagine how divided we are about the fundamentals, especially the fundamentals. While we agree on what lies on the surface we really have no idea where it came from, and how to understand it.*". Daytime confidence – uncertainty at night.

The backlashers have noticed this. They have seen experts speak from apparently boundless knowledge, years of study and training – and constantly contradict each other, or being shown to have been mistaken or biased. But there has been no accountability. So the backlashers have concluded that these are just people in bad faith, speaking down to us in esoteric languages. Privilege disguised as knowledge. But experts know that it is hard, almost impossible to

---

[23] Dani Rodrik, *Economics Rules. Why Economics Works, when it Fails, and how to Tell the Difference* (Oxford University Press 2015), 17.

express uncertainty in public. Try it and you will notice the journalist's despair. And you will never be interviewed again. Displaying complexity is possible in a culture of *trust.* In such culture, people feel that it is better to be governed by people who know something, even if they do not know it all. But where there is no such trust, uncertainty looks like betrayal and expertise appears as self-promotion. According to a study by Pew Research in the United States from July 2017, 58% of Republicans and Republican-leaning independents say colleges and universities have a *negative effect* on the way things are going in the country.[24]

It is important to realise that the backlashers are right that globalization meant the rise of expert power that is coy about its political priorities. In the 1950s, Karl Polanyi observed that the internationalization of economic decisions had "separate[d] the people from power over their own economic life" and that this had been an important contributor to the rise of Fascism in Europe.[25] History never repeats itself as such. But as the philosopher Didier Eribon has shown more recently, the distance between Paris and Reims has become breeding ground for resentment and reaction. For the values of Paris – of the city – today have received automatic priority over those of the provincial town, left to decay economically, socially and culturally. Eribon remembers how his father, together with his trade union friends, everyone active as communists, used to struggle for improved labour conditions in the factory, expressing solidarity with Turkish guest workers. Now the factory is gone, and so is solidarity. Everyone now votes for Marine Le Pen.[26] As Katherine Cramer has found out in her study of popular attitudes in rural Wisconsin, the feeling is that the "people of the city", inhabiting the Capital and having jobs with the government, have utterly lost touch with the greatest part of the country. The well-educated people of the city with their fancy jobs now look down on everyone else, and show no respect. The inhabitants of

---

[24] <http://www.pewresearch.org/fact-tank/2017/07/20/republicans-skeptical-of-colleges-impact-on-u-s-but-most-see-benefits-for-workforce-preparation/> See also Tom Nichols, How America Lost Faith in Expertise. 96 *Foreign Affairs*; Issue 2, 60-73

[25] Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (foreword by J Stiglitz, Beacon 2001). 234.

[26] Didier Eribon, *Returning to Reims* (MIT Press 2013).

rural Wisconsin (and the suggestion is: of many other places) look around and remember (rightly or not) that maybe 20, maybe 40 years ago, these towns and those fields looked prosperous and were well looked after. But now the factories have closed, farming hardly pays off and the young have moved away. No resources are directed from the capital to the towns any longer, those politicians hardly visit these places, apart from the single trip they make just before the elections.[27]

This situation has now been captured by far right cynics. "*Make America Great again*" appeals to that experience and that resentment. This is not absolute deprivation, of course – the people in Wisconsin and not "poor" by any global standard. But the decline is real and prompts the memory of a better past, a time of confidence in one's status, and the status of one's values. And when the decline is then explained as unavoidable owing to the "facts" of globalization, while the "facts" are less than solid and the real cause of the situation is the choices that other people have made on the basis of those "facts", rejection seems not at all that incomprehensible. Instead of knowledge, "fake news". Law shares this problem. It pretends to be about knowledge – knowledge on how to create or maintain just society, or more modestly, about the what technical rules there are and how they should be interpreted. But it not at all clear how "true" our conclusions are, what distance they have from opinions about the matters they discuss. The effort to think of law as a "science", even as culturally embedded in the German (and Finnish) language, sounds quaint in the Anglophone world.[28] legal propositions are like the economists' "models" – their correctness "depends" on a number of assumptions not directly addressed in them. Sam Moyn has recently suggested that there is no longer any larger vision from which the ways of doing law or types of legal knowledge could be evaluated: "we live among the ruins of prior inconclusive confrontation and fragmentation".[29] Well-

---

[27] See Katherine Cramer, *The Politics of Resentment. Rural Consciousness in Wisconsin and the Rise of Scott Walker* (University of Chicago Press 2016) and the update after the Trump election as a public lecture at <https://www.youtube.com/watch?v=My3_lb8x-gM>

[28] See further my 'Is Legal Science Possible?', Gralf-Peter Calliess & Lorenz Kähler, *Theorien im Recht – Theorien über das Recht* (ARSP Beiheft 155, Stuttgart, Nomos 2018), 31-43.

[29] Samuel Moyn, 'Legal Theory among the Ruins' , in Justin Desautels-Stein & Christopher Tomlins, *Searching for Contemporary Legal Thought* (Cambridge University Press 2017), 101.

know approaches to law from the past, formalistic and realistic, critical and mainstream, geared towards economics or anthropology have been available for many years now, each with its well-known strengths and weaknesses, none specifically prepared to respond to problems of *this moment*, least of all to the pervasive cynicism that exists outside towards those very fields.

IV A PROBLEM WITH POLITICS

But it is not only a problem of knowledge, it is equally problem of politics.

Friedmann was still careful, in 1964, presuming that human rights could not yet advance far globally, and instead just made satisfied note of a number of regional developments. Shift again to the 1990s and human rights had become, "the last Utopia". With the fall of real socialism, rights had entered the hard core of politics, directing and limiting the discretion of public authorities, courts, legislators, holders of executive power (but significantly not private enterprises) at home and abroad. Again, the right place to begin to understand this is the sixties and the massive rise of individualism in the West. *It is my life! Who are you to tell me how I should live*! Society had no legitimate claim to enforce "morals", only to prevent concrete, demonstrable harm.[30] This claim was famously written into Ronald Dworkin's theory of rights as "trumps" in 1977, as normative claims overriding utilitarian calculations, social policies and moral principles.[31]

Looking around in the 1990, Tom Franck wrote that "*each individual is entitled to choose an identity reflecting personal preference … in composing that identity, each may select more than one allegiance*".[32] Characteristically optimistic. It is not hard to derive such free-floating individualism from the cultural transformations of the 1960s, the collapse of religious, patriarchal and nationalist values and the rise of what would later be called "identity politics". In a more sociological and

---

[30] On the famous Hart-Devlin debate in the 1960s, see Patrick Devlin, *The Enforcement of Morals* (1965) and HLA Hart, *Law, Liberty, Morality* (1963)

[31] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

[32] Franck, *Empowered Self*, 39.

realist mode, rights arose everywhere in the West from the effort to counter the discretion that, as Tom Franck explained in the works referred to above, had been transferred to authorities by the deformalization of modern law. Open-ended standards of fairness were everywhere telling the law-appliers to take account of purposes and principles and apply them equitably by balancing all relevant considerations. That this no different from inviting them to go by their own cultural and political preferences and that this was OK as long as they broadly reflected those of the relevant community. But if they did not… In any case, many people grasped at the opportunity to "trump" whatever policies were being pursued by domestic authorities. The result was the fantastic "rise and rise" of human rights into a kind of super-value, higher than political principles or programs, limiting what such principles and programs could be.[33]

This turned rights into extremely valuable assets, and explains the intensity with which different groups ran after them. What could be greater than having a preference that no countervailing preference could undermine? As more and more preferences were translated into the rights of their holders, activists began to worry. If everything was a right, nothing was. How to separate "genuine" from "fake" rights? There was no litmus test. Or perhaps better, there once had been such test – namely the theory of natural rights – but that could hardly be proclaimed in modern conditions. How could one "prove" that a preference was actually validated (or invalidated) by "nature"? And so the sphere of politics was colonised by rights-talk. Some this was innocuous, or genuinely helpful. But one could see where this was going. Did racists or misogynists have the right of free speech? Was there a right to bear arms in public places? What about the religious fundamentalist's preference to educate their children at home? Did affirmative action violate the rights of white men? The right to "security" is undoubtedly an important human right – did this then mean that increasing policing resources and the presence of CCTV cameras in public localities should be seen as important human rights measures?

---

[33] Kirsten Sellars, *The Rise and Rise of Human Rights* (2002).

Now no good human rights lawyer would ever think this. They would immediately retort that such policies are not part of "genuine" human rights. And again, the "backlashers" are outraged – "*So you say that everyone's rights are of equal concern – but in your practice, you always override priorities that WE think of as important! Hypocrites!*" In the absence of clear criteria to distinguish "real" from "fake" rights, the human rights camp seems to be merely trying to impose its values on the world. *Why would their political priorities somehow automatically override ours!* Think about economic, social and cultural rights (ESC rights), brought into the canon as a cold war manoeuvre to finish up the implementation of the Universal Declaration of Human Rights (1948/1966). This seemed especially important in order to show that human rights have a heart, and to avoid the accusation that it was blind to larger social problems. Rights also had to do with distributing resources in a just way. If they only had a "programmatic" character (as it was usual to assume), did they not operate as a kind of party program designed to bind the hands of legislators and finance ministries outside electoral policies? Was human rights in truth a social-democratic policy of the welfare state, cleverly disguising itself as a "non-political" project of realising pre-existing "rights"? For example, Philip Alston's recent work as UN special rapporteur on the relation of privatization to extreme poverty is a excellent example of sophisticated human rights policy.[34] But it is also economic policy and the question is whether it has *any* distance to sophisticated *socialist* attention to capitalism's dark side? And if there is no difference – well, then what about the claims about "universal and inalienable" or about the view of rights as a non-political *limit* to politics? For those not already committed, human rights could only appear as a *leftist policy in un-political disguise*.

Of course, nobody denies that extreme poverty ought to be eradicated. Many who think this are surely economic liberals who believe that the best way to accomplish this is by de-regulation. Trade unions, they believe, have distorted the labour market, undermining incentives for companies to hire workers, thus

---

[34] Extreme Poverty and Human Rights, UN Doc A/73/396 (26 September 2018).

contributing to massive unemployment. In an astonishing feat of historical forgetting, the human rights camp has failed to remember that most important rights struggles from the Magna Charta to the American and French revolutions and beyond have been about the recognition of rights to own property. If John Locke is part of the international human rights canon – as Hersch Lauterpacht for example firmly believed – then very strong property protection is part of the canon, too.[35] Surely it is not insignificant that Lauterpacht and his collaborator Sir Hartley Shawcross played key roles in the *Anglo-Iranian Oil Company* case that had to do about the protection of the property rights of the company's British owners. Investment protection can easily be (and has been) argued in human rights terms: the investor has the *right* to repatriate the profits gathered from the uses of the property. If present investment lawyers avoid arguing this, it is not because they would not believe in investors' property rights but owing to their (correct) assessment that the human rights establishment would not view the matter in such a way.

Nor it is irrelevant that some of the 20th century's most visible advocates of liberal economy – Hayek, Röpke, Friedman – were quite comfortable with speaking in rights terms. Opposing Fascism and Communism, the neoliberals wanted to liberate the creative energies of individuals from oppressive economic planning – this then kicked off the development of international trade law.[36] When human rights advocates today speak of "corporate social responsibility" they are over again challenged by business executives arguing that companies contribute best to welfare rights by filling the expectations of their customers and the pockets of their owners. Nor is this necessarily cynical. It may seem such to human rights activists but only to the extent that they have inherited a *different* economic doctrine – namely a social-democratic or a Keynesian one – that they believe compels public intervention. The rights activist may feel that the corporate executive is not "taking rights seriously" – but the latter will see the rights advocate as a closet communist.

---

[35] Hersch Lauterpacht, *International Law and Human Rights* (1950).

[36] See the valuable Quinn Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018). The same points have also been in Samuel Moyn, *Not Enough*. Human Rights in an Unequal World (Harvard University Press, 2018)

Human rights are a politics that emerged in the secular west between the late 1960s and the 1980s. Many things converged then: the break-up of homogenous national cultures and loosening of social and religious norms, the increased attraction of a commercially incentivised non-conformism. Questions of identity became important – much more important than national greatness or growth of the domestic GNP. Interest in rights often coincided with calls for cosmopolitan democracy and global justice. As the phenomenon reached the 1990s it converged with a twofold critique of old style politics. One aimed to set limits to public authorities' powers; in fact it often seemed that constraining the state was the very point of rights. A related consequence was that political objectives came to be defined in abstract and universal terms with little connection to domestic histories or practices. Both developments were underlain by the supposition that conventional policies were hampered by party politicking and state "interests". New types of "civil society" engagement were needed.

Among institutions undermined were political parties and the political process. Changes propagated by the human rights camp appeared wholly beyond the capacity of old institutions. Universality and inalienability connoted a level of ambition they had given up long ago. A particularly important moment was when the social democrats, panicking over declining electoral support, co-opted rights as part of the "Third Way". Tony Blair, Bill Clinton and Gerhard Schröder rose to power by supporting the rights of women, minorities and disadvantaged groups as well as internationalist agendas of humanitarian intervention and the environment. The door was opened for groups and themes previously suppressed. But the neo-liberal co-optation of the Third Way fatally undermined its credibility, eventually bringing social democracy down and now threatening to take human rights with it. By the time the financial crisis of 2008 had set in rights had become infected by their association with a centrist elite that spoke of free trade and privatization while presiding over unending austerity and a massive growth of domestic and international inequality. The Left had lost its bearings and left in its wake an increasingly cynical electorate looking for

revenge in iconoclastic attacks on political correctness and a reactionary attachment to nationalist nostalgia.

The 1990s transformed human rights from a language of revolution to routine governance. That language combined the cultural aspirations of the 1960s with a debilitating blindness about how its alliance with global trade and finance was seen and felt outside the magic circle of its staunchest adherents. Increasingly large parts of Western electorates were beginning to feel that they had been allocated life in an underclass struggling for "bullshit jobs" while a global elite spoke human rights and thrived. Many people suddenly found that they were represented by nobody any longer – until right-wing manipulators found their way to the stage by breaching the rules of political correctness and directing their scorn at "human rights" as a wholly hypocritical effort to move elite values outside of political debate. The new politicians were reactionaries, a species not seen in Western democracies in decades: everything created since the 1960s had to go.

V THE BACKLASH

Much of the liberal and left academy dresses its professed sympathy to the backlashers in terms of a social pathology, to be healed by social and economic reform. According to this analysis, what needs to be done is to support equality and to pick up those "left behind". Reference is often made – I, too, have made it – to the "Elephant Curb" in Branko Milanovic's *Global Inequality* showing that in the period 1988-2008 the economic position of the white-lower middle class in Europe and the US has stagnated while the middle classes in the non-Western world have won, sometimes considerably, as have the richest of the rich, the one per cent of the one per cent.[37] This has been taken to suggest that the right-wing surge expresses an economic grievance that needs to be addressed by policies that better target those constituencies.

---

[37] See Branko Milanovic, *Global Inequality. A New Approach in the Age of Globalization* (2016).

Although this interpretation is correct, it offers no means to respond. The historical causes of the backlash lie in the massive increase of global and domestic inequality in the past thirty years, coupled in the failure of the political process to give meaningful expression to the resulting grievances. The symptoms of that predicament differ across the world.[38] In the global south, the collapse of the 1970s efforts to establish a new international economic order terminated one type of contestation against neo-colonialism and the neoliberal project. The result has been the integration of the developing world in the process of globalization, with massive poverty and political stasis. In 2018, 3,4 billion people – almost half of the world – lived for less than $ 5,5 a day. The significance of this fact is underlined by the simultaneous presence of extreme wealth, both far from but also side by side with such poverty. The backlash against such situation takes both right-wing (India, Brazil, Philippines) as well as left-wing (Venezuela, Bolivia) forms, as befits the specific political history of each country. That the *historical* analysis that identifies the grievances as economic and their causes as global coexists with the diversity of the political and cultural forms that the backlash locally takes. This highlights the relative independence of the political and cultural forms that give expression to the economic facts.

In the developed north, too, the cultural and political attacks on globalization – including the right-wing nationalist surge, operate according to their own specific logics. Measured by almost any global standard the "nationalists" in Hungary or Poland, or the Trump supporters in middle America, are reasonably well-off – though of course they find themselves at the suffering end of the Milanovic curb. Nevertheless, they are not moved by the annual data produced by Oxfam or Credit Lyonnais pointing to the ever widening gap between the richest of the rich and everyone else.[39] No concern has been expressed by the backlashers about money laundering or tax havens. On the contrary, a European

---

[38] One of the more useful messages in Jan-Werner Müller's many analyses of right-wing "populism" is highlighting the different forms it takes in different locations, reflecting domestic histories.

[39] For 2019, see https://www.oxfam.org/en/pressroom/pressreleases/2018-01-22/richest-1-percent-bagged-82-percent-wealth-created-last-year

backlasher may even admire a billionaire who has been able to trick the system so spectacularly. Instead, that person will find it scandalous how social welfare benefits are directed to all kinds of alien groups, "illegal immigrants", mock-refugees and lazy foreigners. In reward for the honest labour of the white man the elites are planning to turn everywhere into a global Mogadishu.

Here lies the cynicism in Europe and the US – the replacement of the theme of economic inequality by a concern over cultural identity and *loss of status*.[40] This has been fertile ground for demagogues to sow. Until recently, almost everyone in Europe and the US could look into the Third World and think, "*well, at least we are not like that*". White privilege justified confidence that notwithstanding the ups and downs of the economy, one's relatively higher status would remain unchanged as would that of one's children. No longer. At the same time, the very aspirations and values to which this confidence was related – the values of white male privilege – have been endlessly ridiculed by the global elites and their human rights client groups. These cultural facts have fuelled the backlash. In the absence of a mechanism to channel injustice into credible economic and social reforms at international institutions, domestic political systems have turned into platforms for cultural battle about national identity and rights, about gender, abortion and immigration, about majorities and minorities and the history and the meaning of the "nation". This transformation is captured in Eribon's *Returning to Reims* – as neither trade unions nor socialist parties are able to channel the resentment so social and economic change, such channelling is taken over by reactionaries tapping on the nostalgia for the (mythical) past where things were supposedly domestic and infinitely "better", when homogeneous solidarity, the sense of "being all in this together", still flourished to compensate the devastations. The slogan of taking *back* control appealed precisely to that nostalgia.

In other words, the attack on "global elites", refugees, non-governmental and human rights institutions is not about economic deprivation. It carries no

---

[40] See further Malcolm Bull, 'Am I Right to be Angry?', LRB 2 August 2018, 23-24.

program for institutional or policy-reform.[41] It has instead been directed against the massive cultural transformation that began in the 1960s: civil rights, women's rights, gay rights, minority rights, the environment, the third world….*café latte*… It is about the fact that Western political leaders no longer "respect" the old values but treat them with contempt. The backlashers do not care for reform – there is no real program, no policy engagement with international institutions (apart from "exit"). All that would seem too "social-democratic", and everyone remembers social democracy's fatal corruption by its neoliberal alliance. Instead of an attack on the economics and technology that upholds global inequality, the backlash is a reactionary cultural-political movement that hopes to create a world before civil rights, before environmentalism, multiculturalism, secularism, gender equality, the time before patriarchy began to seem like bad word.[42] It is only after that reaction has been completed, after new leaders have been chosen and the people's voice will be heard again. It is only then, that the work can begin…

Reactionaries are not interested in institutional niceties – look at the Trump regime's obstructions in the WTO, the unilateral withdrawal from the Iran agreement, the INF treaty and the Paris climate regime. For the reactionaries, to even to debate with an adversary whose legitimacy has been denied would be to capitulate.[43] People who have the expert knowledge it takes to debate reform of the EU, WTO or the climate regime have no regard to white privilege. Whatever

[41] This is nowhere more visible than in the success of the "Brexit party" in Britain whose electoral victory in the 2019 EP and the subsequent appeal of its promise to "change British politics for good" has been independent of the absence of any political program (August 2019). For the promise to "develop" a program, "on the big issues facing the UK" see https://www.thebrexitparty.org/about

[42] The secret with the electoral victory of Donald Trump in the US in 2016, Carol Gilligan and David Richards write, was based on his promise "to undo shame and restore honor to those, mainly white men and their white wives, who felt that they had lost their dignity by losing what they had considered to be their rightful position in the racist and patriarchal scheme of things." Carol Gilligan & David J Richards, *Darkness Now Visible. Patriarchy's Resurgence and Feminist Resistance* (2018), 37. The point Gilligan and Richards are making, and with which I agree, is that patriarchy is not just an aspect of Trump's success. It is its principal lever and the very basis on which the Trump administration reacts to its environment.

[43] For the US refusal to take part in the efforts to fill the WTO Appellate Body is discussed e.g. in Gregory Shaffer, Manfred Elsig & Sergio Puig, 'The World Trade Organization's Dispute Settlement Body. Its Extensive but Fragile Authority, in Karen J. Alter et al, *International Court Authority* (Oxford University Press 2018), 329-330.

adjustments might be made would simply consolidate the authority of *these* institutions, and *those* people. "Exit" is the only message, everything else is secondary, superficial. What the reactionaries want first is revenge against a political elite that has used the grandiloquent rhetoric about human rights so as to distribute material and spiritual values to its friends – aliens, minorities and "unaccountable international bureaucrats". This is pure negativity – from Brexit to the Paris climate agreement or the UN Human Rights Council.[44] There is nothing in terms of future intention or commitment. Instead there is play on the drama of "leaving", admired by an audience who never felt they were inside anyway. And they make the Leninist calculation that the main thing is to crush what exists in the present; the future cannot be any worse.

Here we meet the cynicism of the backlash in its specifically "Sloterdijkian" incarnation. Kantian universalism – the *Plan for Perpetual Peace*, laid out in 1795 and endlessly celebrated by the globalists during its 200th anniversary – was declaration of optimism at the end of a century of enlightenment. The experience of the revolution, of a people taking their future in their own hands, "would not be forgotten", Kant wrote.[45] At the heart of the universal morality that would emerge with critique would be law and legalism, including above the idea of the constitution would become the representative of the "idea of universal history with a cosmopolitan purpose", in the image of Kant's 1784 essay with that name. By contrast, cynicism joins the "realism" that rejects the utopias of a law-governed world. For it, human beings are endlessly self-interested, violent and envious. Against Kant, the cynics raise the omnipresent dangers of *deception* and *conspiracy* threatening "the people" from all sides. It is no wonder at all that out of all the institutions of the modern state, the far-right cynics carry an intimate attachment to the police and the security apparatus. They see everywhere dark forces ready to undermine the nation, to crush its traditional values, break-up its families, destroy its communities. The battle is for survival. There are "too many

---

[44] See also William David, 'Leave, and Leave again', London Review of Books (7 February 2019), 9-10.

[45] Immanuel Kant, 'The Contest of the Faculties', in Kant, *Political Writings* (H Reiss ed. Cambridge University Press, 1991), 182.

people" already – we have to harden ourselves to the images of the bodies floating in the Mediterranean, on the Rio Grande… The "islamisation of Europe" has commenced, illegal aliens are everywhere and the "population replacement" is under way.[46] The elites have already agreed to throw open the borders so as to let all the dark masses in. The "mainstream media", the enemy of the people, wants us to look elsewhere while the catastrophe is imminent and the "American Carnage" is on the way. Law and legalism lead nowhere, they are part of elite machinery of deception – only a powerful Leader can help us resist.

VI FROM CYNICISM TO SCEPTICISM

The backlashers have intuitively felt the entanglement of facts and values, knowledge and politics. Although modern expertise presents itself as hard and self-contained, its encounter with the world is full of ifs and buts: "It all depends". That is true in international law, too. Even as sovereignty was supposed to be declining in the 1990s, this was never the whole truth. Vulnerable communities have always been clear that without something like it – without autonomy – one remains at the mercy of those more powerful. Whatever the benefits of globalization, they often seemed (rightly or wrongly) less important than the loss of ability to decide on the conditions of life at home. International lawyers may have had an intuitive preference for the "international". As if that expression would stand for something clear and fixed. But in their more reflective moments they have been for both internationalism *and* sovereignty at the same time without quite being able explain how the two could be combined.[47] Because neither is clear or fixed, establishing their relationship in a *general way* is not possible. Priority between such abstract categories can be made only once we

---

[46] See e.g. https://www.defendevropa.com/news/population-replacement/

[47] One of the 20th century's most ardent opponents of sovereignty was Hersch Lauterpacht whose main work, The *Function of International Law in the International Community* (1933) was an elaborate manifesto against sovereignty. And yet, in 1948 he found himself in New York, assisting the Jewish Agency and participating in the drafting the Declaration of Independence of Israel. He was both an internationalist and a Zionist, an ardent defender of international institutions but well aware of the need a people might sometimes have of the shield of sovereignty. See James Loeffler, The "Natural Right of the Jewish People": Zionism, International Law, and the Paradoxes of Hersch Zvi Lauterpacht', in James Loeffler & Moria Paz, *The Law of Strangers. Jewish Layers and International law in the Twentieth Century* (Cambridge University Press, forthcoming 2019).

know which solutions they stand for – free trade or protection, for example, the right of this or that group? These are matters on which there is disagreement. International law has not *already* resolved that disagreement so that it would suffice to "apply the law". Should I choose this principle or that? Go by the rule or by the exception? Rather than a repertory of ready-made solutions international law is better seen as a resource for arguing all the many contradictory things that we believe are true or right. Sometimes we opt for the local, sometimes for the international. Sometimes we choose this principle, sometimes that. We bring these choices before authoritative audiences as "interpretations of the law", leaving it to those audiences to decide, definitely for that situation, but always temporarily in the larger frame, what ought to be done, who will win.

The fact that we disagree even on what the "authoritative audiences" are highlights the role of power within international law. Is it the domestic or the international audience? Is it an audience of economic or human rights experts, soldiers or lawyers? That such choices are not pre-determined by some higher-level laws on which everyone would agree warrants some scepticism about international law. An authority decides – but the matter might also have decided another way. For the cynics, such choices come about corrupt manipulations by those in hegemonic positions in the respective institutions. The far right language of "corruption" and "deception" is premised upon the existence of a "correct authority" or the "right solution" that would be unmediated by the uncertainties and internal divisions within the relevant expert vocabularies. The myth of unmediated knowledge (that is to say, knowledge untainted by the priorities within the respective systems of expertise and authority) is part of what makes the far right what it is. This kind of jargon of authenticity (of the "nation", or the "people") once led to anti-Semitism.[48] Although anti-Semitism is still be a fertile source of inspiration for those who parade the myth of the "purity" or genuineness of this or that concoction of people or idea, that myth is no less jargon than its bureaucratic nemesis. What makes it *cynical* is the way it

---

[48] The reference here is of course to Theodor Adorno, *The Jargon of Authenticity* (Northwestern University Press 1973). Still today, anti-Semitism remains a powerful part of the far right cynical disposition.

refrains from turning its hyper-critical eye towards itself: all authority is dubious, everywhere there is a conspiracy, but not among us!

The backlashers are right that expertise *is* political in the sense that it is not about truths carved in stone. It is about bias, uncertainty and conflict, and always revisable. Or as critical lawyers have endlessly argued – for every rule (and not only a rule of "law", but of any formal system of expertise) there is always an exception and the choice of whether to apply one or the other remains open. This warrants scepticism, of course, but it also undermines the kind of cynicism that lets itself be captured by the myth of the unmediated, spontaneous truth that will be revealed once elite deceptions have been abolished. The fact cynicism annihilates both knowledge *and* politics is the reason why it ends up, as Jan-Werner Müller has shown, into mafia regimes where the intermediate world of courts and bureaucracies, universities and the media are turned into servants for the truths of the regime[49] – while in fact inculcating a double consciousness familiar from the Soviet world where the presence of public belief and private non-belief made meaningful critical exchange impossible between the rulers and the ruled.

Perhaps the most important contribution of legal scepticism for present debates is to highlight the role of power in social institutions. Past practices crystallise as future expectations through struggle between alternative standpoints. Those standpoints then inform the endless process of legal interpretation and application. Law as creates hierarchies and distributes values, but also renders such outcomes open to evaluation and critique from alternative standpoints. To think about the law in this way is to go some way to meet the politics of knowledge, to underline the temporary and tentative nature of what it is we believe we know and avoid creating the expectation of final authority that has so enraged the backlashers. This also entails a relativization of the boundary between knowledge and politics. Like many others who came to professional life in the 1970s I used to argue in favour of the "politicization" of this or that aspect

---

[49] Jan-Werner Müller, 'Populism and the People', 41/10 *London Review of Books* (2019), 35-7.

of social life. Technological reason, we believed, had "colonised the life-world". But I now think there was something wrong in that gesture. There is no *authentic* field of politics, untainted by what we think we know, how we have been educated to think about questions affecting, say, the distribution of social values. Every "political" opinion is buffered by some expert knowledge, some system of separating between what is more and what less credible. It is impossible to produce "development", say, without consulting development experts, and being simultaneously exposed to the many preconceptions and biases that "development expertise" entails.

The inseparability of knowledge and politics throws light on two versions of *cynicism* that have emerged in the debates with the backlashers. One operates on the side of the "system" that insists on the "truth" of present forms of knowledge – and does this *against its better judgment*. Here the problem lies in the lack of scepticism warranted by the very assumptions that justify its reliance on the systems of mediation that produce its knowledge and politics. Another has to do with the reactionary politicians for whom the *pursuit of truthfulness* itself can be set aside in the search for power and respect by the reliance of mythical idea of unmediated truths.

A large recent literature suggests that the confrontation with the backlash is about *truth* against *lying*. The retort often takes a moralistic tone. Lying is wrong, it undermines public institutions. [50] *Check the facts!* I doubt the power of this retort. If the best experts understand the relativity of their knowledge (the clash of truth regimes, the internal splitting of regimes into orthodoxies and heterodoxies), then insisting on its obvious verity displays a cynical denial of what they know – namely that all of us move in a gray zone of interpretations, value-judgment and choice. Everyone is situated in a continuum of being "more or less" knowledgeable or ignorant, constantly operating in a situation of relative certainty. If the cynicism of the "system" lies in its insufficient scepticism, the

---

[50] Out of the very extensive literature, see e.g. Michiko Kakutani, *The Death of Truth* (2018); Jennifer Kavanagh & Michael Rich, *Truth Decay. An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life* (Rand Corporation 2018).

cynicism of the far right lies in its having drawn from scepticism the conclusion that everything is corrupted, that knowledge and politics are types of deception carried out by the "unaccountable elites" (of the academy) and the dark forces of the "deep state". The cynicism of the far right lies with its move from a critique of the ways mediation takes place in the present to the position that no mediation at all is needed – that the "truth" is one and obvious for all once the obfuscations of the elites have been removed. This makes political adversaries appear illegitimate because in bad faith and supports their methodological by-passing or indeed their criminalization: *Lock her Up*!

On both sides, there is a tendency to assess the situation in terms of the black and white of "truth" and "lies". But it may be better to think of these encounters as people acting in more or less *truthful* ways. It is no news that the backlash is connected with the absence of trust and confidence between groups in the West that have, since the 1960s, become increasingly alien to and suspicious of each other, an experience intensified by the cocooning effect of digital media and the targeting practices of the global economy. In such conditions, efforts at sincerity and accuracy – elements of truthfulness – may not be highly appreciated.[51] They involve risk – risk of not hitting the mark, risk of appearing naïve. The risk is accentuated if there is neither a common project nor shared norms – apart from the norm instructing everyone to stick to their rights. The perverse concern of the far right of the "freedom of speech" is one incident of this. Indeed, why is it that racist or anti-Semitic speech should be prohibited? Aren't racists quite justified in their righteous sense of being unjustly discriminated against? Such questions highlight the social and communicative aspects of the situation. It is not everywhere that one can say "*I may not know everything, but I will try my best*". To be able to say this requires some kind of solidarity, some sort of acknowledgment of a common project or shared norms of decency, rather like a recognition of the idiocy of the claim for "Nazi freedom of speech" does. Only as long as there is some intuitive agreement of the latter, a culture where the former can be said is possible. Both raise the issue of vulnerability as a kind of

---

[51] See further, Bernard Williams, *Truth and Truthfulness. An Essay in genealogy* (2002).

litmus test: from attacking knowledge for the reason that it is fragile it is only a step to attacking the human individual because of that same reason.

VII CONCLUSION

I want to finish by reflecting on our "situation" in a historical light. In a massive, recently completed history of democracy, the French historian Marcel Gauchet identified the world of the 1990s – "neoliberalism" – as fatally self-contradicting. It arose from the long history of departure in the West from tradition, both religious and secular. In the 20th century, attachment to the nation gradually gave way to the pursuit of individual self-realization and autonomy, both enshrined in a culture of rights but also more widely in the kind of legalism that underlay the world of the 1990s. In this process, the nation came be understood as a the sphere of the "rule of law", arbitrator between the autonomous pursuit of their rights and interests by individuals.[52] The public realm was flooded by experts to guide us in how to realize such individual life-projects. In such a market conception of society government became the aggregation of individual preferences. This occasioned a "crisis of representation". In the absence of a shared project and commitment to norms, representative mechanisms became alien and insignificant, hardly more than playground for professional politicians who were understood, like everyone, to be only interested in pursuing their interests.[53] The political process failed to channel the experience of the citizens into projects of social transformation. Instead, it became "governance", an elite performance on a par with other features of the popular culture.

Instead of simply producing the conservative lament about the effects of individualism on tradition, Gauchet claims that these phenomena form the surface of a (neoliberal) system that are in stark contradiction with their "proper conditions of existence", an utterly homogeneous set of economic, social and cultural assumptions. The conflict between the explicit surface – the performances with which the electorate are entertained – and this "deep-

---

[52] Marcel Gauchet, *Le nouveau monde. L'avénement de la democratie* IV (2017), 656-7.

[53] Gauchet, *Le nouveau monde*, 655-664.

structure" emerges over again, in economic inequality, social dislocation, the increase of private an public debt, the depletion of natural resources and the devastations in the peripheries. But these are never dealt with as systemic issues. Over again, small adjustments are made to cope with problems regarded as accidental and born out of extrinsic causes. The migration crisis, for example, has exploded the contradiction between the ideas of individual autonomy and the heavy investment in the nation – national borders, cultural and religious homogeneity that controls the response. The inability to articulate and reason about those underlying values has emboldened reactionaries to appeal directly to cultural prejudices. The great majority who say they believe in autonomy and rights are silenced by their inability to draw the conclusion that there is no valid justification for preventing anyone from settling down really anywhere they like. For Gauchet, it is unsurprising that no conception of nationhood has entered the public debate that would be reconcilable with individual rights. "Only those political communities that are certain about their consistency are capable of accommodating alterity. Hospitality presupposes confidence in its background reasons and the ways to realise it".[54]

The contradiction between the world in which we live and how we have learned to understand it and our place in it raises the old theme about historical change: to what extent are (legal) systems able to accommodate contradictions and anomalies through reforms and adaptations – and when do they collapse so that a revolution will bring about a new system, new values and hierarchies, new winners and losers?[55] The backlash is a symptom of a systemic problem – a problem, I have argued that originates in the 1960s but came to a head in the liberal hubris of the 1990s. Adaptations are now being frantically looked for, including in international law. The "Brighton declaration" that strengthened

---

[54] Gauchet, *Le nouveau monde*, 677.

[55] Distinguishing between routine adaptations of a system to pressures from its environment and "revolutionary" transformations affecting the inner rationality of the system as a whole is an old theme not only in systems theory (Luhmann) and the history of science (Kuhn), history of ideas (Foucault) or philosophy (Badiou) but also in critical legal thought. I have made use of it in *From Apology to Utopia. The Structure of International Legal Argument* (2005), 548-561. This has been recently updated for an analysis of "legal revolutions" in Hauke Brunkhorst, *Critical Theory of Legal Revolutions. Evolutionary Perspectives* (2014).

member state jurisdiction vis-à-vis the European Court of Human Rights is one example, the demise of the TTIP treaty and the replacement of investment arbitration in CETA by an "investment court" another. The State's right to regulate in important fields of domestic policy has been reaffirmed. "Brexit" and the move to plurilateral or regional treaties might engender yet further adaptations. Whether they suffice to counter growing support for authoritarian or proto-fascist leaders preaching a wholesale return to a pre-1960s world remains unclear.

The separateness of what we know and what would be good is an important aspect of the way we have learned to think about the world. Much of the backlash has attacked that distinction: they claim people who insist on it (and make the distinction between truth and lying) are only trying lift their opinions outside political debate so as to strengthen their cultural, political and economic hegemony. I have argued that the backlashers are right in this regard: the culture of global expertise cannot be so confident of the "truths" with which it wants to bind others. To respond in a non-cynical way would be to change focus from truth to *truthfulness,* the social attitudes and practices of knowledge-production and dissemination. This is both to insist on the best available scientific – and legal – knowledge but also on its limits and its vulnerability to sceptical criticisms. This injects political contestation – equally invited to truthfulness – within knowledge-production and use. The far right is suspicious of academic work because its results so often conflict with far right prejudice. But I think an even greater conflict exists between with what the far right stands for and the pursuit of accuracy and sincerity that belongs to knowledge-production and use. To cultivate truthfulness, I have written, is to work for a society where vulnerability (or knowledge and humans) is taken seriously. This may not be compatible with mere adaptations of present international law and institutions. It will require bringing the inner contradictions of neoliberal society in the open, and thinking creatively about the alternatives. Such thinking will have to take place at and involve institutional reforms at both "domestic" and "global" levels. It may also require rethinking 18th century revolutionary myths about the separation of knowledge and political value. This itself is both a "political"

project and an inference of what we "know", namely that the truth of a proposition has to do with the extent to which it contributes to emancipation.