

SYMPOSIUM ON PROSPER WEIL, “TOWARDS RELATIVE NORMATIVITY IN INTERNATIONAL LAW?”

THE INTERNATIONAL LAW OF CO-PROGRESSIVENESS AS A RESPONSE TO THE PROBLEMS ASSOCIATED WITH “RELATIVE NORMATIVITY”

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Prosper Weil misfired his volleys by targeting his protestations at relative normativity in international law. In itself, relative normativity is unavoidable and beneficial. The enduring value of his celebrated 1983 article “Towards Relative Normativity in International Law?”¹ lies in identifying the various problems that he associated with relative normativity. These problems deserve serious attention and conscientious responses in order to assure the health of the international legal system as well as the international community. The idea of an international law of co-progressiveness that I have developed,² though not intended as a direct response to these problems, does come with a toolkit full of responses that would go a long way to solving those problems or at least reducing them to a minimum.

Problems Associated with Relative Normativity

Weil detailed many problems associated with the relativization of norms; to varying degrees, these problems challenge what he viewed as the three pillars of the international legal system: voluntarism, positivism, and neutrality. However, the problems he identified are not necessarily a result of the relativization of norms, but may be a result of other forces, or are even structurally inherent in the international legal system. Indeed, Weil’s article’s lasting value lies in identifying and propounding these problems, to the point of exaggeration. Here I will highlight some, but not all, of them.

One type of problem goes to imperfect participation in law-making, especially regarding *jus cogens*, essential norms, obligations *erga omnes*, obligations *omnium*, and other super-norms. In the formation of such norms, Weil notes,

a rule acquires superior normative density once its preeminence is accepted and recognized by “all the essential components of the international community.” But since a state’s membership in this club of

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¹ Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413 (1983).

² Sienho Yee, *Towards an International Law of Co-Progressiveness*, in INTERNATIONAL LAW IN THE POST-COLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI 18–39 (Sienho Yee & Wang Tieya eds., 2001) (reprinted in SIENHO YEE, *TOWARDS AN INTERNATIONAL LAW OF CO-PROGRESSIVENESS* 1–26 (2004)); Sienho Yee, *The International Law of Co-Progressiveness: The Descriptive Observation, the Normative Position and Some Core Principles*, 13 CHINESE J. INT’L L. 485–500 (2014); SIENHO YEE, *TOWARDS AN INTERNATIONAL LAW OF CO-PROGRESSIVENESS, PART II: MEMBERSHIP, LEADERSHIP AND RESPONSIBILITY* (2014) [hereinafter YEE, PART II].

“essential components” is not made conspicuous by any particular distinguishing marks—be they geographical, ideological, economic, or whatever—what must happen in the end is that a number of states (not necessarily in the majority) will usurp an exclusive right of membership and bar entry to the others, who will find themselves not only blackballed but forced to accept the supernormativity of rules they were perhaps not even prepared to recognize as ordinary norms.³

Second, to Weil, alongside or associated with the problematic participation in lawmaking is the problematic expansion of the scope of application of international law, from the original bilateral or conventional scope, to the general scope (via customary or general international law), then to the universal scope (via “universal law”). He took as signs of such danger the International Court of Justice’s analysis of the relationship between treaties and custom in *North Sea Continental Shelf*,⁴ and its penchant in *Hostages in Tebran* for referring to “obligations under general international law” despite the apparent sufficiency of the convention at issue in grounding the case.⁵ The result of such an expansion is that, in *some* situations, for a dissenting state there is not only no chance to participate in the formulation of the norm, but also *no exit* from the application of that norm, because the escape hatch—the persistent objector rule—is not available. Here Weil observed a transition from the classic “presumptive acceptance to imposed acceptance.”⁶ The circle of imposition is thus complete. This phenomenon is now reflected in the International Law Commission’s Draft Conclusions on *jus cogens*, adopted on first reading, Conclusion 14(3) of which states that “[t]he persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).”⁷

Third, concomitant with the expansion of the scope of application of international law is the expansion of the interest of a state in the enforcement of international law, or the standing of a state in that regard, which Weil found to be alarming. For him, the international legal system is such that “it is up to each state to protect its own rights; it is up to none to champion the rights of others.”⁸ The arrival of the concepts of obligations *erga omnes*, obligations *omnium*, etc., opens the door for the idea of *actio popularis*. Left unregulated,

that would mean that any state, in the name of higher values as determined by itself, could appoint itself the avenger of the international community. Thus, under the banner of law, chaos and violence would come to reign among states, and international law would turn on and rend itself with the loftiest of intentions.⁹

Fourth, not only were the movement from non-norm to super-norm, the proliferation of super-norms, and the expansion of the scope of application concerning to Weil, but so also was the excessive speed of all that was happening. For him, the “stealthy rise” of non-norm to super-norm was already a process difficult to contain.¹⁰ He saw this rush as undesirable: “By seeking to create today the law of tomorrow’s international society, one runs the risk of cutting a key that will not fit the lock it will have to open.”¹¹

Fifth, all these problems would finally result in great uncertainties in the law, Weil feared. Indeed, he invoked “uncertainty” six times (in the singular or in the plural) in his article to describe the new situation. To take just one

³ Weil, *supra* note 1, at 427.

⁴ *Id.* at 436-37.

⁵ *Id.* at 439.

⁶ *Id.* at 437.

⁷ Int’l Law Comm’n, *Report on the Work of Its Seventy-First Session*, UN Doc. A/74/10, at 182 (Apr. 29-June 7, July 8-Aug. 9, 2019).

⁸ Weil, *supra* note 1, at 431.

⁹ *Id.* at 433.

¹⁰ *Id.* at 427.

¹¹ *Id.* at 442.

situation, the uncertainties in identification of the super-norms as well as the chain reactions therefrom are unmanageable.¹²

Obviously, these problems would challenge the three pillars in the international legal system as identified by Weil: voluntarism, neutrality, and positivism. The problem with participation in lawmaking and the expansion of scope of application of law and standing directly challenge the pillars of voluntarism and neutrality. The excessive speed by which this is occurring appears to exhibit a certain amount of overmoralization and thus also challenges neutrality. The uncertainties that may result from all of these problems threaten to destroy the prevailing *lex lata* in the world and, as a result, shake the positivism pillar.

Some of these problems, however, are inherent in the international legal system, even in the classic paradigm of international law. There has never been perfect participation in international lawmaking; the minority always has to wrestle with the majority. The escape hatch, i.e., the persistent objector rule, has also never been a perfect one because, to be able to benefit from it, the relevant state has to be there when the rule originates and then be in a position to make objections consistently going forward. Those who are not privileged to be there first, such as new states or states excluded from the process for whatever reason, or not prescient enough to foresee the new development, may not claim such a benefit. That is to say, perfect voluntarism or complete neutrality has never existed, nor will either ever be possible in international society.

The International Law of Co-Progressiveness as a Response

To these problems associated with relative normativity, Weil's antidotes seem to be a reemphasis on voluntarism, neutrality, and positivism. But the undercurrents for these phenomena were not completely lost to him: "the potential negative consequences of the relativization of international normativity must at worst be regarded as secondary effects of changes that in themselves are beneficial."¹³ Still, as a giant who straddled the era of coexistence and cooperation, on the one hand, and the dawning of a new era, on the other, Weil ultimately failed to cross the threshold into that new era.

That new era was waving at me like an impressionistic figure around 2001 when I was attempting to identify the character of international society and international law in the post-Cold War world. I did so by tracing the spirit of society and law at different stages in time, as that spirit may exhibit itself in terms of subjects of the law, content of the law, and enforcement of the law. The *leitmotif* of international law and society was coexistence at the height of the Cold War and cooperation during the period of détente. Since the end of the Cold War, one can see a spirit of society and law that is all-encompassing (in terms of subjects of the law); preoccupied with moral and ethical advancements at an appropriate speed; and internally driven, with human flourishing as its ultimate goal (in terms of the content of the law and the enforcement of the law).

The lawmaking activities now witness the participation of not only traditional subjects such as states and, to a lesser extent, international organizations, but also individuals as well as NGOs. The extraordinary influence of NGOs was on full display in their dramatic success in promoting the conclusion of the Landmine Convention. The all-encompassing character of the participation in lawmaking causes some to abandon the use of the traditional term "subject of law" in favor of "participant in lawmaking" as a general term. In terms of content of the law and its enforcement, what preoccupy us most are no longer the usual issues of coexistence, such as sovereignty, or cooperation, such as economic development, but community interests, human rights matters, and international crime and punishment, thus showing advancements in moral and ethical terms. As there was no preexisting word that follows perfectly from coexistence and cooperation, I had to coin the phrase "co-progressiveness" to describe

¹² *Id.* at 427.

¹³ *Id.* at 423.

what I had observed. By the international law of “co-progressiveness” is meant a society or law that is all-encompassing (hence “co”), preoccupied with advancements at an appropriate speed in moral and ethical terms more than in other terms, and having human flourishing as its ultimate goal (hence “progressiveness”). Of course, the *leitmotif* in each period is not the only theme audible to us: in coexistence there was cooperation; coexistence was the background note to cooperation; and coexistence and cooperation are the background notes to co-progressiveness.

I have developed this idea of co-progressiveness in various places¹⁴ and will simply summarize the main tenets here as may be helpful. First, where possible, international law should decide a question with a bent for or a bias in favor of co-progressiveness. Second, progressiveness is to be measured both internally against a given participant’s historical achievements and externally across the world against those of other states or participants in the system, but the content and pace of such advancements should be informed by the special circumstances of each state or participant and be ultimately set by that state or participant, limited by the condition that they comply with the most fundamental obligations under international law. This point finds an illustration in the “intended nationally determined contribution” as each state’s promised effort under the Paris Agreement to combat climate change. Progressiveness should be usually internally-initiated or self-propelled within each state or participant; it can also be externally induced—but not coerced. This point would not endorse hard conditionality in economic assistance programs that would impose a certain course of governance reform, but it would counsel in favor of soft conditions such as requirements that recipients of assistance participate in educational programs that would expose them to best practices while leaving to them to decide themselves whether or not to adopt them.

Third, clashes between intrinsic and instrumental values should be decided by decision-makers in a conscious and explicit way and by giving preference to a more important value but, at the same time, to the applicable intrinsic value where possible.¹⁵ Fourth, every state or appropriate participant (including international organizations, regional organizations, and perhaps individuals) in the international system is a holder of rights and bearer of obligations vis-à-vis each other as well as vis-à-vis the international system or the international community of common interests or community of shared future for mankind. Fifth, the equality to be pursued should be enlightened equality, not mechanical or superficial equality. It should be based on a fitting and progressive criterion in each instance, appropriate to the particular subject matter at issue and the occasion, so as to make meaningful or sophisticated the twin maxims that “like cases should be treated alike” and “different cases should be treated differently.” Sixth, great states and leader states enjoy special powers and thus should shoulder special responsibilities in the international system. Seventh, every state or appropriate participant in the international system is to observe the rule of law in every respect and, in particular, to take the best account of rule-of-law concerns in making every important decision, especially the need for taking a rigorous approach thereto.

Born out of my (perhaps rosy) observations of the spirit of international society and law, the idea of the international law of co-progressiveness was not intended as a direct response to the problems that Weil identified. Nevertheless, it does come with a toolkit full of responses that would go a long way to solving those problems or at least reducing them to a minimum.

As to those problems inherent in the international legal system, such as imperfect participation in lawmaking and the perennial struggle between the majority and the minority, the international law of co-progressiveness cannot eliminate them, either. Its promotion of all-encompassingness and greater participation in the legal system (including lawmaking), however, would no doubt reduce the feeling among many states of being left out. Still, the need to maintain an international community at least with respect to the most important matters, i.e., *jus cogens*,

¹⁴ See *supra* note 2.

¹⁵ See YEE, PART II, *supra* note 2, at 85.

requires the elimination of the escape hatch, i.e., the persistent objector rule, in such matters. The alternative to this rule would be to prioritize one particular state over the entire community, a scenario that is not appetizing, either.

In promoting a perspective of shared progressiveness in all decision-making, the international law of co-progressiveness would ultimately bridge the gap between different ideological orientations and thus alleviate or even eliminate the challenge to neutrality. Furthermore, it does so by relying on internally driven progressiveness within each state or participant in the system, even if induced (but not coerced) by outsiders; this would promote voluntarism on the part of states and participants and reduce the feeling of having views imposed on them.

The backlash against problems with excessive speed and overmoralization has been driven home to us all by the rise of particularism, local boosterism, antiglobalization, or a retreat from international institutions. The international law of co-progressiveness recognizes that one cannot rush things too much and thus emphasizes that progressiveness must be achieved at each participant's own appropriate pace, not to the satisfaction of all but better than no progress at all.

This law also considers that the addressees of the need to be co-progressive include all states and other participants, strong or weak. In this regard, this law recognizes the enormous impact that strong or leader states¹⁶ may exert, whether in promoting progressiveness by providing constructive engagement with other states and participants, or in wreaking havoc in the world by using their advanced positions as a tool of oppression. When the latter happens, one will see overmoralization or self-interest taking reign to the extreme. Obviously, these states or participants themselves need to undergo a heavy dose of co-progressiveness, so as to avoid severe backlash or a “tooth and nail” fight back from the oppressed. Here the intelligentsia in each state or participant would play an indispensable role.

To all the problems, especially the problem with uncertainty, the most potent antidote is the strict application of the rule of law, particularly in decision-making, that the international law of co-progressiveness emphasizes. The championing of community interests and the increasing recognition of the standing of states in the enforcement of community interests (to the extent they are so recognized by the international community) are to be celebrated. The tough task is to identify and apply the exact extent of such championing and recognition. In this regard, the international law of co-progressiveness demands evenhandedness, condemns double standards, and imposes a rigorous approach to decision-making on all relevant decision-makers, especially legal decision-makers such as judges and arbitrators. Too often we see decision-makers overrecognize such community interests and do so by taking a fast and loose approach to decision-making, such as skipping many pivotal decision-points in order to achieve their goal. Such decision-making does a disservice to, rather than helps the cause of, community interests. These “overachievers” give lawyers a bad name.

If a rigorous approach to decision-making does identify the extent of the recognition of a community interest and its associated regime, such as *actio popularis*, its application probably would not create the kind of chaos that Weil feared. For example, the International Court of Justice accepted a kind of *actio popularis* or obligations *erga omnes partes* within the context of the Torture Convention,¹⁷ and is confronted with the same issue in the context of the Genocide Convention in an ongoing case.¹⁸ *Actio popularis* pure and simple may one day appear. One may ask whether, on the issue of standing, the Court has conducted a rigorous exercise so far. If *actio popularis* in the context

¹⁶ On the role of strong states and leader states, see *id.* at 123.

¹⁷ See *Questions Relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), 2012 ICJ REP. 422, paras. 68–69 (July 20). The standing issue potentially was present in *Whaling in the Antarctic* (Austl. v. Japan: N.Z.), 2014 ICJ REP. 226, but it was not discussed by the Court.

¹⁸ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Gam. v. Myan.), I.C.J., <https://www.icj-cij.org/en/case/178>.

of a treaty or even pure and simple is the result that a rigorous approach to decision-making would in fact give us, a court or tribunal's exercise of this approach may help the respondent accept it and convince members of the international community that being taken to court is just a normal part of the burdens of being a member of that community. The respondent may take measures to limit consent to jurisdiction by excluding *actio popularis* cases. Or perhaps measures can be taken to compensate a respondent prevailing on the merits, so as to prevent the abuse of the *actio popularis* regime. Regardless, a rigorous approach to decision-making would help to promote the steady progress in recognizing community interests.

Conclusion

This short discussion gives one the feeling that the various problems associated with relative normativity are enduring problems. As a result, the efforts to counter them will probably have to be enduring efforts, if not Sisyphean. Still, the international law of co-progressiveness as highlighted here and seen as a toolkit points in a good direction. The world of coexistence and cooperation, plus co-progressiveness, will be a better one, despite all the rough-going in the world today.