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COMMENTARIES

## A Reply to David Kennedy

Anna-Alexandra Marhold\*

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Dear Professor Kennedy, thank you for your inspiring, insightful and thought-provoking Montesquieu Lecture. It offers a positive outlook in these times and much of what you say resonates with me, as well as with the audience, I am sure. But since I would not be considered a decent academic if I would agree with everything you say, I will swiftly turn to my questions and comments to you. In doing so, I also hope to contribute to this more positive outlook on the issues you discussed. Disclaimer: my reply to you only contains my personal opinion – I do not intend to cite any experts or scholars in it.

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Let me start with the nostalgia you expressed for the “stable” post-war global order, centred in the North Atlantic. My question is: What is this order that you refer to exactly? The order of the NATO? The dominance of the West? The dominance of the US? The dominance of the English-speaking world? The perceived equilibrium during the Cold War?

You also state that in hindsight, this order was in fact “too good to be true”. I think I have to agree. Was it really that stable, and was there really such an equilibrium as you describe? Was this era you refer to even a homogenous period of time in the first place? I would say that the post-war period was made up of different stages and different perspectives, rather than one stable order. This period was also characterised by the Cuban missile crisis, wars in Vietnam and Afghanistan, de-colonialization, apartheid in South Africa, occupations and violent suppressions in central and eastern Europe, dictatorships in Southern Europe, the troubles in Northern Ireland, just to name a few.

It might have been a resilient order in your view – the question is, whether it really was. Maybe it was to you, from your part of the world, from your position of power (if I may say so). Citizens of communist countries or former colonies might view the nature of the post-war order quite differently. I guess it depends on the perspective you take. In essence, my question is, was there order in the first place, more, than there is now? Or do we only nostalgically perceive it that way in hindsight?

Connected to this point, large parts of the world were not part of the multilateral trading system during this period, contrary to today, when the World Trade Organization has 164 Members.<sup>1</sup> Although some founding members are behaving capriciously at present and the system certainly has serious glitches, this is still more Members than ever before and fundamentally a positive development for the global trading system.

You also mention that the proliferation of law was and is everywhere. My question here is: what do you understand by the law? Any system of rules? Rules imposed by the stronger on the weaker? A few basic norms of customary law that can be stretched and shaped depending on the circumstances? You say that our notion of the law is a grab bag of ideas, but what do you think yourself in this context?

### In connection with 21<sup>st</sup> century problems, and worries about the law

You express the worry or fear of not law, but politics in our technocratic world and state that it was different a hundred years ago. My opinion is that such worries might have been exactly the same in 1918, there was just less law then. Now, on the other hand, there may be too much law, but the essential fear of politics being more powerful than the rule of law remains the same as before.

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<sup>1</sup> See World Trade Organization, 'Members and Observers' <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.html](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.html)> accessed 18 May 2018.

A bit on how knowledge becomes power and how winners consolidate power by legal means. Now, I will get personal (and I am sure you have heard this argument before). You say whenever spaces allocate power and privilege, people have a reason to contest them. You also write that it is frustrating when the center claims already to have taken everything into account. But being at Harvard, you are very much at the center yourself, a professor at one of the most elitist institutions in the world. This is, of course, no news to you. It is for that reason that we are listening to your lecture here today and reading it in the *Tilburg Law Review* later.

In a way, it may be said that you profited from the structural inequality you describe. The elitist centre has benefitted you personally. And yet you criticize the order and the experts it produces and encourage us to do the same. My question is: Why? What is in it for you? Do you truly want to turn things around, and thereby potentially jeopardize your own position of power? Change the system from within, at that risk? Should we really contest you? Or, do you merely want to point things out, demonstrate that you know how the world works, as a true expert, yet contently part of the system that you criticise? You are a winner who has consolidated his power as well, after all.

### My last comment

You say, we need to rearrange the global order, because the world now is chaotic and uncertain. Moreover, the public is disengaged. I want to offer a more positive perspective on this.

For I am of the opinion that the world has always been in disarray, albeit less connected. Its institutions have been dispersed, as well. Needless to say, global issues have been always intertwined, affecting one another, from the times of colonialism and even much earlier, of course. There was always a crisis going on somewhere, we just did not always know about it and did not have the means to be confronted with it.

This is in fact the first time in history that we actually have such a global overview of things, made possible by globalization, increased mobility and digitalisation. We can witness and examine issues we had no idea about a couple of decades ago. It is the first time in history that we can critically reflect on ourselves in such a comprehensive, analytical and crucial manner. So maybe we are doing better than ever before, by being able to reflect on our actions, by having the possibility of a bird's eye view of the world in the first place, for the first time, a real global overview. And we can all have this overview now to a certain extent, not only the men in Davos, like was perhaps the case in the past.

Perhaps this is a positive realization, by having the overview that we have today, for the first time in history, we may have a clearer vision than ever before on how to improve ourselves.

The same goes for the periphery and the centre, not a new concept after all. It is just that it is now much easier for the periphery to know what is going on in at the centre, and what they might be missing out on. Vice versa, the centre is now able to see how their actions affect the periphery as well.

Last but not least, the means available to us in this new era also allow us to discover that the established orders are perhaps not so established after all. Maybe this will actually help advance the necessary changes so much needed in these times.

My suspicion is that you intentionally left an important part of your plea open. You discuss what needs to happen, namely that we need to rearrange the global order, that we need a different mindset. You are convinced that it must happen, and that it will be difficult by definition. But you do not elaborate much on how exactly, concretely that should happen. I would like to ask you, as the expert, for your opinion on that. Thank you.

### Competing Interests

The author has no competing interests to declare.

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