
The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism

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La recherche de la paternité est interdite.¹

Abstract

International law was virtually synonymous with the natural law until the nineteenth century when the new doctrine of legal positivism supplanted Enlightenment naturalism as the dominant legal philosophy. Whereas the perennial jurisprudence of the natural law had conceived of the natural law and the positive law as complementary aspects of a single juridical reality, Enlightenment naturalism rejected or underestimated the role of positive law in regulating international relations. The confusion this error caused in international law rightly discredited Enlightenment naturalism. This did not, however, lead to a revival of older and more complete conceptions of the natural law. Austin's positivism expelled international law from the province of jurisprudence because it failed to conform to that theory's narrowly constructed definition of 'law'. Successive attempts by leading legal positivists to redeem international law for their school have led to a dilution of positivist doctrine, but have not furnished a coherent account of international law's juridical character. These revisions have failed to explain the persistence of non-positive juridical phenomena in the system, which may be highlighted by a detailed consideration of international law's sources. Legal positivism is also having an adverse impact on the theory and practice of international human rights law.

1 Introduction: Shifting Perceptions

International law is a subject which over the last 150 years has endured a crisis of

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¹ Code Napoléon, Article 340.

identity. For most of its life, it has been virtually synonymous with the natural law.² This is not only because Hugo Grotius (1583–1645), with whose name the foundation of modern international law is usually associated, was within the natural law tradition.

Rather, its close association with natural law thinking was also long due to the underdevelopment of international positive law, i.e. custom and treaties, combined with a pressing need for a stronger legal order among the fractious European states of the sixteenth and seventeenth centuries. Whereas positive international law was relatively sparse, European thought had spent almost two millennia building up a mature body of jurisprudence corresponding to the natural law. This jurisprudence — which is part of the *philosophia perennis*³ — represents a reasonably continuous intellectual tradition which may conveniently be referred to as the perennial jurisprudence of the natural law.

Prior to the European Enlightenment, this perennial jurisprudence of the natural law reached its summit in the work of Thomas Aquinas (1225–1274). The perennial jurisprudence, but not of course the natural law itself which remains valid and in force even when we are unconscious of it, later went into partial eclipse. This was especially so during the period from the European Enlightenment, which was dominated by conceptions of the natural law sharply at odds with the perennial jurisprudence, to the middle of the twentieth century when legal positivism was hegemonic. Although various versions of legal positivism remain the dominant standard for juridical thought to this day, the perennial jurisprudence of the natural law enjoyed a highly fruitful scholarly revival and renewal in the late twentieth century.⁴

² 'With regard to International Law, it is notorious that all authorities down to the end of the eighteenth century, and almost all outside England to this day, have treated it as a body of doctrine derived from and justified by the Law of Nature.' Sir Frederick Pollock, *Essays in the Law* (1922) 63.

³ *Philosophia perennis*: This term was employed by G.W. Leibniz (1646–1716), and may have been first used in 1540 by Agostino Steuco ('Steuchus', 1496–1549; *De perenni philosophia libri X*, 1540). It refers to a body of philosophical truths that are found across ages and civilizations. See Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy* (1946; 1998 edition translated by Thomas R. Hanley) 27–28, note 21. See also *New Catholic Encyclopedia*, vol. 11 (1967) 450. It embraces the work notably of Aristotle, the stoics, Augustine, the scholastics, and more latterly the neo-scholastics and the neo-thomists.

⁴ See, most notably, Joseph M. Boyle Jr, John Finnis and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (1987); Boyle, Finnis and Grisez, 'Practical Principles, Moral Truths and Ultimate Ends', 32 *American Journal of Jurisprudence* (1987) 99–151; John Finnis, *Natural Law and Natural Rights* (1980); John Finnis, *Fundamentals of Ethics* (1983); John Finnis, *Aquinas: Moral, Political and Legal Theory* (1998); George, 'Recent Criticism of Natural Law Theory', 55 *University of Chicago Law Review* (1988) 1371–1492; Robert P. George, *Making Men Moral* (1993); Robert P. George, *In Defense of Natural Law* (1999); and Grisez, 'The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1–2, Question 94, Article 2', 10 *Natural Law Forum* (1965) 168–201. This revival and renewal of the perennial jurisprudence of the natural law has come to be generally known as the 'new natural law theory' (see e.g. Robert P. George, *In Defense of Natural Law* (1999) 1) or the 'new classical theory' (*ibid.*, at 231–234). It is also sometimes known as the 'Grisez–Finnis theory'. The theory is 'new' inasmuch as it seeks to understand the natural law in terms of practical reason, resting on its own first principles, necessarily directed towards the realization of a number of self-evident and incommensurable forms of human good or human flourishing. Among these forms of human good or flourishing is practical reasonableness, which corresponds to our free will and intelligence, and which involves a set of

Starting in the nineteenth century the new doctrine of legal positivism first resolutely expelled international law from the realm of positivist jurisprudence. Then, as if repenting of its initial indiscretion, it effected a series of moves in order to reclaim international law on terms acceptable to positivist dogma. These moves involved both a tactical retreat from legal positivism's initial conception of sovereign will and a distorting manipulation of international law's character. Positivism's attitude to international law has truly wavered 'between icy rejection and acceptance in a bone-crushing embrace'.⁵

As we shall see, however, the initial rupture between positivist jurisprudence and international law was dictated by fidelity to legal positivism's core dogmas. Subsequent attempts to reintegrate international law into positivist jurisprudence have failed because legal positivism is incapable of furnishing a coherent explanation for international law's obligatory character. This incapacity is the result of legal positivism's radical refusal to acknowledge the juridical character of any object which is not sourced to an act of sovereign will located in history. In particular it expels from the realm of legal thought those pre-positive juridical norms of the natural law, from which the positive law draws all its authority.

By the first decade of the twentieth century, most international lawyers had become positivists, though there remained an influential minority who recognized that international law comprised both positive and natural elements. Thus, as late as 1899 Sir Sherston Baker (1846–1923) was able to write in a standard text of the time:

Customs which are lawful and innocent are binding upon the States which have adopted them; but those which are unjust and illegal, and in violation of natural and Divine law, have no binding force.⁶

By the 1920s, however, legal positivism was all but triumphant in the jurisprudence of international law. The new consensus was neatly summarized in a 1926 opinion of the Mexico–United States General Claims Commission:

The law of nature may have been helpful, some three centuries ago, to build up a new law of nations, and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago, on the development of modern democracy on both sides of the ocean; but they have failed as durable foundation of either municipal or international law and can not be used in the present day as substitutes for positive

methodological requirements for distinguishing between reasonable and unreasonable practical possibilities. Practical reasonableness also leads to the identification of general moral standards which in turn modulate the exercise of practical reason. The natural law is our participation, as rational and free creatures, in an antecedent eternal law. Unlike other natural law theories since the middle ages (including Enlightenment naturalism as well as those theories which may be considered part of the *philosophia perennis* of the natural law), the 'new natural law theory' does not rely on deductions drawn from posited images of human nature by a methodologically prior theoretical reason. It thus avoids the illicit inference from facts to norms which has troubled much natural law theorizing since Aquinas, whose own views on this score adumbrate the foundations of the 'new' approach. Cf. especially Russell Hittinger, *A Critique of the New Natural Law Theory* (1987).

⁵ Lon L. Fuller, *The Morality of Law* (1969 revised edition) 232.

⁶ Sir Sherston Baker, *First Steps in International Law* (1899) § 8, at 16. See also e.g. John Westlake, *International Law* (2nd ed., 1910), Part I, 14–15 (see accompanying text at note 84).

municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand.⁷

Legal positivism made its first appearance as a mature and distinct jurisprudential doctrine during the early part of the nineteenth century.⁸ In its classical mode, it is characterized by a faith in three core dogmas.

First, it is not content to defend the existence and legal force of positive law, i.e. law generated by a creative act of 'laying down' located in history. Rather, positive law is wholly identified with the idea of Law itself. Secondly, it is not content with the proposition that the creative act of laying down may be performed by human beings in a variety of modes. Instead, the creative historical act must be performed by a sovereign.⁹ On both these counts legal positivism broke with hitherto prevailing legal conceptions, and involved a dramatic narrowing of jurisprudential focus.

Finally, any necessary connection between the reasonableness or justice of a positive law and its complete legal effectiveness was denied. This aspect of legal positivism is widely, but mistakenly, regarded as being the most significant feature separating it from the natural law. In reality, it is the least significant of the three principal differences; and not only because it is so rarely instantiated.

The natural law does not regard an unreasonable or unjust positive law as a non-law *in every sense*. Rather, the natural law merely regards such a positive law as failing to impose an unqualified moral obligation of compliance, and as being juridically defective to that extent. The natural law does not otherwise deprive the positive law of its juridical status.¹⁰ At the same time legal positivist theories, without

⁷ *North American Dredging Company of Texas (USA) v. Mexico*, 4 RIAA 26, at 29–30 (1926). The following year, the Permanent Court of International Justice said: 'International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing and independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed.' *Lotus case (France v. Turkey)*, 1927 PCIJ Series A, No. 9, at 18. Writing at about the same time, P.E. Corbett remarked: 'The writer, while fully aware that there are disciples of the naturalist school in the field, assumes that the general view of international law which has, for all practical purposes, definitely prevailed is that of the positivists.' 'The Consent of States and the Sources of the Law of Nations', 6 *BYIL* (1925) 20–30, at 21.

⁸ This is not to deny that important elements of legal positivist thought were present in earlier times. See, in particular, Arthur Nussbaum, *A Concise History of the Law of Nations* (2nd ed., 1958) 164–185. Indeed, as John Finnis observes, '[p]ositivism was first articulated as a concept organizing reflection on law, legal right(s), and legal justice, in about 1130': *The Truth in Legal Positivism*, in Robert P. George (ed.), *The Autonomy of Law* (1996) 195–214, at 195.

⁹ See e.g. Ago, 'Positive Law and International Law', 51 (1957) *AJIL* 691–733, at 697–698.

¹⁰ Even an unjust positive law imposes a moral obligation to obey to the extent that (i) it does not promote acts which are radically unjust or immoral in themselves, and (ii) disobedience would cause loss of respect for a legal system which is on the whole just: John Finnis, *Natural Law and Natural Rights* (1980) 278–280 and 351–368; Damich, 'The Essence of Law According to Thomas Aquinas', 30 *American Journal of Jurisprudence* (1985) 79–96; Thomas Aquinas, *Summa Theologica*, I-II, q. 96, a. 4, c. on the obligation to obey certain unjust laws, which never arises where the positive law is contrary to the Divine law. Specifically, in relation to the obligation to obey certain unjust judgments of courts, which are also part of the positive law, see *Summa Theologica*, II-II, q. 67, a. 1, c and q. 69, a. 4, c.

denying that positive laws may sometimes be so unjust as to be morally iniquitous and worthy of resistance, do not consider moral obligation to be an essential component of legal obligation. Hence, both approaches will regard an unreasonable or unjust positive law as possessing technical legal validity, i.e. validity within the system of positive laws in which it is situated. Legal positivist theories regard such technical legal validity as conferring complete legal effectiveness (without excluding the supposedly extra-judicial possibility of non-compliance justified on moral grounds). The natural law, on the other hand, regards technical legal validity as giving rise only to a *partial or imperfect* legal effectiveness, which is completed or perfected by the positive law's reasonable orientation to the common good.

2 Enlightenment Naturalism

The emergence of legal positivism as the hegemonic framework for legal thought in the nineteenth century was partly a reaction against the work of the naturalist school of jurisprudence¹¹ founded by Samuel von Pufendorf (1632–1694), with which the names of Christian Thomasius (1655–1728), Christian von Wolff (1679–1754), Jean-Jacques Burlamaqui (1694–1748) and Emmerich de Vattel (1714–1767) are also prominently associated.

Enlightenment naturalism was highly individualistic, voluntarist and rationalist, and rested on various conceptions of a state of nature and a social contract. It tended strongly, but in varying degrees depending on the publicist, towards a rejection of custom and tradition as sources of authority or as restraints on personal and political action.

The naturalism of the Enlightenment furthermore cut itself off from the much older and richer tradition of the perennial jurisprudence. This tradition, rooted in the classical and mediaeval periods, postulated man as an intrinsically social being;¹² the natural law was ordained to the common good and was man's rational participation in an antecedent eternal law.¹³ According to Sir Frederick Pollock (1845–1937):

That which modern writers since Rousseau have commonly called the Law of Nature without qualification is nothing else than a one-sided development of the 'secondary Law of Nature' as it was understood before the scholastic terminology was forgotten.¹⁴

The 'natural' element in the Enlightenment's conception of the natural law was not a moral, ethical and rational standard as it is in the natural law itself. Rather, it was an essentially empirical or descriptive standard resting upon the state of nature in which people had supposedly existed before entering into their social contract. This shift in perception was reflected in the increasing use of the term 'Law of Nature' in preference

¹¹ On the Enlightenment's naturalist school, see Nussbaum, *supra* note 8, at 147–164. See also E.B.F. Midgley, *The Natural Law Tradition and the Theory of International Relations* (1975) 167–195; and Rommen, *supra* note 3, at 67–96.

¹² Aristotle observed that 'man is a political animal' and that outside the *polis* he is 'either a beast or a god': *The Politics*, I, ii.

¹³ Thomas Aquinas, *supra* note 10, q. 90, a. 3; and q. 91, a. 3.

¹⁴ Pollock, *supra* note 2, at 38.

to the older '*lex naturalis*', '*ius naturale*' or 'natural law'. With the Enlightenment, thinking about the natural law degenerated from an objective metaphysical idea into a nominalist political theory, and a component of an ideology, which sought to justify and catalyze political change.

The perennial jurisprudence of the natural law, furthermore, recognizes a large freedom of choice and wide latitude of action in the shaping and application of positive laws. The natural law and positive laws are complementary elements of a single juridical reality. The natural law calls forth the positive law and endows the latter with its binding character. The positive law gives determined form to the natural law's general precepts and principles.

Enlightenment naturalism embraced instead a 'doctrine of the autonomy of human reason which, in conjunction with the rationalism of this school, led straight to an extravagance of syllogistic reasoning, of deductively constructed systems that served to regulate all legal institutions down to the minutest detail',¹⁵ thereby diminishing or eliminating the role of positive law. Thus were the practitioners of Enlightenment naturalism entangled in a jurisprudential method the practice of which they scornfully and erroneously attributed to the mediaeval scholastics. It is, furthermore, an irony of history that the Enlightenment's caricature of the scholastic method stubbornly survives as part of the image which most moderns possess of the middle ages.

Pufendorf who 'was largely ignorant of, and certainly contemptuous of, the works of Aristotle and the scholastics'¹⁶ developed a theory in which the existence of positive law at the level of international relations was regarded as an impossibility. In reaching this conclusion he was acting under the influence of certain ideas of Thomas Hobbes (1588–1679) which were also to be seminal to the emergence of legal positivism. Hobbes had taught that positive laws were 'those which have not been from eternity, but have been made laws by the will of those that have had the sovereign power over others'.¹⁷

Accepting this thesis, Pufendorf rejected the idea that an agreement between sovereigns could generate positive law.¹⁸ As all international laws of a putatively positive character (treaties and customs) were based on agreements between sovereigns, they could not properly be regarded as positive laws at all. Since the only two kinds of law were natural law and positive law, it followed that only the natural law could legally regulate international relations. International law, Pufendorf argued, consisted of nothing else than 'the natural law of states'.¹⁹

It was against this new exclusivist conception of natural law that many jurists under the influence of legal positivism eventually reacted. Their objection to the

¹⁵ Rommen, *supra* note 3, at 83.

¹⁶ Midgley, *supra* note 11, at 167. Rommen similarly observed that 'Pufendorf was well acquainted with scarcely a single Greek or Scholastic': Rommen, *supra* note 3, at 83.

¹⁷ Thomas Hobbes, *Leviathan* (1651), Chapter XXVI, 7.

¹⁸ Samuel von Pufendorf, *De jure naturae et gentium libri octo* (1672), lib. II, cap. III, § 23, 226 (1934 translation by C.H. and W.A. Oldfather of the 1688 edition). See also Ago, *supra* note 9, at 695.

¹⁹ *Ibid.* Pufendorf was expressly adopting Hobbes' terminology.

continuing validity of natural law reasoning, typified in the stance of the Mexico–United States General Claims Commission, erroneously assumed that all natural law jurisprudence necessarily postulates a rejection of, or deep scepticism towards, the legally binding character of treaty and custom.

Henry Wheaton (1785–1848), commenting on a Pufendorf treatise,²⁰ observed that its author ‘professes to follow the method of geometers, laying down his definitions and axioms, and demonstrating his conclusions with a strict mathematical accuracy, which is now generally acknowledged that moral reasonings do not allow’.²¹ Identifying the natural law mainly with the works of Pufendorf and other leading members of the Enlightenment naturalist school, F.E. Smith (Earl of Birkenhead, 1872–1930) remarked that the conception of the natural law ‘has, perhaps, caused more loose thinking than any other in the history of thought’.²² There were also numerous Enlightenment scholars of lesser renown who:

were filling the libraries of educated people, government officials, and judges with numberless systematic but conflicting expositions of natural law. With few exceptions . . . these men claimed that they were the first to discover the natural law or to free it from the fancies and verbiage of the Scholastics. It was precisely this break with tradition that was responsible for the confounding of this doctrine of natural law with the perennial idea of the natural law. So it was, then, that the nineteenth century could believe that, with the refutation of this doctrine, the natural law itself had been proved a chimera.²³

In its earlier stages, Enlightenment naturalism was definitely ‘an affair of the ruling class, the nobility and the intellectuals of the age, clerics and men of science’.²⁴ It was, from the first, primarily political in orientation. It served reformist objectives by helping to replace the remnants of feudal society with more rational social arrangements corresponding to the orderly administrative requirements and modernizing ambitions of centralized Enlightenment despotism.

²⁰ *Elementorum jurisprudentiae universalis libri duo* (1660).

²¹ Henry Wheaton, *History of the Law of Nations* (1845) 89. The mechanical and abstract rationalism of the Enlightenment, highlighted by Wheaton’s observation, spread well beyond jurisprudence and affected every aspect of practical reasoning. According to Edmund Burke, it was the habit of George III and his later ministers of seeking ‘geometric exactness’ in the uniform application of abstract universal principles, so that ‘the natives of Hindostan and those of Virginia could be ordered in the same manner’, which led to the justified revolt of the American colonies; and a similar intellectual flaw adversely affected policy towards Ireland: Peter J. Stanlis, *Edmund Burke and the Natural Law* (1965) 104–106, quoting from Edmund Burke, *Letter to the Sheriffs of Bristol* (1777).

²² The Earl of Birkenhead, *International Law* (6th ed., 1927) 4. This understandable frustration with the legacy of the Enlightenment’s naturalist school also appears to have informed Hans Kelsen’s rejection of natural law: Hans Kelsen, *Pure Theory of Law* (1967, translation by Max Knight of *Reine Rechtslehre* (2nd ed., 1960)) 220; see also Hersch Lauterpacht, ‘Kelsen’s Pure Science of Law’, in *Modern Legal Theories* (1933) 105–138, at 135–136.

²³ Rommen, *supra* note 3, at 82. Sir Frederick Pollock took a similar view: ‘In fact, the Law of Nature, as Grotius found it, was no mere speculative survival or rhetorical ornament. It was a quite living doctrine, with a definite and highly important place in the mediaeval theory of society. What is more, it never ceased to be essentially rationalist and progressive. Modern aberrations have led to a widespread belief that the Law of Nature is only a cloak for arbitrary dogmas or fancies.’ Pollock, *supra* note 2, at 32, see also *ibid.*, at 62.

²⁴ Rommen, *supra* note 3, at 69.

As these political objectives were realized and consolidated, and as the logic of its individualist and contractarian foundations were remorselessly worked through, Enlightenment naturalism became an increasingly important component of a popular-revolutionary ideology. Under the influence of, in particular, Jean-Jacques Rousseau (1712–1778), the politicization of Enlightenment naturalism was completed, and by the late eighteenth century it had become principally an ideological weapon for social revolution and the overthrow of Enlightenment despots. This almost wholesale collapse of Enlightenment naturalism into radical political ideology served, in the nineteenth and twentieth centuries, to further discredit the very idea of the natural law.

Though it superficially resembled the perennial jurisprudence of the natural law, Enlightenment naturalism involved a dramatic decay in legal theorizing. This decay was only partly offset, during Enlightenment naturalism's later radical phase, by the express recognition of natural rights.

The existence of natural rights was already implicit in the perennial jurisprudence of the natural law.²⁵ The Enlightenment's recognition was, however, substantially impaired by the distorting conceptual framework of contractarianism. In its earlier reformist phase, under the influence of Hobbes and the naturalist school, Enlightenment naturalism posited that man had decisively surrendered the rights he possessed in his state of nature when he entered into the social contract. In the later revolutionary phase these radically individualist 'natural rights of man' were thought, on the contrary, to be preserved intact by the social contract. There was also a distinct readiness, for narrowly political purposes, to reject established positive law by appeals to a highly abstract, disembodied and revolutionary conception of the natural rights of man. This readiness extended, for example, to the Jacobins' purported voiding of all treaties as a prelude to their contemplated conquest of Europe.²⁶

On the whole, Enlightenment naturalism led to a desiccated conception of the natural law which was too frequently detached from the richness of human life:

The Enlightenment . . . brought the dormancy of winter to natural law. The term was bandied about, but its interpretation was radically changed, from situated precepts guided by human nature, historical experience, and prudence, to abstractions that neglected both their institutional history and their carefully crafted justifications.²⁷

The hubris of Enlightenment naturalism gave way to its nemesis in the nineteenth century. The spreading eclipse of natural law thinking at that time was also intimately connected to a paradox in the West's intellectual development.

²⁵ See e.g. Thomas Aquinas, *supra* note 10, q. 96, a. 6, c: 'And laws of this sort [i.e. unjust laws] are acts of violence rather than laws, as Augustine says (De Lib. Arb. I. 5), a law that is not just, seems to be no law at all.' See also John Finnis, *Aquinas: Moral, Political and Legal Theory* (1998) 135–138, and John Finnis, *Natural Law and Natural Rights* (1980) 205–208.

²⁶ Stanlis, *supra* note 21, at 93–94.

²⁷ Black, 'Natural Law', in Christopher Berry Gray (ed.), *The Philosophy of Law: An Encyclopedia*, vol. II (1999) 575–581, at 576.

3 Nineteenth-century Trends

On the one hand the nineteenth century was characterized by impressive progress in, and a heightened prestige of, the natural sciences. Indeed, the word 'scientist' first appeared in the English language in the 1830s and 1840s, replacing the earlier term 'natural philosopher' to describe those who studied nature and its workings.²⁸

As scientific knowledge expanded, so too did the division of the natural sciences into a greater number of increasingly specialized fields. The age of the Enlightenment savant passed away as the sheer volume of knowledge exploded.

The path to scholarly respectability lay in the transformation of one's field of study into a 'proper' science, i.e. a science in the likeness and image of the natural sciences:

The pronouncements of scientists began to influence the way men and women looked at the world as the teachings of priests had once done. It came to be as influential in this way as through its explanation and manipulation of nature. In its grossest form, such credulity has been called 'scientism' by some historians of culture. One of its expressions was a greatly increased willingness to extend the scientific method into new areas as the only sure road to truth. Saint-Simon envisaged a reconstruction of society on the basis of science and industry. Karl Marx also exemplified the wish to found a science of society, and a name for one was provided by Comte — 'sociology'. In particular, some sought to establish 'social sciences'. The utilitarian followers of . . . Jeremy Bentham were among these.²⁹

This impelled scholars in a number of fields, including jurisprudence, to attempt to stake out clearly the boundaries of their disciplines and to exclude from their ambit issues which were not susceptible to solution by methods resembling those used in the natural sciences. In particular, this meant the exclusion of questions of an essentially 'conjectural' character; i.e. those falling principally within the domains of morality, ethics and metaphysics.

Thus, the nineteenth century was marked by a distinctly positivist approach in many fields of scholarly endeavour. 'Conjecture' gave way to observation, and evaluation yielded to analysis.

In jurisprudence, an act of a legislator's will is an object which can be observed and analyzed. Whether a law is just or unjust requires, by contrast, an inquiry into those very realms condemned by the positivist outlook as 'conjectural'. Law becomes, consequently, 'no true norm or something pertaining to reason, but mere actual will in the psychological sense'.³⁰ Dazzled as the age was by the remarkable progress in natural science, this approach reflected a diminished understanding that human activities such as the making and observance of laws are essentially intentional, moral, ethical and teleological. They are therefore not matters pertaining essentially to the natural sciences. Nor are they especially susceptible to understanding by recourse to the methods of the natural sciences.

The Enlightenment, which laid the intellectual and cultural foundations for the nineteenth century's scientific revolution, had promised to liberate humanity from

²⁸ J.M. Roberts, *History of Europe* (1996) 388.

²⁹ *Ibid.*

³⁰ Rommen, *supra* note 3, at 113.

the shackles of superstition and ignorance by unleashing the force of pure reason upon the world. In so far as ‘reason’ is understood to mean only theoretical reason, i.e. reason in relation to the natural world, the promise was amply fulfilled.

On the other hand practical reason, i.e. reason in its relation to human action, fared poorly in the nineteenth century. This was partly a reaction to the Enlightenment’s abuse, for political purposes, of a rootless and distorted practical reason. Indeed, a principal cause of the Enlightenment’s disorientation in matters pertaining to the natural law was its philosophical nominalism. This caused Enlightenment thinking to assimilate falsely the mathematical and geometrical methods of theoretical reason to the quite distinct tasks of practical reason, thereby unfairly discrediting the use of practical reason as a means of inquiry into human affairs. It was then but a small step to the nineteenth century’s abandonment of practical reason altogether in jurisprudence and other areas of investigation where it properly belonged.

Indeed the Enlightenment’s legacy in the nineteenth century, which remains alive in the tradition of legal positivism, was a *flight* from reason in its practical dimension:

The current denial of natural law is one of those strange anachronisms in human thought in which, instead of going forward with a progressively clearer understanding of a doctrine, the course of thought suddenly reverses itself and turns backward toward ancient errors and discredited sophistries.³¹

The nineteenth century’s turning away from the natural law marked a decisive break with the mainstream Classical, Judeo-Christian, Mediaeval and Enlightenment traditions of Europe. This jurisprudential detour was and remains a principal characteristic of modernity.³² It was partly an effect, and partly a cause, of the emergence of determinist theories of man and society; itself a phenomenon dramatically at odds with both the Judeo-Christian and Enlightenment ideals of free and rational Man capable of shaping and pursuing his chosen goals.³³ In the words of Leo Strauss (1899–1973):

The crisis of modernity reveals itself in the fact, or consists in the fact, that modern western man no longer knows what he wants — that he no longer believes that he can know what is good and bad, what is right and wrong.³⁴

Because man is a rational creature, the natural law establishes that the source of obligation in the law is its rational concordance with the common good. In other words a law is obligatory primarily because of its rightness and justice, and the

³¹ McKinnon, ‘Natural Law and Positive Law’, 1 *Natural Law Institute Proceedings* (1947) 85–103, at 86.

³² See Schall, ‘Natural Law and the Law of Nations: Some Theoretical Considerations’, 15 *Fordham Journal of International Law* (1991–1992) 997–1030, at 1003–1012.

³³ Russell Hittinger, commenting on the situation in the US, has remarked: ‘At the turn of the twentieth century, the educated classes thought of “nature” not according to the classical conception of an ordered cosmos of ends, nor even according to the Enlightenment understanding of fixed physical “laws of nature”; rather, nature was conceived according to one or another evolutionary scheme within which the human mind exercises creative, pragmatic adjustments.’ Introduction to Rommen, *supra* note 3, at xv.

³⁴ Strauss, ‘The Three Waves of Modernity’, in *Political Philosophy: Six Essays by Leo Strauss* (1975, edited by Hilail Gildin) 81. *See* John Finnis, *Aquinas: Moral, Political and Legal Theory* (1998) 297.

exercise of authority is justified in similar terms.³⁵ Obedience to law is fundamentally a matter of moral obligation. With the flight from practical reason which accompanied modernity and legal positivism, the source of law's obligation must be sought elsewhere. Legal positivism's response has been to replace reason as the source of law's obligation, with fear; fear of violence, fear of lost liberty, advantage or amenity, or fear of social disapproval.

4 The Birth of Classical Legal Positivism

Legal positivism's most important founders were Jeremy Bentham (1748–1832) and, especially, his friend John Austin (1790–1859). As professor of Jurisprudence and the Law of Nations at the newly founded University of London, Austin published *The Province of Jurisprudence Determined* (1832), which commenced a revolution in English legal thought. By century's end, the Cambridge jurist T.A. Walker (1862–1935) described Austin's work as the 'starting point of all English dissertations on legal science' and observed sardonically that 'the language of the Victorian English Law School is the language of the Province of Jurisprudence Determined, and each jurist of the mode talks Austinese'.³⁶

Austin was determined to demarcate strictly law and ethics, and to extend to jurisprudence the status and respectability enjoyed by the natural sciences. The opening words of his first lecture are:

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors.³⁷

A law simply and strictly so called is a 'command which obliges a person or persons, and obliges *generally* to acts of forbearances of a *class*'. It does not include particular or ad hoc commands.³⁸ Positive law is 'contradistinguished to *natural* law, or to the law of *nature*' and is 'law existing by *position*', i.e. law 'set by men to men'.³⁹

The 'superiority' of a political superior does not imply any quality of excellence or mere deference, but 'signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes'.⁴⁰

The political superior is not, however, simply a person who can enforce his commands through fear of an inflicted evil:

³⁵ John Finnis, *Natural Law and Natural Rights* (1980) 23–24 and 359–360. Richard R. Baker, 'The Scholastic Concept of International Law', 16 *Notre Dame Lawyer* (1940) 1–17, at 9. Thomas Aquinas, *supra* note 10 at q. 90, a. 1, ad. 3, remarked: 'Reason has its power of moving from the will (q. 17, a. 1), for it is due to the fact that one wills the end, that reason issues its commands as regards things ordained to the end. But in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law, for otherwise, the will of the sovereign would rather be injustice than law.'

³⁶ T.A. Walker, *The Science of International Law* (1893) 4.

³⁷ John Austin, *The Province of Jurisprudence Determined* (1832; 1995 edition edited by Wilfred E. Rumble) 18.

³⁸ *Ibid.*, at 29 (emphasis in the original).

³⁹ *Ibid.*, at 19 (emphasis in the original).

⁴⁰ *Ibid.*, at 30 (emphasis in the original).

[T]he essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme.⁴¹

Thus all laws strictly so called emanate from a sovereign to members of an independent political society. A sovereign and an independent political society are both identifiable by two conjoined conditions: '1. The bulk of the given society are in a habit of obedience or submission to a determinate and common superior. . . 2. That certain individual, or that certain body of individuals, is not in a habit of obedience to a determinate human superior.'⁴²

If there is no sovereign, and no independent political community which is subject to that sovereign, there can be no laws strictly so called.⁴³ There can likewise be no state without a sovereign and an independent political society.

Nevertheless, certain commands of persons who are not political superiors of those to whom the commands are addressed can also be regarded as laws properly (but not strictly) so called if they are imperative commands of a general character set by a determinate source armed with sanctions. They include commands established by men who are not in a state of subjection to a sovereign, or by men who are in a state of nature or anarchy, or by 'sovereign individuals or bodies, but are not established by sovereigns in the character of political superiors'.⁴⁴ The study of these laws might belong to a science of positive morality, being 'a science closely analogous to jurisprudence'.⁴⁵ Jurisprudence itself is the science of law strictly and properly so called, i.e. positive law.

Likewise falling within a possible science of positive morality is 'law improperly so called',⁴⁶ which includes '*laws set or imposed by general opinion*: that is to say, by the general opinion of any class or any society of persons.'⁴⁷ In this connection, Austin remarks:

A few species of the laws which are set by general opinion have gotten appropriate names. . . There are laws which regard the conduct of independent political societies in their various relations to one another. Or, rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled *the law of nations* or *international law*.⁴⁸

Into the same category, argues Austin, fall 'the rules of honour' and 'the law set by

⁴¹ *Ibid.*, at 165.

⁴² *Ibid.*, at 166.

⁴³ Cf. Jeremy Bentham, *Of Laws in General* (1782; 1970 edition edited by H.L.A. Hart) 18: '[T]he will of which it [law] is the expression must . . . be the will of the sovereign in a state.'

⁴⁴ Austin, *supra* note 37, at 119–120.

⁴⁵ *Ibid.*, at 112.

⁴⁶ *Ibid.*, at 123.

⁴⁷ *Ibid.* (emphasis in the original).

⁴⁸ *Ibid.* (emphasis in the original).

fashion'.⁴⁹ Thus in Austin's view international law is not law properly so called, does not belong to the science of jurisprudence, but does belong to a possible analogous science of positive morality. Furthermore, international law fails the test of law strictly so called because it does not emanate from a sovereign to an independent political society.⁵⁰ In his analysis of international law, Austin was Pufendorf minus the natural law. Austin therefore identifies law with the will of the sovereign, which is identical to the will of the state.

The bindingness of law, in Austin's view, stems entirely from the fear of an evil inflicted by a sovereign in case of disobedience. The sovereign is subject to no law strictly so called, and is the source of all law strictly so called. On this analysis it is impossible to avoid the conclusion that might is right.⁵¹

Legal positivism's reign since the mid-nineteenth century and its continuing ascendancy into the early twenty-first century can easily conceal both its historical novelty and its revolutionary character.

A conception which has all law flowing from the will of a sovereign state to its human subjects is obviously incompatible with the characterization of international law as a real legal system. A strict adherence to the positivist doctrine in its pristine form must preclude, as Austin precluded, any recognition that international relations among sovereign states can be governed by law.

Legal positivism is a theory which draws its strength from its observance of, and reliance on, verifiable facts. It is one of the theory's many contradictions, however, that Austin's desire to exile international law from the province of jurisprudence manifestly failed to connect with the facts of international life.

States continued to regard international law as real law, they continued to abide by its rules in the vast majority of cases, their diplomatic communications continued to bristle with claims and counter-claims of legal right, and they continued to sign treaties by which they regarded themselves and other states as legally bound.⁵² This remained so notwithstanding the absence of an international sovereign, the absence of an independent political community subject to such a sovereign, the absence of any commands set by the former to the latter, and (usually) the absence of a factual power of coercion in case of a violation of the law. Austin's legal positivism involved, despite its scientific aspirations, an unscientific attempt to make the facts fit a preconceived theory.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, at 171.

⁵¹ A phrase which Austin describes as 'a great favourite with shallow scoffers and buffoons', perhaps revealing a raw nerve. He nevertheless expressly endorses it, on the understanding that it means a subject's legal right stems exclusively from the might of the sovereign: *ibid.*, at 235, note 23.

⁵² As J.L. Brierly observed in *The Outlook for International Law* (1944) 5: 'The best evidence for the existence of international law is that every actual state recognizes that it does exist and that it is itself under obligation to observe it. States may often violate international law, just as individuals often violate municipal law, but no more than individuals do states defend their actions by claiming that they are above the law.'

5 Jellinek's Revision

This discordance between the positivist creed and the observable facts called for a revision of Austin's theory by those adhering to positivism's fundamental dogmas. These had to be reconciled somehow with the juridical reality of international law.

The first major rescue attempt occurred nearly half a century later and was mounted by the German jurist, Georg Jellinek (1851–1911).⁵³ Legal positivism found especially fertile soil in Germany where it was well adapted to the Hegelian conception of the state as the 'realization of the moral idea'.⁵⁴ Jellinek argued, following Hegel, that states are sovereign persons with their own wills which are subject to no external limitation. States can, however, consent to subject themselves to legal obligations on the international plane by limiting their own sovereignty to the extent necessary to achieve that result. This auto-limitation of sovereignty was reversible so that a state could, by another act of will, lawfully disengage itself from that to which it had earlier consented. The only objective rule of international law, according to Jellinek, is the right of states to preserve themselves.⁵⁵

Jellinek's theory did not effectively redeem international law for positivist jurisprudence. Any obligation from which a person can validly disengage by a unilateral act of will is not binding, and therefore not law, in any meaningful sense.⁵⁶ Jellinek strengthened the jurisprudential character of international law only by weakening the juridical character of law itself.

Nevertheless, he made a move which was pivotal in seeming to reconcile legal positivism with international law. Although all law emanated from the will of a sovereign, it was not necessary that a law so posited needed to be addressed to a political subordinate. In willing a law into being and addressing that law to itself, the state sovereign remained the source of all law and at least provided a fragile basis upon which legal relations among equally sovereign states could be conceived in positivist terms.

⁵³ *Die rechtliche Natur der Staatenverträge* (1880). See Nussbaum, *supra* note 8, at 234–235.

⁵⁴ 'Wirklichkeit der sittlichen Idee': G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (1821), § 257. See also Ago, *supra* note 9, at 698.

⁵⁵ Jellinek subsequently formulated the idea as follows: 'Whenever the observance of international law is found to be in conflict with the existence of the State, the rule of law retires to the background, because the State is put higher than any particular rule of law. . . International law exists for States and not States for international law.' *Allgemeine Staatslehre* (3rd ed., 1914) 377 (as translated by Sir Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) 47, note 2).

⁵⁶ 'Now, a legal rule is an objective norm independent of the will of the person who is bound by it.' Lauterpacht, *supra* note 55, at 56. This formulation is one with which both positivists and naturalists can agree. *Semle J.L. Brierly, The Basis of Obligation in International Law* (1958, edited by Sir Hersch Lauterpacht and C.H.M. Waldock) 14 (originally published in French under the title 'Le Fondement du caractère obligatoire du droit international', 23 *Recueil des cours* (1928-III) 462–549). 'However we may choose to define law, an essential part of the function of law must be to limit the wills of those to whom the precepts are addressed, and its binding force cannot possibly be derived from the wills that it limits. A self-imposed limitation is no true limitation at all, but a contradiction in terms.'

6 Triepel's Revision

Heinrich Triepel (1868–1946) provided a somewhat less insecure foundation for a union of positivist jurisprudence and international law.⁵⁷ The theory of auto-limitation was rejected in its application to relations among national sovereigns.

Rather, the source of international law was said to lie in the *common* will of states. More specifically, it lay in law-making agreements reached explicitly (treaties) or implicitly (custom). Once a law-making agreement had been created by the common will of states via an act of explicit or implicit agreement, those same states were no longer free to repudiate it by a subsequent unilateral act of will. They remained legally bound by the original act of common will.

In Triepel's theory we have arrived at the strategic position from which mainstream legal positivism surveys international law to this day. The international sovereign is a collective body, as national sovereigns can be. Unlike national sovereigns, however, there is no separate political community over which the sovereign exercises power. Rather, sovereign and subject are the same entities. Thus legal positivism reluctantly came to accept that sovereignty can be limited permanently, at least on the plane of international relations.

Furthermore, the identical personalities of sovereign and subject required a shift in the conception of will itself. Rather than being an object expressed in the mode of command, will assumed the passive form of consent. With Triepel, the positivist conception of international law became, and continues to be, decisively one in which each state *consents* to be bound.⁵⁸

And yet, the theory still does not provide an explanation for the phenomenon of international law. Why *should* the common will of states — a will necessarily above and beyond the international law which it generates — create an obligation which continues to bind individual states even after they have withdrawn their consent by a subsequent act of will? Moreover, is it not a naked fiction that 'the collective will, once formed, while remaining a purely factual assemblage of specific wills, continues to live its own life, independent of the continued support of its constituents'?⁵⁹

Furthermore, and even more fundamentally, why *should* any act of any sovereign bind a subject to obedience? This aspect of legal positivism is what lends it a quasi-religious quality, for it is 'a premise — unproved and unprovable — that only the will of the State as sovereign authority can be the source of . . . legal norms'.⁶⁰

Austin's fundamentalist positivism could at least rely on a utilitarian fear of a potentially inflicted evil, flowing from the will and might of the sovereign, to provide a sub-rational motive for obedience to domestic law. The imposition of a potentially inflicted evil, such as to inspire fear (namely, reprisals or countermeasures), can perhaps only exceptionally be counted on for violation of international law; especially,

⁵⁷ *Völkerrecht und Landesrecht* (1899). See Nussbaum, *supra* note 8, at 235.

⁵⁸ According to Louis Henkin, 'State consent is the foundation of international law': *International Law: Politics and Values* (1995) 27.

⁵⁹ Ago, 'Positivism', in *Encyclopedia of Public International Law*, vol. 7 (1984) 385–393, at 387.

⁶⁰ *Ibid.*

but not exclusively, on the part of powerful states in their dealings with weaker states. If the potential evil which inspires fear is diluted to mean merely the disapproval of other states or of the broader international community, then there is a fundamental confusion. Disapproval occurs when there has been a breach of a norm (legal or otherwise) which is regarded as engaging moral or ethical responsibility. The social disapproval following a breach of the law is therefore not a substitute for the law's moral content, but a consequence of it.

The response of Triepel's followers was that these sorts of questions were non-judicial, and beyond the realm of their inquiry. In other words the questions require an exercise of practical reason, as opposed to theoretical reason, and are therefore conjectural. The fundamental questions were left expressly unanswered.

7 Positivism and the Sources of International Law

These were not the only obstacles, however, hindering legal positivism's efforts to annex international law. Not only did the revised positivist doctrine fail to explain *why* international law is binding, but the dogma that law is binding on a state only because that state has in some sense willed itself to be bound stubbornly refused to square with the observable realities of international life. This discordance reveals itself especially in a consideration of the sources of international law.

Article 38(1) of the Statute of the International Court of Justice provides that, in deciding in accordance with international law such cases as are submitted to it, the Court shall apply treaties, international custom and 'the general principles of law recognized by civilized nations'. The Court may also have regard to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law'.⁶¹ Because they are subsidiary, judicial decisions and the works of publicists are not *per se* sources of law; their function is to illuminate the three sources of treaty, custom and general principles.

Only two of the three sources — treaty and custom — are clearly positive in character; i.e. they specify obligations and entitlements pursuant to acts of human will. The character of the general principles is, as we shall see, more ambiguous.

Although Article 38 strictly applies only to the work of the International Court, it is nevertheless generally accepted as setting out the sources of international law at large.⁶²

A *Treaties*

Treaties are the only objects of an apparently law-creating character at the international level to which states unambiguously consent. Treaties do not, however, formally create law at all:

⁶¹ Article 38 uses materially identical wording to the same Article in the Statute of the Permanent Court of International Justice, drafted in 1920.

⁶² See e.g. Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, vol. 1 (9th ed., 1996) § 9, 24.

Considered in themselves, and particularly in their inception, treaties are, formally, a source of obligation rather than a source of law. In their contractual aspect, they are no more than an ordinary private law contract; which simply creates rights and obligations. . . The only 'law' that enters into these is derived not from the treaty creating them — or from any other treaty — but from the principle *pacta sunt servanda* — an antecedent general principle of law. The law is that the obligation must be carried out, but the obligation is not, in itself, law.⁶³

The law compelling a treaty's observance thus necessarily exists independently of, and prior to, the act of will by which state sovereigns agree a treaty's terms.⁶⁴ The principle *pacta sunt servanda*⁶⁵ is a general principle of law.⁶⁶ Indeed, it is quite possibly the first general principle ever to have been manifested in international relations.⁶⁷ It is not the act of sovereign will in concluding a treaty which creates a *legally binding* obligation.

It is no reply to argue that *pacta sunt servanda* is a principle of customary international law resting on the consent of states.⁶⁸ J.L. Brierly (1881–1951) succinctly deals with this line of defence:

[C]onsent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting. To say that the rule *pacta sunt servanda* is itself founded on consent is to argue in a circle. A consistently consensual theory . . . would have to admit that if consent is withdrawn, the obligation created by it comes to an end. Most positivist writers would not admit this, but to deny it is in effect to fall back on an unacknowledged source of obligation, which, whatever it may be, is not the consent of the state, for that has ceased to exist.⁶⁹

Furthermore, as we shall presently see, customary international law itself can be universally binding even absent the consent of all states. Therefore even if *pacta sunt servanda* is nothing more than a principle of customary international law, it does not

⁶³ Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', *Symbolae Verzijl* (1958) 153. See also H.L.A. Hart, *The Concept of Law* (2nd ed., 1994) 225.

⁶⁴ See especially Sir Hersch Lauterpacht, *supra* note 55, at 54–59.

⁶⁵ Agreements are to be complied with.

⁶⁶ See e.g. Malcolm N. Shaw, *International Law* (4th ed., 1997) 81; Ian Brownlie, *Principles of Public International Law* (5th ed., 1998) 620; and Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) 112–114. Louis Henkin remarks that: 'Inevitably, the normative character of a treaty depends on an antecedent, underlying "constitutional" principle, rooted perhaps in the natural law, the principle *pacta sunt servanda*, agreements are to be observed', *supra* note 58, at 28. In the Advisory Committee of Jurists on Article 38(1)(c) of the Statute of the Permanent Court of International Justice, Lord Phillimore (the co-author of the provision) observed that: 'the general principles referred to . . . were those which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc.' The principle that all international legal obligations are to be performed in good faith is '[p]erhaps the most important general principle' (Shaw, *supra* note 66, at 81) and 'the very rule of *pacta sunt servanda* in the law of treaties is based on good faith' (*Nuclear Tests case (Australia v. France)*, ICJ Reports (1974) 253, at 267). Indeed, Article 26 of the Vienna Convention on the Law of Treaties, which codifies the general principle of law, recognizes that good faith is inseparable from *pacta sunt servanda*: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

⁶⁷ Shaw, *supra* note 66, at 12–13. Nussbaum, *supra* note 8, at 1–2.

⁶⁸ Cf. Hans Kelsen, *General Theory of Law and State* (1945, translation by Anders Wedberg) 369.

⁶⁹ J.L. Brierly, *The Law of Nations* (5th ed., 1950) 54. *Semle Hart*, *supra* note 63, at 224–225.

necessarily follow that treaties are legally binding on account of the prior universal consent given to *pacta sunt servanda*.

Treaties are thus material sources of law, rather than formal sources; they tell us what the legal obligation requires in the circumstances of a particular case, but not that a legally binding obligation exists.

The force of this point was not, at first, widely conceded by legal positivists. For instance in 1913 Dionisio Anzilotti (1867–1950) argued that ‘States are bound because and so far only as they wish to be bound’ and that ‘[e]ven the obligatory force of the rule *pacta sunt servanda* is derived from nothing else than the collective will of States’ so that the ‘norm which postulates the carrying out of obligations validly contracted ceases to be operative when, logically, the will of States ceases’. Within 10 years, and during his membership of the Permanent Court of International Justice, Anzilotti had come to accept that states could not will away *pacta sunt servanda* which is ‘a primary norm, over and above which there is no other norm which could explain it juridically [*che ne spieghi la giuridicità*], and which the science of law accepts nevertheless as a hypothesis or an indemonstrable postulate.’⁷⁰

Therefore, and contrary to positivist dogma, sovereign will does not create binding treaty law unless the general principles of law are themselves the product of sovereign will. We shall see, as Anzilotti eventually conceded, that they are not.

B Custom

The other source of positive international law is custom. According to Article 38(1)(b) of the Statute of the International Court of Justice, the Court is to apply to such disputes as are submitted to it ‘international custom, as evidence of a general practice accepted as law’. This formulation is universally, or almost universally, regarded as reflecting the customary law requirements for the existence of a custom. Article 38(1)(b) reflects a framework custom within which other customary legal rules, enjoying less than unanimous support, may emerge and continue to function.

Custom is in many ways the pre-eminent source of positive international law. Although an applicable treaty provision will generally override an inconsistent customary rule, custom will prevail if it enjoys the status of a *ius cogens* norm,⁷¹ or if

⁷⁰ Anzilotti, 7 *Rivista di diritto internazionale* (1913) 64, at 65; Dionisio Anzilotti, *Corso di diritto internazionale* (1923) 40; as translated by Lauterpacht, *supra* note 55, at 59.

⁷¹ *Ius cogens* is the term normally used to describe a peremptory norm of general international law. Article 53 of the Vienna Convention on the Law of Treaties provides: ‘A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ Article 64 provides: ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’ See also Article 71 on the consequences of the invalidity of a treaty which conflicts with a *ius cogens* norm.

the parties to the treaty actually observe an inconsistent custom among themselves.⁷² The vast majority of treaties are not universal, and are generally binding only on those states which are parties to them,⁷³ whereas almost all customary law is universally applicable.⁷⁴

To an even greater degree than treaties, custom provides serious conceptual resistance to positivism's attempted adoption of international law.

As we have seen, Triepel's idea of sovereign will was expressed in the mode of consent. This was in order to overcome the difficulties which will-as-command, combined with auto-limitation of sovereignty, posed for the juridical status of law as an obligation independent of the subject's will. International law was binding, on Triepel's account, because every state had consented to be bound. Once the consent was given, the legal obligation to which it had given birth could not be terminated by a unilateral reversal of will. The explanation for this curious effect was not to be found in jurisprudence, but remained a non-judicial issue according to that school.

Triepel was, by the dogma that all law emanates from sovereign will, precluded from making the relatively simple move of arguing that a majority or near-unanimous view among states can bind even dissenters. From such a position an obligation would certainly result from a collective act of sovereign will. There would, however, need to be a higher legal rule, prior to the will of states, which transformed the bare fact of such a majority or near-unanimous positing into an obligation legally binding on dissenters.⁷⁵

Clearly, however, one could not be an orthodox positivist while admitting the existence of a legal rule which was independent of the sovereign wills it was

⁷² Such later inconsistent practice by all parties, or by some with the acquiescence of others, could be characterized as 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation': Article 31(3)(b) of the Vienna Convention on the Law of Treaties. The entire treaty might also fall into desuetude as a result of subsequent compliance with an inconsistent custom.

⁷³ Treaty provisions which are of a fundamentally norm-creating character may, however, generate a customary law rule binding even on non-parties where there is 'a very widespread and representative participation in the convention ... provided it included that of States whose interests were specially affected': *North Sea Continental Shelf cases (Germany v. Denmark; Germany v. The Netherlands)*, ICJ Reports (1969) at 43, para. 73 of the Court's judgment.

⁷⁴ Customary international law can exceptionally be 'regional', 'special' or 'local', i.e. applicable only as between or among certain states where there is an observance of 'a constant and uniform usage by the states in question', such usage being supported by *opinio iuris*: *Asylum Case (Colombia v. Peru)*, ICJ Reports (1950) 266, at 276–277. There is also the shadowy presence of the 'persistent objector' principle, by which 'express dissent by a state in the formative stages of a potential rule of customary law may prevent it ever becoming established, at least as against the dissenting state'. Jennings and Watts, *supra* note 62, at § 10, 29 (emphasis added). An *obiter dictum* in support of the principle is to be found in the *Anglo-Norwegian Fisheries case (United Kingdom v. Norway)*, ICJ Reports (1951) 116, at 131, but neither the International Court of Justice, nor its predecessor, the Permanent Court of International Justice, has ever applied the principle. See in particular Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 *BYIL* (1985) 1–24, and Charney, 'Universal International Law', 87 *AJIL* (1993) 529–551, at 538–542.

⁷⁵ In the words of Ago, *supra* note 9, at 702: 'The legal nature of a rule is ... deduced, not from the fact which has produced it materially and historically, but from that other legal rule which considers this "fact" as a "source" of legal rules.'

regulating. Down this route lurked the persistent spectre of the natural law. Any such higher ‘authorizing’ rule could not itself have been arrived at by majority act of will, opposed by dissenters, because any such mode of authorization would involve circular reasoning. Nor could any such ‘authorizing’ rule have been arrived at by universal consent of sovereign wills because, absent a yet higher and even more prior ‘super-authorizing’ rule, a state would be free to withdraw its consent to that rule. And so on, down a never-ending positivist hall of mirrors.

Having embraced will-as-consent in its analysis of international law, legal positivism confronted yet another gulf between its self-consciously scientific theory and the stubbornly unaccommodating data. It is clear that there are very few, if any, universally binding customs to which all states have actually consented. This inconvenient fact raises, for a legal positivist, the prospect that there cannot be any universal system of international law. An attempt to avoid this highly inconvenient result was made by importing the notion of implied consent in the even more passive mode of will-as-acquiescence; i.e. absence of protest.⁷⁶

Will-as-acquiescence appeared to solve two critical problems with the positivist position. It could be used to give the appearance of widespread consent to new rules where no such consent seemed actually to exist, and it could be used to explain how newly emerged states come to be bound by existing international law without any apparent act of consent on their part. This manoeuvre, however, did not save legal positivism from an embarrassing collision with the realities of international life:

States fail to protest for very many reasons. A state might not wish to give offence gratuitously or it might wish to reinforce political ties or other diplomatic and political considerations may be relevant. It could be that to protest over every single act with which a state does not agree would be an excessive requirement. It is, therefore, unrealistic to expect every state to react to every single act of every other state. If one accepted that a failure to protest validated a derogation from an established custom in every case then scores of special relationships would emerge between different states depending upon acquiescence and protest. In many cases a protest might be purely formal or part of diplomatic manoeuvring designed to exert pressure in a totally different field and thus not intended to alter legal relationships.⁷⁷

Quite apart from these factual difficulties for will-as-acquiescence, there is an even more fundamental conceptual problem. As Brierly pointed out:

Implied consent is not a philosophically sound explanation of customary law, international or domestic; a customary rule is observed, not because it has been consented to, but because it is believed to be binding, and whatever may be the explanation or the justification for that belief, its binding force does not depend, and is not felt by those who follow it to depend, on the approval of the individual or the state to which it is addressed. Further, in the practical administration of international law, states are continually treated as bound by principles which they cannot, except by the most strained construction of the facts, be said to have consented to, and it is unreasonable, when we are seeking the true nature of international

⁷⁶ I.C. MacGibbon defines ‘acquiescence’ as ‘silence or absence of protest in circumstances which generally call for a positive reaction signifying objection’: ‘The Scope of Acquiescence in International Law’, 31 *BYIL* (1954) 143–186, at 143, and ‘Customary International Law and Acquiescence’, 33 *BYIL* (1957) 115–145.

⁷⁷ Shaw, *supra* note 66, at 71.

rules, to force the facts into a preconceived theory instead of finding a theory which will explain the facts as we have them.⁷⁸

The artificial character of will-as-acquiescence was particularly highlighted in the case of new states. A newly independent state assumes all the rights and obligations generally applicable to states under existing international law, and no newly independent state is free to say that it accepts some rules of international law and rejects others.⁷⁹ Under the modified, but still rigid, positivism inspired by Triepel, new states were taken to have impliedly consented to the whole corpus of universally applicable international law — even to those parts which they in fact expressly rejected.⁸⁰ This, of course, empties the idea of consent of any meaningful content. It also manifests a determination to manipulate not only the facts, but also the very language by which we grasp the facts, in a way to fit a preconceived dogma.

Sir Hersch Lauterpacht (1897–1960) was moved to remark that the implied consent of newly independent states ‘is no more than a fiction resorted to in order to conceal the objectively binding force of international law as independent of the will of the particular State’.⁸¹

The legal positivisms inspired by Triepel were unable to provide an account of custom as the exclusive product of sovereign will; even in any of the progressively weakening modes of command, consent, or acquiescence. The account rendered was both conceptually artificial and failed to conform to the observable data.

Moreover, the positivists’ belief that only positive law is real law and that positivity requires an act of laying down by sovereign will, causes them to see a sovereign legislative act in what is only a store of evidence. The perceived sovereign legislative act is the imagined tacit agreement among states which is said to undergird custom. When, however, we speak of the ‘evidence’ for custom consisting of state practice supported by *opinio iuris* we mean exactly that. The practice and *opinio* are merely evidence of an existing phenomenon; or ‘nothing but the external data by which the existence and efficacy of a customary norm can be recognized, since it is a norm which is not otherwise manifested.’⁸²

No sovereign legislative act, whether in the form of tacit agreement or otherwise, is

⁷⁸ Brierly, *supra* note 69, at 52–53. Westlake, *supra* note 6, at 49, had similarly observed: ‘Those . . . who lay it down that it is only by virtue of its consent to international law that a State is bound by it, are obliged to infer that consent from incidents in which we may be sure that nothing of the kind was thought of when they occurred. Practically, the obligation is always assumed to exist, and it is therefore more reasonable to inquire what is its source than to strain inferences in order to prove that it has been admitted.’

⁷⁹ See e.g. Jennings and Watts, *supra* note 62, at § 5, 14.

⁸⁰ For example, according to Oppenheim, *International Law*, vol. I (1st ed., 1905), § 12, 17–18: ‘New States which came into existence and through express or tacit recognition were admitted into the Family of Nations thereby consented to the body of rules for international conduct in existence at the time of their admittance. . . No single State can say on its admittance into the Family of Nations that it desires to be subject to such and such a rule of International Law, and not to others.’ It therefore seems, on Oppenheim’s view, that new states impliedly consent as a matter of irrebuttable presumption.

⁸¹ Lauterpacht, *supra* note 55, at 53. See also Elihu Lauterpacht (ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht*, vol. I (1970) 66.

⁸² Ago, *supra* note 9, at 723.

required for the emergence of a customary norm.⁸³ Rather, international customary law evolves and is ‘accepted’ (in the language of Article 38(1)(b)) as being already binding. The *opinio iuris* element in relation to any particular practice is in reality a belief that: (i) it is necessary or desirable for the international common good that there be a binding rule governing a particular domain; (ii) this practice is an appropriate (but not necessarily uniquely appropriate) means of responding to the requirements of the international common good; and (iii) this practice *would* be normatively binding *if* the belief and practice were subscribed to, or acquiesced in, by a sufficient mass of states.

The *opinio* element in customary international law is, therefore, propositional; i.e. it is simply a view that a particular practice is a suitable candidate (from perhaps numerous possible alternatives all of which might be more or less equally consistent with advancing the international common good) for customary law status. Once the practice and the accompanying *opinio iuris* are sufficiently widespread, acceptance of the practice’s legal status follows. Similar conceptions of *opinio iuris* existed prior to the drafting of Article 38. John Westlake (1828–1913), for instance, taught:

Custom and reason are the two sources of international law... Reason is a source of international law . . . for two causes. First, the rules already regarded as established, whatever their source, must be referred to their principles, applied, and their principles extended to new cases, by the methods of reasoning proper to jurisprudence, enlightened by a sound view of the necessities of international life. Secondly, the rules as yet established, even when so applied and extended, do not cover the whole field of international life, which is constantly developing in new directions. Therefore from time to time new rules have to be proposed on reasonable grounds, acted on provisionally, and ultimately adopted or rejected as may be determined by experience.⁸⁴

How widespread the practice and *opinio* need to be before acceptance occurs depends on the relationship of the putative customary rule to the requirements of the international common good, including especially the attitude of any subjects of international law whose interests are particularly affected.

This conception of *opinio iuris* also has the advantage of being more faithful to the language of Article 38(1)(b) than the traditional positivist understanding. According to that tradition, *opinio iuris* (understood to mean a conviction that a practice is already legally binding) and state practice are evidence of the existence of an international custom. Yet the text of Article 38(1)(b) puts the matter entirely the other way around: ‘The Court . . . shall apply . . . international custom, *as evidence of a general practice accepted as law.*’ According to the traditional positivist understanding, Article 38(1)(b) ‘somewhat curiously’⁸⁵ reverses the relationship between international custom and those elements (state practice and a conviction of its extant legal status) which are evidence of the custom.

On a natural law conception of *opinio iuris*, however, there is no peculiarity in the

⁸³ For a compelling natural law account of the emergence of customary international law norms, see John Finnis, *Natural Law and Natural Rights* (1980) 238–245.

⁸⁴ Westlake, *supra* note 6, at 14–15.

⁸⁵ Jennings and Watts, *supra* note 62, at § 9, 26.

drafting of Article 38(1)(b). *Opinio iuris* and 'acceptance as law' are different, albeit related, objects. Thus Article 38(1)(b) accurately, and without paradox, expresses the true dynamic underlying international customary law: international custom, which consists of sufficiently widespread state conduct supported by *opinio iuris* (in the propositional sense), really is 'evidence' supporting the existence of a 'general practice accepted as law'.

It is traditional and convenient to refer to the phenomenon which results from this dynamic as 'customary international law', or with cognate expressions including 'international custom'. There has too often been, however, an unhappy by-product of this convention which adversely affects our reflections on Article 38(1)(b). Because of the similarity of the terms involved, and labouring under positivist misconceptions, we have tended to conflate customary international law (i.e. the end result of the dynamic referred to in Article 38(1)(b)) with 'international custom' in the narrower sense (i.e. the evidence from which recognition or acceptance of customary international law follows).

An important consequence of this confusion, which facilitates and is facilitated by positivist misunderstandings, has been the erroneous collapsing of the propositional *opinio iuris* element of international custom into the 'acceptance as law' of that international custom.

Even the International Court of Justice, in its various formulations of customary international law, has not been immune from these confusions. Indeed, operating mainly within positivist conceptual frameworks, the court has been a principal agent of confusion.⁸⁶

The 'acceptance as law' identified in Article 38(1)(b) is not an act of willing but merely an act of perceiving or recognizing. The propositional *opinio iuris* is, by contrast, an act of willing in the sense that it is a consciously created object. It is, furthermore, an object which is attached by a further act of will to a practice which is also consciously chosen. It is this aspect of customary international law which provides it with its positive character. It is the result of deliberate human choosing, but it is not *enacted* (by agreement, command or otherwise) by any act of will. It is simply 'accepted', or recognized, as having in fact emerged.

It is the insistence on forcing the evidence supporting customary international law into the procrustean bed of sovereign legislative will that gives rise to one of the most stubborn and awkward enigmas of positivist jurisprudence; i.e. that in order for an international custom to emerge there must be a stage during which states are labouring under the necessarily false belief that the act or forbearance is already required or permitted by international law. Where the false belief is that the act or

⁸⁶ E.g. most notably in the *North Sea Continental Shelf* cases (*Germany v. Denmark; Germany v. The Netherlands*), ICJ Reports (1969) 3, at 44, para. 77 of the Court's judgment: 'Not only must the acts [of states] concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.' See also especially the *Asylum Case (Colombia v. Peru)*, ICJ Reports (1950) 266, at 276.

forbearance is already permitted, the paradox is sharper and results in the imagined legislative act being grounded in an actual breach of the *lex lata*.

The positivist obsession with sovereign will has sought to separate customary international law from its roots in the international common good. In so doing, it has created for itself this wholly unnecessary paradox.

C *General Principles of Law and the Ius Gentium*

The difficulties posed for legal positivism by treaty and custom are, however, minor compared to that presented by the third source of international law, set out in Article 38(1)(c) of the ICJ Statute — the general principles of law recognized by civilized nations.⁸⁷ The very existence of the general principles as a source of law indicates that treaty and custom do not provide an exhaustive source of legal norms in international law.

The fact that the general principles are described as ‘principles of law’ demonstrates that they do not authorize the ICJ to proceed on the basis of non-legal considerations which are thought to be fair and right in all the circumstances. This conclusion is reinforced by the fact that Article 38(2) of the ICJ Statute provides separate authorization for the ICJ to decide cases ‘*ex aequo et bono*’ if the parties agree.⁸⁸ Such separate authorization would not have been necessary had Article 38(1)(c) already authorized resort to non-legal considerations. The same reasoning precludes the view that the reference to general principles of law in the ICJ Statute adds nothing to what is already indicated by the reference to treaty and custom.⁸⁹

The result is that the general principles, which are of a legal nature and which are not merely manifestations of treaty and custom, are a source of real law for the regulation of international relations.

Furthermore, the general principles are merely ‘recognized’ by civilized nations, and not enacted or consented to by them. In the Advisory Committee of Jurists on the Statute of the Permanent Court of International Justice, Lord Phillimore (1845–1929), the provision’s co-author, observed that ‘the general principles referred to . . . were those which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*, etc.’.⁹⁰ In particular, he meant the general principles to mean ‘maxims of law’.⁹¹

This would suggest that those basic concepts and processes of legal justice which are observed in mature domestic legal systems are to serve as sources of international

⁸⁷ See Lauterpacht, *supra* note 55, at 60–71.

⁸⁸ Oppenheim, discussing the authority of the ICJ to decide cases *ex aequo et bono*, comments: ‘On this basis the decision will not be based on the application of legal rules but on the basis of such other considerations as the court may in all the circumstances regard as right and proper.’ Jennings and Watts, *supra* note 62, at § 15, 44.

⁸⁹ Cf. Tunkin, ‘Co-existence and International Law’, 95 *Recueil des cours* (1958-III) 25–26.

⁹⁰ Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (1920) 335.

⁹¹ *Ibid.*

law. Again, what is required is *recognition* of *existing* basic legal ideas, not enactment of or consent to measures to be adopted on the plane of international law.

This approach is strengthened by reference to the fact that recognition of the general principles is by ‘nations’ and not by states. The terminology is not without significance. States are the international legal entities who are still the immediate subjects of rights and duties in international law.⁹² Nations, by contrast, are the peoples themselves.

This interpretation is confirmed by the fact that, apart from the expression ‘United Nations’, the word ‘nations’ is used only twice in the ICJ Statute: in connection with the general principles of law in Article 38, and in the phrase ‘the teachings of the most highly qualified publicists of the various nations’, also in Article 38. In the latter phrase, the intention appears to convey the idea that the publicists are not representatives of the states as such, but simply members of the world’s diverse peoples and emblematic of the world’s various legal cultures. The nouns ‘state’ or ‘states’ appear 30 times, and uniformly signify the state as a sovereign legal entity in international law.⁹³ Article 38 is therefore declaring that those general principles of law *recognized* by the *peoples* of the world, without necessarily being adopted or enacted into international law by states, are to be employed in international law.

What we are dealing with in the general principles of law, then, is the *ius gentium*.⁹⁴ The term ‘*ius gentium*’ is commonly translated as ‘the law of nations’, but is perhaps less ambiguously rendered as ‘the law common to all peoples’, or ‘the common law of mankind’.

The *ius gentium* originated in Roman law as a supplement to the *ius civile*, which was the law regulating relations among Roman citizens. As Roman power expanded and as Roman citizens came into increasing contact with non-citizens, a law was developed to regulate relations among non-citizens and between citizens and non-citizens; this was the *ius gentium*. The Roman jurist Gaius (active c. 130–180) provides the following characterization:

Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius civile*, while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* as being observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the law of mankind.⁹⁵

The *ius gentium* did not regulate relations among sovereigns (formal equality

⁹² At the time Article 38 was drafted (1920), states were the only formal subjects of international law. Since the end of the Second World War, natural persons have increasingly become formal subjects of international law rights and obligations with the emergence of international human rights law and international criminal law.

⁹³ E.g. Article 34(1) provides: ‘Only states may be parties in cases before the Court.’

⁹⁴ Cf. Judge Tanaka (dissenting) in the *South West Africa* cases (*Ethiopia v. South Africa; Liberia v. South Africa*) (Second Phase), ICJ Reports (1966) 6, at 296. See also D.P. O’Connell, *International Law*, vol. 1 (2nd ed., 1970) 10–14.

⁹⁵ Gaius, *Institutiones*, I, i, as translated by Hans Julius Wolff in *Roman Law: An Historical Introduction* (1951) 82–83.

between Rome and foreign sovereigns was not recognized), and was therefore not international law. Rather, it consisted of general principles governing relations among individuals in any civilized society, which principles would find differentiated manifestation as to detail in each society's functional equivalent of the *ius civile*. Thus, the '*ius gentium* as defined by Gaius is a comprehensive concept which includes rules and legal institutions . . . found everywhere, such as matrimony, protection of property, or the wrongdoer's obligation for damages; it is a universal law.'⁹⁶ It included some principles of an international character, such as the inviolability of envoys and the law on spoils in war,⁹⁷ but this was far from establishing an equivalence of the *ius gentium* to international law.

The *ius gentium* became over time confused with the *ius naturale* (eternal and universal principles of law discoverable by right reason), which entered Roman law through Greek stoic philosophy. This confusion was the result of both uncertainty and expositional lack of clarity as to whether the *ius gentium* was based on the positive law, or whether it was founded on reason alone. This confusion affected legal and philosophical analysis in practical ways. For instance if the *ius gentium* was identical with the natural law, it would follow that the then universal institution of slavery was part of the *ius naturale*,⁹⁸ and was truly eternal; if on the other hand, the *ius gentium* was based on the positive common law of mankind, then the possibility remained open that slavery was contrary to the *ius naturale*.⁹⁹

It was one of the great accomplishments of the scholastics, and especially Aquinas, that the ambiguities which had long dogged thinking about the *ius gentium* were cleared up.¹⁰⁰ According to Aquinas, 'every human positive law has the nature of law to the extent that it is derived from the natural law'.¹⁰¹ Positive law can be derived from the natural law in two ways, and:

in this respect human law is divided into the common law of mankind [*ius gentium*] and civil law [*ius civile*] according to the two ways in which things can be derived from the natural law. . . For those things belong to the common law of mankind which are derived from the natural law as conclusions from principles, such as just buying and selling and the like without which men cannot live together. . . But those things that are derived from the natural law by way of particular determination [*per modum particularis determinationis*] belong to the civil law according as each political community [*civitas*] determines something appropriate for itself.¹⁰²

Thus both the *ius gentium* and the *ius civile* are derived from the natural law; the

⁹⁶ Nussbaum, *supra* note 8, at 14.

⁹⁷ *Ibid.*

⁹⁸ '[T]he universality of a given rule was quite understandably taken as an indication of its naturalness, that is, of its origin from right reason.' *Ibid.*, at 15.

⁹⁹ *Semle*, Nussbaum, *ibid.*, at 15–16.

¹⁰⁰ Confusions were reintroduced during the Enlightenment, during which time the *ius gentium* — via its translation as the 'law of nations', and assisted by a contempt for and ignorance of mediaeval learning — was widely misunderstood to mean 'international law': see e.g. Stanlis, *supra* note 21, at 85–86. See also Schall, *supra* note 32, at 1020–1028.

¹⁰¹ '*Omnis lex humanitus posita intantum habet de ratione legis in quantum a lege naturae derivatur*'. *supra* note 10, q. 95, a. 2, c.

¹⁰² *Ibid.*, at q. 95, a. 4, c.

former by a process of deduction from first principles, the latter by particular determination. Aquinas compares the process of deduction by which we arrive at the *ius gentium* to ‘that by which, in sciences, demonstrated conclusions are drawn from the principles’.¹⁰³ The act of particular determination leading to the *ius civile* is compared to ‘that whereby, in the arts, general forms are particularized as to details’, just as ‘the craftsman needs to determine the general form of a house to some particular shape’.¹⁰⁴

The craftsman building a house has a very wide range of choices reasonably open to him; e.g. how many doors will the house have? His choice is not, however, unlimited — he would not be free to build a house with no doors, or with doors too small for human use. The structure which the craftsman actually builds must bear a rational relationship to the requirements of the general form of a house in order to qualify as a ‘house’. Similarly the positive law crafted by the legislator, though he enjoys considerable freedom of choice, must bear a rational relationship to the requirements of the natural law in order to qualify as a ‘law’.

Aquinas argues that the *ius gentium* contains the principle ‘one must not kill’ as a conclusion from the higher natural law principle that ‘one should do harm to no man’. But the precise punishment to be imposed on the evil-doer, and the details of the procedures to be followed in reaching that point, are among the matters of determination or choice from a range of more or less equally reasonable or just possibilities, and is thus a matter for the *ius civile*.¹⁰⁵

The *ius gentium* and the *ius civile* are, according to Aquinas, both part of the human or positive law in that they are both the result of deliberate human choosing. As with all human or positive law, they both derive their obligatory force from the natural law. However, whereas the *ius civile* belongs solely to positive law, the principles of *ius gentium* belong simultaneously to the positive law and the natural law. They are ‘part of the natural law by their mode of derivation (by deduction, not *determinatio*), and at the same time part of positive human law by their mode of promulgation’.¹⁰⁶ The *ius gentium* consists of deduced secondary principles derived from the precepts and first principles of the natural law; it is *manifested* in promulgated¹⁰⁷ positive laws which are themselves part of the *ius civile*.

John Finnis identifies 13 interrelated principles which constitute ‘general principles of law’, and which are (or are part of) the *ius gentium* in the sense explained by Aquinas:

¹⁰³ *Ibid.*, at q. 95, a. 2, c.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ John Finnis, *Natural Law and Natural Rights* (1980) 296. See also Finnis, *supra* note 6, at 201–203. There is promulgation because the deductions from the first principles and precepts of the natural law are ‘substantially adopted by all peoples (and in that sense is positive law) because recognized virtually everywhere as what is required by reason (natural law)’: John Finnis, *Aquinas: Moral, Political and Legal Theory* (1998) 268. Promulgation may also take the form of manifestation in customary international law: Elihu Lauterpacht, *supra* note 81, at 76.

¹⁰⁷ Promulgation means simply notification to those affected. Customs, which may be part of the positive law, are promulgated by general knowledge of their existence.

(i) compulsory acquisition of property rights to be compensated, in respect of *damnum emergens* (actual losses) if not of *lucrum cessans* (loss of expected profits); (ii) no liability for unintentional injury, without fault; (iii) no criminal liability without *mens rea*; (iv) estoppel (*nemo contra factum proprium venire potest*); (v) no judicial aid to one who pleads his own wrong (he who seeks equity must do equity); (vi) no aid to abuse of rights; (vii) fraud unravels everything; (viii) profits received without justification and at the expense of another must be restored; (ix) *pacta sunt servanda* (contracts are to be performed); (x) relative freedom to change existing patterns of legal relationships by agreement; (xi) in assessments of the legal effects of purported acts-in-the-law, the weak to be protected against their weakness; (xii) disputes not to be resolved without giving both sides an opportunity to be heard; (xiii) no one to be allowed to judge his own cause.¹⁰⁸

These *ius gentium* principles bear a striking resemblance to the general principles of law and of equity which feature prominently in the work of the International Court of Justice and other tribunals applying international law.¹⁰⁹ The *ius gentium* principles identified by Finnis really are principles in that ‘they justify, rather than require, particular rules and determinations, and are qualified in their application to particular circumstances by other like principles’.¹¹⁰ This is precisely how the general principles of law function in international law.

This foundational and pre-positive nature of the general principles was emphasized by Bin Cheng in his landmark work on the subject:

This part of international law does not consist . . . in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of *juridical truth itself*, in short of Law.¹¹¹

Furthermore, Baron Descamps (1847–1933), president of the Advisory Committee of Jurists on the Statute of the Permanent Court of International Justice, stated that the inclusion of general principles in the text of Article 38 ‘was necessary to meet the possibility of a *non liquet*’.¹¹² Conceived of in this way, the general principles of law serve much the same function as the natural law in mediaeval Europe:

When once there were plausible grounds on either side and no decisive authority, the Law of Nature — like the king’s ultimate power of doing justice in default of an adequate ordinary jurisdiction — could always be invoked by way of supplement. It might furnish a rule where no rule had been declared, or might guide interpretation where the application of the rule was not certain.¹¹³

Thus the general principles of law provide a reservoir from which apparent gaps in

¹⁰⁸ John Finnis, *Natural Law and Natural Rights* (1980) 288, and explanatory note at 296.

¹⁰⁹ See e.g. Shaw, *supra* note 66, at 79–86; Brownlie, *supra* note 66, at 15–19 and 25–28; Jennings and Watts, *supra* note 62, at § 12, 36–40, § 15, 43–45; O’Connell, *supra* note 94, at 12–13; Bin Cheng, *supra* note 66.

¹¹⁰ John Finnis, *Natural Law and Natural Rights* (1980) 288.

¹¹¹ Bin Cheng, *supra* note 66, at 24 (emphasis added).

¹¹² Permanent Court of International Justice, Advisory Committee of Jurists, *supra* note 90, at 336. To pronounce a *non liquet* is to ‘invoke the absence of clear legal rules applicable to a dispute as a reason for declining to give judgment’: Jennings and Watts, *supra* note 62, at § 3, 13. See also Shaw, *supra* note 66, at 78.

¹¹³ Pollock, *supra* note 2, at 45.

the corpus of international law may be filled. They reinforce the view that international law should properly be regarded as a 'complete system', i.e. that every international situation is capable of being determined as a matter of law and that international tribunals may not pronounce a *non liquet*.¹¹⁴ Because they belong partly to the positive law, the *ius gentium* general principles do not provide a foundation for any arbitrary or capricious rejection of positive law rules. Rather, the positive law rules from which the general principles are partly derived furnish a basis upon which the *ius gentium* may be employed to fashion a rule to 'fit' the requirements of a case where no directly applicable conventional or customary rule provides an answer.¹¹⁵

Louis Henkin argues that recourse to general principles of domestic law does not derogate from the principle of consent, even if they have not been translated into principles of international law by treaty or custom. This is so, he says, because the general consent of states is to be assumed. Implicitly conceding that this explanation may not be convincing and that positivism cannot coherently account for the internationally binding force of the general principles, he observes:

In any event, if the law has not yet developed a concept to justify or explain how such general principles enter international law, resort to this secondary source seems another example of the triumph of good sense and practical needs over the limitations of concepts and other abstractions.¹¹⁶

Quite. The law *has*, however, explained how such principles enter international law without sovereign consent, and has done so in a way which meets mankind's practical needs without violating good sense. That legal explanation is not, to be sure, discoverable within a legal positivist framework; but it is to be found in the natural law. Indeed, Henkin virtually concedes as much by noting that 'principles common to the principal legal systems often reflect natural law principles that underlie international law'.¹¹⁷

Kotaro Tanaka (1890–1974), in his dissenting opinion in the *South West Africa* cases, was correct to observe that 'it is undeniable that in Article 38, paragraph 1(c), some natural law elements are inherent'.¹¹⁸ Lauterpacht was even more forthright:

[T]he 'general principles of law' conceived as a source of international law are in many ways indistinguishable from the law of nature as often applied in the past in that sphere. There is no occasion for treating it, for that reason, with suspicion or embarrassment. The part of the law of nature in legal history — including the history of international law — is more enduring and

¹¹⁴ Oppenheim, *supra* note 62, at § 3, 12–13.

¹¹⁵ On the problem of avoiding an international *non liquet* from a position of legal positivism, and on the attendant need to fashion legal rules to 'fit' lacunae in international law, see Hutchinson, 'Positivism and International Law', in Stephen Guest (ed.), *Positivism Today* (1996) 45–64. Cf. Aznar-Gómez, 'The 1996 Nuclear Weapons Advisory Opinion and Non Liqueur in International Law', 48 *ICLQ* (1999) 3–19. For a critical assessment of the use to which the idea of legal 'fit' has been used by Ronald Dworkin as a criterion in legal reasoning, see Finniss, 'Natural Law and Legal Reasoning', in Robert P. George (ed.), *Natural Law Theory* (1992) 134–157, at 143–148.

¹¹⁶ Henkin, *supra* note 58, at 40.

¹¹⁷ *Ibid.*

¹¹⁸ *Ethiopia v. South Africa, Liberia v. South Africa* (Second Phase), ICJ Reports (1966) 6, at 298.

more beneficent than that of positivism, which either identifies the law with, or considers it the result of, the mere will of the State and its agencies.¹¹⁹

In the ‘general principles of law recognized by civilized nations’, we are not dealing with principles which states have willed into existence, or to whose application to international relations states have consented. They exist quasi-spontaneously¹²⁰ in every civilized legal order, including international law,¹²¹ and are deductions from the natural law; to this extent, they are part of the natural law.

Article 38 sets out a rational methodology for technical legal reasoning in international law, proceeding from the specific to the general; ‘an order of natural *précellence*’.¹²² In determining the rules applicable to a particular problem, it is legally sound first to look for any obligations established between the parties as a result of their own agreement; and for that we turn primarily to treaties. Failing any such obligations, or failing their sufficiency in resolving the problem, we should then look to any applicable customary law. The customary law will also provide us with rules by which we interpret and apply treaties. Failing a sufficient solution being found in customary law, we should then look to the general principles of law in order to avoid a *non liquet*, and for principles underpinning and modulating treaties and custom; e.g. most significantly, *pacta sunt servanda*. Many positivists, however, ‘have been too ready to treat a method of legal reasoning as though it were an explanation of the nature of law’.¹²³

8 ‘Pure’ Positivism

Classical legal positivism sought to annex international law, after having initially disowned it. In doing so the system was forced to stage a series of tactical retreats in its conception of sovereign will, the supposed source of all law. It is, however, impossible for classical legal positivism to annex international law. The immovable dogma that all law results from the will of the state — as command, consent or acquiescence — stands in the way. Treaties are not binding because states consent to them. Rather, the consent of states is a datum which engages *pacta sunt servanda*, a general principle of

¹¹⁹ Elihu Lauterpacht, *supra* note 81, at 76. R.P. Dhokalia has also rightly remarked, albeit somewhat less accurately, that ‘the “general principles of law recognized by civilized nations” are nothing but the fundamental and universal principles accepted for many centuries by jurists and philosophers as constituting the natural law, and thus their recognition by Article 38 . . . is recognition of natural law without naming it’: R.P. Dhokalia, *The Codification of Public International Law* (1970) 348. Dhokalia overstates the position by asserting that the general principles are ‘nothing but’ the natural law, whereas they belong simultaneously to the natural law and to the positive law.

¹²⁰ Brierly, *supra* note 69, at 63–64, comments that the general principles of law ‘are a source to which international courts have instinctively and properly referred in the past’.

¹²¹ Sir Hersch Lauterpacht took the view that the general principles of law are ‘an important source of law which though recognized to a large extent by the practice of States is essentially independent of it and owes its validity to the very existence of the international community’: Lauterpacht, *supra* note 81, at 91.

¹²² The term used by Baron Descamps, in Advisory Committee of Jurists, *supra* note 90, at 337.

¹²³ Brierly, *supra* note 69, at 55.

law. Similarly, a state's consent to a rule of customary international law is not necessary in order for that rule to be binding on the state. Furthermore, the *ius gentium* general principles of law are recognized as existing, but not consented to, by states and exercise a modulating and justifying function for the bindingness of treaties and custom.

If legal positivism was to further pursue a coherent justification to its claims over international law, it needed to stage a strategic retreat and abandon its legally foundational notion of sovereign will altogether. That is, in fact, what happened in the neo-positivist jurisprudence of Hans Kelsen (1881–1973), who styled his ideas 'the pure theory of law'.

Moving away somewhat from a will-based model of jurisprudence, Kelsen's pure theory conceived of legal systems as constituted by a hierarchy of norms involving the potential of coercion in case of breach. Each norm is authorized by a preceding higher norm until one reaches a basic norm — the *Grundnorm*. This *Grundnorm* is the highest authorizing norm; it legally validates all other norms which can be traced from the *Grundnorm* in a chain of authorizations. According to Kelsen, the *Grundnorm* in each national legal order can be formulated as follows:

Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short, one ought to behave as the constitution prescribes.)¹²⁴

For Kelsen, the state is not an entity separate from the law and which is the source of all law. He accepts that classical legal positivism conceives of the state 'as a meta-legal being, as a kind of macro-anthropos or social organism, [which] is presupposed by the law — and at the same time, as a subject of the law . . . [which] presupposes the law'.¹²⁵ Kelsen seeks a positivist escape from this contradiction by identifying the state with the legal order itself.¹²⁶ Gone, then, is the classical legal positivist dogma that all law emanates from the sovereign will of states. Rather, the state is the legal order which finds its foundation in the *Grundnorm*.

In the realm of international law, according to Kelsen, custom is the fundamental source of all law. On this view, *pacta sunt servanda* is a principle only of customary international law, and the general principles likewise find their exclusive foundations in custom:

The basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: 'The States ought to behave as they have customarily behaved.' Customary international law, developed on the basis of this norm, is the first stage within the international legal order.¹²⁷

This move neatly resolves the conundra associated with classical legal positivism's obsession with sovereign will. By making international law's basic authorizing norm

¹²⁴ Kelsen, *supra* note 22, at 201.

¹²⁵ *Ibid*, at 285.

¹²⁶ *Ibid*, at 286–290.

¹²⁷ Kelsen, *supra* note 68, at 369.

independent of sovereign will, international legal obligation attaches to non-consenters without resort to the awkward legal fiction of presumed consent. Furthermore, the logical problem of agreement being, solopistically, the source of its own legal obligation is resolved.¹²⁸ Sovereign will exists under, and subject to, the international *Grundnorm*; the latter conferring legal force on custom and, by extension, treaties and general principles.

And yet, for all its deftness, even this radically modified version of legal positivism is not capable of coherently embracing international law.

Kelsen's pure theory of law is a theory of positive law,¹²⁹ and there is no room in it for the natural law or a conception of justice.¹³⁰ With one exception, all the norms in a legal system are acts of will by persons authorized by a superior norm in the hierarchy of norms. The sole exception is the *Grundnorm*, the source of validity for the entire legal order. It is the only norm whose making cannot, logically, have been authorized by a higher norm.

If the *Grundnorm* is not positive in character, what is it? It is a transcendental-logical presupposition, upon which is based the obligation to obey the constitution (in domestic law) and custom (in international law). According to Kelsen:

A positivistic science of law can only state that this norm is presupposed as a basic norm in the foundation of the objective validity of the legal norms, and therefore presupposed in the interpretation of an effective coercive order as a system of objectively valid legal norms.¹³¹

The most important norm in Kelsen's entire system is simply a necessary presupposition, and itself non-positive in character. It is a given beyond which it is not juridically possible to enquire. The *Grundnorm* is thus 'rather like the idea of the world supported by an elephant, the rules not permitting you to ask what supports the elephant'.¹³² Kelsen does not, therefore, solve the fundamental problems of classical legal positivism, but simply tidies them up and relocates them. He tacitly acknowledges this weakness by conceding that the *Grundnorm* can be viewed as an ultra-minimalist natural law.¹³³ While being far from a surrender, Kelsen's retreat from classical legal positivism is strategic, and not merely tactical.

Kelsen's international *Grundnorm* is, furthermore, remarkably thin. It amounts to no more than saying that there is an *opinio iuris* to observe custom; or, in the words of H.L.A. Hart (1907–1992), 'it says nothing more than that those who accept certain rules must also observe a rule that the rules ought to be observed'.¹³⁴

¹²⁸ 'It is not the State which, by its own free will, consents to a certain restriction of its liberty; it is general international law which restricts the liberty of the States without regard to whether they consent to this restriction or not.' Kelsen, *ibid.*, at 251.

¹²⁹ Kelsen, *supra* note 22, at 1.

¹³⁰ *Ibid.*, at 219–221.

¹³¹ *Ibid.*, at 204.

¹³² Dennis Lloyd (Lord Lloyd of Hampstead), *The Idea of Law* (1981 revised edition) 194.

¹³³ 'If one wishes to regard it [the *Grundnorm*] as an element of a natural law doctrine . . . very little objection can be raised. . . What is involved is simply the minimum . . . of natural law without which a cognition of law is impossible.' Kelsen, *supra* note 68, at 437.

¹³⁴ Hart, *supra* note 63, at 236.

We have also already observed that *pacta sunt servanda* cannot be a principle of customary international law, and yet for Kelsen it, too, is nothing but a principle of custom.

Lauterpacht succinctly identified the cause of the pure theory's poverty:

Pure positivism is self-contradictory for the simple reason that it takes into account only one part of legal reality. In so far as the initial hypothesis of a positivist system claims to be divorced entirely from the element of natural law, the claim is not justified, seeing that that element is contained in the existing law and that the initial hypothesis is admittedly framed so as to embrace as much as possible of actual legal experience.¹³⁵

Lauterpacht's criticism is equally valid for classical legal positivism. Legal positivism, whether in its classical or 'pure' form, is a one-sided theory of the positive law only. It arbitrarily exiles from the realm of jurisprudence all law that is not the product of a legislative act of laying down located in history. For this school of jurisprudence, legality is entirely a matter of pedigree. Legal phenomena which it cannot explain in its own terms it simply expels from the realm of legal thought, thereby banishing even the possibility of reaching a complete understanding of the legal order. It involves a flight from reason.

9 Legal Positivism and Human Rights

Legal positivism's inability to furnish a complete picture of international legal reality, and indeed of legal reality in general, produces effects more far reaching than one might initially suppose. Its pernicious influence adversely affects the theory and practice of international law in a number of specific areas. This is particularly true in the case of human rights law, one of the most dynamic fields of international law in recent times. Although fuller treatment is certainly necessary, an adumbration is here warranted having regard to the striking importance of this phenomenon in contemporary international law, and the extent to which we are beginning to drift without the natural law's moorings.

Our natural rights (as human rights were commonly called before they became important objects of positive international law after the Second World War) are fundamental components of the common good.¹³⁶ They may be conveniently mediated by treaties and custom, but they are not *conferred* by positive international law.¹³⁷ Natural rights form part of the broad limits within which we are free to fashion positive laws.

¹³⁵ Lauterpacht, *supra* note 22, at 134. See also Joseph Raz, 'Kelsen's Theory of the Basic Norm', 19 *American Journal of Jurisprudence* (1974) 94–111.

¹³⁶ John Finnis, *Natural Law and Natural Rights* (1980) 218.

¹³⁷ This reality is recognized in the first paragraph of the preamble to the Universal Declaration of Human Rights (General Assembly Resolution 217A (III), 10 December 1948), which records the United Nations' 'recognition of the *inherent* dignity and of the equal and *inalienable* rights of all members of the human family'. Article 1 of the same instrument also notes that all 'human beings are *born* free and equal in dignity and rights'. Emphasis added.

In a culture which has largely forgotten the perennial jurisprudence of the natural law and in which Enlightenment naturalism has been discredited, human rights must lead an insecure life as the hostage of positivism in its various manifestations. Notwithstanding the ambition of some social philosophies to promote government as the sole or principal dispenser and guardian of important social goods, states (whether acting individually or collectively) are not the source of our natural rights. State sovereigns can facilitate the exercise of our natural rights, but cannot grant them. Similarly, states are physically capable of hindering or preventing the enjoyment of our natural rights, but cannot withhold them.

Nor may states, as they are sometimes inclined, define natural rights in whatever way they please. In particular states are not free to transform moral wrongs into human rights *with complete juridical effect*; i.e. with the positive law's usual moral obligation of observance attached.¹³⁸ The establishment of a human or fundamental right to abortion under the positive law would be an example of an attempt to transform a moral wrong into a human right. Laws authorizing abortions, and buttressing access to abortions, are radically unjust (and radically immoral) in that they permit choosing directly against a self-evident form of human flourishing; i.e. life. This has certainly occurred widely at the national level, and is sometimes argued also to have occurred at the level of international law partly as a result of such widespread state practice.¹³⁹ The temptation to turn moral wrongs into human rights arises when, unmindful of the richness of the common good under the natural law, every person's desire or preference is a potential candidate for promotion to the ever-expanding pantheon of positive human rights.

The common good may also be damaged in a less serious way when mere economic or social interests, not morally wrong in themselves but not essential components of the common good, are likewise promoted to the pantheon of purely positive human rights by the wave of a positivist magic wand. By characterizing such interests as matters of fundamental or human right, a serious juridical and pseudo-moral obstacle is erected to challenging them. It is an attempt to load the dice of public discourse heavily in favour of a desired outcome.

An inability or unwillingness by those in political authority to remove the defects in the positive laws, because of their elevation to the status of positive human right, will over time bring the legal system generally into disrepute. This will in turn cause mounting damage to the common good as respect for the whole system of positive laws gradually diminishes. The damage to the common good is exacerbated where, as is sometimes the case especially in international law, the natural law principle of

¹³⁸ Although an unjust positive law gives rise to no moral obligation of obedience under the natural law, and is therefore not a *fully effective* law, it does not follow that the positive law is not a law in any sense: John Finnis, *Natural Law and Natural Rights* (1980) 25–29 and 351–368; Thomas Aquinas, *supra* note 10, q. 92, a. 1, ad. 4. See also *supra* note 10.

¹³⁹ E.g. Hernandez, 'To Bear or Not to Bear: Reproductive Freedom as an International Human Right', 17 *Brooklyn Journal of International Law* (1991) 309–358; Klashtorny, 'Ireland's Abortion Law: An Abuse of International Law', 10 *Temple International and Comparative Law Journal* (1996) 419–443.

subsidiarity¹⁴⁰ is infringed. Subsidiarity is a principle of justice which precludes a higher authority or association (e.g. an international organization) arrogating functions which can be effectively performed by a lower authority or association (e.g. the family, civil society, subnational organs of government, or national governments).

This was the territory into which, for example, the European Court of Human Rights ventured when it extended the European Convention on Human Rights (and natural law) prohibition on ‘degrading treatment or punishment’ to corporal punishment inflicted on a child by a stepparent where the child was bruised as a result. The court so held notwithstanding the absence of evidence of severe or long lasting effects on the child and where a trial jury had found that the punishment inflicted was reasonable in all the circumstances.¹⁴¹

Such positive laws are juridically imperfect under the natural law, and therefore in need of reform. Nevertheless, a moral obligation to obey them subsists to the extent that (i) they do not promote acts which are radically unjust or immoral in themselves and (ii) disobedience would cause loss of respect for a legal system which is on the whole just.¹⁴²

Respect for the law is also diminished because, in attempting to depoliticize contentious public policy preferences by transforming them into matters of fundamental legal right, the practice of law becomes deeply politicized.

The positive law, immensely potent though it is under the natural law, is not a philosopher’s stone which can transform base metals into real gold. Nevertheless, it is legal positivism, when hitched to some tendencies within the contemporary human rights movement, which frequently dabbles in alchemy.

During the later Enlightenment, as we have already seen, a radical political impulse harnessed the revolutionary-naturalist ‘rights of man’ for the purpose of justifying and advancing narrowly ideological objectives. Especially since the end of the Cold War a similar impulse has, mainly in the Western democracies, attached itself to a thoroughly positivist conception of human rights.¹⁴³ This vision of human rights postulates that legally privileged fundamental rights may be defined to embrace any value — if it advances ‘personal autonomy’ in some way — which is passionately held

¹⁴⁰ See generally Robert P. George, *In Defense of Natural Law* (1999) 239–241 and the materials there cited. See also Article 5 (ex Article 3b) of the Treaty Establishing the European Community (OJ 1997 C340/173) where the subsidiarity principle finds substantial expression.

¹⁴¹ *A v. United Kingdom* (App. No. 25599/94), 27 EHRR (1998) 611.

¹⁴² See *supra* note 10.

¹⁴³ A conception of human rights closer to that of the Enlightenment, and to a lesser extent of the perennial jurisprudence of the natural law, played a role in the downfall of the radically collectivist (i.e. totalitarian) regimes in Eastern Europe, where natural rights were routinely and systematically suppressed. The character of human rights dialogue in these countries continues to be markedly different from that prevailing in the established Western democracies. Whereas the politics of human rights in the former communist bloc are a continuing stimulus to limiting the state’s control of society and expanding the areas of legitimate discussion and choice in matters of public policy, the reverse is increasingly true in the Western democracies.

or forcefully advanced. Human rights, on this view, cease to be the positive law manifestations of our objective natural rights, and become instead important elements of a political strategy to reorder society. They depart the realm of jurisprudence and philosophy, their rightful home, to the domain of politics.

Whereas the reformist and revolutionary political impulse of eighteenth-century intellectuals was highly individualist, that of twentieth-century intellectuals has been predominantly collectivist. It generally seeks to expand the role of the state, and often of intergovernmental and supranational organization, even as it now energetically extols a hypertrophic personal autonomy and the positivist human rights creed.

This collectivism finds particular expression in the enthusiasm to elevate economic, social or group interests to the status of positive human rights. These interests are, because they function squarely within the realm of distributive justice, especially liable to produce an expanded role for states in the regulation of society. One should not, however, suppose that an expanded role for national or international state authority is in some way categorically contrary to the natural law. It may be that, in particular circumstances, the common good is prudently served by providing, extending, limiting or withdrawing legal protection in relation to economic, social or group interests. The natural law preserves our freedom of reasoned action and determination in this regard, and erects no ideological barriers to our deliberation and choice. The problem arises where an attempt is made to entrench protection, and eliminate our freedom of action, by elevating a preferred policy option to the status of positive human right.

There is, however, a more general reason why a positivist conception of human rights is well situated to advance a collectivist political vision. States, including both their domestic and international organs, become strategically positioned to cast and recast human rights as an act of malleable will responsive to shifting political objectives. Explaining his view that human rights are frequently deployed as part of an 'ideological project', James V. Schall remarks:

I mean this first of all as a logical aspect of the modern project of the full autonomy of man, not merely the Lockean idea of the state as protector of my 'rights' which I have from nature, but the state as the primary contractor not only to 'protect' my civil rights — the problem of negative rights — but the state as the promoter and distributor of all that is good, but this in a world where the theoretic definition of good has no metaphysical content or stability.¹⁴⁴

Without an anchorage in the natural law, juridical and political thought will increasingly treat human rights not as an objective reality, but as a convenient sanctuary into which may be placed whatever interests the politically powerful or astute wish to quarantine from normal contention. In such a setting, the language of human rights becomes too frequently little more than an illiberal rhetorical card which may be played for the purpose of pre-emptively silencing (or 'trumping') dissent. It becomes a means of unilaterally and arbitrarily restricting the scope of

¹⁴⁴ James V. Schall, 'Human Rights as an Ideological Project', 32 *American Journal of Jurisprudence* (1987) 47–61, at 57.

legitimate debate. Every important issue of public policy, and not just our natural rights, thus tends sooner or later to become a question of human rights:

[T]he question of right and wrong, and thus of truly inalienable human rights, is quietly replaced by the question who is in charge, and by the determination to be among those who hold power, set the agenda, and possess the fruits of autonomous personal and group dominance. The moral, political, and juridical language of rights and responsibilities becomes the cloak which such self-and group-will needs for two reasons: to mark purposes which, if frankly expressed, would arouse resistance from competing wills; and to satisfy an uneasy conscience. For, although the publicly assumed and educationally promoted beliefs about theoretical truth treat practical reason as devoid of foundations other than human sentiment and interest, each person's practical reason in fact retains the capacity and the directiveness which contemporary beliefs deny it has.¹⁴⁵

The politicization of contemporary human rights also entails a substantial risk that they, like the Enlightenment's 'natural rights of man' before them, will eventually fall into disrepute. The consequences of such a development are difficult to foresee, but are unlikely to be attractive.

Furthermore, the continuing proliferation of new positive (and positivist) human rights to ever more areas of contended public policy threatens an inflationary debasement of the human rights coinage, with the possible result that even our natural rights will eventually cease to enjoy the reverence due to them as indispensable components of the common good.

Recovering an appreciation of the unique significance, and relatively modest limits, of our natural rights is the best guarantee of strengthening respect for our objective human rights. It is also the way to restore the true freedom to which those natural human rights entitle us in prudently selecting among policy options ordained to the common good.

10 Conclusion

In the international legal order, which is still primitive compared to mature domestic legal orders, the negative effects of legal positivism on a proper appreciation of juridical reality are heightened due to the relatively weaker development of the positive law. The same natural law principles which are heavily attired in positive law garb in domestic legal orders, are often either naked or but scantily clad in treaty and custom in international law.

The perennial jurisprudence of the natural law, on the other hand, provides a balanced explanation of both the natural law and the positive law — expelling neither and integrating both in a unified conception of The Law. The positive law lacks coherence and authority without the natural law, and the natural law lacks most of its ability to coordinate human society effectively, and to deal with delinquency, without the positive law.

¹⁴⁵ John Finnis, *Aquinas: Moral, Political and Legal Theory* (1998) 297.

Most international lawyers know or sense that legal positivism is an inadequate medium through which to engage their discipline. Why, then, does a theory in which most of us no longer believe still operate as though it lived? Why is it that ‘most international lawyers are more or less positivists today’?¹⁴⁶ Roberto Ago (1907–1995) offers an explanation:

When convictions have been accepted for a long time in a doctrine it is easy to lose sight of their derivation from certain assumptions; they therefore continue to be regarded as truths, even when these assumptions have been discarded.¹⁴⁷

We have stranded ourselves in a malaise; afraid to exercise, and unsure of our capacity to exercise, our practical reason. This malaise is the latest phase of humanism and one which, having almost completely dissolved its own foundations, perhaps marks its passing. It is a phase which has been accurately labelled ‘resigned nihilism’,¹⁴⁸ but which has been more popularly and abstractly called ‘post-modernism’.

We are sceptical as to the natural law’s capacity, or certain of its incapacity, to replace the rotting timbers of legal positivism. In reaction we cling tenaciously to the wreckage of positivism. We also increasingly seek to salvage legal positivism by grafting it onto one or other of the ‘social sciences’ — especially sociology, political science, international relations or economics — in the vain hope that a firm basis of, or functional substitute for, legal authority and obligation can be found there. In this way we are really seeking to recycle Kelsen’s phantasmic *Grundnorm* in different livery.

Our fears and doubts about the natural law alternative are not entirely unreasonable if, as is almost always the case, our image of it comes from the Enlightenment. The natural law, however, is not a vehicle for providing detailed and prescriptive answers to the numerous problems of international life. It provides us merely with a coherent framework within which we are free to fashion just solutions within very broadly set limits. It sits easily with the knowledge that ‘you can’t study men, you can only get to know them’.¹⁴⁹ Furthermore, it speaks to us as free, rational and moral — but deeply flawed — beings who imperfectly seek to pursue the good in our own lives and the common good in our various communities.

It is also ideally equipped to assist in the newly complex situation engendered by the continuing growth of positive international human rights law.

A reacquaintance with the perennial jurisprudence of the natural law would not involve us in a revolution (or counter-revolution). We certainly theorize and formulate as though positivism, in one of its multiple and multiplying manifestations, provided a complete account of the international legal order; but we already act and reason, for the most part, in intuitive accord with the natural law. We do this, for

¹⁴⁶ Maurice Mendelson, ‘The Subjective Element in Customary International Law’, 66 *BYIL* (1995) 177–208, at 178.

¹⁴⁷ Ago, *supra* note 9, at 701.

¹⁴⁸ John Carroll, *Humanism: The Wreck of Western Culture* (1993) 138.

¹⁴⁹ C.S. Lewis, *That Hideous Strength* (1945) 83.

instance, every time we search for the *ratio legis* behind a treaty, custom, statute, judicial order or other item of positive law. No rational positivist actually behaves as though his theory were a complete account of legal reality. Few positive laws, especially in the international legal order, are structured in such a way as to prevent recourse to the *ius gentium* and the natural law, whatever labels we attach to them in so doing.

Let us not be too fearful of calling a spade a spade. The liberation involved in doing so will allow us to move forward with a clearer understanding of the international legal order and its capacity to serve the common good of all humanity.

