© INNOVATIVE RESEARCH THOUGHTS | Refereed | Peer Reviewed | Indexed
ISSN : 2454 – 308X | Volume : 04 , Issue : 01 | January – March 2018

International Relation and Theory

Dr. Kusum Lata "Assistant Professor, Defence Study, CRM Jat College Hisar

Abstract: In International Relations (IR) theory, norms are widely held to be the opposite to 'interest defined as power' (Morgenthau). Norms are often held to be *scripts of emancipation*, and power to be a *practice of domination*. The paper argues that IR norms research all too often buys into a problematic dichotomy by adopting a binary perspective from which power is either held to be superior to norms or erased from the notion of the norm. The problem with this dichotomy is that norms are misconceived when limited to the two options of either being emancipatory values against the dictates of power politics or utopist scripts never standing these dictates in the long run. The paper aims to explore a deeper understanding of how norms are political and how elements like power, coercion, and violence circulate *within* norms and norms-related practice. To this end, it offers IR to draw on certain strands of work in legal theory, namely the legacies of American legal realism and critical legal studies, to elaborate on *how norms and norms-related practice are political*.

Introduction: In International Relations (IR) theory, norms are widely held to be the opposite to 'interest defined as power' (Morgenthau 1978: 5). Either, so it seems, states play by the international rules or they play international power politics. This assumption has given rise to a major research program on why norms, from time to time, trump interest-based power politics so that, in fact, international lawyer Thomas Franck gets to the heart of this strand of work by asking 'Why do *powerful* nations obey *powerless* rules?' (Franck 1990: 3, italics added). Thus understood, norms are held to be *scripts of emancipation*, and power to be a *practice of domination*. It is here that this paper aims to establish a critique. It argues that IR norms research all too often buys into this dichotomy, the problem being that norms are misconceived when limited to the two options of either being emancipatory values against the dictates of power politics or utopist scripts never standing these dictates in the long run. The paper aims to explore a deeper understanding of how norms are political and how elements like power, coercion, and violence circulate *within* norms and norms-related practice. To account for the workings of power *within* norms, the paper suggests that IR may draw on certain strands of legal theory, namely the critical legacies of American legal realism and critical legal studies.

Struggling with 19th century legal formalism, inter-war American legal realism has stressed the influx of a political moment—especially the ideology of *laissez-faire* liberalism—in juridical decision-making.2 For the realists, law structures bargain between different societal groups while legal practice—'law in action' (Pound 1910)— actively brings a coercive force of law to the fore (Cohen 1927). Drawing upon the early realists,3 critical legal studies (CLS) have—since the 1970s and 1980s— radicalized this critique and enriched legal realism with different types of—mainly continental—social theory (like Marxism, Frankfurt School Critical Theory, poststructuralism).4 '"Law is politics" is the war cry of critical legal studies' (Teubner 1997: 152). Law structures the bargain between actors and, thus, implies a moment of power, coercion, etc. More recently, this type of critical legal thinking has stimulated a vibrant debate also with respect to international and transnational law.5 In IR, the adoption of this literature is rather limited, to say the least. However, while IR norms research has widely built upon a dichotomy of *norms/power*, more recently, the emphasis on the *contestation* of norms (Wiener 2014) has effectively put into question a ready-made ontology of norms and thus established an interesting vanishing point. Norms are misconceived as ready-made scripts. In the course of an ongoing social process, they remain undetermined, for being subject to a *surplus of meaning*. It is here that politics comes back into play. Norms may be put in charge for different purposes, emancipation and

dominance. Thus, building arguments upon norms does not mean to continue with a discourse, which has been depoliticized when certain norms had been formally established. By contrast, to reference a norm may always add a moment of trouble, i.e. a new interpretation, which implies a contestation of the established but never fixed meaning of a norm. Thus, to build an argument upon norms is deeply political—and *politics goes on*.

The Invisible Politics of Norms: In IR, norms research had started from a rather 'rule-utilitarian' approach, and it was Friedrich Kratochwil (1984) who brought a then timely claim that rationalist regime theory would not be the right path to understanding how things normative work. What he suggested was no less than a social theory of international norms—a depth of elaboration that, unfortunately, not too many scholars have taken up.6 Instead, a major theme in a then evolving IR norms research has been the attempt to explain the international emergence of norms (Finnemore and Sikkink 1998) and the *diffusion* of human rights norms across the globe and even in areas of authoritarian statehood (Risse et al. 1999).

While rationalist approaches would indeed have severe difficulties in explaining this kind of *norm diffusion*, one prominent approach suggests studying a transnational process during which authoritarian governments would soon find themselves in a discursive 'spiral' (Risse and Sikkink 1999). While actors on different 'levels,' particularly in the course of discursive interactions between societal actors in the authoritarian nation-state context and societal actors in the transnational realm, effectively establish a human rights discourse, the authoritarian government's scope of action is becoming smaller and smaller. This process is even escalated when the government starts talking human rights itself since concessions in human rights issues can be used by the domestic opposition to claim even more concessions up to the point of formal ratification, implementation, and, finally, compliance with international human rights treaties (Risse and Sikkink 1999; for an update, see Risse and Ropp 2013).

The Politics of Contestation: More recent discussion in the field of IR norms research provides some ground for elaboration, also along the lines of the problems mentioned. In the first place, this holds true for the debate on the contestedness of international norms by which IR theory comes much closer to acknowledging what it means for norms to be applied in the course of everyday normative practice. Recently, particularly Antje Wiener's theory of contestation (2014) has stimulated debate on the future paths of norms research, e.g. with regard to its normative orientation (Niemann and Schillinger 2016; Wolff and Zimmermann 2016; Havercroft 2017; Wiener 2017) as well as, its relation to other theoretical debates in the field (Bueger 2017). In IR, the insight that contestation is the rule rather than the exception has stimulated the assumption that international norms may differ with respect to their contestability. Partly returning to the insights of early constructivists (Kratochwil 1984), Wiener stresses that different weight is attached to different types of norms in the course of a social process. As a result, the function of norms does not only depend on its embeddedness within formal frameworks like treaties, organizations, or a formal constitution (Wiener 2014: 36). Norms come to the fore in different scenarios, even beyond the confines of an international legal system, and thus differ with regard to their social (or socio-legal) function. This emphasis on the *social life* of international norms acknowledges a significant process of social interaction and, in so doing, establishes a framework for the empirical analysis of norms and norms-related practice. Moreover, in theoretical terms, this emphasis on social interaction puts into question the ontology of norms that, before, IR study of international norm had just taken for granted.

Stressing the Norms' Indeterminacy: Since norms are always—to a certain extent—open for interpretation, the resulting state of uncertainty affects the social function of the norm. Instead of the certainty that norms shall provide, we face uncertainty. Instead of determination of socially adequate behavior, we face

indeterminacy. This is a problem. If we understand the *norm as practical script of a counterfactual stabilization of expectation*,9 we will have to account for the still remaining indeterminacy, that is, the fact that, for the time being, *it remains contested what it is exactly that can, may, must, or should be expected.* Instead of understanding contestation as a divergence of norm and practice and a departure from the norm's original content (or meaning), *the norm rather serves as the very source of contestation*. Rather than being challenged by contestation, the norm *enables* contestation in serving as a source of normative practice and, in so doing, also becomes its product. Norms entail by definition a claim for universality, that is, they must be assumed to be applicable to all particular situations of a kind. At the same time, it is not determined from scratch that a norm, in being 'universal,' is applicable to the particularity of the case (or situation). This is to be determined only in the course of the norm's application. The norm, as a script, does not contain a script of its own application, i.e. it does not determine itself how to be applied (Joerges 2005). The phenomenon has been theorized by Jacques Derrida (1990) during a lecture in a US law school in which he situates his thoughts on deconstruction within a then already vibrant CLS. Decision-making on the bench, says Derrida, cannot operate in a mechanical way.

Some Critical Legal Theory: As a 'big thing' in IR, international law somewhat co-emerged (or re-emerged) together with the success of constructivism (Kratochwil 2000). While international law became a well-researched empirical phenomenon, legal theory, and let alone 'critical' legal theory, has remained more or less invisible, even though some of the prominent proponents of IR constructivism did indeed provide some thorough insight in how lawyers had theorized their subject (Kratochwil 1989; Onuf 1989, 2011). Before, Hedley Bull had indeed mentioned American legal realism to clarify a notion of law informing his take on international law as an institution of international society. Identifying international law as a 'body of rules,' he stresses that '[s]ome international lawyers reject the conception of international law as a *body of rules* and instead define it as a particular kind of *social process*' (Bull 1977: 127, italics added).

The politics of international law: In the recent two or three decades, especially one international legal scholar (and practitioner), Koskenniemi, has been credited for his innovative and thought provoking work on international legal practice. Although Koskenniemi is indeed cited by those IR scholars working across the boundaries of IR and International Legal Studies (e.g. Rajkovic et al. 2016), his theoretical considerations have not led to substantial debate in IR. In turn, Koskenniemi himself has taken issue with IR theory and published a bloody attack in the *European Journal of International Relations* (Koskenniemi 2009) during which he alleges somewhat a colonization of international law through IR. Suffice it to say that while some of the points Koskenniemi raises were already made in IR (Kratochwil 1984; Kratochwil and Ruggie 1986; Onuf 1994), others are problematic for in fact contributing to a narrowing down of IR theory to a particular strand of US mainstream positivism. For the purposes of this paper, I am more interested in the theoretical baseline of Koskenniemi's earlier work, his *Apology and Utopia* (Koskenniemi 2005) and a corresponding piece on the *Politics of International Law* (Koskenniemi 1990). As he himself acknowledges in a later reflection, his argument indeed flows from legal realism and critical legal studies (Koskenniemi 2011). In fact, the way how Koskenniemi accounts for the somewhat paradoxical nexus of law and politics gets to the heart of how international norms and normative practice relate to power. Since it is this critical line of legal thought that this paper aims to explore as a source of theoretical insight, it makes sense to briefly outline Koskenniemi's argument before moving on to the body of work from which he himself draws.

Legal realism: As has been mentioned before, American legal realism, as a strand of legal theory, does not correspond with IR realism. At the same time, and perhaps not unrelated to the fact that the label 'realism' is assigned, legal realism has, as far as I can see, rarely been acknowledged in the field of IR. Besides Bull,

more recently, the closest IR has got to legal realism is perhaps Jutta Brunnée and Stephen Toope's reliance on Lon Fuller (Brunnée and Toope 2010). Though not understood to be among the main protagonists of legal realism, Fuller shares with legal realism a switch from doctrine to the social context of law and legal practice. Indeed, this is what makes legal realism attractive also for IR theory: it suggests a critical perspective on the context of law and legal practice. Law, for the realists, is embedded in its time and space, including all power relations, inequalities, etc. To find a way through (or at least into) legal realism,16 it makes sense to start from the 1905 *Lochner* Case in which the United States Supreme Court held a New York labor law to be impermissible for 'interfer[ing] with the right of contract between the employer and the employes'.17 What had happened? A labor regulation by the state of New York that had limited the maximal working hours of employees in bakeries has been understood by the majority of the judges as illegitimate intervention by the state into the individual right to make treaties and thus into the private sphere. In a dissenting opinion, which later served somewhat as a manifesto of legal realism, Justice Holmes held that there was no necessity to interpret the liberties from the Fourteenth Amendment in the way the majority of the court did. The dissenting opinion challenged the formalistic view of a court decision to be a mere consequence of a constitutional script.

Critical legal studies: During the 1970s and 1980s, a heterogeneous group of legal scholars drew on a number of ideas of the earlier realists and returned to the progressivism that the latter had eventually abandoned, especially after World War II (Kennedy 1991: 342). Interested in the idea of law's indeterminacy as well as the realist insight that, in the absence of determinacy, the outcome of jurisprudence corresponds to social relations of power, CLS has an increased interest in social theory. By no means did this lead into a unitary critical theory of law. Quite to the contrary, it is striking that CLS refers to a broad spectrum of—very often: continental European—theory: e.g. Marx, Frankfurt School Critical Theory, Foucault, Derrida, etc.21 What is important, this new theoretical spectrum did not only broaden the perspective but also helped radicalizing it. In particular, critical legal scholars took the societal implications of the entry of politics more seriously than their 'grandfathers.' Although, in principle, the point had already been prepared by the realists, what found a stronger emphasis in CLS is a distinction between the political conditions of the judges' (personal) decision-making, one the one hand, and the societal relations of power, on the other. While realism, in its turning away from formalism, had stressed the irrationality of law, CLS adds a distinction between 'internal' and 'external irrationality' (Frankenberg 2011: 303). This is what broadened the focus. Realists had mainly attempted to explain jurisprudence and, eventually, to enhance decision-making practice on the bench—by way of 'applying' social sciences. In turn, CLS has more far-reaching rationales. Far from causing an undesirable background noise, politics, when operating *within* the law, would be understood as indication of a 'logic of capitalism at work' (Frankenberg 2011: 303). Rather than aiming for an explanation of how law 'suffers' from external influences (as the realists), CLS attempt to understand society—societal relations of power—through law.

Conclusion: In this paper, I have identified a few problems in IR norms research and suggested that these may be addressed through the lenses of critical legal theory. While IR theory has indeed stressed that the ontology of norms cannot just be taken for granted (Wiener 2014), I have built on this insight by holding that ontology be understood as 'political,' thus stressing a momentum of power and force at work *within* norms. To that end, the dichotomy of *norms/politics* needs to be abandoned. By no means does politics, power, or coercion stop with the implementation of norms. *Vice versa*, norms and normative practice do not end with politics. Thus, it is reasonable to spell out *how* norms are political, *how* power is at work *within* norms. One major theme in critical legal theory is that 'law constitutes bargaining power in the sense that the content of

background rules conditions the outcome of conflict' (Kennedy 1991: 346). This formulation renders visible a structural moment in norms and norms-related practice. Norms, as it were, are more than just *instruments* in the play of more or less powerful actors. Rather, they can be important parameters in societal bargain, and it is for exactly this reason that actors have stakes in the practice of contestation. Ground rules structure bargain and thus the relations of power between actors. This focus on power and/or force not only *of* norms but also at work *within* norms is a strength of critical legal theory that IR may want to take up. Legal realists have argued that property points to the relation of actors with respect to a thing rather than to a relation between an actor and a thing (Cohen 1927). While property law grants the owner the right to use her property, it bares the non-owner from using it. This, as realists have argued, establishes a relation of power between the two. And it is this social relation that may even force the non-owner into a certain behavior—e.g. to earn money in order to pay for the use one another's property or to achieve property himself. In addition, the social relations affected by the law find their ongoing reproduction during the law's application.

Reference:

- Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. (2000) The Concept of Legalization. *International Organization* 54 (3): 401–419.
- Bartelson, Jens. (1995) A Genealogy of Sovereignty. Cambridge: Cambridge University Press.
- Brown, Chris. (2002) Sovereignty, Rights and Justice: International Political Theory Today. Cambridge: Polity.
- Brunnée, Jutta, and Stephen J. Toope. (2010) *Legitimacy and Legality in International Law.* Cambridge: Cambridge University Press.
- Bull, Hedley. (1977) *The Anarchical Society. A Study of Order in World Politics.* London: Macmillan.
- Carens, Joseph H. (2013) The Ethics of Immigration. Oxford: Oxford University Press.
- Chayes, Abram, and Antonia Handler Chayes. (1993) On Compliance. *International Organization* 47 (2): 175–205.
- Cohen, Morris R. (1927) Property and Sovereignty. Cornell Law Quarterly 13: 8–30. Cover,
- Robert M. (1983) Nomos and Narrative. *Harvard Law Review* 97 (4): 4–68.
- Darian-Smith, Eve. (2013) Laws and Societies in Global Contexts. Contemporary Approaches.Cambridge: Cambridge University Press.
- Derrida, Jacques. (1990) Force de Loi. Le "Fondement Mystique de l'Autorité" / Force of Law: The "Mystical Foundation of Authority". *Cardozo Law Review* 11 (5-6): 919–1045.
- Dunoff, Jeffrey L., Mark A. Pollack, Eds. (2013) Interdisciplinary Perspectives on International Law and International Relations. The State of the Art. Cambridge: Cambridge University Press.
- Finnemore, Martha, and Kathryn Sikkink. (1998) International Norm Dynamics and Political Change. *International Organization* 52 (4): 887–917.