

One example was the duty of allegiance of subject to monarchy in the national state. The association of this personal relationship with the tenure of land gave way to territorial monarchy; and the identification of rights with property led to the concept of the realm as the dominion or property of the monarch and the concept of the people as his subjects.<sup>3</sup>

The other retarding influence was the Church, as civil authority in every country was subordinated to the spiritual authority which the Church exercised. But with the Reformation and the Peace of Westphalia in 1648 the state was recognized as the supreme authority within its own territory. This did not mean however, that the state was accepted as the final and perfect form of human association. A new force was quick to arise which denied the absolute separateness and irresponsibility of states - international law.

A problem was created for this task, however, by the consequent development of the doctrine of sovereignty, first formulated by Jean Bodin in De Republica. Sover-

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3. Ibid.

eighty, he held,<sup>4</sup> is the principle foundation of every republic. It has no limit either of power, change or time. The absolute power of the sovereign does not extend to the laws of God or of Nature, however. The Prince is not bound by his own laws nor by the laws of his predecessors, but he is bound by his conventions, they being just and reasonable, and in the observance of which the subjects in general or in particular have an interest, i.e., the law of nature. The distinguishing characteristics of sovereignty, according to Bodin, were the power of legislation for all in general and each in particular, without consent of superior, equal or inferior, the power of declaring war and making peace, the power of instituting principle officials, the power of final appeal, and the power of pardon. Bodin thus paved the way for the appearance of systematic treatises on the laws regulating the relations of states with other states, although later writers would distort his conception of sovereignty into a principle of international disorder by identifying it with absolute power above the

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4. Thomas A. Walker, A History of the Law of Nations I (Cambridge: Cambridge University Press, 1899), p. 240.

law and transforming it into the organic theory of the state,<sup>5</sup> where the state became an end in itself, as we see in Hobbes.<sup>6</sup>

As well as the development of the doctrine of sovereignty, there was the development of the social contract theory which was to influence the legal theory of international law. The fact that political life was conceived to be a state of voluntary arrangements in which the previous state of nature had been one in which rights and duties were deduced from considerations of human reason and justice led to emphasis upon the concept of the Law of Nature, or natural law.<sup>7</sup>

At first this Law of Nature had semi-theological associations.<sup>8</sup> Gentili and Suarez proclaimed that relations between states must be regulated by principles

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5. J.L. Brierly, The Law of Nations, p. 11.

6. Charles De Visscher, Theory and Reality in Public International Law. p. 15.

7. Sir Paul Vinogradoff, "Historical Types of International Law," Bibliotheca Visseriana (Leiden: E.J. Brill, 1923), p. 53.

8. Joseph G. Starke, An Introduction to International Law (London: Butterworths, 1963), p. 20.

of natural justice, more or less clearly recognized by all those who believe in God as the fountain of morality and justice.<sup>9</sup> Even earlier than these writers the concept of a law of nature exercised a signal influence on international law. Particularly important was the Roman concept of ius gentium, the law of peoples which was supposed to have universal application and later merged with the concept of ius naturale, natural law founded upon Man's nature as a rational and social being.<sup>10</sup> This concept culminated in the thought of St. Thomas Aquinas in medieval times when natural law based on reason became identified with God's law or divine law.<sup>11</sup>

It was Grotius who to a certain extent secularized the concept of natural law in its application to international relations. In his scheme were two great strands in the law governing states, which put him on a middle ground between the two main schools of international legal thought, the positivist school and the naturalist

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9. Sir Paul Vinogradoff, "Historical Types of International Law," Bibliotheca Visseriana. p. 53.

10. J.L. Brierly, The Law of Nations. p. 17.

11. Joseph G. Starke, An Introduction to International Law, p. 20.

school. His great work The Law of War and Peace deals with this dichotomy of ius naturale or the law of nature and ius gentium or the law of nations. The Law of Nature was the ideal law founded on the nature of man as a reasonable being, the body of rules which Nature dictates to human reason. From this strand the naturalist school developed, which adopted the view that international law derived its binding force from the fact that it was a mere application to particular circumstances of the "law of nature."<sup>12</sup>

The second strand of Grotian theory was that the same law of nature gives binding force to the common consent by which laws are established among States, so natural law is the common ancestor of civil law and the law of nations. The content of international law (as it was called after Bentham) may be identical with that of natural law, but there may be differences, introduced by common consent. It was this idea of "common consent" which makes Grotius the forerunner of another school of thought, the positivists, who hold that consensus is the

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12. Joseph G. Starke, An Introduction to International Law, p. 20.

principal, if not the sole basis, for a law purporting to govern states.<sup>13</sup> Grotius himself, however, remained suspended between the two strands of thought, as the law of nations could either permit things forbidden by ius naturale or forbid things permitted by ius naturale, so neither natural law or international law was superior to the other.

Grotius' thought had other implications for international legal theory, especially in his treatment of the concept of sovereignty. He said that a people may choose what form of government they deem best but in the exercise of this right they may resign all right of self-government, so it is not true that all government exists for the sake of the governed or that the supreme power resides without exception in the people.<sup>14</sup> So people and kings are not mutually subject but there is rather an unequal alliance in which one party give to another some permanent preference.<sup>15</sup> So the trend was

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13. P.E. Corbett, The Study of International Law (New York: Random House, 1955), p. 13.

14. T.A. Walker, A History of the Law of Nations, I, p.288.

15. Ibid., 289.

encouraged towards a view of sovereignty as absolute and irresponsible, which had understandably unfortunate consequences for the development of international law.<sup>16</sup>

The great master of the naturalist school was Samuel Pufendorf, author of The Law of Nature and of Nations. He insisted that law could not be derived from the consent of its subjects, that it was essentially the dictate of a superior.<sup>17</sup> Custom had no legal force and treaties owed their binding force to the natural law precept that promises must be kept. This thought was refined to some extent by Vattel in the eighteenth century in Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns, in which he said:

We use the term necessary Law of Nations for that law which results from applying the natural law to nations. It is necessary, because nations are absolutely bound to observe it....it is no less binding upon them (states) than it is upon individuals. For States are composed of men, their policies are determined by men, and these men are subject to the natural law under whatever capacity they act.<sup>18</sup>

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16. J.L. Brierly, The Law of Nations, p. 22.

17. P.E. Corbett, The Study of International Law, p. 14.

18. J.G. Starke, An Introduction to International Law, p.21.

Aside from the obvious defects in this type of theory there are certain positive contributions which are made to the development of international legal theory. For one thing, it transfers to States the juridical ideas and requirements worked out by earlier generations in the domain of private law. Once States are conceived as persons on a footing of equality brought together under the protection of sovereignty their collective life is treated as that of persons in private law, they enter into transactions, assume responsibilities, conclude conventions, make claims, demand compensations, etc. So the state incurs all the consequences of its deliberate acts although these consequences may not be drawn by a superior tribunal but by self-help under natural law.<sup>19</sup> Another example of the application of the private law conceptions of personality to states is the recognition of their equality before the law;<sup>20</sup> in this sense Vattel introduced the doctrine of the equality of states, for since men are naturally equal, he said, so are states

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19. Sir P. Vinogradoff, "Historical Types of International Law," p. 55.

20. Ibid., p. 56.



regardless of strength.<sup>21</sup> As a result of later interpretations of this implication we once more have rationalizations for political liberty or anarchy on the international scene, for Vattel says that other states may request a state to reform its conduct, but it does not have to comply with all of the demands. This is the necessary (or natural) law. On the other hand, when states have expressly or tacitly agreed to abide by certain practices (which to Vattel is still the dictates of the law of nature) then these agreements are binding upon them. This is what he calls the voluntary law of nations.<sup>22</sup>

There are obvious objections to theories based on the law of nature. One involves man's constant rediscovery or reinterpretation of what it really is, which results in a great deal of confusion and differences of opinion. This becomes extremely unfortunate when natural law is invoked as an ideology to rationalize selfish actions of a state, as may be the case when international law is

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21. J.L. Brierly, The Law of Nations, p. 37.

22. J.G. Starke, An Introduction to International Law, p.21.

used in disputes or conflicts of interest situations as as a symbol of rectitude to create or strengthen a consensus favorable to one of the parties and unfavorable to its opponents.<sup>23</sup>

The other school of thought, more widely accepted but just as controversial, is the positivist school. Its precursor was Zouche, who deduced law from the precedents of state practice as well as from natural law.<sup>24</sup> Bynkershoek elaborated a bit; law was recognized as being based on custom, but a qualification which smacked once again of naturalism was added: this custom must be explained and controlled by reason.

One interpretation of positivism is that rules in the final analysis are of the same character as positive municipal law, or state law, inasmuch as they also issue from the will of the State. Thus the validity of a system of rules in the international system depends upon the fact that states have consented to them. This can

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23. Oliver J. Lissitzyn, International Law in a Divided World (New York: Carnegie Endowment for International Peace, 1963), p.6.

24. J.L. Brierly, The Law of Nations, p. 35.

be seen in the thought of those who continued in the tradition of the Grotian strand of positivism in the eighteenth century who agreed that positive international law within the body of law in force in international society was that part of the law which was laid down by tacit and expressed consent of the different states.<sup>25</sup> The writers of this school and others in the nineteenth century did not consider the law of the society of states different in composition from that of the separate national societies.<sup>26</sup> This is the theory of monism, the conception that international law and State law are concomitant aspects of one system, law in general.<sup>27</sup> These same thinkers, however, regarded the positive aspects of both types of law as depending for existence upon natural law, which conferred the power to set up obligatory norms. So early positivism didn't discard all of the lore of natural law.<sup>28</sup>

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25. Robert Ago, "Positive Law and International Law," The American Journal of International Law, LI (1957), p. 692.

26. Ibid.

27. J.G. Starke, An Introduction to International Law, p.67.

28. P.E. Corbett, The Study of International Law, p. 16.

Even Pufendorf of the naturalist school, although denying the existence of positive law in the society of nations, actually only limited its scope. He regarded the emanation of a precept from a superior legislator, or a voluntary act, as positive law rather than the agreement between different sovereign states. This had its roots in the Hobbesian idea that positive law was that made by the will of those who had sovereign power over others.<sup>29</sup>

Another root of positivism is the psychological notion of the State-will, from the thought of Hegel, which is attributed complete sovereignty and authority. Following this assumption, international law consists of those rules which various State-wills have accepted by a process of voluntary self-restriction, or what Jellinek calls auto-limitation.<sup>30</sup> In other words, by consenting to observe the customary rules of international conduct, states accept these rules of conduct without

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29. Robert Ago, "Positive Law and International Law," p.694

30. Wolfgang Friedman, The Changing Structure of International Law (New York: Columbia University Press, 1964), p. 85.

abandoning their sovereignty. The obvious weakness of this theory is that what states can consent to they can also revoke. This is the principle of rebus sic stantibus, which states use to repudiate treaties because of a change of circumstances.<sup>31</sup> The only way in which Jellinek's theory can hold up is to assume that the pacta sunt servanda principle that agreements between states must be respected, stands above the revocable consent of states.<sup>32</sup> Jellinek, however, relies entirely upon the manifestation of consent, without which international law would not be binding on the society of states.<sup>33</sup> Most of the positivists, especially Zorn, make the further assumption that this international law then becomes a branch of State law, which is the theory of monism again.<sup>34</sup>

A technical definition of positivism has been given as follows: a juridical norm laid down in an externally recognizable manner by a formal source from an historically existing legal system.<sup>35</sup> This identification of

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31. Ibid., p. 335.

32. Ibid., p. 85-86.

33. J.G. Starke, An Introduction to International Law, p.23.

34. Ibid., p.23.

35. Robert Ago, "Positive Law and International Law," p.700

the only true law with the "laying down" of it by a formal source created the myth previously referred to of the Hegelian will of the state, which made the State the sole origin of international law. This strict interpretation naturally presents problems, for the competence established by the law. So a vicious circle begins, since eventually one comes to a norm whose existence cannot be defended according to the positivist criterion. This was the problem of Perassi in his study on the sources of international law, when he said that only a relevant legal fact, which was one taken into consideration by another rule, could be the source of legal norms. This essentially means that the legal nature of a rule is deduced not from its historical and material existence but from another legal rule. So eventually the analytical jurist reaches the "rule of production", or what Hans Kelsen calls the postulate or Grandnorm, the source of legal rules.<sup>36</sup> Kelsen, who is one of the most consistent of the positivists and the leading adherent of monism,

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36. J.G.Starke, An Introduction to International Law, p. 29.

calls this postulate the most important of all norms, the one whose juridical nature conditions that of all others. It follows that it is not positive because it is not created in a legal procedure by a law-creating organ.<sup>37</sup>

This can be further explained by reference to a treatise by the Italian jurist Anzilotti, who later became Judge of the Permanent Court of International Justice, in which it was held that the binding force of international law could be traced back to one, supreme, fundamental principle or norm, which is the principle that agreements between states are to be respected. This norm, pacta sunt servanda, is an absolute postulate of the international legal system, and manifests itself in one way or another in all the rules belonging to international law.<sup>38</sup> Similarly, Triepel holds that agreements made between states merge into an objective body of conventions which states are then no longer free to repudiate. In this theory, the international norm of

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37. Robert Ago, "Positive Law and International Law," p. 700.

38. J.G. Starke, An Introduction to International Law, pp. 23-24.

conduct does become superior to the will of the states, but only as a product, not as a presupposition of interstate agreement.<sup>39</sup> It is unnecessary to subscribe to Anzilotti's view that the validity of international law rests on the principle of pacta sunt servanda, however, to accept the position that without a respect for treaty obligations in international relations order inevitably dissolves into chaos.<sup>40</sup>

It is Kelsen again, who in contrast with his colleagues of the monistic school, reaches the conclusion that international law is supreme to state law.<sup>41</sup> He does this by applying his doctrine of the hierarchy of norms, where eventually the one supreme fundamental norm is discovered, beyond which the analytical jurist cannot venture, as the ultimate origins of law are determined by non-legal considerations.<sup>42</sup> It is argued against the

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39. W. Friedman, The Changing Structure of International Law, p. 86.

40. C. Wilfred Jenks, The Common Law of Mankind (London: Stevens and Sons Limited, 1958), p. 143.

41. P.E. Corbett, The Study of International Law, p. 17; Joseph G. Starke, Studies in International Law, London: Butterworths, 1965, pp. 10-11.

42. J.G. Starke, An Introduction to Internat'l Law, p. 70.



primacy of state law (although Kelsen peculiarly takes the view that the fundamental postulate may be either state or international law) and in response to the dualists who maintain state supremacy that (1) if international law were not the higher legal order, primacy would have to be attributed to over one hundred and more different and separate systems of State law, which would virtually amount to an affirmation of international anarchy; (2) if international law drew its validity only from a State Constitution, it would necessarily cease to be in force once the Constitution on which its authority rested disappeared. This assumption is disproved by the fact that the valid operation of international law is independent of change or abolition of constitutions or of revolutions. This was declared by the London Conference of 1831 which decided that Belgium should be an independent and neutralized state. It was upheld that treaties do not lose their force despite internal constitutional changes. Also, it is well established that international law binds the new State without its consent, and such consent if expressed is merely declaratory of the true legal position.<sup>43</sup>

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43. Ibid. p. 71.

One encounters several problems in the theory of positivism which assumes a tacit or expressed consent in order to give a law a legal quality. For one thing, in the case of customary rules, there are many instances where it is quite impossible to find any consent by states to the binding effects of these rules. There is also the fact that when a new state enters the family of nations it is bound by international law upon the moment of its emancipation without an express act of consent.<sup>44</sup>

There are even stronger criticisms of the conception of positivism which holds that the legal nature of a rule depends entirely upon its being "laid down" by a formal source. This theory ignores a whole series of rules in international law which are not laid down by a special law-making procedure and yet their "legal nature" is recognized.<sup>45</sup> As a result of this a new branch of theory developed which identified positivity with the effective application and forced or sanctioned observation of a law. So Kelsen's postulates or rule of legal production, although

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44. J.G. Starke, An Introduction to International Law, p.25.

45. R. Ago, "Positive Law and International Law," p. 700.

non-positive, is still considered by scholars as obligatory.

All of the debate concerning the technicalities of positivism tend to obscure the real fact, that certain norms can be qualified as legal because of characteristics belonging objectively to the norms themselves because of their functions as norms of law, and not as a mere reflection of their origin. Therefore "spontaneous law" must be recognized as well; in fact, it is of the greatest importance in the international order since the equalizing structure of international society makes all common international law law of this nature.<sup>46</sup> One source makes a very plausible suggestion: that the word positive could be eliminated entirely from the legal vocabulary and the concept of "law in force" could be divided into norms of spontaneous formation and those produced by legal law-creating organs.<sup>47</sup>

Dualism, the other theory concerning the relation between international and state law, holds that the two

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46. Ibid., p. 732-733.

47. R. Ago, "Positive Law and International Law," p. 733.

types of law represent two entirely distinct legal systems, international law having an intrinsically different character from that of State law.<sup>48</sup> The very fact that some of the positivists relied on the concept of consent as the basis of international law led to the natural conclusion that State law would be regarded as a distinct system and superior to international law. Triepel and Anzilotti are the main exponents of dualism. According to the former there are two fundamental differences between the two systems: (1) the subjects of state law are individuals, while the subjects of international law are states solely and exclusively. This is disproved by the very fact that international law can affect individuals; they can be punished for war crimes, for instance. (2) Their juridical origins are different; the source of State law is the will of the State itself, the source of international law is the common will (Gemeinwille) of States. It has already been shown how it is dubious as to whether the consent, tacit or expressed, is the source of international law; so the natural inference is

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48. J.G. Starke, An Introduction to International Law, p. 67.

that over and above this common will of states there must be some fundamental principles of international law, superior to it and indeed regulating its exercise or expression.

A larger problem concerns the very nature of the State itself and thus involves the positivist assertion of a state-will as well as the premises of dualism. It could be effectively argued, as has been, that in the ultimate analysis international law binds individuals only, but through the state which acts as an intermediary.<sup>49</sup> If it is remembered that the state is only a legal order which determines the conditions under which society may employ its monopoly of organized violence,<sup>50</sup> in other words a fictitious personality in whose name men act, then the only will or wills of that state are those of the individuals by whom it is governed.<sup>51</sup> To paraphrase Kelsen, the affirmation that international law binds states merely signifies that the individual

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49. J.G. Starke, Studies in International Law, p. 5.

50. Hans J. Morganthau, Politics Among Nations (New York: Alfred A. Knopf, 1965), p. 507.

51. J.G. Starke, An Introduction to International Law, p. 25.

who has violated the legal duty is not directly confronted by a norm of international law but that international law leaves the determination of that individual to state law. Just as the execution or non-execution of these duties must take place through the action of individuals, so does the statement that international duties are the duties of the state simply amount to this, that it is an internal matter for the state alone to determine who are the individuals bound to fulfill these duties.<sup>52</sup> Thus monism is the prevalent theory today.

A more debatable and less significant school of international legal theory is Leon Dugit's sociological positivism, which bases the rule of law upon men's direct perception of social necessities. The State merely implements this rule. It is itself subject to it, being itself only means and not end. The decisions of rulers are binding not because they express a legally competent will but because they accord with the social imperatives springing from the sense of solidarity and of justice.

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52. J.G. Starke, Studies in International Law, p. 5.

Thus Duguit goes to the extreme by denying sovereignty and the state's personality altogether.<sup>53</sup>

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53. Charles De Visscher, Theory and Reality in Public International Law (Princeton: Princeton University Press, 1957), pp. 63-64.