II. The Positivist Doctrine. A Critical Examination


Is this failure on the part of positivist writers to conform with the chief postulates of their own teaching merely a deplorable lack of consistency, or is it due to a fault inherent in the positivist doctrine? The charge of inconsistency may be ruled out in view of the offence being committed so persistently by leading authorities, of whom Hall, Oppenheim, and Liszt have been mentioned only as typical instances. It is therefore necessary to inquire whether the failure is not unavoidable in the sense that the positivist doctrine is incompatible, in some of its aspects, with the postulates of juridical logic in its application to international law and with the conception of the family of nations as a community of equal States. We are aided in this inquiry by a searching analysis of this side of the problem undertaken by Kelsen and Duguit, two publicists whose influence on the science of international law is now generally recognised. Kelsen points out that the con-


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deemed to be of the sane value and possessed of mutually determined competencies, is in the first instance an essentially moral conception. As a legal notion, however, it is possible only with the aid of a juridical hypothesis, namely, that

'There is, above the Commonwealth described as the State, a legal order which defines the respective scopes of power of individual States by forbidding the encroachment of one into the sphere of another . . . a legal order which regulates the relations of States by means of rules equally applicable to all. International law does this - but only when its supremacy over the legal systems of individual States is recognised, when . . . it is contemplated as a legal system standing above the States, i.e. when the legal systems of individual States are regarded as component parts of a universal legal order.'

Duguit, in an argument almost identical with that of Kelsen, lays stress on the fact that the notion of fundamental rights, which attempts to reconcile the doctrine of sovereignty with the existence of an international law, turns in a vicious circle:

'In Order that the personality should be able to possess subjective rights, it is necessary that it should be related to other personalities; it is necessary that there should be a society subjected to any objective law. It is impossible to explain objective international law by the existence of fundamental subjective rights of States, because such rights cannot exist without there being a society of nations subjected to an objective international law.'

This reasoning is not a new one. No writer, for instance, realised the theoretical inaccuracy of the positivist conception of the independent will of States more clearly than Lorimer, who saw in the very claim to recognition 'a logical abandonment of independence.'

Similar considerations apply to the question of the binding force of treaties and of the juridical character of the rule pacta sunt servanda which constitutes the basis of conventional international law. The explanation usually given by writers, who point either to the fear of the consequences of a wanton breach of a treaty, or to the well-being of the community of nations which would be impossible without the regular observance of treaties, cannot be regarded as satisfactory. The lawyer called upon to answer the question why crime is forbidden obviously leaves his proper field if he answers by referring to the fear of punishment an the part of would-be offenders. The appropriate answer is that which points to the existence of a legal rule commanding or forbidding a certain line of conduct. Now, a legal rule is an objective norm independent of the will of the person who is bound by it. To say that the binding force of treaties is derived from the will of contracting parties who, through an act of self-limitation, give up a part of their sovereignty, is to leave unanswered the query why the treaty continues to be binding after the will of one party has undergone a change. The will of the parties can never be the ultimate source of the binding force of a contract whose continued validity is necessarily grounded in a higher objective rule.

The will of the parties, no doubt, creates law between them, and if, for instance, Salmond enumerates custom, statute, and agreements as sources of law, one can hardly raise an objection against such an assertion. But from a more general point of view what appears to those directly concerned as an immediate source of the obligation is only a condition under which a higher, more comprehensive rule shall become operative. Thus the will of the parties is only a condition under which the higher rule, i.e. that promises should be kept, comes into operation. It is a rule of municipal law which, as between individuals, gives legal force to promises; it is the objective validity, independent of the will of States, of the rule pacta sunt servanda which renders legally possible the working of conventional international law.

It is especially in recent years that this elementary truth is being stressed by publicists. But we find already in Bluntschil's treatise a lucid statement of the same problem. He says

'It does not depend upon the discretionary will of the State whether it should respect or reject international law . . . . If international law were only the product of the free will of the individual States, then all international law would really be a law of contract, which means that no State, would be under the obligation to another State to respect international law where its rules are not sanctioned by a treaty. Moreover, it is not clear why, in this case, treaties should bind States also after they have changed their mind, and why every change of the will is not a change of the law.'

Later Bar asked the same question and urged the logical necessity of grounding international conventional law
on an objective rule. Recently the writings of Nelson, 1 Kelsen, 2 Duguit, 3 Krabbe, 4 Salvioli, 5 and Verdross 6 have, it seems, done much to shatter the uncritical dogma of the will of the State as the ultimate foundation of conventional international law. The science of international law, while recognising that it is the business of international lawyers to expound law as it is and not as it should be, is now increasingly realising that dogmatic positivism as taught by a generation of jurists fascinated by the splendour of the doctrine of sovereignty is a barren idea, foreign both to facts and to the requirements of a scientific system of law. 7 Nothing

PART II
THE PRACTICE OF STATES AND THE SCIENCE OF INTERNATIONAL LAW

CHAPTER III
PRIVATE LAW ANALOGIES APART FROM TREATIES

IV. Prescription, Acquisitive and Extinctive

§ 50. Extinctive prescription.

While the field of application of acquisitive prescription is naturally a limited one, extinctive prescription, corresponding to limitation of actions in municipal law is becoming of overgrowing importance in international arbitration. The Williams' case, in which umpire Little, after a detailed discussion of the problem, adopted the doctrine of prescription, marks the beginning of its full recognition in international law. 1 This development had been checked for while by the much misunderstood award in the Pious Fund arbitration 2 but the balance was soon restored. In 1903 extinctive prescription was again fully adopted in a learned award which has since been followed by other international tribunals. 3 The Institute of International Law was fully justified in stating, in 1925 in its resolution on International Public Law, that the principle itself is long accepted in arbitral jurisprudence. 4 Where
VIII. Interest and the Measure of Damages

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§ 64. The Practice of International Tribunals.

It will be seen that in the course of the important arbitration in which this question constituted the main issue, namely, in the Russian indemnity case before the Hague Court, arguments were put forward designed to show that the position is not analogous, and that payment of moratory interest cannot be regarded as an established rule of international law. The Court, however, adopted the view that the non-fulfilment of an obligation by one contracting State constitutes a delinquency entitling the other to compensation, and that in the case of a pecuniary debt this compensation assumes, in accordance with the generally recognised principle of private law, the form of moratory interest. In fact, the adoption of the contrary view leads, in the long run, to mischievous consequences. To maintain that a legal relation between two States, prima facie identical with a corresponding relation between individuals, cannot be governed by a generally recognised rule applicable to the matter in question, because it has not been expressly recognised by international law, is to make such a relation impossible or to render it ineffective. The postulate of positivism is complied with by the fact that States entering into legal relations may stipulate for special rules derogatory of the general principle, but it cannot mean that a legal relation should be rendered abortive because there are no rules of international law on the subject. International law and private law differ from each other mainly in respect of the subject-matter which they regulate. If the subject-matter is the same or analogous, then the rule to be applied must be the same or analogous, unless there is an express or customary provision to the contrary. It is true that a generally recognised rule of private law is not per se a part of international law; but it becomes so impliedly by States entering into such legal relations as can only be maintained or rendered effective by the application of this generally recognised rule.

The practice of allowing interest in international arbitration is generally recognised, and special reasons are adduced by arbitrators in those cases in which interest is disallowed --- for instance, if the claimants are guilty of delay in the prosecution of their claim, or if the award of interest is expressly excluded by the arbitration convention. Only in one case has interest been disallowed on the ground that ‘there is no settled rule as to the payment of interest on claims on countries or governments.’ There is no cogent reason for objecting to awarding interest in international law because of the absence of a settled rule as to the rate of interest or the date from which it begins to run. This circumstance can no more prevent the awarding of interest than the application of the principle of prescription can be excluded because no rule has yet evolved as to the time required for its completion.

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CHAPTER V

PRIVATE LAW RULES OF EVIDENCE AND PROCEDURE


States are, in their mutual relations, subject to rules either expressly recognised by them, or flowing from the very nature of these relations and from the legal character of the international community. An attempt has been made in the preceding chapters to establish that, in the absence of rules expressly provided by custom and treaty, it is, on the whole, private law as generally accepted by civilised communities which supplies the formulation of this necessary complement of international law. The same applies to private law rules of evidence and procedure, of which it is proposed to discuss some typical instances illustrating this general proposition. Of them, in turn, the most instructive and best illustrated by
cases taken from the practice of States is that of estoppel.

The doctrine of estoppel is *prima facie* a private law doctrine forming a part of the law of evidence. 'Where one by his word or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing as existing at the same time' --- this is the classical formulation of the English doctrine of estoppel *in pais* (estoppel by conduct).¹ It might seem that this is a doctrine exclusively confined to English law, and that it cannot therefore be regarded as a general principle of private jurisprudence. But this is only in form. In substance the principle underlying estoppel is recognised by all systems of private law, not only with regard to estoppel by record (estoppel by judgment; *res iudicata*), but also, under different names, with regard to estoppel by conduct and by deed.² Where the Anglo-American lawyer refers to estoppel, the continental jurist will usually say that the party is 'precluded' from asserting a fact or putting forward a demand.³ But apart from the differences in terminology and from the fact that in the common law countries the doctrine has received a more thorough and systematic treatment, there is nothing that would justify us in asserting that the position is radically different in various systems of law. 'The doctrine of estoppel "in pais,"' says Sir Frederick Pollock, 'is perhaps the most powerful and flexible instrument to be found in any system of civil jurisprudence.'⁴ It is of interest to see how strongly English judges believe in the universality of this rule. Says Baron Cleasby in *Halifax Union v. Wheelwright*:

'It is perhaps only an application of one of those general principles which do not belong to municipal law of any particular country, but which we cannot help giving effect to in the administration of justice, viz. that a man cannot take advantage of his own wrong, a man cannot complain of the consequence of his own default against a person who was misled by that default without any fault of his own.'¹¹

It is not easy to adduce reasons why those general principles underlying estoppel should be disregarded in the relations between States.² As a matter of fact, in no less than seven important arbitration cases was the doctrine of estoppel or preclusion put forward by the parties or made the basis of the award.

²The term 'equal' is used here in the meaning of equal protection by the law, not as connoting actual equality of rights and competencies. See Dickinson, The Equality of States in International Law, 1920, pp. 3-5, and Lorimer, vol. i. p. 171.

¹Der Begriff der Souveränität und des Völkerrechts, 1920, p. 205.

²Traité de droit constitutionnel, 1921, vol. i. p. 557. This part of Duguit's teaching is quite independent of his rejection of the juridical personality of the State. Compare here the preamble to the Declaration of the Rights and Duties of Nations adopted by the American Institute of International Law, January 8, 1916 ('Whereas, the nation is a moral or juridistic person, the creature of law, and subordinated to law, as is the natural person in political society . . .'). The same is the attitude of Krabbe, The Modern Idea of State (English translation), 1919, especially pp. 244-248; and Salvioli, Rivista, xiv. (1921-1922) p. 49, n.

¹Vol. i. p. 140.


³1878, p. 60.


¹Rechtswissenschaft ohne Recht, 1917, passim.

²Op. cit., pp. 162-174. It will be observed how clearly the formal basis of Kelsen's theory, namely, the necessity of adopting certain ultimate principles undervide from any legal source proper, is set forth in Salmond's Jurisprudence (1st ed., 1902; see now 7th ed., 1924, § 48).

³Loc. cit.

⁴Loc. cit.

⁵Loc. cit., and, previously, Perassi in Rivista, xi. (1917) pp. 195-223.

⁶Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung, 1923, pp. 120-125; Die Verfassung der Völkerrechtsgemeinschaft, 1926, pp. 28-33.

⁷It is, perhaps, not yet sufficiently realised that the dogmatic positivism of ten years ago is no longer predominant. The renaissance of natural law is finding its way from legal philosophy and from municipal law into the domain of international
law, where the influence of the new ideas was facilitated by the depressing consciousness of the inadequacy of rigid positivist method. Needless to say, it is not the old law of nature, it is rather the modern 'natural law with changing contents,' 'the sense of right,' 'the social solidarity,' or the 'engineering' law in terms of promoting the end of the international society. Cf., in addition to the authors referred to in this paragraph, Pound, Philosophical Theory and International Law, Bibliotheca Visseriana, vol. i. pp. 73-90. See also Le Fur in R.I., 3rd ser., vol. vi (1925) pp. 59-79, Bourquin, ibid., 3rd ser., vol. vii. (1926) pp. 106-110, and Cathrein, Die Grundlage des Völkerrechts, 1918, passim. It may be useful, for the purpose of illustration of the present position, to refer to a recent inquiry instituted by Prof. Niemeyer (N.Z., xxxiv. (1925) pp. 113-189). In a circular letter addressed to a number of international lawyers, he asked for an opinion whether the law of nature conception of international law as taught by Grotius is valid to-day - that is, whether it may be resorted to by international tribunals as a source of decision for the purpose of supplementing and interpreting customary and conventional international law. It is significant that out of forty-one answers which have reached the editor only eleven were in the negative, whereas seventeen may be regarded as given in the affirmative. There are, in addition, nine answers which, although adhering formally to the positivist principle, give in fact an affirmative reply to the question. Prof. De Louter, for instance, the author of the well-known treatise on Positive International Law, says: 'Only in cases where there is no rule or where the law is silent or uncertain is the judicial authority free . . . to decide upon grounds of higher justice - provided always that the source of decision is expressly mentioned.' The answer is so far quite in the affirmative. The restriction which follows is of a more technical character: 'Thus a permanent jurisprudence will gradually evolve which, however, will become law proper only through custom or treaty.' Prof. Politis, while denying that international tribunals are authorised to supplement international law by recourse to principles of the law of nature, says: 'Les principes du droit naturel, d'après la théorie de Grotius, doivent inspirer les juges et les arbitres dans l'interprétation du droit international positif, car ils en sont l'indispensable complément.' This is in fact an affirmative reply to the question, for it is most frequently in the way of extensive interpretation that the supplementing of rules of law by judicial tribunals take place. It seems that, quite apart from the doctrine enunciated by Blackstone ('The law of nations . . . is here adopted to its full extent by the common law'), which is in itself an expression of the objective validity of international law, - British (and American) judges and publicists, both positivists and naturalists, were never inclined to commit themselves to the dogmatising tendencies of continental positivism. From Lord Stowell, who regarded the view, that international law depends merely on convention, as adopted only by Barbary pirates (The Helena, 4 Rob. 7), through Phillimore to Maine and Westlake, there is in this regard a significant uniformity. 'We must either admit that modern international law is a law founded on cosmopolitan principles of reason, a true living offshoot of the Law of Nature, or ignore our most authoritative expositions of it,' says Sir Frederick Pollock (Essays in the Law, 1922, p. 67). See also supra, p.27, n.5.

1Rivista, vii. (1913) pp. 64-65.
2Corso, 1923, p. 40.
3See Moore, pp. 4181-4199; see also the Mossman case, ibid, p. 4180.
4See pp. 249, 250, infra

3See the Gentini case, Ralston's Report, p. 720 and p. 274, infra. See also Ralston in A.J., v. (1911) p. 133; and the same, Nos. 683-687. There is, however, a comparatively recent arbitral award which states that 'the principle of limitation of actions does not . . . operate as between States.' The argument of the arbitrator, who in this case was an 'amiable compositeur,' is not very convincing (see Award in the Alsop Claim, A.J., v. (1911) pp. 1079-1107).
4The resolution wholly confirms the view put forward in the text. It regards the limitation of actions as 'a general principle of law recognized by civilized nations' and urges the necessity of its adoption in arbitral jurisprudence (Article 1). 'In the absence of a conventional rule in force in the relations of the litigant states', fixing the limit of the prescription its determination is a question left entirely to the decision of the international judge . . . ' (Article 2). Article 3 (2) provides that the judge has to take into consideration 'whether the delay in the claim applies to its original presentation or simply to its renewal, as prescription ought to be excluded in the second hypothesis except if it is established as a fact that the subsequent inaction of the claimant State is not imputable to the adverse party or to the case of force majeure.' The Institute acted consistently in refusing to disallow prescription in cases relating to public or contractual debts. (in contradiction to debts of a private origin or tortious debt; see Politis, R.I. (Geneva), iii. (1925) p. 4). It states only (Article 3 (1)) that, as a rule, it is more difficult to admit prescription for debts of the first kind. The resolution is printed in A.J., xix. (1925) p. 760. Cf. also Montluc in R.I. (Geneva), iii. (1925) pp. 195-197; Niboyet in R.I. (1925), 3rd ser., vol. vi. pp. 659-665; and Cavaglii in Rivista, xviii. (1926) pp. 169-204.

1See the Butterfield claim of the U.S. against Denmark (award, Moore, p. 1205); The Stevenson case (Ralston's Report p. 327); the Roberts case (ibid., p.142). See also Laparadelle-Politis, note doctrinale on the case of The Macedonian, vol. ii. pp. 205-209; and Politis, loc. cit. pp. 7-9. See also Ralston, op. cit., Nos. 668-694.
3See pp. 255, 256, infra.
1See p. 258, infra.
2See Ralston, Nos. 212, 213, 219, and Laparadelle-Politis, vol. i. pp. 529, 624, and vol. ii. pp. 222, 567, 635. See also cases quoted in the award in the Russian Indemnity case, Scott's Reports, p. 314, and Venezuelan Arbitrations, Ralston's Report, pp. 425, 658. For another enumeration of cases where interest has been allowed, see case of the Cape Horn Pidgeon and others, U.S.A. For. Rel., 1902, Appendix I. (U.S. Argument, Russian Counter Memorandum, and Decision,
CF. also the Award of the Permanent Court of Arbitration in the matter of French Claims against Peru of October 11, 1921, A.J., xvi. (1922) p. 483. ('Whereas, since this credit is liquid and payable, interest at 5 per cent. is due from the date of the payability of each of the sums composing it . . .'). It is to be regretted that, the constant practice of States notwithstanding, some writers still continue to uphold their opposition against awarding interest. See Strupp, Delikt, p. 212, and Laparadell-Politis in the note doctrinale to the Alabama arbitration. The author of the note speaks of 'analogie abusive' and of 'artifice non seulement inutile mais dangereux' (vol. ii. p. 981). He does not oppose the paying of an indemnity for the delay, and he does not even exclude the admissibility of awarding interest under this title, but he argues that the judge should be permitted to allow compensation for delay also in another form, not necessarily that of interest.

For several cases illustrating this rule see Ralston, No. 215 Compound interest is a rule disallowed (See Ralston, No. 221; Laparadell-Politis, op. cit., ii. pp.116, 117 (case of Yuille, shortridge & Co.; see p. 269, infra). See also the award in French Claims against Peru, A.J., xvii. (1923) p. 481., which summarises accurately the attitude adopted in this question by international tribunals. ('Whereas . . . it is not in order to admit the claim relative to the capitalisation of interest; whereas, in fact, the capitalisation of the interest can result only from a stipulation or from circumstances of fact making clear the consent of the debtor to assume such an onerous obligation. . . .') The same rule has been followed by the Permanent Court of Arbitration in the Award of October 13, 1922 (United States v. Norway, A.J., xvii. (1923) p. 396).

1Montijo case, Moore, p. 1445.
2So, for instance, Strupp, Delikt, p. 213; but see Ralston, Nos. 222-226. See also the Award of May 1, 1924, in the Lord Nelson, Claim No. 20, British and American Claims Arbitral Tribunal, Nielsen, p. 435. ('It is a generally recognised rule of international law that interest is to be paid at the rate current in the place and at the time the principle is due.') It appears that with regard to dies a quo arbitral decisions recognise, in the overwhelming majority of cases, that the date from which interest commences begins with the time at which the claim has first been presented. For a reasoned opinion, based on private law, on this subject, see the Cervetti case in Venezuelan Arbitrations, Ralston's Report, p. 658, and Russian Indemnity case, Scott's Reports, pp. 316, 317, and p. 258, infra.


2Cf. Articles 122, 307-309 of the German Code; Articles 1341, 1350, 1351, 1352, 1356, of the french Code; and Riezler, quoted below, pp. 114, 121, 122, 144, 166; see also Schuster, Principles of German Civil Law, 1907, pp. 361-362; and Sherman, Roman Law in the Modern World, 2nd ed., 1922, vol. ii. p. 417. It cannot be investigated in this connection how far estoppel originating from an equivalent Roman doctrine (Inst., 3, 21); cf. Here Riezler (Studien im römischen, deutschen und englischen Civilrecht), Venire contra factum proprium, 1912.


4The Expansion of the Common Law, 1904, p. 108.


2On the question of estoppel in international law, cf. McNair, B.Y. (1924) p. 34.

Referring Principles:
- I.1.2 - Prohibition of inconsistent behavior
- IV.1.2 - Sanctity of contracts
- IV.9.1 - Limitation periods
- VII.6 - Duty to pay interest