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7

Post-modern perspectives on orthodox positivism

INGO VENZKE*

1 Introduction

This contribution explains the travails of international legal positivism (ILP) from post-modern perspectives. It identifies conventional precepts of orthodox ILP and shows how variants of post-modern thinking unravel them. It thereby provides part of the background against which current ILP needs to argue. The focus rests on three main such precepts and their critique: first, orthodox ILP works against the backdrop of a given language that stands stable and unsoiled from the operation of the law. Second, it embraces a political philosophy that gives the legal subject – traditionally the sovereign state – a foundational role. Third, orthodox ILP sees but a small space for politics in international law that is confined to law's creation through legal sources. These three basic precepts relate to *linguistics* (the location and generation of meaning), to *subjectivity* (the place of state consent) and to *politics* (here understood as the struggle for power and its exercise).

I will present key concepts of post-modern thinking to question each of these precepts. The vivacious concept of *performativity* embodies lessons of the linguistic turn. It lets go of the idea that language operates as a scheme that exists independent of its operation and instead appreciates how social practices create the language they use. Performativity internalises the generation of meaning into communicative practice and reveals that legal interpretation is a creative activity that contributes to the making of what it purports to find. *Deconstruction* suggests unveiling conflicting diversity underneath harmony and unity not only within legal and social order, but also within any subject. It disassembles state consent as a foundational anchor and further lays bare how consent can be an expression of power structures. *Governmentality*, finally, exposes the

* Parts of this chapter draw on Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012).

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many faces of power that not only work through hard law and variants of visible coercion, but also in much more penetrating ways. Law and politics are much more entangled than ILP would traditionally have it.

The primary concern, which I understand to lie at the heart of legal positivism and its specifically international variant, is the autonomy of law in relation to other normative orders.[1] On a positivist account, law gains and maintains its autonomy above all through a distinct modus of law-creation and law-application. Law enters the world in a way that separates it from everything else. From the view of positivism, (international) law is artificial. It is a product of human action rather than natural design. Law is positive because man has made it, and man has made it as law.[2] The underlying political philosophy that typically comes with legal positivism teaches that law is authoritative because its subjects have accepted it as binding against themselves. As such, positivism ties law to human action. How can ILP meet this main concern?

Sure enough, it faces a number of perennial problems in this regard that have been fought out with some wins and many draws where judgment calls hinge on yet grander normative vantage points.[3] In this chapter I will concentrate on how ILP has traditionally tried to meet its main concern, what basic claims it had to make along the line, and what happens to its line of argument when viewed from post-modern perspectives. This, I hope, clarifies at least in part the travails that contemporary ILP encounters.

I ultimately argue that strands of post-modern thinking – revolving around performativity, subjectivity and governmentality – set out significant challenges to orthodox ILP that its contemporary variants struggle to wring down. As a project, however, positivism is not necessarily defeated and anxieties about its arguably indefensible bases seem to be exaggerated. In spite of all challenges, legal practice reproduces itself as a distinct enterprise. Post-modern thinking typically wants to disrupt and unnerve in a struggle against submission to metanarratives, to apparently preordained decisions, and to new and still masked forms of power. It also pursues many quintessentially modern themes by other means and does not necessarily stand in poisonous opposition to positivism. ILP will do best to confront post-modern challenges head-on and to then pursue its

[1] HLA Hart, 'Positivism and the Separation of Law and Morals' 71 *Harvard Law Review* (1957–1958) 593–629.

[2] Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (Suhrkamp 1986) 34 (§ 3); d'Aspremont and Kammerhofer, Chapter 1.

[3] Liam Murphy, 'Better to See Law This Way' 83 *New York University Law Review* (2008) 1088–1108.

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normative ambitions more compellingly. Clarifying the travails of positivism thus responds not only to theoretical but also to practical concerns of a normative agenda.

In summary, I provide the background of three basic precepts that sustain orthodox ILP (Section 2), then unravel them in post-modern perspectives by focusing on assumptions pertaining to linguistics (Section 3.1), subjectivity (Section 3.2) and governmentality (Section 3.3). I will conclude by sketching how ILP may respond and which dead-ends it had better avoid (Section 4).

2 Orthodox precepts of international legal positivism

2.1 The externalisation of meaning

ILP traditionally runs on the background assumption of a given language that the law can use, but that is not itself affected or shaped by the operation of the law. Like other basic precepts, this first core assumption can well be gleaned from the way in which orthodox ILP constructs the making of law in terms of sources and from its take on the nature of legal interpretation.

Positivism understands legal sources as norms that set out the criteria in accordance with which actors can create law. Those norms also spell out for everyone engaged in the legal enterprise where to look if they want to know what counts as law. Something is law when 'it crystallises through the relevant sources of law'.[4] Once it has thus entered the world, it can be used and applied. Alexander Orakhelashvili opines that use of the law merely 'deduce[s] the meaning exactly of what has been consented to and agreed'.[5] Interpretation is understood as something categorically different from law-making. The latter is a matter of sources alone.

Further examples abound in this regard. In their contribution on Article 31 in the recent commentary on the Vienna Convention on the Law of Treaties (VCLT), Jean-Marc Sorel and Valérie Boré Eveno for instance contend that interpretation is of fundamental importance because it results in 'releasing [*dégager*] the exact meaning and the content of the rule of

[4] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 55.

[5] Orakhelashvili, n. 4 at 286; see also, critically, Michael Waibel, '[Review Essay]: Demystifying the Art of Interpretation' 22 *EJIL* (2011) 571–588 at 583.

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law that is applicable to a given situation'.[6] From this perspective, interpretation could concretise the law, perhaps, but surely does not make it.

The categorical distinction between making law by way of sources and interpretation that deduces meaning is sustained by the assumption that the meaning of legal texts lies outside the interpretative process. Law uses language, but does not contribute to its making. It is thus never the use of language that leads to semantic change – a change of law's content – but typically a change in environmental circumstances or in normative convictions.[7] Interpretation, that is the bottom line, is not a creative activity, but an act of discovery. Law is only created through legal sources. Were this otherwise, law's autonomy would arguably be under siege.[8]

When it comes to customary international law, positivist legal doctrine more readily shows an inkling that the distinction between applying the law and making it is indeed a difficult one.[9] It is precisely the interpretative practice of some (state) authorities that is recognised as contributing to the creation of custom.[10] The most promising avenue to sustain a distinction would be to assimilate custom to treaty law, not in the quaint fashion of 'tacit consent', but in the sense that also customary norms take the form of rules that are interpreted and applied.[11] It may also help that customary norms often have quasi-authoritative textual formulations, for instance by virtue of the International Law Commission's codification projects.[12] But any distinction between applying and making customary law is

[6] Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31' in Olivier Corten, Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press 2011) 804–837 at 806.

[7] Sabine Müller-Mall, *Performative Rechtserzeugung: Eine theoretische Annäherung* (Velbrück 2012) 24.

[8] Stanley Fish, 'The Law Wishes to Have a Formal Existence' in Stanley Fish, *There's No Such Thing as Free Speech and It Is a Good Thing Too* (Oxford University Press 1991) 141–179 at 142.

[9] Albert Bleckmann, 'Zur Feststellung und Auslegung von Völkergewohnheitsrecht' 37 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1977) 504–529 at 520–521 (trying to distinguish the identification and application of customary international law from its making).

[10] Maurice Mendelson, 'The Formation of Customary International Law' 272 *Recueil des Cours* (1998) 155–410 at 174–175.

[11] On the central role of textuality in legal positivism, see Dennis M. Patterson, *Law and Truth* (Oxford University Press 1999) 96.

[12] Hersch Lauterpacht, 'Codification and Development of International Law' 49 *AJIL* (1955) 16–43; Julius Stone, 'On the Vocation of the International Law Commission' 57 *Columbia Law Review* (1957) 16–51.

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troubled by methodical uncertainty.[13] Positivist international legal doctrine certainly struggles in this regard.[14] Here, I only take these struggles to be indicative of the more general difficulty of constructing an account of norms that exist independently of their application.

2.2 The foundational role of subjectivity

Next to locating meaning outside the operation of the law, orthodox ILP places the sovereign state as the foundational legal subject at the heart of legitimate order. Positivist accounts of international law notably developed and grew in finesse with the diminishing universal appeal of other normative substructures of religious and natural law types. In the heyday of classic liberalism, domestic contractual theories were projected onto the international level so that states assumed internationally the place that individuals enjoyed domestically.[15] Classic liberalism in international law provides the backdrop for seeing law almost exclusively the positivist way. It offers a first grasp at traditional ILP's political-philosophical inspiration.[16]

In blunt analogies, it projected fundamental individual rights carved out in the French Revolution onto states in their international affairs.[17] This is evident, for instance, in Immanuel Kant's projection of Hobbesian

[13] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Co. 1989, reissued Cambridge University Press 2005) 397–473.

[14] Robert Kolb, 'Selected Problems in the Theory of Customary International Law' 50 *Netherlands International Law Review* (2003) 119–150; see already Michael Akehurst, 'Custom as a Source of International Law' 47 *BYBIL* (1976) 1–53.

[15] Gerry Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' 15 *Australian Yearbook of International Law* (1994) 103–128; Julius Goebel, *The Equality of States: A Study in the History of Law* (Cambridge University Press 1925) 34. See also Paul Guggenheim, 'Contribution à l'histoire des sources du droit des gens' 4 *Recueil des Cours* (1958) 1–84 at 20–35. Sources doctrine was used before this move to voluntarism, to be sure, but in this new context it grew in importance: see Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011) 63–66.

[16] Collins, Chapter 2 (likewise arguing that ILP, at this nineteenth-century outset, had been a normatively driven perspective); Murphy, n. 3 (arguing that the choice of how to see law is a normative one).

[17] E.g. the Déclaration du droit des gens (1795) treats states and peoples like individuals – the people has many of the relevant attributes of individuals and forms part of the human family. See Wilhelm G. Grewe, *The Epochs of International Law* (Michael Byers (tr.), Walter de Gruyter 2000) 415.

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contractual theory onto the international level in his *Metaphysik* (1797)[18] as well as in the classic liberal conception of international law that Jeremy Bentham developed a year later in his influential *Principles of International Law* (1798).[19] The long-lasting repercussions of this move are inter alia reflected in the famous first article of the Montevideo Convention on the Rights and Duties of States, which defines '[t]he state as a *person* of international law'.[20] Constructing the state as the subject of international law brought with it a host of related tropes.[21] In particular, states could express a will, give their consent and create international law as an instrument of auto-determination. International law and legal thinking have certainly developed significantly since those formative times. Yet the conception of anthropomorphic states as foundational subjects remains omnipresent in scholarly and practical discourses.[22]

In order to ensure that international law is nothing else than what sovereign states have consented to, it is necessary to set out the modus in which law is created – this, once again, is what the doctrine of sources does. While dissatisfaction with Article 38 of the ICJ Statute (following verbatim Article 38 of the PCIJ Statute) is legion, it has continuously been the dear focal point of ILP.[23] According to Orakhelashvili:'[i]t follows from the basic concept of the sources of international law, as specified in Article 38 of the ICJ Statute, that the validity of legal rules derives from the agreement and acceptance of States'.[24] The word 'States' is notably capitalised. In the traditional positivist reading, each of the elements of Article 38 aspires to

[18] Immanuel Kant, *Die Metaphysik der Sitten* (Suhrkamp 1977) 466–467 (§ 53).

[19] Jeremy Bentham, 'Principles of International Law' in John Bowring (ed.), *The Works of Jeremy Bentham*, Vol. 2 (William Tait 1843) 535–571.

[20] Convention on the Rights and Duties of States ('Montevideo Convention'), 26 December 1933, 165 LNTS 19 (emphasis added).

[21] Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry Into the History and Theory of International Law* (Asser Press 2004). How deeply thinking about the state as a person is seated is reflected in many metaphors such as 'head of state' or 'state organ', see Reinhart Koselleck, 'Staat und Souveränität III' in Otto Brunner, Werner Conze, Reinhart Kosseleck (eds), *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, Vol. 6 (Klett-Cotta 1990) 25–64.

[22] Armin von Bogdandy, Sergio Dellavalle, 'Ad hostes docere: Zu den Ursprüngen und zur Präsenz partikularistisch-holistischen Denkens' in Andreas Fischer-Lescano *et al.* (eds), *Frieden in Freiheit – Peace in Liberty – Paix en liberté: Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos 2008) 847–863.

[23] Thomas Skouteris, 'The Force of a Doctrine: Art. 38 of the PCIJ Statute and the Sources of International Law' in Fleur Johns, Richard Joyce, Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 69–80.

[24] Orakhelashvili, n. 4 at 112.

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translate consent to be bound into law.[25] ILP traditionally places states as foundational subjects at the core of the international legal order.

2.3 The small space of politics

It has for a long time been a core proposition of legal positivism that law is an artefact and is subject to politics. In fact, ILP generally seeks to ensure that international law is *nothing but* a product of political struggle.[26] But politics can only make law in ways that are recognised to meet the demands of sources doctrine. Otherwise it could not be ensured that states are only bound by what they have consented to.[27] At the moment of its source, law meets politics and politics becomes law. What happens before is a matter of politics. What happens after is a matter of operating the law, not a matter of politics.

It is a third precept of orthodox ILP that what is important comes as hard law, identified as such by the sources of law. The argument is compellingly circular: international law obligates and constrains its subjects and therefore it must be based on their consent. Sources tell how consent can be turned into law. Nothing else could create legal obligation because law would then loose its consensual basis.

In turn, orthodox ILP tends to know only one kind of legal normativity: hard law.[28] It also approaches other legally relevant phenomena such as 'soft law' through the lens of hard law. Resolutions of the General Assembly – the focal point of many of the debates – could help interpret treaties or assist in finding customary international law.[29] But ultimately something is either law because it was created in ways recognised by the

[25] Maarten Bos, 'Recognized Manifestations of International Law: A New Theory of Sources' 19 *German Yearbook of International Law* (1977) 9–76; Godefridus J. H. van Hoof, *Rethinking the Sources of International Law* (Kluwer 1983).

[26] Ulrich Fastenrath, 'A Political Theory of Law: Escaping the Aporia of the Debate on the Validity of Legal Argument in Public International Law' in Ulrich Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 58–78.

[27] Orakhelashvili, n. 4 at 30.

[28] The possibilities and limits of seeing 'soft law' from the perspective of traditional and modern legal positivism are discussed in further detail in Matthias Goldmann, *Handlungsformen internationaler öffentlicher Gewalt: Zur Dogmatik von Soft Law und Informationsakten im Recht der internationalen Institutionen* (doctoral thesis, University of Heidelberg, 2013) 130–154. Relevant parts have been published in English as Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' 25 *LJIL* (2012) 335–368.

[29] Goldmann, *Handlungsformen*, n. 28 at 140–148.

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sources of law, or it is not law and can thus neither create legal obligations. 'Soft law' is thus often presented as an oxymoron. 'Softness' may relate to the vagueness of law's contents, but not to its degree of obligation, which is binary: law ('on') or not ('off').[30] In the orthodox positivists' mind, soft law is not legally binding because it typically lacks the prerequisite formal pedigree. For many authors, soft law is a 'convenient description for a variety of non-legally binding instruments used in contemporary international relations by States and international organisations'.[31] The way it matters, if at all, is through its interplay with hard law.

3 Post-modern perspectives

Having carved out three main precepts of conventional ILP, this section now unsettles each from post-modern perspectives. *Performativity* unravels the externalisation of meaning (Section 3.1), *deconstruction* undercuts the foundational role of the subject (Section 3.2), and *governmentality* significantly expands the space of politics (Section 3.3).

3.1 Performativity: semantic change and creative interpretations

3.1.1 The linguistic turn

Scholarship in the wake of the 'linguistic turn' has refined the idea that meaning is generated in social practices and internal to interpretative processes. It suggests that neither language nor law exist as schemes independent from their use. It thereby disturbs orthodox ILP's background assumption of a given and rather static language, which ensured that law can be created at one point in time to then be used in interpretation. Two strands of theoretical developments shake this first core assumption.

The first sets out with the work of Ferdinand de Saussure whose *Course on General Linguistics* successfully defeated the long-held view that the meanings of words are revealed through the connection with something they represent. He rejected this basis of stability and instead argued that linguistic signs only gain their meaning through their difference from

[30] Prosper Weil, 'Towards Relative Normativity in International Law?' 77 *AJIL* (1983) 413–442.

[31] Alan Boyle, 'Soft Law in International Law-Making' in Malcom D. Evans (ed.), *International Law* (2nd edn Oxford University Press 2006) 141–157 at 142.

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other linguistic signs.[32] Not representation but difference constitutes meaning. Only the tradition of language usage can to some extent stabilise fluctuating distinctions.[33]

Another line of thinking takes off with Wittgenstein's piercing view that words do not have a meaning other than that attributed to them by their use.[34] In his solemn observation, the best that can be done is to observe and to find rules that describe the use of an expression. In attempting to find the meaning of a rule, it is necessary to find the rule that explains the use of that rule.[35] The meaning of the explanatory rule is of course subject to the same fate so that one is caught in an infinite regress: 'any interpretation . . . hangs in the air along with what it interprets, and cannot give it any support'.[36] In the notes *On Certainty*, Wittgenstein summed up his insights: '[y]ou must look at the practice of language, then you will see it'.[37] That also holds true for international law. It is necessary to look at its practice in order to see it.[38]

In this line of thought, the challenge for traditional ILP is further polished by John Austin, the twentieth-century philosopher of language, not the nineteenth-century founding father of analytical jurisprudence. Austin coins the concept of performative speech, which refers to communicative utterances that change the world.[39] The worn example is the utterance of the words 'I do' that can create the bond of marriage if

[32] Ferdinand de Saussure, *Course in General Linguistics* (Open Court 1983) 65, 106. See Sybille Krämer, *Sprache, Sprechakt, Kommunikation: Sprachtheoretische Positionen des 20. Jahrhunderts* (Suhrkamp 2001) 19–36.

[33] De Saussure, n. 32 at 67–69.

[34] Such semantic pragmatism in the wake of Wittgenstein can find considerable common ground. For a concise and accessible account, see Dennis M. Patterson, 'Dworkin on the Semantics of Legal and Political Concepts' 26 *Oxford Journal of Legal Studies* (2006) 545–557 (inter alia specifying semantic pragmatism's main contentions and excluding a range of alleged implications that do not follow); Damiano Canale, Giovanni Tuzet, 'On Legal Inferentialism: Toward a Pragmatics of Semantic Content in Legal Interpretation?' 20 *Ratio Juris* (2007) 32–44; Markus Winkler, 'Die Normativität des Praktischen' 64 *JuristenZeitung* (2009) 821–829.

[35] Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell 1958) para. 43. See also Krämer, n. 32 at 128.

[36] Wittgenstein, n. 35 at para. 198.

[37] Ludwig Wittgenstein, *On Certainty* (Blackwell 1969) para. 501.

[38] In detail, see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012).

[39] John L. Austin, *How to Do Things with Words* (Oxford University Press 1979) 138–139. Further expanded in John L. Austin, 'Performative Utterances' in James O. Urmson, Geoffrey James Warnock (eds), *Philosophical Papers* (Oxford University Press 1979) 233–253.

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performed in the right context. In a clever move, Austin tries to come up with distinctions that separate creative *performative* speech acts from simple *constative* speech acts such as 'this is an apple'.[40] If an interpreter only engaged in constative acts of the kind 'this is what the law is', then she could possibly withdraw from any charge of actually making law rather than applying it. Austin suggests, however, that this is simply impossible.[41] It is impossible to use legal norms without interpretation and without performing an act.[42] He ultimately comes to the conclusion that every attempt at distinguishing performative from constative acts fails because it is unfeasible to withhold from interpreting even simple objects such as apples, let alone complex phenomena such as the law.[43] Judicial interpretations present themselves as declaring what the law 'really is' and contribute to the law's creation.

The linguistic turn is multifaceted and extends to a broader reconsideration of the relationship between language and the world.[44] For the present discussion of ILP's travails, its central emphasis on *performativity* is of main importance. It highlights the inevitable creativity, roughly, that is nested in any reiteration of a rule.[45] The concept of performativity builds on the idea that the use of words generates their meaning and captures the simultaneous presence in any linguistic utterance of a transformation of the past as well as the placing of something new into the world.[46]

Jean-François Lyotard placed performativity centre stage in his epochal treatise *The Postmodern Condition: A Report on Knowledge*.[47] He uses the notion slightly differently. In Lyotard's work, performativity draws

[40] Austin, *Words*, n. 39 at 140–141. [41] Austin, *Words*, n. 39 at 141.

[42] Cf. Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993) 256 (agreeing that it is impossible not to interpret and to thus contribute to the construction of the law).

[43] Austin, *Words*, n. 39 at 142–143; Krämer, n. 32 at 135–153; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1989) 488–491.

[44] Richard Rorty (ed.), *The Linguistic Turn: Essays in Philosophical Method* (Chicago University Press 1992).

[45] For an introduction to the concept in legal theory, see Ralph Christensen, Kent D. Lerch, 'Performanz: Die Kunst, Recht geschehen zu lassen' in Kent D. Lerch (ed.), *Die Sprache des Rechts*, Vol. 3 (Walter de Gruyter 2006) 55–132; Müller-Mall, n. 7.

[46] The concept has been refined in the works of Jacques Derrida and Judith Butler especially. See Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak (tr.), Johns Hopkins University Press 1997); Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997).

[47] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (University of Minnesota Press 1984).

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together factors that channel knowledge and that sustain the success of inevitably creative statements about the world.[48] What I take from the concept is the inescapable creativity of using a language. Turning to law and ILP, with baggage and nuance lost, performativity places the construction of meaning into the operation of the law and thus unravels orthodox ILP's first basic precept. Performativity internalises meaning.

3.1.2 Sources and semantic change

Performativity suggests that the law placed into the world through the channels of sources is subject to a process of continuous creation simply by being interpreted and applied. A quintessentially modern anecdote clarifies the point: already at the time of the French Revolution, it was argued perceptively that change should be induced by conceptual anticipation, that is, through the use of arguments in speech and writing.[49] First among others, Denis Diderot designed the *Encyclopédie* to fix then the spirit of the revolution and carry it henceforth.[50] But when he recognised the power of words to reach into the future, he immediately saw words' double-edged quality: if *he* was in a position to shape words to meet the ends of the revolution, so could others.[51] In an attempt to tie the meanings of words to revolutionary ideals, he therefore advocated that 'les paroles nationales seront souverains de tous les souverains'.[52] The sovereign as a source of legitimacy should decide about the meaning of words. At the same time, words should be sovereign; they should have the ultimate authority. There is a readily visible and intricate tension between the fact that the words are *souverains* (noun, not adjective) and the fact that revolutionary thinkers tried to shape those same words to advance their own ideas. Words should be the ultimate authority, but they should mean what the authors of the *Encyclopédie* intended them to mean.

The same tension troubles ILP. Legal subjects enter into legal commitments, reach into the future, carefully formulate the words with which

[48] Lyotard, n. 47.

[49] Reinhart Koselleck, *Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache* (Suhrkamp 2006) 298, referring to Brigitte Schleiben-Lange, 'Die Französische Revolution und die Sprache' 41 *Zeitschrift für Literaturwissenschaft und Linguistik* (1981) 90–123.

[50] See Koselleck, n. 49 at 299.

[51] Reinhart Koselleck, 'Begriffsgeschichte and Social History' in Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* (Keith Tribe (tr.), Columbia University Press 1979) 75–93 at 80.

[52] '[N]ational words will be sovereign of all the sovereigns': 'Abondance' in *Nouveau Dictionnaire Historique* (1791), quoted from Koselleck, n. 49 at 300 (author's translation).

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they do so, and then submit those words to processes of interpretation that escape their control. If international norms change in the process of interpretation after they are placed into the world, then this process distances the law from its source and, possibly, from the consent of its foundational subjects.

The anecdote features three key insights for the fate of traditional ILP. First, the authors of the *Enyclopédie* recognised how words are powerful in the sense that they can constrain others in what they can say or do. That is a thought which positivism certainly cheers, but perhaps just a bit too much because words are not so powerful as to *determine* their future use. Revolutionary thinkers understood, second, that actors fight about semantic content in pursuit of their interests and convictions. They saw and expected meanings to shift over time in such semantic struggles. While they tried to coin *paroles nationales* when writing the *Encyclopédie*, they realised that these words would take on a life of their own and would possibly escape their control. For ILP, such semantic change is problematic because it effectively shifts the law in a way that escapes the reach of legal sources. The authors of the *Encyclopédie* saw the answer in arguing, third, that the meaning of words be tied back to the legitimating subject, the people. But that was surely a highly aspirational and ultimately impossible argument. Once the *Encyclopédie* was published, its meaning would change in semantic struggles and control over its life would escape its creators.

In short, when traditional ILP and its classic liberal impetus suggest in a crudely simplified fashion that unitary states are sovereign and that they make the law that constrains them, the underlying confidence in the stability of semantic content is at least shaky. Certainly, recognising the creativity of the interpretative process renders the distinction between making law through sources and law-making by way of interpretation neither impossible nor superfluous.[53] But the distinction needs to be re-articulated by placing emphasis on distinct argumentative demands that characterise each modus of law-making. Both forms of law-making also work differently. Law-making by way of interpretation, for instance, hinges more on persuasion and on other actors' acceptance. But how creative or constrained then is the semantic struggle that changes the law? In other words, how is legal interpretation constrained by international law if it is that same interpretative practice that creates the law?

[53] Armin von Bogdandy, Ingo Venzke, 'On the Democratic Justification of International Judicial Lawmaking' 12 *German Law Journal* (2011) 1341–1370 at 1344–1349.

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3.1.3 Rule-following, creative and constrained interpretations

Traditional legal positivism would find the answer in limits set by the law itself. The limits stem from the terms of the treaty, which must be interpreted according to its 'ordinary meaning . . . in their context and in the light of [the treaty's] object and purpose'.[54] Seeing that these limits are themselves produced in the practice of interpretation questions these constraints. Scholarship connecting to notions of performativity then suggests that the law itself does not give away the limits to its interpretation. What is limiting is the need of an interpreter to find acceptance for its interpretations within a community of interpreters.[55]

Philosopher Robert Brandom explains further that when an actor has consented to a rule – has acted in a way that creates law – she has committed herself in relation to others to using certain expressions. The actual content of those commitments, the meaning of expressions, then results from a process of 'negotiation' with others:

> [T]he boundaries around what one has and has not committed oneself to by using a particular concept (and what is and is not a correct application of it) are determined by a process of *negotiation* among actual attitudes of application and assessments of application.[56]

This brief summary of his refined argument for now leaves a number of open questions. But it does offer an alternative ground for assessing whether the interpretation of a norm was (in)correct. Brandom rightly submits that this assessment can only be part of the communicative practice itself. In this practice, applications of a concept in the present have to connect to the past in a way that convinces future applications: '[t]he current judge is held accountable to the tradition she inherits by the judges yet to come'.[57] Contents of commitments gain shape and develop in the practice of demanding and giving reasons for or against a particular application of a concept (a particular interpretation of an international norm).

[54] Art. 31 VCLT. [55] Fish, n. 43 at 488–491.

[56] Robert Brandom, 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms' 7 *European Journal of Philosophy* (1999) 164–189 at 173.

[57] Brandom, n. 56 at 181. For a concise introduction and summary, see Jasper Liptow, *Regel und Interpretation: Eine Untersuchung zur sozialen Struktur sprachlicher Praxis* (Velbrück 2004) 220–226; Ralph Christensen, 'Neo-Pragmatismus: Brandom' in Sonja Buckel, Ralph Christensen, Andreas Fischer-Lescano (eds), *Neue Theorien des Rechts* (Lucius und Lucius 2009) 239–262; Winkler, n. 34.

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Brandom follows in the footsteps of semantic pragmatism that has learned the lessons of the linguistic turn. But he is hardly a post-modern thinker. In particular, he leaves another fundamental category intact that would typically be attacked in post-modern scholarship: subjectivity.

3.2 Deconstruction: consent and agreement

3.2.1 Unity and diversity in conflict

It is a basic suggestion in post-modern thinking to uncover conflict and diversity underneath harmony and unity. This impetus is directed against metanarratives that operate at a high level of abstraction and create mythical images of reality. Lyotard sees working against such abstraction to be the defining feature of post-modernity: '[s]implifying to the extreme', he writes, 'I define *postmodern* as incredulity toward metanarratives'.[58] The narrative of classic liberalism, reciting that international law is what sovereign states have wanted it to be, would be a prime example of such a metanarrative.[59] The work of Lyotard's *confrère*, Jacque Derrida, on deconstruction as a style of enquiry pursues a very similar quest and is designed to help uncover suppressed antagonisms.[60]

Deconstruction could take a genealogical style by retracting the history of a concept or idea. It could thereby show how contested as well as contingent its development has in fact been.[61] Deconstruction would rediscover rivalling understandings and destabilise the winning side of history.[62] Another, less historical style would concentrate on identifying paradoxes in seemingly stable conceptual relationships. A prime example, which Derrida plays out in detail in his *Force of Law: The 'Mystical Foundation of Legal Authority'*, is the relationship between law and justice. He uncovers three *aporiae* – moments of undecidability – in this relationship.[63] If legitimate power is to be distinguished from ordinary violence, it is because it follows rules that authorise it. But what

[58] Lyotard, n. 47 at xxiv.

[59] Jean-François Lyotard, 'Memorandum über die Legitimität' in Peter Engelmann (ed.), *Postmoderne und Dekonstruktion: Texte französicher Philosophen der Gegenwart* (Reclam 2004) 54–75.

[60] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' 11 *Cardozo Law Review* (1990) 920–1045.

[61] Derrida, n. 46; such deconstructive genealogy was foreshadowed prominently by Nietzsche and also practised by Michel Foucault, 'Nietzsche, Genealogy, History' in Donald F. Bouchart (ed.), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press 1977) 139–164.

[62] Derrida, n. 60. [63] Derrida, n. 46.

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authorises the creation of those rules? Further, rules do not determine their own application. How then can the exercise of legitimate power be rule-bound? Finally, how can justice be achieved if it continues to escape the reach of rules? Derrida's answer to these questions, all of this 'simplifying to the extreme', points to deconstruction itself as a technique to show the possibility of deciding differently. On this note, deconstruction is justice. It struggles with every trick in the book against the reification of law and justice and seeks to prevent the violent submission of one alternative to the benefit of another. It upholds contingency.

The subject is no longer the rock-solid building block of legitimate order. The subject is the construction of metanarratives that overshadow diversity. If anything, it is the meeting-point of competing factors that stand in unresolvable tension. The post-modern pop-slogan, which announces the 'death of the subject', brings this to the point.[64]

3.2.2 Disaggregating the subject

Part of the legacy of classic liberalism's projection of domestic contractual theories onto the international level is the picture of the sovereign state as a person of international law. The anthropomorphic state makes the law that constrains it. And if it is not the state that acts as a person, then it is its head or its organs.[65] The post-modern critique of abstract unities challenges this metanarrative on different levels: on a fundamental and far-reaching note, it questions any and all ideas about autonomous will formation. It suggests that one should better look at the social structures that form will, generate preferences, and constitute the subject. On a slightly less penetrating level that leaves parts of the state intact, it highlights that actions of specific state organs may only be linked back to 'the state' at a tenuous stretch. In fact, institutions and individuals forming part of all branches of government can and do engage as independent actors in the interpretation of international law.

[64] This pop slogan was originally part of an argument directed *against* the dissection of the subject through market forces. See Theodor W. Adorno, *Minima Moralia: Reflections from Damaged Life* (E. F. N. Jephcott (tr.), Verso 1978); likewise Herbert Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* (Beacon Press 1964). It then resurfaced in Michael Foucault's emphasis on pervasive power/knowledge structures, which undermine conditions of human agency, to which I return in Section 3.1. See Michel Foucault, 'Two Lectures' in Colin Gordon (ed.), *Power/Knowledge: Selected Interviews and other Writings 1972–1977* (Alessandro Fontana, Pasquale Pasquino (trs), Pantheon Books 1980) 78–108; Amy Allen, 'The Anti-Subjective Hypothesis: Michel Foucault and the Death of the Subject' 31 *Philosophical Forum* (2000) 113–130 (showing the ambivalence of Foucault's position towards the possibility of human agency).

[65] Koselleck, n. 21 at 26.

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The state falls into distinct parts, each acting autonomously, often contravening the action of the executive to which ILP has traditionally granted prime place. Domestic courts in particular have become increasingly significant and confident in the making of international law.[66] In some fields, they might even form a 'united, coordinated judicial front'.[67] Of course, legal doctrine has ways of capturing and absorbing domestic courts' actions into its framework, for instance by recognising their practice in the formation of customary international law.[68] But the state as the main subject of international law does not have a will. It falls apart into competing actors. As Eyal Benvenisti notes, the phenomenon of transnational judicial cooperation 'demonstrates yet again the consequences of the "disaggregated state" as both the national government and the national court seek foreign allies in their quest to balance each other out'.[69] Often, domestic courts do not say what the head of state thinks.

Network theory and scholarship inspired by systems theory further contend that the societal action falls along sectoral lines and is driven by particular rationalities such as those of the market, human rights or security. Such views let go of the belief in *one* rationality that traverses all human action. Instead, they see a plurality of functional rationalities.[70] State consent can hardly play a foundational role from this perspective. There is no aspiration to construct international law as a coherent system that could be held together by conflict rules of treaty law or by harmonious interpretation. The search for legal unity in the fragmentation of global law is simply vain.[71] The disaggregation of the subject into its parts and the operation of competing rationalities not only touch on ideas of state consent in making law by way of sources, but also on ideas of

[66] André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011) 6–10; August Reinisch, 'The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity' in August Reinisch, Ursula Kriebaum (eds), *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (Eleven 2007) 289–309 at 309 (concluding that 'in the long run, national courts will increasingly shape international law through their transnational exchanges').

[67] Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' 102 *AJIL* (2008) 241–274 at 249.

[68] See already Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' 10 *BYBIL* (1929) 65–95 at 92.

[69] Benvenisti, n. 67 at 244.

[70] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

[71] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' 25 *Michigan Journal of International Law* (2004) 999–1045.

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interpretation. What does it mean that an actor needs to find acceptance for her interpretative claims? More specifically, what could possibly be the nature of such acceptance?

3.2.3 Hegemonic contestation and the nature of agreement

One central and all too obvious strategy for interpreters to find acceptance is that they simply present their claims as the 'right' interpretation in all the ways in which an interpretation could possibly be considered right. Embracing once again the idea that unity should arguably be unravelled to expose conflicting diversity, it would be a small further step to think of all legal interpretations as hegemonic:

> International actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents . . . To think of this struggle as *hegemonic* is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preference seem like the *universal preference*.[72]

Interpretation does not uncover the law that is laid down in legal sources, nor could capable legal scholars recognise the outer limits that separate permissible from impermissible interpretations. No stable ground appears to be available from which to judge. Any interpretation would be hegemonic due to its attempt at making inevitably particular claims prevail in the cloak of universal rightness.[73]

On the premise that there is indeed no external yardstick against which disputes about the meaning of (legal) expressions could be assessed, any meaning would be a function of power relations. Chantal Mouffe made the point clear when she wrote that 'power is constitutive of the social because the social could not exist without the power relations through which it is given shape'.[74] And 'since power relations are constitutive of the social, every order is by necessity a hegemonic order'.[75] On her

[72] Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' 17 *Cambridge Review of International Affairs* (2004) 197–218 at 199.

[73] With regard to the specific example of international trade law, see Jason Beckett, 'Fragmentation, Openness and Hegemony: Adjudication and the WTO' in Meredith Kolsky Lewis, Susy Frankel (eds), *International Economic Law and National Autonomy* (Cambridge University Press 2010) 44–70.

[74] Chantal Mouffe, *On the Political: Thinking in Action* (Routledge 2005) 18.

[75] Mouffe, n. 74 at 106.

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account, only power is left as a constitutive building block for social order.[76]

Strikingly, such a spirited critique of metaphysics rests on the equally metaphysical and therefore equally unsupported assumption that there are no such things as moral values or – turned into inter-subjective relationships – of a rationality that allows for something like genuine agreement. Metaphysical claims need to be avoided on both sides. Beyond doubt, however, interpretation is a site of politics, to which I now turn with the help of a third core concept: governmentality.

3.3 Governmentality: politics and what matters

3.3.1 The many faces of power

Orthodox ILP's third basic precept, which pertains to the space of politics, crumbles in light of post-modern reassessments of how power is exercised. The concept of governmentality highlights the larger space of politics in legal interpretation and in the generation of legal normativity through soft law instruments. Michel Foucault coined the enigmatic concept of governmentality (*gouvernementalité*) to refer to the ways through which power is exercised over a population, to the growth of government in exercising such power, and to the historical transformation of the state into the administrative state.[77] One of Foucault's decisive contributions to social theory has been his nuanced understanding of how power does not only come in forms of coercion and constraints. Power is also at work in the production of reality. It permeates systems of knowledge and, fundamentally, shapes subjects – their identity, cognitive frames and preferences. Power, Foucault suggests, not only takes the shape of law that commands and constrains, but also the penetrating form of being productive in the sense of constituting subjects and the world that surrounds them.

[76] From the wealth of literature on this issue, see in particular Michel Foucault, 'Afterword: The Subject and Power' in Hubert L. Dreyfus, Paul Rabinow (eds), *Michel Foucault: Beyond Structualism and Hermeneutics* (University of Chicago Press 1983) 208–226; Lyotard, n. 47. Cf. Maurice Merleau-Ponty, 'Everywhere and Nowhere' in Maurice Merleau-Ponty, *Signs* (Richard C. McCleary (tr.), Northwestern University Press 1964) 126–158 at 153 ('Subjectivity was not waiting for philosophers . . . They constructed, created it . . . And what they have done must perhaps be undone.').

[77] Michel Foucault, 'Governmentality' (Rosi Braidotti and Colin Gordon (trs)) in Graham Burchell, Colin Gordon, Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991) 87–104 at 102–103.

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His treatment of law is as sparse as it is ambivalent. But unmistakably he rejects the idea that the only thing that matters is hard law: 'We shall try to rid ourselves of a juridical and negative representation of power, and cease to conceive of it in terms of law, prohibition, liberty, and sovereignty.'[78] Juridical power, Foucault argues, has in fact been on the decline for quite some time. It is overtaken by other forms of governmentality that lean on no less intense and influential mechanisms of 'disciplining' the subject.[79]

Foucault argued with domestic political systems in mind, but his work has been taken up in research on global governance just as well.[80] It highlights the 'constitution of all social subjects with various social powers through systems of knowledge and discursive practice of broad and general social scope'.[81] Fixing the meaning of core legal terms is a prime expression of productive power. Cases in point include prevailing understandings of 'civilian' and 'combatant' in the laws of war as well as the definition of 'refugee'.[82] Foucault generally inspires an investigation of semantic struggles over what the law means as a prime site for the exercise and manifestation of power.

At the same time, his concept of governmentality draws attention to early transformations in the modes of governing and to dissonances between traditional understandings of (juridical) power and largely neglected workings of power.[83] Likewise, the exercise of power on the international level and its relationship with law has developed to now include a multitude of alternative soft law instruments.[84] While Foucault

[78] Michel Foucault, *History of Sexuality*, Vol. 1 (Robert Hurley (tr.), Vintage Books 1990) 90; quoted in Tanja E. Aalberts, Ben Golder, 'On the Uses of Foucault for International Law' 25 *LJIL* (2012) 603–608; Thomas Biebricher, 'Macht und Recht: Foucault' in Sonja Buckel, Ralph Christensen, Andreas Fischer-Lescano (eds), *Neue Theorien des Rechts* (Lucius und Lucius 2009) 139–162.

[79] Foucault later described these mechanisms piercingly as 'biopolitics'; for the international context see Michael Hardt, Antonio Negri, *Empire* (Harvard University Press 2002).

[80] See on 'sovereignty as subjectivity', inspired by Foucault, Tanja E. Aalberts, *Constructing Sovereignty between Politics and Law* (Routledge 2012) 125–142.

[81] Michael Barnett, Raymond Duvall, 'Power in Global Governance' in Michael Barnett, Raymond Duvall (eds), *Power in Global Governance* (Cambridge University Press 2005) 1–32 at 20.

[82] Ingo Venzke, 'Legal Contestation about "Enemy Combatants": On the Exercise of Power in Legal Interpretation' 5 *Journal of International Law & International Relations* (2009) 155–184; Helen M. Kinsella, 'Securing the Civilian: Sex and Gender in the Laws of War' in Michael Barnett, Raymond Duvall (eds), *Power in Global Governance* (Cambridge University Press 2005) 249–272; Bhupinder S. Chimni, 'The Meaning of Words and the Role of UNHCR in Voluntary Repatriation' 5 *International Journal of Refugee Law* (1993) 442–460; Venzke, n. 38 at 72–134.

[83] Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press 2013).

[84] Goldmann, *Handlungsformen*, n. 28 at 6.

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rejects the narrow focus on law as a site of power due to the usually narrow conception of what law is, he in effect offers inspiration and tools for expanding what matters 'legally'.

3.3.2 Politics in legal interpretation

The central place of performativity in post-modern thinking flares up again in seeing a wider space for politics in international law that is not confined to law-making by way of sources. Instead it also extends to processes of interpretation. Interpretations produce law and as such they are as much an exercise of power or authority. Understanding successful interpretations as acts of power usefully highlights how actors seek to tap law's force to their advantage. If an interpretation becomes an accepted statement about what the law is, others have to struggle against it.[85]

The picture of legal interpretation that arises from this perspective is certainly not one of uncovering the law in an apolitical exercise of archaeology, but one of a political struggle in which actors interpret in an attempt to implement meanings that are aligned with their interests or convictions.[86] Success in interpretation translates into 'winning' a semantic struggle in a particular instance by finding acceptance for a certain legal claim. Dietrich Busse suitably notes that '[t]he "winner" of a semantic struggle has succeeded in establishing his or her own rule-of-use as the linguistic norm for the linguistic community'.[87]

Participants in legal discourse craft claims about (il)legality, seek to bend the pay-offs distributed by international law and try to tap law's symbolic power.[88] Power as a vector of sovereignty thus extends to the ability to shape meanings. Carl Schmitt – the arch theorist of the political – enigmatically noted that 'whoever has true power is able to determine the content of concepts and words. *Caesar dominus et supra grammaticam.* (Caesar is also lord over grammar).'[89] The notion of semantic struggle captures precisely this thought. Writing on 'semantic strategies as a means of politics', Busse found that:

[85] Venzke, n. 82.

[86] On the concept of semantic struggle in a historical as well as linguistic perspective, see Koselleck, n. 51 at 80; Dietrich Busse, 'Semantic Strategies as a Means of Politics: Linguistic Approaches to the Analysis of "Semantic Stuggles"' in Pertti Ahonen (ed.), *Tracing the Semiotic Boundaries of Politics* (Walter de Gruyter 1993) 121–128.

[87] Busse, n. 86 at 122–123.

[88] Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' 38 *Hastings Law Journal* (1987) 814–853 at 838. See also Matthew Eagleton-Pierce, *Symbolic Power in the World Trade Organization* (Oxford University Press 2013).

[89] Quoted in Mouffe, n. 74 at 87.

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> [T]he semantic possibilities of linguistic signs correspond to the form of reality, or the view towards reality, admitted by society. Politicians and political agencies that desire to influence the publicly accepted view of political reality will try to dominate the linguistic possibilities within the discourse of politics. Thus language (especially the semantics of political terminology) becomes a means of political action: the so called 'semantic struggles' arise.[90]

This observation holds true all the same for legal terminology. As of late, legal scholars of different *couleur* agree that legal interpretations depend on a political choice. In light of theoretical or practical indeterminacy of the law, unavoidable choices have pervasively but evasively been termed 'political'.[91] At times it seems as though saying that something is political is the post-modern way of ending an argument. Other times, and that is the more productive take, saying so starts an enquiry into the (societal/structural) factors that lead to one decision rather than another.

3.3.3 On what matters

If Article 38 of the ICJ Statue was taken as a formulation of international law's sources,[92] then soft law typically refers to those instruments that do not fit its framework and are thus not considered legally binding even if they show certain legal effects. ILP has tried to accommodate this tension within its framework but, overall, continues to embrace a binary conception according to which something is either law (tested by formal pedigree) or it is not.[93] The concept of governmentality draws together ideas appreciating Foucault's call that we should in fact 'rid ourselves of a juridical and negative representation of power'.[94] Sticking to a narrow conception of law, he argues, neglects all the other ways in which government works and disciplines. Upscaling Foucault's insight onto the international level, work in the exercise of international public authority has highlighted the variety of legal instruments that create legal

[90] Busse, n. 86 at 121.

[91] Martti Koskenniemi, 'The Politics of International Law' 1 *EJIL* (1990) 4–32.

[92] That Art. 38 is hardly the whole story can even be seen from the practice of the ICJ, whose jurisdiction Art. 38 in fact regulates. A prominent example is the binding effect of unilateral declarations, see *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports (1974) 253 at 267 (para. 43); *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, ICJ Reports (1974) 475 at 472 (para. 46).

[93] Weil, n. 30. [94] Foucault, n. 78 at 90.

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normativity, that do not fit sources doctrine and that all the same do matter.[95]

What can be witnessed on the international plane at the moment is indeed an increasing dissonance between acts that generate legal normativity and acts that traditionally qualify as a source of law.[96] Drawing a compelling parallel to Foucault's study of governmentality, Matthias Goldmann argues that the exercise of international public authority has undergone a process of transformation that legal scholarship still struggles to conceptualise adequately. On his account the difficulty stems largely from continuing to try to channel all legal normativity through the bottleneck of sources and, in tandem, from continuing to adhere to a binary concept of law. Such a narrow conception, he argues, should be abandoned in favour of a continuum of legal normativity that connects to standard instruments in global governance and that choses the concept of public authority, rather than law, as the focal point for considering what matters.[97]

4 Prognosis: the travails of international legal positivism

What happens to (international) legal positivism's main concerns against the background of post-modern perspectives? How can international law be tied to human action and uphold its claim to autonomy in relation to other kinds of normative orders? Those concerns, to be sure, continue to be salient ones. As Brandom puts it:

> Commitments and responsibilities are seen as coming into a disenchanted natural world hitherto void of them, as products of human attitudes of acknowledging, endorsing, undertaking, or attributing them . . . [R]ules get their normative force, come to govern our doings, only in virtue of our own attitudes.[98]

Legal positivism pursues its main concerns through claims about the creation of law and its interpretation. It presents both as a formal,

[95] Armin von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010); Nico Krisch, 'Global Governance as Public Authority: An Introduction' 10 *International Journal of Constitutional Law* (2012) 976–987; Neil Walker, 'Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms' 3 *Transnational Legal Theory* (2012) 61–85.

[96] Venzke, n. 38 at 223–245; see further David Kennedy, 'The Mystery of Global Governance' 1 *Ohio Northern University Law Review* (2008) 827–860.

[97] Goldmann, 'Head of the King', n. 28. [98] Brandom, n. 56 at 170–171.

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rule-guided activity. In its orthodoxy, I have argued, ILP has furthermore relied above all on three specific precepts: the externalisation of meaning, the role of states as foundational subjects, and the small space for politics. Performativity unsettles the first precept and undercuts a distinction between making law by way of sources and finding it at a later stage. Second, post-modern views deconstruct subjectivity to unveil conflicting diversity underneath masquerading unity. The notion of governmentality, finally, highlights transformations in the way in which power is exercised at the international level. It destabilises the traditionally narrow boundaries of the political space. How do these challenges bear on the possibilities of a positivist account of international law?

The following chapters in the present volume, even if they might not in detail share my description of the travails, respond to that question. Other scholars have certainly done so as well.[99] In these prognostic paragraphs, I only wish to convey two arguments about what follows in my outlook for the future programme of positivist international legal thinking. The first pertains to sources doctrine and the other to interpretation.

4.1 The fate of the sources doctrine

It is necessary to free thinking about law-making in terms of sources from its metaphorically hazy overtones. Hans Kelsen has already done so in his writings when he offers the appealing view that sources are simply norms that authorise actors to create other norms. They empower actors to make law on the conditions and within the confines that they spell out.[100] Such authorising norms provide the basis of validity for the norms created according to their instructions. They also separate law from non-law. A norm only belongs to the law – is a *legal* norm – when it is based on another norm that vouches for its validity.[101] In short, according to Kelsenian positivism, it is possible to tell whether a norm is a valid legal

[99] Within the context of international law, see among others Beckett, n. 73; Fastenrath, n. 26.

[100] Hans Kelsen, *Principles of International Law* (Rinehart 1952) 303; Adolf Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaus' in Alfred Verdross (ed.), *Gesellschaft, Staat und Recht: Festschrift Hans Kelsen zum 50. Geburtstag gewidmet* (Springer 1931) 252–294; Bettina Stoitzner, 'Der Stufenbau der Rechtsordnung' in Stanley L. Paulson, Robert Walter (eds), *Untersuchungen zur Reinen Rechtslehre* (Manz 1986) 51–90; Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (Routledge 2011) 197–199.

[101] The 'first' norm, the *Grundnorm*, can therefore only be presumed, according to Kelsen.

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norm – and this is a core proposition of legal positivism across the board – by investigating its formal pedigree. In a similar fashion, Herbert Hart understands sources as rules of recognition, that is, as rules identifying the practice that creates the law and that distinguish law from other things.[102] Both Kelsen and Hart maintain that law-making is a matter of legal sources alone in a way that embraces much more dynamism and that is not equally subject to post-modern critiques.

Herbert Hart has rescued, with some inspiration from Wittgenstein, the thesis that law is created through formal sources from the whirl of the linguistic turn. The sources thesis, Jean d'Aspremont argues, can be rooted in the social thesis, which means that in order to know what counts as a source of law, we need to look at the social practice of official law-applying authorities.[103] For Hart, writing with the British legal system in mind, those 'law officials' were judges. For the international context, the spectrum of law-applying authorities would most likely be wider.[104] Either way, looking at the practice of 'law officials' responds to the paradox of rule-following that also befalls sources doctrine, which, after all, spells out another kind of rules, 'rules of recognition': how is it possible to follow/apply a rule if following/applying that rule makes that rule?

I have argued in Section 2.1 that an answer threatens to be trapped in an infinite regress. When rules do not have a meaning other than that attributed to them by their use, then the best that can be done is to observe and find rules that describe the use of an expression. In attempting to find the meaning of a rule, it is necessary to find the rule that explains the use of that rule, and so on.[105] In response, only practice

[102] HLA Hart, *The Concept of Law* (Clarendon Press 1961) 92; d'Aspremont, Chapter 5.

[103] D'Aspremont, n. 15.

[104] D'Aspremont, n. 15 at 203, with reference to Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 142.

[105] Wittgenstein, n. 35 at para. 43. Kant's work already offers an early account of infinite regress when it comes to applying a general norm to concrete facts. See Immanuel Kant, *Critique of Pure Reason* (Paul Guyer, Allen W. Wood (trs), Cambridge University Press 1998) 268 ('Now if [general logic] wanted to show generally how one ought to subsume under . . . rules, i.e., distinguish whether something stands under them or not, this could not happen except once again through a rule. But just because this is a rule, it would demand another instruction for the power of judgment, and so it becomes clear that . . . the power of judgment is a special talent that cannot be taught but only practiced.'). For a discussion of different strands pertaining to the issue of rule-following, see Dennis M. Patterson, 'Law's Pragmatism: Law as Practice and Narrative' 76 *Virginia Law Review* (1990) 937–996.

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can help.[106] For Wittgenstein, practice is akin to habit or custom. It is a cultural phenomenon of almost natural quality. Actors acquire the ability to follow a rule in processes of socialisation, of training and teaching.[107] An actor must have learned in practice what a rule means. She must have internalised the practice so as not to be in doubt about its meaning: 'I obey the rule blindly', Wittgenstein writes.[108]

Hart's social thesis vindicates the sources thesis by looking at the practice of law-applying authorities. This might hold some sway for some domestic contexts where the 'law officials' whose practice matters form a close community of members that have undergone similar drilling exercises. Placing emphasis on the practice thesis to vindicate the sources thesis might run into more profound difficulties on the fragmented international level.[109] To be clear, the sources do not hold the parts together, but it is precisely the parts that are supposed to say what the sources are. What is more, among the dissonant and fragmented voices of international law, it would be difficult to see not only whose claims matter and should count, but also what it is that law-applying authorities are saying. Such a look on practice seems to require *normative* re-construction. The history of ILP has testified to its strong political-philosophy underpinnings that used to point towards state consent as precisely such a vantage point. This now also needs updating.

In any event, under the conditions of the linguistic turn, it is no longer possible to claim that law-making is a matter of sources alone. Conversely, it is simply unconvincing to term everything that matters legally a source of law (a distinction between 'formal' and 'material' sources does not help either). That would spell apology. Sources are part of a normative reconstruction of legal practice. In the meantime, it might be more promising

[106] Wittgenstein, n. 35 at para. 202; cf. Charles Taylor, 'To Follow a Rule . . . ' in Craig Calhoun, Edward LiPuma, Moishe Postone (eds), *Bourdieu: Critical Perspectives* (University of Chicago Press 1993) 45–60; Brian Bix, *Law, Language and Legal Determinacy* (Clarendon Press 1993) 38–45.

[107] Wittgenstein, n. 35 at para. 206–208. Cf. Martti Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' 1 *European Journal of Legal Studies* (2007) 1–18 at 15–16 ('[legal training] would have law as a mindset with which the law-applier approaches the task of judgment within the narrow space between fixed textual understandings (positivism) on the one hand, and predetermined functional objectives (naturalism) on the other, without endorsing the proposition that the decisions emerge from a "legal nothing" (decisionism). I think about this in terms of the spirit of the legal profession, and the aim of legal training.').

[108] Wittgenstein, n. 35 at para. 219.

[109] Against those difficulties stands the plea of a 'communitarian semantics', see d'Aspremont, n. 15 at 213–15.

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to react to transformations of governmentality by focusing on the exercise of public authority rather than the concept of law and its sources in an effort to rectify the dissonance between what matters and what comes within the purview of formal international law-making.[110]

What could possibly be a vantage point for normative reconstruction? Deconstructing the subject and transformations of governmentality has profoundly shaken ILP's orthodox political philosophy. The challenge is not only that semantic change distances the law from its presumed foundation, but that this foundation itself falls apart. Deconstruction strikes at both the state and the individual as legitimating subjects. As regards the state as an aggregate actor, further normative inspiration may be sought from considering which of its particular institutions are likely to express 'good' legal claims. The benchmarks could vary from how prone an institution is to interest capture or to what extent it realises inclusive decision-making. The deconstruction of the individual would strike a more fatal blow to almost all kinds of legitimacy considerations. What remains in most post-modern writings is the struggle against power to liberate (parts of) any subject. It seems that ultimately the main critique *against* some overreaching post-modern arguments has some bite: they cannot do without subjectivity.[111]

4.2 The fate of interpretation

The second main concluding point, which pertains to interpretation, is much more simple. ILP can live, flourish and maintain its quest for the autonomy of international law without postulating the determinacy of legal concepts. Hans Kelsen already went a long way in this regard when he powerfully critiqued orthodox judicial methodology for wanting to make believe that the act of interpretation is nothing but an act of understanding and clarification. The general and abstract norm, he argued, cannot serve as a basis for recognising what the concrete norm in the individual case must be. The norm for any specific case (the *Fallnorm*) cannot be discovered, but only created.[112] Applying a norm creates a new

[110] Goldmann, 'Head of the King', n. 28.

[111] Jürgen Habermas, *Der Philosophische Diskurs der Moderne: Zwölf Vorlesungen* (Suhrkamp 1988).

[112] Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (Deuticke 1934) 74, 95.

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norm for which the norm to be applied serves as a basis of validity – or, simply, as a source.[113]

But Kelsen did not consider the impact that applying a norm has on the norm to be applied. That norm remains untouched and unchanged by its application. It exists in the abstract and separately from the concrete operations of the legal system. Such a view was only stringent. Otherwise the chain of legal validity would collapse. If a norm authorises the creation of another norm and vouches for that norm's validity, then it could not be that the latter norm in effect changes the former.[114] Applying the law makes new law, but it does not change the law that already exists. That law could only change by virtue of the higher norm on which it is based (and so on).

The travails of ILP are thus at least twofold when it wants to offer an account of interpretation on the heels of Kelsen. First, it has to let go of any argument suggesting that applying the law is an act of deduction or discovery. Such ideas place too much faith in the capacity of the cognising subject. Legal interpretation can no longer be thought of as an act of cognition. Likewise, it will probably have to develop a more solid argument on how to distinguish, as Hart put it, between core meaning and its penumbra.[115] ILP has to sever all essentialist ties that connect expressions with something outside, behind or beyond language itself. It must let go of any suggestion that there is 'some way of breaking out of language to compare it with something else'.[116] If there is a stable core, it is typically due to the absence of dispute and not the other way round. Convention stabilises the core.

Second, ILP needs to refine how it is possible to distinguish a right from a wrong interpretation *according to the law*. This was Kelsen's quest, precisely not to seek stability or foundation for the practice of the law outside that same practice. Keep the law free from all subjective leanings

[113] Kelsen, n. 112 at 82–83, 95. On this point, Kelsen draws heavily on Adolf Merkl, 'Das Doppelte Rechtsantlitz: Eine Betrachtung aus der Erkenntnistheorie des Rechtes' 47 *Juristische Blätter* (1918) 425–427, 444–447, 463–465.

[114] This is why he had such troubles in coming to terms with wrong but effective decisions. Cf. András Jakab, 'Probleme der Stufenbaulehre: Das Scheitern des Ableitungsgedankens und die Aussichten der Reinen Rechtslehre' 91 *Archiv für Rechts- und Sozialphilosophie* (2005) 333–365.

[115] Hart, n. 1 at 607.

[116] Richard Rorty, 'Introduction: Pragmatism and Philosophy' in Richard Rorty, *The Consequences of Pragmatism: Essays 1972–1980* (University of Minnesota Press 1982) xiii–xlvii at xix; see also Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communitites* (Harvard University Press 1980).

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of morality and politics – keep it *empty*.[117] But how can interpretation be judged against an essentially empty form? The challenge here comes in terms of singularity and temporality. In Lyotard's piercing view, every instant of acting 'formulates the rules that will have been done'. 'Work and text', he writes, 'have the characters of an *event*... they always come too late for their author, or what amounts to the same thing, their being put into work, their realisation (*mise en oeuvre*) always begin too soon. *Post modern* would have to be understood according to the paradox of the future (*post*) anterior (*modo*).'[118] Each interpretative event falls back onto itself, a singular event in an ever-moving present.

ILP will have to develop an account of how to speak of correct interpretations according to the law without reaching out to false beliefs about the ability of interpreters to deduce true meanings from the text, from the context, from the text's true purpose or from the parties' real intentions. The stability of legal interpretation does not flow from any foundation in the law itself. And yet, interpretative communities still have the capacity to scrutinise interpretations and they tie the interpreter to the law. The paradox of judging interpretations against rules that such interpretations themselves produce resolves in practice.[119] In this sense, positivism needs to shift from a vertical understanding of interpretation, i.e. one that is tied to deep-structures underlying the surface of the law, to a horizontal understanding focused on the semantic struggle for the law on the terrain of the law.[120]

It matters what interpreters 'can get away with' within the community of interpreters. The question could thus be rephrased: 'what makes an interpretation acceptable?'[121] On such an account, the struggle for the law is also a political struggle where actors seek to exercise semantic authority by establishing their own statements about the law as reference points for later legal discourse.[122] The answer to the question of what amounts to a right interpretation will have to be gleaned from the interpretative

[117] Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010) 271.

[118] Lyotard, n. 47 at 81; cf. Fleur Johns, Richard Joyce, Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011).

[119] Systems theory has made that argument powerfully for some time, Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004) 125–128.

[120] Ralph Christensen, Hans Kudlich, *Gesetzesbindung: Vom vertikalen zum horizontalen Verständnis* (Duncker & Humblot 2008).

[121] See Fish, n. 116 at 338–355.

[122] Venzke, n. 38 at 62–64 and 221 (on the concept of semantic authority).

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practice itself. Without speculating about the motives or mindsets of any interpreter who makes legal claims, it is safe to assume that they are overall manifold and often of an instrumental kind. Does that threaten the autonomy of the law? It does not seem to do so as long as making legal arguments that testify to the autonomy of the law counts as the main asset contributing to an actor's semantic authority.

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