

## ACADEMIC OPINION

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# Sustainability as a Foundation for the Philosophy of International Law — Reopening Relations among Peoples

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The sources for my talk are twofold. I wrote a paper for the first issue (2007) of the *European Journal of Legal Studies* (a student journal based at the EUI Florence — open access) called: The Yearning for Unity and the Eternal Return of the Tower of Babel (Carty, 2007). More recently I read very closely a work by a French psycho-analyst and political philosopher, Cynthia Fleury “Ci-git l’amer”, published with Gallimard in 2020. This work has an English translation, as “Here Lies Bitterness, Healing from Resentment”, published by Stockwell, 2023 (Fleury, 2020).

“Sustainability” is a concept usually employed in the contexts of either environmental protection or the closely linked issue of economic and social development. In other words, it attached to types of activity and how they can be continued without leading to the exhaustion of the activity. Renewability is the key driving idea. Maybe it represents a desire for infinity and eternity. At the same time activity presupposes

actors. In the international community the primary actors are states, upon whose effective dynamism all activity depends. Individuals and companies are, of course, also significant actors. However, they are still so linked to individual states that the fruitfulness of their activities is bound up with the health of their states. The sustainability of the world community depends, therefore, vitally, upon the capacity of states to generate sustainable relations with one another. It has to be the task of the international lawyer, as an analyst of the legal well-being of the international community, to understand the dynamics of relations among states — in order to differentiate those dynamics which are positive and favor sustainability, and those which are negative and discourage sustainability.

Cynthia Fleury writes (Fleury, 2020, pp. 66–67) that energy directed to improper objects consumes and puts in peril the ecological system of resilience — talking of individuals and communities. One has not an unlimited psychic energy and to invest it in the world outside oneself, it is essential to avoid the gradual death of the libido, which will follow from negative emotions, which she sees as most easily summed up with the idea or concept of resentment. She is writing primarily in the context of colonialism — as a French person — and draws very heavily on the writings and professional medical practice of Franz Fanon, a fellow political philosopher and practicing psycho-analyst active in the 1950s as France's Empire was imploding in great bitterness. Another equally important strand and source of her reflections is the fascism which gripped Europe in the early middle years of the 20th century, its origins and its lasting effects on late modern and late capitalist society as analyzed in the Frankfurt school of Horkheimer and Adorno. The collective psychological distortions caused by fascism world-wide, but especially in the West, is the second major theme of her reflections. Together these two elements, post fascism and post colonialism, are simply exhausting the possibilities of creative psychological energy in moods of depression, resentment and, above all, collective paranoia in international relations. They threaten the possibility of collective economic and social, as well as physical environmental growth. Fanon and Fleury, who may be described as a disciple of the former, offer a way out into the open air, the open skies, and above all, the open seas.

The title of her book is a play on the French language *Amer* (bitterness) and *Mer* (the sea). The cover of the French edition is a painting of Gustav Klimt “*La Mort et La Vie*.” The English language edition has a photograph of quite a stormy sea, covered over with menacing clouds.

The really difficult and lifelong task of myself as an international lawyer has been to provide for an intellectual framework in which the international lawyer is permitted, or indeed able, to intervene professionally in the dramatic world of Fleury, Fanon, Horkheimer and Adorno. This is where I revert to “*The Yearning for Unity and the Eternal Return of the Tower of Babel*.” The image of international law which is virtually absolutely dominant is pure and formal — following in the footsteps of the Vienna School of international Law, of Hans Kelsen and Josef Kunz. The world is made up of States as corporations. That is, an international legal order grants the competence to act, very much as companies in commercial transactions, to entities which have certain objective characteristics, territory, population and government. The legal order recognizes such entities as having the capacity to bind themselves legally to one another by means of treaties or general customary law — a somehow collective binding acquiescence in particular patterns of behavior. The lawyer, as a purely technical formalist only comes into action as the person who identifies if and when particular states have registered their consent to additional legal obligations.

Rules apply equally and impersonally, to all states which have accepted them. The UN Charter may serve as a fundamental basis for the building of further binding rules. It assumes that all of the entities which are members of the UN enjoy the guarantees of Art. 1 and 2 of the Charter, impersonally and equally. Effectively, this means international lawyers work with signed and authenticated documents. They analyze the meaning of what has been agreed. Beyond this they have no function. Above all, they cannot really give a professional judgement as to whether any particular legal document furthers or does not further sustainability. That would have to be a task assigned to other professionals. Whether an economic or social or energy driven environmental activity is sustainable, only the relevant experts can assess. The lawyers are allowed to affirm the extent of what commitments have been undertaken. They must additionally affirm that the entities making these commitments have

acted within the authority of the entities/states. It might be unkindly remarked that all of these lawyerly activities will soon be within the remit or competence of artificial intelligence.

What will now be attempted is a revolutionary rethinking of the intellectual tasks of international lawyers, largely through a historical exploration of the doctrinal roots of our intellectual tools. The issue of formalism is tied to the idea of international legal order as a rules-based order. States make agreements with one another designated by their law creating wills coming together. All legislation has its roots in the form of contractual agreement. This is actually a way of thinking which goes back to the idea of the original social contract of the Englishmen Thomas Hobbes and John Locke. What is now long forgotten is that such an idea of law replaced the classical Greek (Plato and Aristotle) and Christian concept that Law represented good relations among morally just and fair people. Both Francisco Vitoria and Hugo Grotius still held to the belief that a good society depended upon the just behavior of “well-ordered and reasonable people.” The Prologue to Grotius’s foundational text for International Law, “The Law of War and Peace,” was a debate between Socrates and the Cynics about whether society was possible because of the reasonable nature of people, or whether people were “wolves” to one another and could not live in a harmonious social world.

The social contract, the foundation of what became the liberal, democratic idea of law is based upon the idea that human beings moved or transformed from a wild state of nature to a civil society based upon Law by virtue of an enforceable original contract, which grounds a rule making institution that makes rules for the future, which are binding on all members of the said constituted civil society. What this essentially mythological theory of the origin of Law leaves ambiguous is whether and how far institutions exist which actually rest upon the consent of people, and, indeed, whether people have ever constituted one or more institutions at an international level which encompass the whole of international society.

It has been left to an Anglo-Irish moral theologian, Oliver O’Donovan, one time professor in Christ Church Oxford — the very heart of the Anglo-American world — to expose the nihilistic roots of the liberal-democratic idea of a rules-based world order — nihilistic because it has

neglected to integrate any idea of concrete, historical identity of peoples into its idea of Law. Societies are made up of people, living in particular historical contexts, with, above all, a sense of meaning, purpose and goal to their lives, which is the basis of the possibility of their cooperation with one another. People can live together if they have a common sense of the purposes of their community together. Most important of all, points out O'Donovan, the world does not consist of one people, but of very many different peoples. Each people has a separate historical identity, meaning an experience over time of their living together in particular communities achieving more or less completely the aims that the communities evolve for themselves. International law is therefore, above all, a matter of mutual recognition of relationships among the different peoples. So international law consists of interlocking patterns of mutual recognition among a variety of peoples who succeed — more or less — to achieve convergences among their very varied senses of the meaning, purpose and goals of their individual societies.

O'Donovan draws a very radical conclusion from his perspective that the liberal democratic view of world legal order is built in the absence of any recognition of the differing identities of a variety of peoples. This part of his theory may well appear far fetched and speculative. It is perhaps a matter of reasoning back from a reality observed during the Cold War — before 1989 — that the absence of a capacity to see the necessity of a Law based upon relationships rooted in diversity leads inexorably to a violent, hegemonic drive to compel the whole of world society into a single, homogenous model of society, which is actually a projection of the actual historical circumstances out of which they — original Anglo-American societies — have themselves come — an historical origin of which they are themselves unconscious. It is the lack of self-awareness which permeates these societies — not merely Anglo-American but also other liberal democratic societies which imitate and follow them — that transforms their consciousness of the resistance of other societies to themselves into a paranoia. They then engage in foreign interventions to assure the expansion of their own model of society at a global level. O'Donovan concludes his argument with the assertion that any model of world order rooted in the liberal democratic

model will be hegemonic, violent and provoke great frustration on the part of other peoples.

At the start of the cold war in 1952 another religious thinker, Martin Buber, gave a compatible, if not identical, interpretation of the pathology of the Cold War, in more psychological terms, which provide a more accessible bridge between the thinking of O'Donovan and Fleury. In a short lecture which he gave in New York in 1952, called "The Existential Mistrust between Man and Man", Buber describes how the world is divided into two camps (or Lager) in which each sees the other as bodyful (leibhafte) false and itself as bodyful true. Men no longer content themselves, as in earlier historical periods, with holding their own views for the lonely truth and the other's views for false. He goes further and is convinced that on his side there is the justly right and on the other side there is the unjustly wrong, that it is he who can see and realize what it is right to do, and the other side masks his greedy self-interest in what he says is right. In other words, he sees his own thinking as true ideas and the thinking of the other as ideology.

The other side will explain how he has come to know something, but our side will not take him seriously. We will always read into the other side, an unconscious motive which is driving him to say what he says, in other words a complex. I do not now ask myself about the truth of what the other says, but I ask what is the interest of the group out of which the other person comes, to what group he belongs. However objectively his view may appear to be expressed, his idea can only appear as ideology. Therefore, the main task which I have in relation to these other people is to use individual psychology or social psychology to expose and see through him. These campaigns of exposure, of "seeing through the other" are now the principal Sport of relations among human being, where those practicing this "Sport" have no idea where it is leading them. That from one camp to the other no real conversation can be had, is the strongest symptom of the sickness of men today. This existential mistrust is this sickness.

Fleury applies her own mixture of psychoanalysis and political philosophy primarily in the context of the origins of fascism and colonialism. However, it has to be stressed that her main concern is with the possibility of a failed reaction to these very negative experiences,

which thereby prolong the agony. As she says at the beginning her concern is that her “patient” should avoid a response to fascism or colonialism, which only sets up a chain reaction, in which the patient/victim continues to be trapped in the same circles of negativity. This is precisely where it can be said that she is concerned with resilience, that is with the reestablishment of sustainable persons, the agents which are necessary if one is to have sustainable actions.

Here Fleury connects with one of the fundamental alternatives to liberal democratic, universalist rules-based order, which arose in Europe after the French Revolution and the forceful spread of the French version of the liberal contract (from Jean Jacques Rousseau) into central and eastern Europe. Through Herder and more especially Hegel, the concept of collective, as well as individual identity, was rediscovered in terms of the struggle for recognition, the struggle of one person or group to have his historically distinctive identity respected by the other. This is in fact simply the origin of modern nationalism in its response to the hegemonic ambitions of French universalism. The battle is to compel a respect which will not, in Hegel’s paradigm, be accorded in the absence of a will to fight to the death.

These struggles are certainly not always successfully concluded and here is where Fleury understands a form of fascism to arise. It is based upon a sense of resentment at a believed continued oppression which the oppressed feel they can only overcome through revenge, through inflicting the same suffering on the supposed oppressor. Here is where Fleury and Buber come close together. Her anxiety is that judgement about the nature of the oppression can be purely subjective, constructive and therefore not objectively capable of resolution. She sees the origin of fascism in the collective desire to inflict revenge on a person or group who sometimes is, but often is not, the originator of the oppression.

This paradigm transfers easily to the post-colonial dilemmas of former imperial possessions. And here is where Fleury draws heavily on Franz Fanon, so famous for his fierce tract “The Wretched of the Earth” (1961). Fanon applied his responses in his therapeutic work with individual patients. One fundamental principle which he applied was that, contrary to the abstract principle of the rule of law applying equally to everyone, in fact every patient is different and one has to

find a way through its own particular struggle for recognition. One of the many difficulties of the rules-based concept of the international order is that its concept of the state is abstract. Especially since World War II, mainstream international lawyers in the West at least, are not prepared to find any place for the concept of the nation within the state. The former concept is regarded as volatile and ephemeral and so to be avoided by lawyers who should concern themselves only with what has been agreed among states. This immediately and completely disqualifies them from attending to the very tensions among states which are the threat to world peace. Of course, it also disempowers them from reflecting professionally on any issue connected with the self-determination of peoples or the rights of minorities within states. Fanon realizes, as does Fleury, that every conflict giving rise to a desire for revenge, is very concrete and particular. No two cases of conflict are the same. The way to healing, resilience and sustainability will always be different for different individuals and peoples.

So, what are their ways, of Fanon and Fleury, to resilience? The medical approach is not the juridical. They do not deny that injustice and oppression can sometimes only be overcome with a forceful response. However, resilience or sustainability depends upon the creation of alternative agendas. Fleury uses three French words which sound almost the same but have radically different meanings, as metaphors and psychological images which are intended to aid in psychological healing. These are again *Amer* (bitterness) *Mère* (mother) and *Mer* (the sea). These are supposed to designate three images. The first is one of fixation on injury. It is not disputed that the injury is real, but Fleury suggests that the route to recovery from it is separation. This is where the place of the mother appears. The work of separation — she calls individuation — is always primarily the work of the individual herself, however much helped by the doctor. Similarly, every community ravaged by colonialism or other oppression has to find its own way to recover its wholeness. Anyway, the idea of uncoupling from the object of oppression — rather than returning to it in order to annihilate it — is central. The final stage is the most metaphysical. It calls for a complete transcendence from the previous negative experience. The metaphor of the Sea symbolizes the infinity of the wider world, of all the possibilities



of being which are to be found — if one returns again to O'Donovan — in recovering the past of one's own collective identity and reliving it in the context of the present and its "becoming" Future. The movement, the flow the boundlessness of the Sea expresses the potential for discovering of new goals and meanings, liberated from an alien intrusion which is distorting these goals. Essentially this means an at least temporary uncoupling from the liberal democratic rules based international order.

Of course, the medical approach does resemble a fundamental feature of the UN Charter, in so far as the primary emphasis is on a peaceful resolution of conflict, except in so far as self-defense is absolutely unavoidable as an option. However, the medical approach applies not only to the victims of colonialism and imperialism but also to the perpetrators, those least likely to feel the need for assistance. There has to be healing on both sides if there is to be a global recoupling. This is a very large subject, but two points which are related can be mentioned. It is noticed, also by Fleury — it concerns her extensive review of Horkheimer and Adorno — that the radical individualism provoked by late capitalism, in the cultural Marxist view of the Frankfurt school has fragmented so-called liberal democratic societies into a role of narcissist consumerism, which makes them incessant rivals of one another, and very little able to form any community of purpose. In other words, to borrow the sociological terminology of the late 19th century Germany, *Gesellschaft* has completely absorbed *Gemeinschaft*. Fleury herself draws on another French thinker, Rene Girard, for the warning that this mimic rivalry is inevitably violent in its final outcome. Horkheimer and Adorno do not offer a solution in their portrayal of the cultural hegemony of capitalism. However, Fleury — and here she draws also on Fanon and post-colonial cultural theory — does recommend as urgent and central to her project, the weaning away of the "addicted consumer" from the homogenizing effects of late capitalist cultural imperialism, through an essential therapeutic exercise in the recovery of individualism, a true individualism of personal freedom. That would be a first stage towards the recreation of *Gemeinschaft* among Western nations.

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