

If I had a Hammer: A Review of Kagan's "Power and Weakness"

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A. Introduction

In recent years it has become a truism that after the Cold War Europe no longer plays the important role it used to play. The focus of US foreign policy seemed to shift away from Europe towards other regions like the Middle East or Asia. This process is even accelerated by the recent disagreement of European politicians with respect to the U.S. led military action against Iraq. The climax of this development was Chancellor Schröder's strict and explicit rejection of a German role in any form of military action against Iraq, be it sanctioned by a UN Security Council resolution or not. German Federal Minister of Justice Herta Däubler-Gmelin was axed in the wake of the tensions and replaced by Brigitte Zypries after she compared Bush's war against terrorism with Hitler's strategy to concentrate on foreign policy in order to distract attention from domestic problems (thereby, as the *Economist* put it, giving a fine example of "the pot calling the kettle black.").¹

B. Kagan's Power and Weakness²

While many observers, especially German newspaper commentators, ascribed this conflict to the populist policy of Chancellor Schröder who desperately pulled the

* Thanks to Henok Tsehaye for comments and critique.

¹ *America and Germany - The Poisoned Relationship*, *ECONOMIST* (26 September 2002), <http://www.economist.com/displayStory.cfm?Story_ID=1359855>.

² Robert Kagan, *Power and Weakness*, *POLICY REVIEW* No. 113 June/July (2002), <<http://www.policyreview.org/JUN02/kagan.html>>.

issue out as a surprise last resort of his re-election campaign, its roots lie deeper.³ In his much debated article "Power and Weakness," published in *Policy Review* in June, 2002 (and subsequently, this year as a book under the title: *Of Paradise and Power*), Robert Kagan gives an explanation which is not limited to the above mentioned strategic reasons for the increasing insignificance of Europe. Instead he blames European trust in international law. He analyses it as the symptom of an unrealistic view of the world, which originates in a different collective experience and leads to the divergence of American and European perspectives.

Kagan compares the foreign policy strategies of the US and of European governments. He states that Americans are generally more inclined to unilateral proceedings and the use of military force. Europeans, Kagan explains, normally resort to international law, diplomacy and economic sanctions. This complex corresponds, on the one hand, with the military power of the US and the military weakness of Europe since World War II on the other hand. But, above all, Kagan finds the variant strategies to be manifestations of the Hobbesian philosophy of the Americans and the Kantian *Weltanschauung* of the Europeans.

According to Kagan, the fact, that the use of military power is necessary for the solution of interstate conflicts poses a serious threat to the fundamental values of the European project. This is true in so far as the EU is viewed as a political and legal order based on the assumption that the "rule of law" is possible without a sovereign state as a guarantor of legal compliance.⁴ According to Kagan, from its early beginnings the European Project depended on the military protection of the US and continues to depend on the US to ensuring interior and exterior peace. With his analysis Kagan seeks to demystify the miracle of the evolution of an autonomous European legal order by tearing away the veil that conceals US military power as the foundation upon which those developments have been built.

Kagan's reasoning consists of two main arguments. In a social-psychologic argument he analyses European risk perception as being shaped by the relative weakness of Europe's military strength. In a historic argument he states that Europeans are blind to their dependence on US military protection, because this fact collides with their vision of a legal order independent from sovereign state power.

³ See, the cartoon on <http://de.news.yahoo.com/020912/294/2yjfj.html>

⁴ ARMIN VON BOGDANDY, SUPRANATIONALER FÖDERALISMUS ALS WIRKLICHKEIT UND IDEE EINER NEUEN HERRSCHAFTSFORM. ZUR GESTALT DER EUROPÄISCHEN UNION NACH AMSTERDAM 32-38 (1999).

C. "I'd hammer out a warning . . ."

In a major part of the essay Kagan analyses the diverging risk perceptions of Europeans and Americans. Kagan shows how, in the special case of foreign policy, the options of action shape each side's perceptions of risks. Kagan writes: "Europeans like to say that Americans are obsessed with fixing problems, but it is generally true that those with greater capacity to fix problems are more likely to try to fix them than those who have no such capability."⁵

Regardless of the truth of this analysis it is possible to draw diverging political conclusions from it. Besides it is not really new. As the Norwegian pacifist Johan Galtung already put it in 1999: "And they follow the old American rules, if someone has a hammer, the world looks like a nail. Unfortunately they have got a hammer. This hammer is called an army, and so they are inclined to see problems as military problems."⁶

Apart from his argument about risk perception, Kagan also says that the different positions of Europeans and Americans on the use of military power are based on the difference between the European vision of peace and rule of law and the American Dream of "Life, Liberty and Pursuit of Happiness."⁷ He describes the European vision as a consequence of a collective learning process initialised by World War II, which lead to the construction of the self-executing European legal order. Self-executing at least in the sense that it does not need a military or police force of its own in order for it to function.

This vision of self-executing rules of a "law without a state" lent valuable impulses to European legal scholarship, especially in the fields of legal and constitutional theory, international law and, under the topos of *gesellschaftliche Selbstregulierung* (societal self-regulation), even national law.⁸ Is Kagan right in claiming that these

⁵ Robert Kagan, *Power and Weakness*, POLICY REVIEW No. 113 June/July (2002), <<http://www.policyreview.org/JUN02/kagan.html>>.

⁶ "Und sie folgen den alten amerikanischen Regeln, wenn jemand einen Hammer hat, dann sieht die Welt wie ein Nagel aus. Sie haben leider einen Hammer. Dieser Hammer heißt eine Armee, also haben sie die Neigung, Probleme als militärische Probleme zu sehen." Johan Galtung, *Wiener Friedensgespräche*, 11 July 1999, <<http://religion.orf.at/tv/vis/vi90711.htm>> (Translated into English by the author).

⁷ Declaration of Independence, Action of Second Continental Congress, July 4, 1776, <<http://memory.loc.gov/const/declar.html>>.

⁸ For a theoretical concept of legal pluralism and its impact on political developments, leading to a decline of statehood, see, Gunter Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 LAW AND SOCIETY REVIEW 763 (1997) (also published in German at: <http://www.unibielefeld.de/sozsys/leseproben/teubner.htm> (last visited 4 December 2002)). For more practical exam-

concepts are merely the phantasms of peace-loving Europeans, who have - under the care of US foreign policy and military protection- completely lost touch with reality?

D. Metaphysics of Power

Kagan tries to expose the belief in constructing a peaceful world by means of international law rather than military power as the lived lie of the Europeans. He claims that they fail to recognize that their "Kantian paradise" stood, from the beginning onwards, under the military protection of the United States and would still not be possible without the favour of the global hegemon and its military protection against threats of violence from "rogue states" as well as from the inside of Europe. Kagan writes:

"Europe's evolution to its present state occurred under the mantle of the U.S. security guarantee and could not have occurred without it. Not only did the United States for almost half a century supply a shield against such external threats as the Soviet Union and such internal threats as may have been posed by ethnic conflict in places like the Balkans. More important, the United States was the key to the solution of the German problem and perhaps still is. (...) France's willingness to risk the reintegration of Germany into Europe — and France was, to say the least, highly dubious — depended on the promise of continued American involvement in Europe as a guarantee against any resurgence of German militarism. Nor were post-war Germans unaware that their own future in Europe depended on the calming presence of the American military."⁹

As strong as Kagan's argument might seem, it is only partially supported empirically. Without any doubt it is true, that the US came to Europe to end the fighting between the European states and stayed there to protect Western Europe from communist expansion. But is it also true that the US was also needed (and maybe still is) to keep Germans and French from jumping at each others throats?

In fact the US never really had to take military action within the EU territory to defend one nation against the other. But the omnipresence of the global hegemon's military power might be a "latent structure" that keeps everything in place without ever being executed. It is impossible to refute such latent structures as they are not

ples of the impact of these theories on national law, *see, e.g.*, MICHAEL KLÖPFER, SELBST-BEHERRSCHUNG IM TECHNISCHEM UND ÖKOLOGISCHEM BEREICH (1998).

⁹ Robert Kagan, *Power and Weakness*, POLICY REVIEW No. 113 June/July (2002), <<http://www.policyreview.org/JUN02/kagan.html>>.

subject to empirical evidence. Not only because of this feature, the thesis of Kagan comes close to a metaphysical speculation of American omnipotence and could disqualify itself as such. Kagan's perception seems to match perfectly the implementation of "sovereign power" and "infinite justice" as secret principles of American foreign policy since the election of George W. Bush.¹⁰

E. The Hen, the Egg & the Creator of the European Legal Order

In his article Kagan addresses an issue he calls the "Kantian paradox":

"The United States, in short, solved the Kantian paradox for the Europeans. Kant had argued that the only solution to the immoral horrors of the Hobbesian world was the creation of a world government. But he also feared that the "state of universal peace" made possible by world government would be an even greater threat to human freedom than the Hobbesian international order, inasmuch as such a government, with its monopoly of power, would become "the most horrible despotism." How nations could achieve perpetual peace without destroying human freedom was a problem Kant could not solve. But for Europe the problem was solved by the United States. By providing security from outside, the United States has rendered it unnecessary for Europe's supranational government to provide it. Europeans did not need power to achieve peace and they do not need power to preserve it."¹¹

Speaking of a world government with its monopoly of power one might think that Kagan was referring to America when he invokes "Kant's paradox." But even if Kant was more concerned with the problem of how the *power* of a world government could be moderated by *law* Kagan seems to be primarily interested in the opposite problem: how European *legalism* could come to *power*. In other words, how could European law (or the international legal order promoted by the Europeans) create its proper institutions, thereby ensuring its own execution.

In fact, the evolution of a supranational legal order independent from state power poses grave questions, which were already addressed by scholars of European

¹⁰ See, The National Security Strategy of the United States of America, The White House, Washington, September, 2002. The Strategy bluntly expresses a specific mixture of national interest and missionary fervor: "The U.S. national security strategy will be based on a distinctly American internationalism that reflects the union of our values and our national interests. The aim of this strategy is to help make the world not just safer but better."

¹¹ Robert Kagan, *Power and Weakness*, POLICY REVIEW No. 113 June/July (2002), <<http://www.policyreview.org/JUN02/kagan.html>>.

law.¹² Kagan does not discuss these attempts to solve the dilemma of how law can lead to peace without state power (or respectively: how power can lead to freedom without law). Instead he tries to dissolve the problem of the priority of law or power in much the same way that naive people attempt to solve the question of the hen or the egg. To set an end to the endless circle of mutual production one has to introduce an external power, which, in an act of creation, set the beginning. Kant's jinxed circle of the law which has to come to power and the power which has to become lawful is accordingly made invisible by Kagan, who sees the US as an external power making the development of the Communities' legal order possible.

As far as biological science is concerned Charles Darwin in the 19th century recognised that there is no need for an act of creation, if the question of priority (hen/egg) is left open. Both the hen and the egg have evolved with each other and out of each other. The Kantian dilemma as Kagan refers to it, whether "power" was first or the self-executing (thus weak) "rule of law," could perhaps be solved accordingly, even if it is not directly answered. Yet a simple answer like: "in the first place we need power, we can still care about a legal order later," or vice versa, is wrong because it implies the wrong alternative. Instead, the evolution of an autonomous legal order can only be understood, if we keep in mind that social institutions, being the substrate of "power," are shaped by the law just as law is shaped by social institutions.¹³ Both evolve from each other.

F. "Sed quis custodiet ipsos custodes . . . ?"¹⁴

While concentrating on the Kantian dilemma how law might come to power, the correlative question how power might become lawful does not merit Kagan's attention. If the European problem is the lack of power to enforce its rules, the American problem is the question how this unprecedented global superpower can be checked and balanced. Even if America is the world's longest-surviving democracy and has been the primary cradle of human rights, it is not necessary that it will always have that profile. Above all it is not to be taken for granted that it will always be America that holds the global strategic hegemony. Finally the dismantlement of international law and its organisations by American foreign policy blocks every attempt to democratise global governance.

¹² See, Joseph Weiler, *Transformation of Europe*, 100 YALE L. REV. 2402 (1991); <http://www.law.nyu.edu/weilerj/unit5/UnitV02.htm>

¹³ NIKLAS LUHMANN, RECHT DER GESELLSCHAFT, ch. 6 (1992).

¹⁴ Satura Iuvenalis VI ("But who is guarding those guards...?").

After all that, one could presume that Kagan “is wrong in everything,” except for his analysis that the United States and Europe have parted ways and there is not even a chance of mutual understanding. But hopefully even that is not true: he has made a point in criticising Europeans for their hypocritical attitude towards military action by the US. He accurately observes how Europeans dissent in the first place and then seek to profit from the outcome of US military intervention. He also is right in stating that there are limits to self-executing law without a police and military force ensuring compliance. Of course, he accurately remembers how much help Europe got from the US in the post-war period and how Europe depended on that help. Unfortunately too many of these thoughtful insights are spoiled by his exaggeration of the role the American military power is playing in Europe and the world, leading to the repetition of European hubris with the opposite sign.