

ABSTRACT

By tracing the development and evolution of certain legal theories over the centuries, as well as consequences emanating from such developments, this paper highlights how and why a shift from the model of „classical formalism“ towards more deformed models has arisen.

The paper also illustrates how deformalisation and „a corresponding loss of certainty“ could be harnessed in order to provide for greater „realism“ and externalities, whilst still attaining a respectable level of consistency. Developments and efforts aimed at exploring the applicability of classical formalism and deformed models should be regarded as „an endeavour to establish a consistency of terms, as well as a probing into how far principles, notions, and rules for decision making can be generalised, and rectification when generalisations have gone too far.“

Unity, as well as „a common law of mankind“ are goals which are still capable of being achieved even where fragmentation, diversification and pluralisation of the law occur. Such processes of specialisation, where correspondingly countered by the appropriate level of generality as well as the ability to apply rules – such that they are consistently applied in similar situations, are capable of achieving more equitable, just and unifying goals as opposed to a model which merely strives for the achievement of legal certainty. Looking beyond the borders of legal theory may indeed provide the much needed redress in situations where generalisations exceed the required limits.

Key Words: pluralism, ethics, fragmentation, formalisation, rules, legal certainty, legal theory, plausible constitutionalism, realism, regulation, accountability

Pluralism and Deformalisation as Mechanisms in the Achievement of More Equitable and Just Outcomes – the Move from „Classical Formalism“ to Deformalisation.

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Introduction

In its aim to explain how deformalisation and „a corresponding loss of certainty“ could be harnessed and maximised in order to provide for greater „realism“ and externalities, whilst still attaining a respectable level of consistency as well as level of legal certainty, this paper will commence with a section which is dedicated to a consideration and analysis of the model of „Classical Formalism“ as well as other models founded on formalist theories. Problems encountered by the model of Classical Formalism, as well as a brief discussion of contrasting models will also be incorporated under this section.

Section two provides an analysis of the development of legal theories, as well as illustrates how the the move from classical formalism to deformalisation has occurred. In so doing, it incorporates a discussion on the need for professional pluralism, fragmentation and deformalisation. It also elaborates on why the Systems Theory Analysis is preferred to ethical based approaches.

How can unity or consistency be achieved where pluralism and/or fragmentation occurs? This is a question which section three aims to address. Having considered all these issues and developments, a conclusion will then be derived.

A. Model of Classical Formalism

Classical legal formalism is a concept which is „premised on notions of determinacy in that it aims to limit the role of the individual professional“ whilst retaining an “ethical culture of inclusiveness and self-displacement that enables the embrace of indeterminacy, humanism, and normalizability in rule application.”² Exactly what level of indeterminacy, externalities or contingencies are provided for, by this model of classical formalism is to be questioned. This being all the more necessary since its conflicts and inadequacies in relation to „semantic“ and „ontological“³ indeterminacies are highlighted.

Classical formalism could also be regarded as being synonymous to other models founded on formalist theories which assert that:⁴

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2 S Singh, „The Potential of International Law: Fragmentation and Ethics“ *Leiden Journal of International Law*, 24 (2011), pp. 23–43 at page 41

3 See footnote 6

4 B Leiter, „LEGAL FORMALISM AND LEGAL REALISM: WHAT IS THE ISSUE?“ *Legal Theory*, 16 (2010), 111–133, Cambridge University Press 2010 at page 111

- (i) the law is “rationally” determinate, that is, the class of legitimate legal reasons available for a judge to offer in support of his or her decision justifies one and only one outcome either in all cases or in some significant and contested range of cases (e.g., cases that reach the stage of appellate review);
- and (ii) adjudication is thus “autonomous” from other kinds of reasoning, that is, the judge can reach the required decision without recourse to nonlegal normative considerations of morality or political philosophy.

A distinction is made between two aspects of the “formalism” which are assigned by legal historians to thinkers of the nineteenth century:⁵

- First, there was a “formalist” “theory of the nature of law (the common law, in particular),” according to which “in new situations judges did not make law (even when declaring new rules) but merely discovered and applied preexisting law.”
- Second, there was a “formalist” theory about judicial decision-making, about “how judge mechanically apply law (precedents and statutes) to the facts in particular cases.”

Problems Encountered by the Model of Classical Formalism

Challenges presented to such a model of classical formalism which „presupposes determinacy and a unifying, systemic core of reason within law“ not only include:⁶

- The need for the imposition of order and coherence – since, empirically, no such coherence exists in international law, but also the fact that;
- Such classical legal formalism constantly strives to circumvent semantic indeterminacy;
- Classic legal formalism is unable to provide explanations for the ontological indeterminacy of international law.“

Classical formalism or formalist theories are contrasted with realist approaches and theorists who attempt to provide „an unsentimental and honest account of what judges really do.“⁷ The ensuing section is aimed at highlighting how a move from the classical formalist model has occurred as well as the emergence of legal theories whose generation resulted in a „plurality of theories but not a self-conceptualization of law as law.“⁸

5 See *ibid* at page 115; see also B Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010).

6 See S Singh, „The Potential of International Law: Fragmentation and Ethics“ *Leiden Journal of International Law*, 24 (2011), pp. 23–43 at pages 35 - 37

7 B Leiter, „LEGAL FORMALISM AND LEGAL REALISM: WHAT IS THE ISSUE?“ *Legal Theory*, 16 (2010), 111–133, Cambridge University Press 2010 at page 112

8 N Luhmann, K Ziegert and F Kastner, *Law as a Social System* (2004) Oxford University Press at page 61

B. „Plausible Constitutionalism“⁹ as a Response to Deformalisation (Move Away from Classical Formalism) and the Development of Legal Theories

The development of legal theories which is traced back to the 12th century, whereby the occurrence of „the breakthrough and development of the issue of dissolving a paradox through self organization and the implementation of societal autonomy“ took place, is considered to have resulted in a corresponding loss of certainty as well as generating a number of legal theories – and not a theory of law.¹⁰ Further, such evolvement as argued by Luhmann, is considered to have resulted in an inadequate understanding of law as a unity which produces itself – the result being „ a plurality of theories but not a self-conceptualization of law as law.“

In his opinion, what was of concern, was not „ a re-definition and re-articulation of characteristics of the rationality involved, but the question of how law could be conceptualized as a unity.“¹¹

A change occurred in the 18th century when the „unifying difference between ranks“ was re arranged on the basis of „the concept of progress.“¹² However, it has been observed that even where unity, consistency and formalism appear to be progressive, they might generate regressive results.¹³

This constitutes a reason, amongst others for the need to explore beyond the borders of classical formalism and incorporate ethical based approaches. Ethics and moralism are associated with the culture of formalism – however this should not imply that deformalisation is incapable of generating ethical and moral based outcomes.

Need for Professional Pluralism, Fragmentation and Deformalisation and the Preference for the Systems Theory Analysis

Pluralism and fragmentation are concepts which can be distinguished from each other given the fact that whilst fragmentation is more synonymous to a process of diversification, pluralism represents the inherent nature and potential for a rule to become specialised. In other words, a rule may be

9 This concept comprises „both positivist and ethical elements – from the perspective of International Law, it is positivist in its statement and description of International Law as a system, and ethical since it includes a project of resistance to the current state of affairs.“ See S Singh, „The Potential of International Law: Fragmentation and Ethics“ *Leiden Journal of International Law*, 24 (2011) at page 38.

10 See N Luhmann, K Ziegert and F Kastner, *Law as a Social System* (2004) Oxford University Press at pages 61 and 62

11 „In response to such an issue, the apparatus of systems theory was to be applied in order to analyse what it means to define the unity of law as a system. Possibly, the most influential or certainly the most respected approach to a construction of the unity of law used a hierarchy of sources of law or legal types: an approach which relied on a stratified social system and which postulated the necessity for such a hierarchical order dogmatically – thus obscuring the paradox of unity from multitude.“ See *ibid* at page 62

12 „This being done in the belief that the tradition order had broken down, with increasing secularization and historical conception of descriptions of structure.“ see *ibid* at page 63

13 See for example, S Singh, „The Potential of International Law: Fragmentation and Ethics“ *Leiden Journal of International Law*, 24 (2011), at page 35; J A Beckett, „Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project“ (2006) 7 *GLJ* 1045, at 1072

capable of being specialised in certain contexts – however the question relates to when and at what point such rule becomes an exception (or should become specialised) in a specific situation. Where such a position has been ascertained or when such a question can be responded to, it is most likely and evident that the process of fragmentation will occur. Consequently, it is also likely that a process of deformalisation will follow.

Hence Pluralism, Fragmentation and Deformalisation are linked in the sense that they are elements of a rule which constitute a process and which can be distinguished in the order in which they occur in such a process. Such a process can be illustrated as follows:

Rule/Law's inherent characteristics ---> Occurrence of Fragmentation ----> Deformalisation of rule
(Pluralistic nature of rule)

As well as constituting a term which is „commonly used to refer to the slicing up of international law into regional or functional regimes that cater for special audiences with special interests and special ethos’, fragmentation is also referred to as the so-called primitive character of international law (‘international law is still fragmented’).¹⁴

The language of fragmentation, according to Martineau, is considered to be a powerful metaphor since it „articulates the play between diversity and unity in a specific way.”¹⁵ Even though the fragmentation of law has generated concerns, it will be highlighted in the subsequent section that it could also serve as a means whereby unity could be achieved. Furthermore, it has been asserted that legal theory is moving beyond¹⁶ the realm of philosophy and that theoreticians should also explore the intellectual resources of other legal traditions in their efforts to found a global legal order.¹⁷

Hence the benefits of diversification and pluralism are recognised – such benefits being capable of maximisation, as well as the prevention of a situation where deformalisation contributes to greater chaos, dis-unity and „an inadequate understanding of law as a unity which produces itself.”

The role of ethics and morals in maximising the benefits of diversification and pluralism are thus introduced. From this perspective, whilst there is need for professional pluralism, there is even greater need for the development of professional pluralism. An incorporation of the roles of ethics and morals serves as a means whereby such a development of professional pluralism can occur.

Whilst the value of ethics is lauded on the one hand by Singh, who states that Weber’s warning of the prison bars of bureaucratization, the legacy of Foucault, and the works of Koskenniemi require international lawyers to embrace a considered ethical responsibility and disengage themselves from the language of their expertise and the obfuscated drama of governance,¹⁸ the importance of legal

14 „Both meanings being extensively conveyed by international lawyers. „ See A Martineau, *The Rhetoric Of Fragmentation: Fear and Faith in International Law, The Structure of the Fragmentation Debate: The Play Between Unity and Diversity* Leiden Journal of International Law / Volume 22 Issue 01, pp 1 – 28 Published online: 04 Februar 2009 at page 4

15 See *ibid* at page 5

16 „The acknowledgement that a plurality of rational, but incompatible, positions exists in the context of any legal dispute justifies a comprehensive enquiry into the practicalities of achieving global justice. This does not undermine the importance of theory but it does move us beyond the realm of philosophy.” See S Allen, (Book Review by Stephen Allen, Patrick Capps), „Human Dignity and the Foundations of International Law, *Leiden Journal of International Law* (2010), 23: 960-966 at page 966

17 *Ibid* at page 961

18 He adds that „At the moment of decision, every legal professional has the capability to embrace an freedom. At this moment of decision, of discretion, the legal professional is able to embrace law as Koskenniemi intended for Kant’s

certainty is also highlighted by Luhmann whose preference for the systems theory analysis (as a means of addressing a situation where the question of determining the position of law in modern society arises) is illustrated thus:¹⁹

Systems theory analysis is the only candidate for the task of assisting where the question of determining the position of law in modern society arises and where it is necessary to account for changes that are beginning to reveal themselves. Such solution capable of being provided by systems theory would not be possible by a return to a natural law of the Aristotelian or post Aristotelian kind (legal rationalism) nor by trying to use various „ethics“ approaches that lack conceptual clarity, nor by resorting to the economic analysis of law – which provides too little information about the society to which it is supposed to apply.

Such „ethics analyses“ or „ethics commissions“ as further argued by Luhmann, serve the political preparation of agreed foundations for legal regulation and owe to the law, their confidence that everything could be changed if new information came to hand or the situation were to be assessed differently in the future.

C. How Can Unity or Consistency be Achieved where Pluralism and/or Fragmentation Occurs?

In order to respond to this question, reference has to be made to the concluding part of the previous section.

There is greater need for the development of professional pluralism – as opposed to the mere need for pluralism. An incorporation of the roles of ethics and morals serves as a means whereby such a development of professional pluralism can occur. However, the incorporation of ethics and morals, as well as the process of deformalisation which consequently occurs or which may have occurred as a result of pluralism and fragmentation, will most likely contribute to less consistency and reduced legal certainty. As highlighted in the final part of the previous section, the lack of „conceptual clarity“ attributed to the application of ethical approaches, is considered to be a reason for a preference of a systems theory analysis. This is not to imply that ethical approaches are not to be desired – their ability to incorporate and provide for externalities as well as contingencies may give them an edge over the systems theory analysis.

The systems theory analysis is hence, a means whereby unity or consistency could be achieved – where pluralism and/or fragmentation occur.

Unity could also be achieved through Balanced Realism, a concept which is defined as follows:²⁰

Judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political and moral views and their personal biases (the skeptical aspect [of balanced realism]. Yet [balanced realism] conditions this skeptical awareness with the understanding that legal rules nonetheless work; that judges abide by and apply the law; that there are practice-related, social, and institutional factor that constrain judges; and that judges render generally predictable decisions consistent with the law (the rule-bound aspect).

‘moral politician’. But, more importantly, the professional is also able to revolt against the linguistic barriers of his technicality: to view a plurality of perspectives.“ S Singh, „The Potential of International Law: Fragmentation and Ethics“ *Leiden Journal of International Law*, 24 (2011), at page 43; See M Foucault, ‘Iran: The Spirit of a World without Spirit’, in L. Kritzman (ed.), *Michel Foucault: Politics, Philosophy, Culture* (1988), at 214 and also M Weber, *FromMaxWeber: Essays in Sociology* (trans. H. H. Gerth and C.Wright Mills) (1946), 357.

19 N Luhmann, K Ziegert and F Kastner, *Law as a Social System* (2004)Oxford University Press at page 66

20 See B Leiter, „LEGAL FORMALISM AND LEGAL REALISM: WHAT IS THE ISSUE?“ *Legal Theory*, 16 (2010), 111–133, Cambridge University Press 2010 at page 123

Fragmentation and pluralism, whilst having the potential to generate concerns, could serve as instruments which could be implemented „for the common law of mankind“²¹ as well as a means of establishing a global legal order.²²

Such dynamism in international law, which serves as justification for the implementation of pluralism in the establishment of unifying goals is not only peculiar to international law. Developments and evolvments of classical formalism, as well as socio economic and dynamic changes which have taken place in late modern societies²³, across social, economic and regulatory spheres, re-iterate the need for the development of professional pluralism as well as „the understanding that professional existentialism is a transpiring mindset of noble objectives.“²⁴

CONCLUSION

As illustrated by the model of classical formalism, ethics and moralism are associated with the culture of formalism. However this should not imply that deformalisation is incapable of generating ethical and moral based outcomes. In fact a certain paradox exists – given the fact that ethical based approaches are also considered to generate less certainty and less consistency.

The crucial issue entails achieving the right balance between generalizations and the level of discretion which is required to incorporate approaches which are tailored individually to situations – whilst striving to achieve and „establish a consistency of terms, a probing into how far principles, notions, and rules for decision making can be generalised, and correction when generalizations have gone too far.“²⁵

Furthermore, legal specialists may also be required as a means of introducing greater accountability into the judicial process. This is of immense significance in areas such as regulation. Whilst the level of legal certainty attributed to such diversification of the law may be reduced, a legal professional with moral and ethical values, who is able to apply rules and principles in such a way as to achieve the right balance between formalism (generalization) and pluralism whilst striving for a high level of consistency and legal certainty, will certainly have greater potential to achieve more equitable and just legal outcomes.

21 A Martineau, *The Rhetoric Of Fragmentation: FEAR AND FAITH IN INTERNATIONAL LAW, THE STRUCTURE OF THE FRAGMENTATION DEBATE: THE PLAY BETWEEN UNITY AND DIVERSITY* Leiden Journal of International Law / Volume 22 Issue 01, pp 1 – 28 Published online: 04 Februar 2009 at page 20 and see also C.W. Jenks, *The Common Law of Mankind* (1958)

22 S Allen, *Human Dignity and the Foundations of International Law*, Oxford: Hart Publishing, 2009 at page 966

23 See Beck's „Risk Society Theory“. The “risk society” approach is one that identifies broad socioeconomic and political changes which occurred in late modern societies. See Beck U, *Risk Society: Towards a New Modernity* (1992) London: Sage Publications

24 S Singh, „The Potential of International Law: Fragmentation and Ethics“ *Leiden Journal of International Law*, 24 (2011), pp. 23–43 at page 1

25 „.....when generalizations have gone too far, especially when applying the operating scheme of rules and exceptions.“ N Luhmann, K Ziegert and F Kastner, *Law as a Social System* (2004) Oxford University Press at page 55. For further reading on legal certainty and the role of courts and legislative bodies in the facilitation of a high degree of legal certainty, see M Ojo, „Addressing the Inadequacies of Private Law in the Regulation of Contracts (During and Post Contract Formation Periods) July 2011.

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