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# Tom Franck's Fairness

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The ambit of this paper is both modest and circumscribed. Circumscribed in that its function is to provide an overview of the structural qualities of Tom Franck's fairness thesis expounded, principally, in *Fairness in International Law and Institutions* (1995). Modest in that its main aim is exposition, whilst giving some indication of the intellectual tradition upon which Franck builds. Critical analysis, particularly of specific examples or illustrations Franck employs, is a secondary consideration, given the other contributions to this symposium.

## 1 Tom Franck's Fairness Thesis — An Exposition

Franck starts from the premise that public international law is now a mature legal system that has entered what he terms 'its post-ontological era'.<sup>1</sup> This means that international lawyers need no longer argue about whether international law is or is not 'really' law.<sup>2</sup> The existence and reality of the discipline is now established, but:

With new opportunities come new challenges! The questions to which the international lawyer must now be prepared to respond, in this post-ontological era, are different from the traditional inquiry: whether international law is law. Instead, we are now asked: is international law effective? Is it enforceable? Is it understood? And, the most important question: Is international law fair?<sup>3</sup>

Franck sees this as a development starting in the late 20th century, arising from the growth in the number and functions of international organizations and from

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<sup>1</sup> T. M. Franck, *Fairness in International Law and Institutions* (1995), at 6 [hereinafter *Fairness*].

<sup>2</sup> This is indeed the tenor of Franck's earlier monograph *The Power of Legitimacy among Nations* (1990) [hereinafter *Legitimacy*], see esp. Ch. 2.

<sup>3</sup> *Fairness*, at 6.

developments in science and technology. As a consequence, new areas of potential inter-state conflict have emerged that require regulation.<sup>4</sup>

For Franck fairness, or at least fairness insofar as it is relevant to public international law, has two vectors; the requirement of legitimacy and that of distributive justice. Legitimacy is fundamentally a question of procedure — the requirement that proper mechanisms are in place to ensure the creation, interpretation and application of the law. Distributive justice is concerned, on the other hand, with the substantive worth of rules: is an appropriate or proper allocation of burdens and benefits secured throughout society by the rules themselves? Franck sees these two factors as having different functions — legitimacy is concerned with order while justice deals with change. The two are independent in their operation: claims and arguments in favour of order within the international legal system can conflict with claims and arguments in favour of change. There is always the potential for conflict between these two vectors as they encapsulate different aspects of fairness: legitimacy examines process fairness and distributive justice moral fairness.<sup>5</sup> A claim advanced from one of these perspectives can conflict with a claim advanced from another — ‘Fairness is the rubric under which this tension is discursively managed’.<sup>6</sup> An example offered by Franck is that of the tension between *uti possidetis* and self-determination in determining title to territory.<sup>7</sup>

Fairness discourse, for Franck, is accordingly the method by which the tension between order and change can be negotiated societally, by taking account of both factors:

fairness is relative and subjective ... a human, subjective, contingent quality which merely captures in one word a process of discourse, reasoning, and negotiation leading, if successful, to an agreed formula located at a conceptual intersection between various plausible formulas for allocation.<sup>8</sup>

A fair legal system must manage both these elements of order and change, of legitimacy and distributive justice, because people judge the validity of a legal system in terms of its consequences. As Franck says:

[People] expect that decisions about distributive and other entitlements will be made by those duly authorised, in accordance with procedures which protect against corrupt, arbitrary, or idiosyncratic decision-making or decision-executing. The fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants’ expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.<sup>9</sup>

<sup>4</sup> *Ibid*: a similar sociological claim lies at the heart of Franck’s latest monograph, *The Empowered Self: Law and Society in the Age of Individualism* (1999) [hereinafter *The Empowered Self*].

<sup>5</sup> See *Fairness*, at 22–24.

<sup>6</sup> *Ibid*, at 7.

<sup>7</sup> See *ibid*, at 146 *et seq*, and also Stephen Tierney’s contribution to this symposium, 13 *EJIL* (2002) 941.

<sup>8</sup> *Fairness*, at 14.

<sup>9</sup> *Ibid*, at 7.

So both substance and procedure are equally important, but at this point it should be stressed that Franck sees the process value of legitimacy as encompassing both the creation and application of rules. These transactions must be both principled and not arbitrary. This is one of the core propositions of Franck's theory.

Apart from the relative maturity of the legal system, Franck argues that there are two preconditions that must be present before fairness discourse can take place at all. He claims that both currently exist in international relations. These preconditions are that there must be a moderate scarcity of the good(s) to be distributed, and that distributive fairness can only be discussed when there is a sense of community characterizing the system.<sup>10</sup>

By moderate scarcity Franck means that the good(s) to be distributed must not be in such an abundant supply that no contentious questions regarding their allocation can arise. Fairness is only an issue when there is not enough of a given good to satisfy everyone completely, and that good must be shared out:

When everyone can expect to have a share, but no one can expect to have all that is desired, the critical moment for considerations of fairness is met. It is only then that modes of allocation do not contend in the arena of the zero-sum game, one that pits the survival of each against the survival of all.<sup>11</sup>

On the other hand, allocation can only happen within a community: there must be some subsisting social structure within which distribution makes sense as this cannot happen in a social vacuum. By community, Franck means a social system that assumes some continuity and structured relationship between the actors which is based on shared values and reciprocity — on the implicit promise to treat like as like. Further:

The element of reciprocity which underpins the emergence of community is not solely concerned with rights and rules, it is also about shared moral imperatives and values. To appreciate this aspect of the reciprocal nature of a community, it is necessary to understand that its members share a system not only of legal but also of moral obligations. The laws in a community thus evince not only the generally held belief that each must do what he or she is legally required to do, but also that each will discharge towards all others those obligations arising from the shared moral sense.<sup>12</sup>

Franck is of the opinion that interdependence between actors on the international plane has now reached a degree that one can argue that there is at least an emerging sense of international community in this material, as opposed to a rhetorical, sense.<sup>13</sup> This he explains on the basis of social contract theory:

It is self-evident that contractarian theory readily explains the origins, if not the modern nature, of international law and organization.<sup>14</sup>

<sup>10</sup> See *ibid.*, at 9 *et seq.*

<sup>11</sup> *Ibid.*, at 10.

<sup>12</sup> *Ibid.*, at 10–11.

<sup>13</sup> See *ibid.*, at 11–13, and also Dino Kritsiotis' contribution to this symposium, 13 *EJIL* (2002) 961.

<sup>14</sup> *Fairness*, at 28.

While this claim undoubtedly has a degree of plausibility, it is worth considering whether the growth in both the number and functions of international organizations has undermined the pertinence of Franck's contractarian assumption, especially as he identifies 'this exponential expansion'<sup>15</sup> as one of the factors that has brought the question of the fairness of international law to the fore.

Franck further argues that fairness is a contingent social structure as it is historically and culturally grounded — 'Fairness is not "out there" waiting to be discovered, it is a product of social context and history'<sup>16</sup> — but there are parameters which must exist for fairness dialogue to be viable. Franck terms these 'the gatekeepers of fairness discourse'<sup>17</sup> and identifies them as:

1. *no trumping*: there can be no non-negotiable claims advanced by the participants in fairness discourse;<sup>18</sup> and

2. *maximin*: inequalities are only justifiable if inequality has advantages not only for those who benefit from that inequality but for everyone else.<sup>19</sup>

The function of these gatekeeper principles is, at one level, to act as evidence of the existence of a community based on reciprocity, but they also provide a shared core of assumptions that 'circumscribes the ambit of otherwise unlimited choice':

If there is no such core, if there is no agreement on any basic assumptions to govern discourse, if nothing is excluded, nothing 'off the table' by reference to shared basic assumptions, then there can be little hope of real agreement.<sup>20</sup>

The gatekeeper principles thus delineate the broad contours of the substantive (distributive justice) aspects of fairness. The first entails that there are no foundational non-negotiable values that act as 'automatic trumping entitlements'<sup>21</sup> that would make fairness discourse otiose. The second principle, the maximin principle, Franck avowedly borrows from John Rawls and, at root, amounts to the claim that an 'unequal distribution [of goods] is justifiable only if it narrows, or does not widen, the existing inequality of persons, and/or states' entitlements'.<sup>22</sup> While ruling out some methods of distributing goods, the maximin principle itself does not determine a given outcome but rather a range of acceptable outcomes, leaving the ultimate decision for negotiation between the participants.

Franck examines specific examples of substantive justice in international law, initially considering its use of equity<sup>23</sup> — 'One (at present the most highly developed)

<sup>15</sup> *Ibid.*, at 6.

<sup>16</sup> *Ibid.*, at 14.

<sup>17</sup> See *ibid.*, at 14 *et seq.* and, for a searching critique of this aspect of Franck's thesis, John Tasioulas' contribution to this symposium, 13 *EJIL* (2002) 993.

<sup>18</sup> See *Fairness*, at 16–18.

<sup>19</sup> See *ibid.*, at 18–22.

<sup>20</sup> *Ibid.*, at 15.

<sup>21</sup> *Ibid.*, at 16.

<sup>22</sup> *Ibid.*, at 18.

<sup>23</sup> See *ibid.*, at 47 *et seq.*

approach to an inquiry into the justice of international law is to study the emerging role of *equity* in the jurisprudence of international tribunals'.<sup>24</sup> Analytically, Franck identifies three distinct types of equity,<sup>25</sup> the first of which is *corrective equity*,<sup>26</sup> employed to ameliorate the unfair outcome of rule application. As an illustration, Franck gives an account of the judicial manipulation of the equidistance-special circumstances delimitation rule embodied in Article 6(2) of the 1958 Geneva Continental Shelf Convention.<sup>27</sup>

His second category is termed *broadly conceived equity*,<sup>28</sup> where the norm expressly refers to equity as the governing standard, that is, 'equity is itself a rule of law':

it is not an exception mitigating the unfair application of a legitimate law, but is itself the dominant applicable rule for the accomplishment of resource allocation. This model of allocation affords the tribunal more discretion than does corrective equity for ensuring that considerations of fairness determine the outcome. Consequently, decisions according to this model of equity are apt to be more openly distributive than those made according to corrective equity.<sup>29</sup>

To illustrate the incorporation of broadly conceived equity into the corpus of international law, Franck proffers the examples of the delimitation of continental shelf (and exclusive economic zone) areas following the Third UN Conference on the Law of the Sea and the adoption of the 1982 Law of the Sea Convention<sup>30</sup> and, more briefly, the standard for the allocation of water resources contained in the 1987 International Law Commission draft articles on non-navigational uses of watercourses.<sup>31</sup> This standard is now embodied in Article 5(1) of the 1997 Convention on the Non-Navigational Uses of International Watercourses.<sup>32</sup> Franck sees the negotiation of instruments like these that aim at the distribution of resources as 'reveal[ing] the search for a consensus on the admix of legitimacy and distributive justice to be applied ... involv[ing] a discursive process in which adversary interests needed to be reconciled'.<sup>33</sup>

<sup>24</sup> *Ibid.*, at 47 (emphasis in original).

<sup>25</sup> *Ibid.*, at 57.

<sup>26</sup> *Ibid.*, at 58 *et seq.*

<sup>27</sup> *Ibid.*, at 61–65; he also examines preferential trading arrangements for developing states under this rubric, see at 58 *et seq.* and also 413 *et seq.*

<sup>28</sup> *Ibid.*, at 65 *et seq.*

<sup>29</sup> *Ibid.*, at 65–66.

<sup>30</sup> See Articles 83(1) (regarding the continental shelf) and 74(1) (regarding the exclusive economic zone), both of which provide that 'delimitation ... shall be effected by agreement on the basis of international law ... in order to achieve an equitable solution': and also *Fairness*, at 66–74.

<sup>31</sup> *Fairness*, at 74–75.

<sup>32</sup> This provides:

Watercourse States shall in their respective territories utilise an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

<sup>33</sup> *Fairness*, at 67.

His final category is *common heritage equity*<sup>34</sup> which differs from the other two in that it is premised upon a different destination of benefits. While corrective and broadly conceived equity assume that the resources to be allocated belong to states, common heritage equity ‘assumes instead that certain resources are the patrimony of all humanity’.<sup>35</sup> This presupposition entails certain consequences, such as shared management and benefits. Franck outlines the broad contours of this type of equity with reference to deep seabed mining and the exploitation of lunar and Antarctic resources.<sup>36</sup>

For present purposes, the category of common heritage equity is relatively uninteresting. The other two, however, exemplify Franck’s normative dichotomy between idiot and sophist rules that is crucial to fairness discourse and its management of the tension between legitimacy and justice, between order and change. Equity, whether employed to create an exception where the strict application of a rule would otherwise be deemed unfair, or used to apply the notion of distributive justice *per se* to resource allocation, inevitably undercuts a rule’s determinacy, and thus its legitimacy:<sup>37</sup>

Some degree of indeterminacy is inevitable in any body of rules and . . . may even have its uses in promoting agreement and achieving flexibility. But indeterminacy also has its costs, which are paid in the coin of legitimacy. Not only do indeterminate normative standards make it harder to know what is expected . . . but indeterminacy also makes it easier to justify non-compliance. To put it conversely, the more determinate a standard, the more difficult it is to justify non-compliance.<sup>38</sup>

Franck argues, nevertheless, not only that indeterminacy is inevitable but that determinacy itself can lead to unacceptable results — ‘A rule which appears to be perfectly clear *unintentionally* may command what turns out to be an absurdity . . . usually in unforeseen circumstances’.<sup>39</sup> Thus arises a paradox: rule determinacy can undermine legitimacy when it results in perceived injustice. Franck terms these ‘idiot rules’ which:

tend to be unsophisticated in their lack of fine tuning and are then likely to be perceived — at their margins — as unreasonable and illegitimate in their demands. If a patently absurd or unfair result accrues from the only possible application of the evident meaning of a simple rule in circumstances requiring a more calibrated response, then that rule has suffered *reductio ad absurdum*, a condition which even may undermine its legitimacy in circumstances not at its margin.<sup>40</sup>

Sophist rules, in contrast to idiot rules, have a ‘multi-layered complexity’<sup>41</sup> which

<sup>34</sup> *Ibid.*, at 75–79.

<sup>35</sup> *Ibid.*, at 76.

<sup>36</sup> *Ibid.*, at 76–79, and also 393–405.

<sup>37</sup> See *ibid.*, at 79, and also *Legitimacy*, at 52 *et seq.*

<sup>38</sup> *Legitimacy*, at 53–54.

<sup>39</sup> *Ibid.*, at 68 (emphasis in original).

<sup>40</sup> *Ibid.*, at 77.

<sup>41</sup> *Ibid.*, at 75.

give them a degree of elasticity. Franck expressly includes in this category '[n]orms setting out standards of compliance which are measured in complex qualitative terms':<sup>42</sup> axiomatically these include rules employing broadly conceived equity as the governing standard. Sophist rules, however, carry with themselves their own problems:

While an idiot rule more-or-less applies itself, sophist rules usually require an effective, credible, institutionalized, and legitimate interpreter of the rule's meaning in various instances . . . Since they are less obviously clear, sophist rules need more help from legitimate interpreters than do idiot rules . . . In sum, a rule finely calibrated to reflect sophist considerations, embodying a carefully tuned system of regulatory and exculpatory principles, may suffer legitimacy costs due to its very complexity, its elastic texture which invites disputes as to whether the rule is applicable in any particular case.<sup>43</sup>

Sophist rules embodying standards of broadly conceived equity as the governing directive principle 'shift the fairness discourse to include a broad array of socio-economic factors normally associated with the pursuit of distributive justice'. Franck concedes that these factors differ from the regulatory elements embodied in 'more traditional normative rules' but argues that the accumulation of precedents will result in their increased determinacy. This, he counsels, 'may assuage the fear that the pursuit of justice inevitably connotes the surrender of legitimacy'.<sup>44</sup> Nevertheless:

The tendency of qualitative standards and complex sophist rules to create an appearance of indeterminacy can only be rectified by adding a credible interpreter to supply process-determinacy. Ideally, this would suggest a vision of nations solemnly taking their disagreements before the International Court of Justice. In practice, for many reasons, this is not now a realistic scenario.<sup>45</sup>

Franck argues that there must be alternative methods of interpretation, asserting that '[t]he key is institutionalized multilateralization'<sup>46</sup> — that is, the search for consensus on a given interpretation or the particularization of a rule to very specific subjects or circumstances.

Nevertheless, at the core, for law to be fair, the requirements of stability and change, of legitimacy and justice, must be balanced to ensure that the international community does not slip into disorder. As Franck emphasizes:

Fairness is not a fixed destination, it is a journey or process . . . Fairness as a *destination* remains for us always an open question. What matters is the opportunity for discourse: the process and its rules. We assume that fairness incorporates an element of equalization: of life chances and access to goods, a variation on Rawls' maximin principle . . . The issue is not a society's definition of fairness in any particular instance, but rather the openness of the process by which those definitions are reached.<sup>47</sup>

<sup>42</sup> *Ibid.*, at 79.

<sup>43</sup> *Ibid.*, at 81–82 (paragraph breaks suppressed).

<sup>44</sup> *Fairness*, at 75.

<sup>45</sup> *Legitimacy*, at 86–87.

<sup>46</sup> *Ibid.*, at 87.

<sup>47</sup> *Fairness*, at 83 (emphasis in original).

This underlines the importance of legitimacy in the process of the allocation of goods. The legitimacy vector of fairness requires, if scarce resources are to be allocated fairly, the existence of a community that determines and applies rules of allocation to ensure that this is formally fair — ‘in other words . . . a moral community engaged in formulating itself as a “rule community”’. There must be a core of reciprocal rules and an agreed ‘process for making and applying rules and resolving disputes about their meaning’.<sup>48</sup> In sum, there must be rules that legitimize the exercise of authority. Legitimacy is essentially the idea that a rule is fair because it was correctly made, interpreted and applied. Franck claims that there are four indicators of rule legitimacy:<sup>49</sup>

1. rules should be determinate as indeterminacy aids non-compliance through self-serving interpretation. Clearly stated determinate rules make this more difficult but, as noted, idiot rule determinacy can itself undermine that rule’s legitimacy. Instances can arise where a balance must be struck between the value of legitimacy at stake in the strict application of the rule and the substantive justice of doing so. This necessarily entails that ostensibly like cases might be treated unlike through the creation or recognition of an exception to the application of the rule;
2. nevertheless, rules should be coherent in that they should fit together as a system and ‘be applied uniformly in every “similar” or “applicable” instance’.<sup>50</sup> Exceptions to rules must be capable of rational justification. Coherence demands that these must be ‘based on underlying general principles which connect with an ascertainable purpose of the rules and with similar distinctions made throughout the rule system’;<sup>51</sup>
3. symbolic validation of law’s importance in the social order. This reinforces law’s authority by grounding it in the social order: ‘The objective of symbolic validation is to emphasize those cultural-anthropological aspects of rules which, in all societies, tend to give them a *gravitas* not found in *ad hoc* or opportunistic exercises of authority’.<sup>52</sup> Various social indicators — such as ‘[r]itual and pedigree’<sup>53</sup> — can be employed to identify that a norm has been made in accordance with the prescribed rules for law creation within a given society. This requirement meshes with Franck’s final aspect of legitimacy, namely:
4. adherence — ‘the infrastructure of rules about rules’.<sup>54</sup> This requires a clear relationship between a substantive (primary) rule and the underlying (secondary) rules governing its creation, interpretation and application. Primary rules

<sup>48</sup> *Ibid.*, at 12.

<sup>49</sup> See *ibid.*, at 30 *et seq.* and *Legitimacy, passim*.

<sup>50</sup> *Fairness*, at 38.

<sup>51</sup> *Ibid.*, at 41.

<sup>52</sup> *Ibid.*, at 37.

<sup>53</sup> *Ibid.*, at 34.

<sup>54</sup> *Legitimacy*, at 184.



unconnected with secondary rules are simply 'ad hoc reciprocal arrangements'.<sup>55</sup> Apart from this systemic legitimating function, Franck argues that secondary rules 'manifest the normativity of interactions between states'<sup>56</sup> and provide evidence of the existence of a community.

The components of Franck's doctrine of legitimacy project a jurisprudential view firmly anchored in the late twentieth century and expressly influenced by H. L. A. Hart and Ronald Dworkin.<sup>57</sup> The requirements of symbolic validation and adherence in particular indicate that a clear enumeration of the sources of law is a key aspect of legitimacy. Franck argues, moreover, that legitimacy and the consequent compliance pull of rules are stronger if obligation is based on the notion of association rather than contract. In short, the legitimacy of international law is a function of community rather than consent. In particular:

consent is not required or applicable to those rules which tell us about the sources and nature of obligation itself.<sup>58</sup>

Accordingly, *pacta sunt servanda* attaches to agreements by virtue of the parties' association in a community and not by virtue of their consent. This moves Franck beyond his initial contractarian assumption to argue that:

the consent of a member of a community to a particular rule or exercise of authority is not necessary in a strictly contractarian sense but may be assumed, at least in matters pertaining to common governance, as an implied condition of membership of the community.<sup>59</sup>

Nevertheless, Franck's explanation of association in international affairs ultimately rests on social contract theory — 'the social contract is the only associational theory relevant to the inter-state system':

The same social needs which propelled Greek city-states, the people of Prussia, and the inhabitants of the thirteen American colonies to a common association also compels the states of the world at the end of the second millennium. While most of the literature about the social contract addresses the formation of a community by persons, contractarian theory is also readily applicable to, and influential in, the evolution of a community of states.<sup>60</sup>

Franck leaves this aspect of his argument relatively undeveloped, but the classic exposition of social contract theory in international relations, as opposed to domestic association, is Kant's *Perpetual Peace*.<sup>61</sup> Kant presents an intrinsically minimalist theory, arguing that states should incrementally renounce force in their relations with one another, and institute the notion of a 'cosmopolitan right' of universal hospitality, namely:

<sup>55</sup> *Ibid.*, and also *Fairness*, at 41.

<sup>56</sup> *Fairness*, at 42.

<sup>57</sup> See, e.g., *Legitimacy*, at 183 *et seq.*, 201–203; and *Fairness*, at 30 *et seq.*

<sup>58</sup> *Legitimacy*, at 205 (emphasis in original).

<sup>59</sup> *Fairness*, at 29.

<sup>60</sup> *Ibid.*, at 26–27.

<sup>61</sup> *Perpetual Peace: A Philosophical Sketch* (1795); H. B. Nisbet translation used, from Hans Reiss (ed.), *Kant's Political Writings* (1970), at 93 *et seq.* [hereinafter *Perpetual Peace*]. For the historic context of Kant's argument, as well as a basic exegesis, see W. B. Gallie, *Philosophers of Peace and War* (1978), at Ch. 2, and C. F. Murphy Jr., *The Search for World Order: A Study of Thought and Action* (1985), at Ch. 3. The leading

the right of a stranger not to be treated with hostility when he arrives on someone else's territory. He can indeed be turned away, if this can be done without causing his death, but he must not be treated with hostility, so long as he behaves in a peaceable manner in the place he happens to be in.<sup>62</sup>

Kant, however, sees this only as an ultimate end, rather than a necessary condition for the institution of perpetual peace.<sup>63</sup> Kant's view of international organization thus essentially amounts to a non-aggression pact:

Each nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which the rights of each could be secured. This would mean establishing a *federation of peoples*. But a federation of this sort would not be the same thing as an international state.<sup>64</sup>

Moreover, in Kant's scheme, each state should, necessarily, be a republic:

A *republican constitution* . . . is the only constitution which can be derived from the idea of an original contract, upon which all rightful legislation of a people must be founded. Thus as far as right is concerned, republicanism is in itself the original basis of every kind of civil constitution.<sup>65</sup>

Not only has this republican imperative not been achieved, but international organization has moved well beyond the narrow compass of the functions envisaged in *Perpetual Peace*. But if we have moved beyond this minimalist Kantian perception of international relations, is it not also true that we have moved beyond the model of the state on which this world view was based? Moreover, although Kant envisages a 'federation of peoples', this is predicated on inter-state agreement — 'peace can neither be inaugurated nor secured without a general agreement between the nations'<sup>66</sup> — and thus on the assumption that only states are international actors. Two considerations accordingly engage with the underpinning of Franck's social contract foundations — the first is the nature of the contemporary state, and the second the proliferation in the number and function of international organizations, whether governmental or non-governmental.

## 2 The Bicycle's Contribution to Evolution

In comparison to the modern state, that of the eighteenth century was fairly restricted in its functions. Rather than fairness and social contract being the structural concerns

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contemporary 'Kantian' expositor of international law is Fernando Tesón, see his 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992) 53 and *A Philosophy of International Law* (1998).

<sup>62</sup> *Perpetual Peace*, Third Definitive Article, at 105–106.

<sup>63</sup> *Ibid*, at 106–108; and also R. Tuck, *The Rights of War and Peace* (1999), at 220–221.

<sup>64</sup> *Perpetual Peace*, Second Definitive Article, at 102 (emphasis in original); and see Gallie, *supra* note 61, at 25 *et seq*.

<sup>65</sup> *Perpetual Peace*, First Definitive Article, at 99–100 (emphasis in original). This requirement reflects Kant's admiration of the French revolution — see Gallie, *supra* note 61, at 8–9, and Tuck, *supra* note 63, at 221 *et seq*.

<sup>66</sup> *Perpetual Peace*, Second Definitive Article, at 104.

in the changes Franck perceives in modern international order, might not changed expectations of the state in domestic matters be the driving force behind changed expectations of international order? The state in the eighteenth and nineteenth centuries was essentially one of private law:

[Kant's] whole life had been spent in Prussia, an autocratic, militaristic state in which the middle classes enjoyed only a minimum of political rights ... Prussia was only an extreme example of what was basically the common situation of all the dynastic states of eighteenth-century Europe. Even in those which appeared to be the most progressive, war and the continued preparation for war were the main preoccupation of governments, delaying when they did not altogether forbid the prospects of constitutional reform.<sup>67</sup>

In contrast, the principal development in the twentieth century was the expansion of public law in its various guises — 'Kant of course had in mind governments whose tasks ... were easily recognised and relatively fixed, and were indeed minimal in comparison with what almost all people expect from government today'.<sup>68</sup>

The shift in perceptions and expectations this change in function has engendered — in terms of what the state should properly do and provide — might simply have been projected onto international order and generated demands for international fairness. Rather than a changed international order resulting from a recognition of community and a demand for fairness, might this simply not reflect the expectation of domestic regulation and, at least in some cases, the realization that the efficacy of domestic regulation is dependent on the international regulation of a given matter? Franck himself has adverted to this:

[The] emergence of transnational loyalty references is as functionally inevitable today as was the eighteenth-century emergence of liberal states in direct response to the dictates of industrial revolution and competitive overseas expansion. Now, as then, new challenges and new sources of nurture evoke new social and attitudinal formations. In many areas of endeavour — commerce, defence, environmental protection, health, entertainment, education — human needs and wants cannot any longer be satisfied by, or in, the state alone.<sup>69</sup>

The driving force behind change could therefore be domestic necessity or practicality and not international fairness or community as such — 'it has become apparent that traditional territorial communities are incapable, alone, of resolving many of the more obdurate issues facing humanity'.<sup>70</sup> Just as the human gene pool was expanded by the invention of the bicycle, extending peoples' awareness of potential sexual partners beyond their cousins, so factors such as improved communications<sup>71</sup> might have extended their awareness of the need for international

<sup>67</sup> Gallie, *supra* note 61, at 12–13 (paragraph break suppressed).

<sup>68</sup> *Ibid.*, at 22.

<sup>69</sup> *The Empowered Self*, at 59–60.

<sup>70</sup> *Ibid.*, at 87.

<sup>71</sup> See, e.g., *ibid.*, at 91, where Franck claims that '[w]hat is happening is a social convergence facilitated not by invading armies or concordats, but by the communications and information revolutions'. There is a degree of 'armchair sociology' in Franck's broad approach — namely of treating 'empirical questions of sociology as though they were conceptual questions only' (see N. MacCormick, *HLA Hart* (1981), at 78).

cooperation to satisfy common goals, as well as the claims of others beyond the frontiers of their state.

### 3 The Paradoxical Aggrandizement of the State

Further, Kamenka and Tay argue that the shift from a private law system to one of public law — or from rights to administration — attacks ‘the classical liberal individualist ideal of political democracy and the rule of law’.<sup>72</sup> Franck’s argument for fairness is embedded in liberalism. This foundation is most apparent in *Empowered Self*. Here, the tenor of Franck’s argument is that increasing individualism, and the formation of transnational affinity groups ‘combine to point to the evolution of a complex, multilevel, vibrant new civil culture and civic society that slips the surly bounds of territoriality’.<sup>73</sup> Given the substructure of legitimacy underlying fairness, this shift towards individualism away from the state must have implications for right process as:

the burgeoning canon of individual rights has begun to crack open the previously encrusted Vattelien system, transforming formerly unchallenged concepts of state sovereignty.<sup>74</sup>

Franck’s argument for liberal individualism engenders a paradox: although individualism transcends the state, it is also dependent on the state. He acknowledges the contemporary practical importance of the state:

Today, even more than in Kant’s Prussia, it is primarily the state that collects taxes, provides education, licences the professions, regulates commerce, polices the streets, and cares for the sick and hungry. Loyalty to the nurturing state is still an eminently logical fact of life, still considered ‘natural’ except in those instances where the state fails to deliver.<sup>75</sup>

Increasing individualism, however, inevitably serves to entrench the state structure, and this cuts deeper than a simple enumeration of the functions of the state. Franck concedes this to a degree, acknowledging that the realization of personal autonomy requires the state not merely ‘to recognize each individual’s right to be different, but to practise those differences sheltered from public pressures to conform: whether political, social, cultural, or legal. The rights of nonconforming individuals thus require the protection afforded by an overarching right to privacy’.<sup>76</sup>

This is inadequate. The exercise of autonomy not infrequently requires that the individual has the capacity to enforce a given choice against others, whether organs of

<sup>72</sup> Kamenka and Tay, ‘Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology’, in E. Kamenka and R.S. Neale (eds), *Feudalism, Capitalism and Beyond* (1975) 126, at 134.

<sup>73</sup> *The Empowered Self*, at 280.

<sup>74</sup> *Ibid.*, at 281.

<sup>75</sup> *Ibid.*, at 61.

<sup>76</sup> *Ibid.*, at 191.

the state or other individuals. Effective autonomy requires, as a matter of logical priority, that states must exercise either a protective or facilitative function in order to ensure the enjoyment of individual rights in the first place. Individualism requires state intervention. A right to do or claim *x* entails that others at least have the duty to respect this right or facilitate its realization. If the claim is against state regulation — e.g., the right to choose a name for one's offspring — then its implementation might simply lie in the removal of state control over the matter.<sup>77</sup> If, however, the right in question has a more extensive implication — such as a claim against other members of society or a matter that requires positive action by the state to secure — then there must be legislative intervention. For instance, the right to choose a career entails governmental regulation to prohibit discriminatory access.<sup>78</sup>

One may also question the nature of the increased individualism perceived by Franck. Has 'control' been granted to the individual in the 'private' sphere but attenuated in the 'public'? It may be that more control and autonomy have been accorded over issues that principally and directly affect the individual, but this tendency is coupled with an incremental disempowerment in matters of high politics — including, and perhaps especially, the formulation and conduct of foreign policy — and macroeconomics.<sup>79</sup> Undoubtedly a full analysis of this issue would require a thorough consideration of the nature and effects of globalization, nevertheless, as Franck himself comments:

In the late twentieth century . . . many of the profound, shaping experiences of one's life tend to be private and personal, rather than collective and vicarious; and values have come to be more widely recognized as — potentially — subjective preferences, rather than genetically, culturally, territorially or socially determined. With recognition of the subjectivity of experiences and values has come the liberation of at least some individuals . . . to design customized affinities reflecting an eminently personal telos, drawing on individual preferences.<sup>80</sup>

Franck might complain that this is a quotation taken out of context, and that individuals are able to form affinity groups based on shared political values, and campaign for the implementation of these values both nationally and transnationally. Undoubtedly this is true, but it is equally true that transnational organization, whether or not governmental, must have implications for Franck's thesis.

<sup>77</sup> Franck marshals the right to the free choice of a name as an illustration of increasing individual freedom in *The Empowered Self*; see at 151 *et seq.*

<sup>78</sup> For Franck's use of this as an illustration, see *ibid.*, at 177 *et seq.* On the logic of the implementation of rights see, e.g., Holmström-Hintikka, 'Could the Right to Die be a Human Right', in U. Kangas (ed.), *Enlightenment, Rights, Revolution: A Collection of Finnish Papers Edited for the 14th World Congress of the IVR* (1989) 171.

<sup>79</sup> There is an affinity here with the public/private distinction employed by feminist legal theorists: see, e.g., H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), at 30–31, 43–44 and 56–59.

<sup>80</sup> *The Empowered Self*, at 46.

## 4 Increased International Organization

According to Franck, fairness, the discourse of order and change, of legitimacy and justice, is judged by the extent to which rules are made and applied in accordance with right process.<sup>81</sup> Because fairness is not some predetermined outcome, the important point 'is not a society's definition of fairness in any particular instance, but rather the openness of the process by which those definitions are reached'.<sup>82</sup> Contemporary international order, however, is characterized by the participation of international organizations, both governmental and non-governmental:

As global and regional institutions assume powers which were once the sole preserve of sovereign states — for matters now perforce transnational: such as environmental pollution, non-proliferation of nuclear weapons, and the prevention of breaches of the peace — it is very much to the advantage of such institutional endeavors that their initiatives be perceived as legitimate and fair. This cannot be achieved if any significant number of the participants in the decision-making process are palpably unresponsive to the views and values of their own people. In the legitimacy of national regimes resides the legitimacy of the international regime.<sup>83</sup>

Surely this notion of accountability cuts both ways. Not simply should national regimes be responsive to the domestic audience, but the conduct of international organizations should similarly be accounted legitimate. The notion that this can be done through a 'trickle-up' mechanism — that an organization's action is legitimate by virtue of the fact that its members are democracies and thus legitimate in themselves — is not convincing. Intergovernmental organizations are more than the sum of their members, with both an autonomous and independent existence and personality.<sup>84</sup> The trickle-up theory also appears to assume that organizational action is taken in a principled, transparent manner rather than being subject to the exigencies of *realpolitik*, horse-trading, and self-serving deals struck in, no doubt by now, smoke-free rooms. Maybe, at best, this compromised discourse can only give rise to a thin form of fairness whose substantive content is more subject to the contingent and situational bargaining strengths of the participants than decided 'in accordance with procedures which protect against corrupt, arbitrary, or idiosyncratic decision-making'.<sup>85</sup> Rather than the negotiated definition of the contours of fairness, too often this will be determined through imposition by the powerful. Franck is not blind to this:

the new transnational organizations, both intergovernmental and nongovernmental, need the legitimization that derives from open discourse with their constituents, which is not easily achieved in the absence of a democratic political process, something all the new transnationals still lack. Absent a global parliament, people's interests in intergovernmental operations are

<sup>81</sup> *Fairness*, at 7.

<sup>82</sup> *Ibid.*, at 83.

<sup>83</sup> *Ibid.*, at 90–91.

<sup>84</sup> For discussions of organizational personality, see e.g. C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (1996), at Ch. 3; Bettati, 'Création et personnalité juridique des organisations internationales', in R. J. Dupuy (ed.), *Manuel sur les organisations internationales* (2nd ed., 1998) 33 at 48 *et seq.*; and H. G. Schermers and N. M. Blokker, *International Institutional Law: Unity within Diversity* (3rd rev. ed., 1997), at 976 *et seq.*

<sup>85</sup> *Fairness*, at 7.

represented primarily by diplomats, most of whom, at best, inadequately represent the diverse interests of their citizenry. To address this 'legitimacy deficit' ... many non-governmental organizations ... have sprung up across state boundaries. These appear to be becoming purposeful and expert participants in the intergovernmental diplomatic process by which new policies are formulated, implemented and enforced.<sup>86</sup>

Perhaps, however, the real test case for Franck lies not with the governmental but with these non-governmental international organizations — the transnational affinity groups he envisages that empowered individuals may form in order to pursue common aims and values. Although Franck concedes that not all non-governmental organizations are either beneficial or benign,<sup>87</sup> in addition to the problem of how one may distinguish between the valued and the vicious, one surely must question the democratic credentials of non-governmental organizations in the first place. How do they attain democratic legitimacy? On the one hand, it could be argued that they attain this by virtue of being popular movements, but on the other it could be argued that they can set themselves in opposition to (presumptively) democratically elected governments and thus amount to an attempt to usurp political power from its legitimate bearers in the international arena. Quite simply, effective non-governmental organizations are loud and visible, but they are not necessarily democratic. Further, how do they fit into Franck's foundational argument of the social contract? He argues that:

membership in a community ... entail[s] the fundamental associative obligation to abide by the norms which define that community. Chief among these, in the community of states as in a nation of persons, is the obligation to respect legal commitments ... [S]tates in joining the international community, are bound by the ground rules of community. Once a state joins the community of states (today an inescapable incidence of statehood) the basic rules of the community and of its legitimate exercise of community authority apply to the individual state regardless of whether consent has been specifically expressed.<sup>88</sup>

Given the uncertain status of non-governmental organizations in a legal order hostile to entities that are neither states nor composed of states,<sup>89</sup> can they easily be encompassed within Franck's contractarian assumption? Can it readily be assumed that transnational affinity groups all subscribe to 'the basic rules of the community and ... [the] legitimate exercise of community authority'?

<sup>86</sup> *The Empowered Self*, at 87–88.

<sup>87</sup> See, e.g., *ibid.*, at 79, 90 and 93.

<sup>88</sup> *Fairness*, at 29 (paragraph break suppressed).

<sup>89</sup> For instance, in June 1989, the Swiss Federal Council received a letter from the Permanent Observer of Palestine at the UN Office in Geneva, which stated that the Executive Committee of the Palestine Liberation Organisation had decided to accede to the 1949 Geneva Conventions and 1977 Additional Protocols. In September 1989, the Council informed states that it was unable to decide whether this constituted an instrument of accession 'due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine'. It has been claimed that this Palestinian attempt to become party to these instruments was blocked by some existing High Contracting Parties: see Human Rights Watch Middle East, *The Gaza Strip and Jericho: Human Rights under Palestinian Partial Self-Rule* (1995), at 13–14.

## 5 Bargaining in the Shadow of what?

Franck's concept of justice is also somewhat problematic — in particular, his account of equity, especially that brand of equity that he calls 'broadly conceived equity' where notions such as equitable principles, equitable allocation, reasonableness and so on provide the governing standards for the distribution of goods. Rules embodying broadly conceived equity — such as Articles 74(1) and 83(1) of the 1982 Law of the Sea Convention and Article 5(1) of the 1997 Convention on the Non-Navigational Uses of International Watercourses — are undeniably sophist rules, and thus relatively indeterminate in their application. Franck concedes that this entails some disadvantage:

the more opaque and elastic a rule text, the less it is likely to be perceived as fair: a rule which cannot be understood is an invitation to the exercise of arbitrary authority, and to deliberate creative misconstruction by some whose conduct it is intended to regulate.<sup>90</sup>

Non-idiot rules 'finely calibrated to reflect sophist considerations'<sup>91</sup> can paradoxically be unfair in their implementation by distributing the costs of their application to the party least able to bear them. For instance, in providing the standard for the delimitation of a maritime boundary, the requirement to reach an equitable agreement may work to the detriment of the state in greater economic need of exploiting the maritime resources of the offshore area in issue. This is simply a function of relative bargaining power in negotiations aimed at implementing an open-ended standard, exacerbated in the international arena by the absence of compulsory authoritative third-party decision-making. This leaves the parties effectively reliant on 'private ordering', to borrow the term employed by Mnookin and Kornhauser in their classic analysis of divorce.<sup>92</sup> This is a process of 'bargaining in the shadow of the law', and thus of determining 'how the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between [parties] *outside* the courtroom'.<sup>93</sup> In this, the parties' expectations and predictions of the content of an adjudicated outcome is important as 'the outcome that the law will impose if no agreement is reached gives each [party] certain bargaining chips'.<sup>94</sup>

The use of rules embodying 'broadly conceived equity' as the determinative standard complicates the process of negotiation — how can parties bargain in the shadow of the law if they have little idea of what the bargain should be about? If a projected adjudicated outcome is opaque and uncertain, how can the parties identify the bargaining chips they possess and should employ? Accordingly, if the parties are left to determine the content of an open-ended but determinative standard themselves, then surely this favours the interests of the party best able to bear the costs, not all of

<sup>90</sup> *Fairness*, at 99.

<sup>91</sup> *Legitimacy*, at 82.

<sup>92</sup> Mnookin and Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88 *Yale Law Journal* (1979) 950.

<sup>93</sup> *Ibid.*, at 951 (emphasis in original).

<sup>94</sup> *Ibid.*, at 968.



which are economic,<sup>95</sup> of not reaching a decision — ‘the party better able to bear the transaction costs ... will have an advantage in ... bargaining’.<sup>96</sup> Accordingly, Franck’s endorsement of broadly conceived equity displays, perhaps, a misplaced enthusiasm and presents an over-idealistic analysis which has the potential to subvert rather than realize the quest for fairness.

## 6 Rose-tinted in Washington Square

In conclusion, while Franck undoubtedly presents a powerful thesis in his interrelated arguments for legitimacy, fairness and individual autonomy, there is more than a tinge of idealism in his account of the changed and changing nature of international law. Perhaps the spirit of Dr Pangloss has touched NYU Law School as there is some resonance in *Fairness* of the view that developments in the international legal system are all for the best in this best of all possible worlds, or at least for the better in a world that is getting better.

<sup>95</sup> *Ibid.*, at 971–972.

<sup>96</sup> *Ibid.*, at 972.