# Chapter 10
# International Law and the Natural Law Tradition: The Influence of Verdross and Kelsen on Legaz Lacambra

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## 10.1 Introduction[1]

We will analyse Legaz' ideas comparing them with the key figures of German legal thought, Hans Kelsen and Alfred Verdross, and their influence on the Spanish philosopher of law, concentrating particularly on the inter-war period. Both of these internationalist philosophers of law were German-speaking Austrians. Meanwhile, we know that Professor Legaz Lacambra studied directly under both, and he wrote his doctoral thesis on Kelsen and, more widely on the Vienna Circle, which of course included Alfred Verdross,[2] after a research visit to the Austrian capital under the auspices of both scholars.[3]

Alfred Verdross' thinking evolved to a position on International Law that was, by his own admission, based on the ideas of Francisco de Vitoria and Suárez. In his

[1] I am grateful to Yolanda Gamarra, director of the research project "*El pensamiento 'ius' internacionalista español en el siglo XX. Historia del derecho internacional en España, Europa y América, 1914–1953*", Ministry of Science and Innovation DER 2010-16350, for her invitation to take part. Meanwhile, Professor Gil Cremades has helped me through his ever-pertinent suggestions to focus on the historical context, an area in which he is an expert, and has provided me with certain essential clues to understanding Legaz Lacambra, whom Professor Gil came to know well when he directed his thesis. Cf. Gil Cremades (2004, pp. 469–473).

[2] Verdross (1923, 1931, 1973).

[3] Some key works by Prof. Legaz Lacambra dealing with issues in International Law are: Legaz Lacambra (1928, 1931, 1933a, 1934a 1935a).

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prologue to the Spanish edition of his manual of *International Public Law*,[4] Verdross would directly affirm, "It is with great satisfaction that I view the publication of this translation of my book into the language of a country to which I owe so much, insofar as its philosophical foundations are in turn rooted in the Spanish doctrine of the 'law of nations' developed in the 16th and 17th centuries, which has come to have a universal influence."

Legaz was himself well versed in the thought of Francisco de Vitoria and Suárez.[5] As Martii Koskenniemi[6] notes, it was at the end of the nineteenth century that the Belgian historian of law, Ernest Nys, drew attention to the *renewal* of natural law in the Spanish *Siglo de Oro*, pointing to the thought of Vitoria and some of his successors, in particular the Jesuit Francisco Suárez (1548–1617).[7] Sometime later the Spanish Krausists (and especially the internationalists) would draw upon Suárez's thought. Meanwhile, the yearbook of the *Asociación Francisco de Vitoria* also appeared in Madrid in the period with which we are concerned. It was first published in 1928[8] with the collaboration of certain Dominican friars, who would later prepare a Spanish-language edition of Vitoria's works for the first time.[9]

According to Gil Cremades, "It could fairly be said that Legaz's intellectual character was formed in this period. His Catholic axiology coexisted in a tense relationship with the 'philosophy of values', the perspectivism of Ortega y Gasset and the 'sociology of knowledge'. The climate, meanwhile, was different from the stable Thomist *ius naturale*. Moreover, Legaz became convinced under Kelsen's influence that the law is first and foremost, although not only, a series of norms, which is to

[4] Verdross (Verdross 1955b, 1937); 3rd edition, 1955 (Spanish translation, *Derecho internacional público*, with additional notes and bibliography by A. Truyol, Madrid, 1955); 4th edition, 1963 (Verdross (1963). *Derecho Internacional Público*, Madrid, Aguilar, 4th German edition in collaboration with Karl Zemanek 1963. Direct translation with additional notes and bibliography by Antonio Truyol y Serra, based on the revised 4th edition in which Verdross shortened some of the earlier texts); 5th edition, revised in collaboration with S. Verosta and K. Zemanek, 1964 (new Spanish translation by Truyol and revision in collaboration with M. Medina Ortega, Madrid, 1976).

[5] Legaz Lacambra (1934c, p. 273; 1948, pp. 11–44). This article was published again 1 year later in Legaz Lacambra (1935a, pp. 1–13).

[6] Koskenniemi, Martti (2010, pp. 43–63).

[7] Koskenniemi, Martti, op.cit., p. 43.

[8] Truyol cites this journal in Truyol y Serra (1977), p. 263. This legacy is now kept at the Instituto de Estudios Internacionales y Europeos Francisco de Vitoria belonging to the Universidad Carlos III de Madrid.

[9] De Vitoria (1933–1935, 3 vol.; 1960). Fernández De Marcos Morales (2009, p. 258). Another Dominican, Vicente Beltrán Heredia, has also recently brought together a part of the master's manuscripts (located in the Vatican Library in Rome, the Library of the University of Salamanca, the Library of the University of Valencia, etc.), most of them copied by his pupils and disciples, some of whom were themselves outstanding scholars, such as Martín Ledesma, who as professor in Coimbra, would publish a part of the lessons and teachings of F. de Vitoria in 'Secudae quartae' in 1560. Legaz Lacambra (1943, 1951).

say neutral forms around which a diversity of material contents may fit. Drawing on Ortega, but supported by Kelsen, he would define law as "social life in form". He studied this social dimension following the arguments proposed by Gurvitch, which were already present in the work of Luño. It was within these coordinates that the young Legaz placed his work, producing numerous papers and lecturing on natural Law, pure theory and, under the noxious influence of Carl Schmitt, on the legal philosophy of National Socialism."[10]

Though all of the group's members accepted natural Law as useful and a point of reference for their legal philosophy, this concept, while remaining Thomist, had acquired numerous different formulations, ranging from the robust position of Sancho Izquierdo to the young Legaz's much cooler expression.[11]

This article has two parts. The first describes the historical evidence for the influence of German legal thinking on Spanish jurists in the inter-war period. The second examines the ideas about International Law that Legaz Lacambra imbibed as a pupil and critic of the two Austrians, Kelsen and Verdross. Specifically, we argue that Legaz was an adherent of the moderate monism Verdross proposed to explain the place of international Law in the hierarchy of the State's internal norms. He also followed Verdross in his conception of International Law and its role in the creation of an increasing number of international bodies, such as the League of Nations. Verdross set out his thinking on this matter with utmost clarity in his manual of International Public Law.[12] Finally, I shall rely on existing published sources, in particular the work of Professor Juan José Gil Cremades[13] and Benjamín Rivaya,[14] for historical data and to trace the contacts between the Austrian thinkers and their Spanish adepts.

Despite the recent fashion for Anglo-Saxon Philosophy of Law among the younger generation of scholars, the influence of German legal thinking remains strong in Spain. Moreover, it is no accident that Professor Gil Cremades wrote his own doctoral thesis on Spanish Krausism[15] under the direction of Legaz Lacambra.

For reasons of space, the essential content of this paper is confined to the place of International Law in relation to the internal law of states, a highly specific issue that nonetheless holds the key to numerous other topics, and more precisely to Legaz Lacambra's own position and the influences upon him. This will lead us to a discussion of what is an evergreen topic in the teachings of both philosophers of law and internationalists with a bearing on the key issue of the foundations of Human

[10] Gil Cremades (2002, p. 49).

[11] Also according to Gil Cremades (2002, p 50).

[12] Verdross (1937).

[13] See Gil Cremades (2002), passim.

[14] Rivaya (1998, 2010).

[15] Gil Cremades (1969). I, in turn, wrote my own thesis under Professor Gil Cremades, and to complete the chain I followed in his footsteps as a Humboldt scholar when I went to study under the philosopher and jurist, Robert Alexy at the Faculty of Law in Kiel, where Radbruch and Larenz also taught.

Rights, a matter which to this day arouses lively debate and is still addressed in practically the same way as it was decades ago by the three scholars with whom we are concerned. It is, indeed, striking that the works of all three remain *vade mecums* in Spanish law faculties, retaining an untarnished currency.[16]

Spain's neutrality in the inter-war period meant intellectuals like Rafael Altamira, who became a Judge at the Permanent Court of International Justice between 1921 and 1939, were able to play a key role in the League of Nations.[17] Though the League of Nations would end in failure, the idea on which it was founded was in turn based on the notion of *Societas Internationalis* conceived by Francisco de Vitoria as a *ius inter gentes*. This was egalitarian and ecumenical between nations, unlike the conception underlying the UN, which is constituted under oligarchic principles that grant pride of place and the right of veto (despite some minimal evolution) to the permanent members of the Security Council.[18]

## 10.2 The Influence of Kelsen and Verdross on Legaz Lacambra

Gil Cremades has amply documented the relationship between Legaz Lacambra and Kelsen and Verdross. In his inaugural lecture for the 2002 academic year at the University of Zaragoza, he gives the following account: "The work of Luis Legaz Lacambra, who was born in Zaragoza in 1906, would have a great impact from the start. He graduated in 1928 having studied under Sancho Izquierdo, but on commencing his doctoral studies in Madrid the following year he met Don Luis… In Madrid, he was friendly rather with Luis' son Alfredo and Recaséns, a follower of Ortega, however, and we may surmise that the latter[19] had more influence over his choice of the Pure Theory of Law as a topic for his thesis than Legaz's Aragonese teachers. However, he addressed the topic from the standpoint of a renewed Catholicism"[20]… In 1930, when his thesis was already well advanced, a grant from the *Junta de Ampliación de Estudios* enabled him to visit the University of Vienna for the first time, where he would attend courses and seminars given by Hans Kelsen, the Catholic Alfred Verdross, Fritz Schreir and Felix Kaufmann. He finally earned his doctorate in 1931, when another grant awarded in Zaragoza financed a second visit to Vienna before the publication of his monograph.[21] This was followed by his

[16] López Medel (1981).

[17] For a study of Rafael Altamira, see Coronas González (2002).

[18] This thesis is originally attributable to Gil Cremades.

[19] In the prologue to Legaz's doctoral thesis, Recaséns Siches expressly says, "I suggested this study to him some years ago, which he has now so brilliantly and splendidly completed." Cf., Legaz (1933b), p. 11.

[20] Legaz Lacambra (1932a).

[21] Legaz Lacambra (1932b).

book on Kelsen, published in 1933 with a prologue by Recaséns[22]… Legaz was also an early translator of some of Hans Kelsen's works,[23] following in the footsteps of Recaséns, who had translated one of the Austrian's books in 1927.[24]

Having shown the direct contacts that existed between Legaz Lacambra and Kelsen and Verdross, let us now go on to explain his view of International Law, and the extent to which he shared the thinking of the two Austrians. To this end, we shall concentrate on the analysis contained in his doctoral thesis, which displays a striking intellectual maturity for what is, logically, an early work,[25] and for its currency today, as it still remains a very useful work in the Philosophy of Law. Meanwhile, Legaz maintained his theory of moderate monism in International Law throughout his life, stressing the primacy of the *derecho de gentes* or "law of nations" over national law.[26]

Nevertheless, Legaz Lacambra did more than merely repeat and compile the thinking of the Vienna Circle but took a position delineating his own ideas, which he would attempt to combine with these fundamental issues of legal theory, despite falling prey to some logical incongruities when he underwent his own political transformation during the years of the Franco dictatorship and his approach to the thought of Carl Schmitt.[27]

In any event, his doctoral thesis is key to understanding Legaz's philosophy of law in this early stage, which lasted until the outbreak of the Spanish Civil War. A contrast with his ideas is to be found in the prologue to the 1940 Spanish translation of Karl Larenz (first published in 1933 and reissued in 1935). Legaz had already become acquainted with Larenz's thinking while working on his own thesis, and both Larenz's and Legaz's monographs were published in 1933. In 1934, meanwhile, Legaz wrote an article examining the philosophical roots of National Socialism.[28]

At this time, the conception of International Law defended by Legaz was incompatible with the thesis advanced by Larenz. Curiously, however, he would agree in 1942 to write the prologue to Larenz's work.[29] Larenz sought to justify the III Reich by denying the possibility that international law could construed as a supranational jurisdiction, reducing or identifying law to the law of sovereign states, or rather the

[22] Legaz Lacambra (1933b).

[23] Luis Legaz Lacambra translated the following of Kelsen's works: Kelsen (1933, 1934a, b). Also Kelsen (1935).

[24] Recaséns and De Azcárate (1930). In his doctoral thesis, Legaz dates the translation as having been made in 1927.

[25] Rivaya (2010, p. 86. and p. 88).

[26] Legaz (1977).

[27] See Rivaya (2010, p. 127).

[28] Legaz (1934a).

[29] Larenz (1942).It is the Spanish translation of the German edition with an introduction by E. Galán Gutiérrez and A. Truyol y Serra, and a prologue by Legaz Lacambra. It was reissued by Reus in 2008 with a foreword by Miguel Grande Yáñez. Other translations by Legaz include Sauer (1933) and Mayer (1937).

law of a specific community, and denying that any jurisdiction could be accepted above and beyond the racial and historic community. Legaz felt unable to criticize Larenz's position in his 1942 prologue to the monograph, although he did not defend it. Rather, he confined himself to noting the importance to the Philosophy of Law of understanding the influence of Hegelianism on jurists such as Larenz. However, he had nothing to say about Larenz's racist arguments and justification of National Socialism.[30]

The thesis we shall attempt to prove, then, is that Legaz held a conception of international law that would have made him a follower of Verdross in the stage at which he split from Kelsen's positivist monism to construct his own moderate monism. The other keys to this question lie in the explicit references made to Vitoria and Suárez[31] as a starting point for a monist construction of international law based on the supposed superiority of the law of nations. Legaz asserts that Kunz[32] and Verdross recognised these roots.[33]

Meanwhile, Legaz accepted Kelsen's formal monism (as did Recaséns), but he sharply criticized his positivism, stressing the importance of a reference to values. As Legaz would put it, the legislator must desire what is right and just. This introduces a reference to values in which we may clearly observe the influence of Max Scheler's axiology on Legaz, and the personalism of French authors like Mounier.[34]

## 10.3 The Austrian Internationalist Jurist and Philosopher of Law, Alfred Verdross

Alfred Verdross-Drossberg was born in Innsbruck, Tyrol, on 22 February 1980. He was awarded his doctorate in Law at the University of Vienna in 1913, and after being recruited by the Austrian Foreign Ministry he was posted to Berlin. In 1922 he began teaching at the Consular Academy, and he then went on to teach International Public Law, Philosophy of Law and International Private Law at the

[30] For a discussion of his subsequent transformation, which is not dealt with in this article, see Rivaya (2010, pp. 117–118). According to Rivaya, Hegel had scant influence in the Spain of the interwar period, and Legaz's transformation was more closely associated with the restored Neo-Hegelianism of German and Italian Fascism, and with Legaz's own intellectual development during the war and post-war years. See op. cit., p. 97. See also Gil Cremades (1978), pp. 55–103.

[31] Suárez (1970–1971, 1981). Groot, Hugo de (1993).

[32] The discussion of KUNZ provided by Truyol in his *Fundamentos de Derecho Internacional Público* is enlightening, because it explains why Legaz came to follow him. Cf. Truyol (1977, p. 70).

[33] Legaz (1933b p. 330).

[34] Legaz (1933b, p. 293).

University of Vienna between 1924 and 1960.[35] In 1957 he became a member of the Hague Tribunal. He was a Judge of the European Court of Human Rights in Strasbourg between 1958 and 1977. He was also a member of the United Nations International Law Commission and of the Institute of International Law. He chaired the 1961 Vienna Conference on Diplomatic Relations which gave rise to the Vienna Convention on Diplomatic Relations.

Together with Adolf Julius Merkl, he was a disciple of Hans Kelsen in the Vienna School. He created his own theory of the relationship between International Law and the internal law of states, diverging from Kelsen's dualism and evolving towards a moderate monism. Verdross travelled a long intellectual road from Kelsenian legal positivism to his discovery of the natural law of the Salamanca School,[36] whose ideas he would revitalise and apply in an original way to the new functions ascribed to International Law in the scenario created after the First and Second World Wars.

Legaz wrote his theories on Verdross in 1933. At this time, Verdross had already propounded his own Kelsenian theses, but was increasingly distancing himself from them. Verdross drew attention to the fact that the Salamanca School (Francisco de Vitoria and Francisco Suárez) had influenced Hugo Grotius[37] and the thinking of the Protestant Natural Law School of the seventeenth and eighteenth centuries (Johannes Althusius, Samuel Pufendorf and Christian Wolff). In more recent times, this influence has been widely investigated and described by specialists like Alexander Broadie of the University of Glasgow[38] and Knud Haakonssen,[39] both experts in the field of Scottish philosophy in the sixteenth, seventeenth and eighteenth centuries.

Verdross was not only a Philosopher of Law but also possessed extensive knowledge of prevailing positive Law, allowing him to combine his formal training with practice as a Magistrate of the European Court of Human Rights (ECHR), where he intervened in numerous decisions on practical matters of international politics.

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[35] The brief summary printed on the dust jacket of Truyol's Spanish translation of Verdross' Manual corroborates these details: "Professor Verdross is a professor of International Law. He is also a Philosopher of Law, however, and as such grounds International Law philosophically and juridically in a way that is unusual in manuals of this kind. He has also had direct experience as a judge in international courts, which enriches his theories with a profound knowledge of international jurisprudence and his own professional practice in the international courts. He is not only a university professor but has also taught at the international Academy in The Hague."

[36] Verdross (1971/1972, pp. 57–76). In Verdross' festschrift, Truyol submitted a paper on the Spanish law of nations in the sixteenth century entitled *Völkerrecht und rechtliches Weltbild, Festschrift für A. Verdross*, Viena, 1960. The original Spanish version of this work, entitled *Razón de Estado y derecho de gentes en tiempos de Carlos V* had appeared in the collective work *Karl V., der Kaiser und Seine Zeit*, edited by P. Rassow and F. Schalk, Cologne-Graz, pp. 189–210.

[37] Fernández De Marcos Morales (2009, p. 259): "Grotius cites Vitoria over fifty times in his famous treatise *De iure belli ac pacis*, where he expounds the fundamental ideas of the Dominican's doctrine. As Brown notes, moreover, the Dutchman's own doctrine barely differs in the essentials of its method and content from that of the Dominican, because if Grotius built the 'edifice', he did so using 'materials' taken largely from Vitoria."

[38] Broadie (1990, 2003).

[39] Haakonssen (1996, 2010).

First the League of Nations and then the United Nations Organisation created after World War II were to a great extent founded on the values of the natural Law of nations, especially the idea of shared common rights and, in turn, the development of Fundamental Rights and the duty of States to respect them. Verdross extended and expanded the classical concept of *bonum commune,* the common good, to that of *bonum commune humanitatis,* the common good of the world or of humanity.[40] It was his express wish that his successor in the Vienna Chair should be versed in both International Law and the Philosophy of Law.[41]

## 10.4 Legaz's Defence of Moderate Monism

Let us now follow step by step how Legaz constructed his own position, which would lead him to defend a moderate monism in his doctoral thesis. Analysing the role of International Law in national Law, Legaz clearly describes and distinguishes the positions of both Kelsen and Verdross, remarking the points where he is in disagreement with them and where he concurs. I rely on Legaz's summary of Kelsen's views. It is not the goal of the article to go deeply in analysing if Legaz´s interpretation of Kelsen was enough accurate. We are exposing Legaz´s ideas in 1934, when he was still very young.

As Antonio Truyol explains in *Fundamentos de Derecho Internacional Público,* the problem of the relationship between international and national Law from the standpoint of doctrinal solutions is "one of the most difficult in the theory of international law."[42] It was first raised by the German jurist H. Triepel in 1899, in his book *Völkerrecht und Landesrecht*. For the purposes of the present discussion, it will be sufficient to note, without simplifying what is a highly complex issue, that the consensus reduces doctrinal postures to two major categories: dualist or pluralist theories, and monist theories. Legaz also argues within this framework, following Verdross' explanations.[43]

In Truyol's words, "The former treat international and national law as two independent systems, while the latter both form part of the same normative system, so that first one and then the other may prevail. However, this general framework can

[40] Verdross' original works in German and successive reprints may be consulted in the *Katalog der Deutschen Nationalbibliothek:* https://portal.dnb.de/opac.htm?query=Woe%3D11862654X&method=simpleSearch

[41] Seidl-Hohenveldern (1994, p. 101).

[42] Truyol (1977, p. 109). The first edition was published by Seix Barral in Barcelona in 1960.

[43] Truyol agrees with Legaz's criticisms of this kind of monism, tending towards a moderate monism or reconciling theory. he considers himself a disciple of Verdross, although he never actually heard him lecture. Cf. Pérez Luño (1991, pp. 344–345). For further information on Verdross' disciple, Karl Zemanek, who helped Truyol translate one of the editions of Verdross' manual, see Verdross (1955a, pp. 116–117).

be further qualified, insofar as that it is possible, on the one hand, to reconcile a dualist position with *partial dependence* of one of the two legal systems, and on the other to argue from a monist stance for a certain *coordination* between international and internal law."[44] The latter was the position at which Kelsen eventually arrived under Verdross' influence, and it was taken up by Legaz. Meanwhile, we should not forget that Truyol was the heir to Verdross' thesis in Spain, establishing the influence of the Austrian internationalist among Spanish scholars of International Law.

Kelsen endeavours to resolve the compatibility of the sovereignty of states employing the idea that states' independence includes the idea of legal coordination, and this inevitably leads entails "acceptance of an authority that is above all states and to which they all submit, limiting the sphere of each and therefore conditioning all states."[45]

The dominant doctrine asserts that the state is superior only with respect to its subjects, and that it is independent of other states but not superior to them. Rather, they are "coordinated" and the power of an individual state thus does not extend beyond "its own sphere". Legaz held that this concealed a contradiction. Following Kelsen, he argued, it is not sufficient to refer to independence and it is also necessary to refer to some kind of coordination. Legaz thus shares Kelsen's idea that some kind of authority is needed over and above states to which all submit, and which limits the spheres and therefore coordinates each of them.[46] The fundamental idea justifying the need for International Law is, then, the need for an overarching common order.

Kelsen based his monism on the argument that validity of sovereign states' law requires them to refer to the validity of a single foundation on which the unity of the normative system is based.[47]

Legaz thus considers that the formal aspects of the creation of Kelsenian international law remain correct (a thesis he would always hold), insofar as the creation of international norms must inexorably comply with certain formal procedures if such norms are to be valid. In this regard, both Legaz and Recaséns realised that the system constructed by Kelsen was a keystone of future law-governed states, regardless whether their ultimate foundation was accepted or not. On this point, both scholars also understood the importance of creating some kind of international court or tribunal, even if they finally opted for Verdross' thesis with regard to its ultimate foundations, a position that fitted perfectly with both Legaz's and Recaséns' intellectual training moreover. This synthesis is not eclecticism but consists of the adoption of a moderate monism as an intermediate stance between monism and the dualism present in the formation of the League of Nations.

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[44] Truyol (1977, p. 109).

[45] Legaz (1933b, p, 69). With reference to Kelsen (1928, p. 40). We may recall here that Truyol himself translated this work, and he would therefore have been well acquainted with Verdross' work.

[46] Legaz (1933b, pp. 68–69).

[47] Legaz (1933b, pp. 70–71), citing the Kelsen Compendium, p. 55 ff.

## 10.5 Strict Monism and Legaz's Moderate Monism

As explained by Legaz, the monist construction of International Law can be maintained from two different standpoints. The first would be the defence of the primacy of the legal order of the state. This thesis excludes the idea of International Law as superior to the state. The second position would defend the primacy of the international legal order.

According to Legaz, the monist construction of International Law is above all the work of Verdross, who made his first defence of this position in the Vienna School in 1914.[48] Verdross's position evolved towards the moderate monism he upheld in 1933 when Legaz wrote his thesis. The problem of strict monism was that it required sacrificing either the sovereign will of the State or the sovereignty of International Law. Verdross always maintained a monism that was in line with Kelsen's ideas and favoured the sovereignty of International Law, but he did not wish to sacrifice the soveriegnty of states either. This led him to seek a balance, which was translated in real terms into the Austrian Constitution and was finally accepted by Kelsen himself.

Legaz shared Verdross' position, although he enriched it with ideas drawn from other European authors such as Léon Duguit (1859–1928). This French jurist sought to reconcile the sovereignty of the State with freedom,[49] affirming that the all-embracing concept of sovereignty needed to be overcome and replaced in the first place with the duty not to disturb the peace, respecting the national and territorial autonomy of other nations.[50]

Legaz appears to support the doctrine of integration, which aspires to surmount the ethical and sociological antithesis of the individual and the community.[51] It is possible to reconstruct his stance from his criticisms of Kelsen and those other authors whom Legaz considers to be on the right track. In Legaz's view, the identification of Law and State leads to numerous confusions, the most significant in the case of Kelsen's theory being that it results in a deification of the Law. Legaz thus attributes a certain pantheism to Kelsen. The intellectual context in which the Viennese scholar developed his theories was of course deeply imbued with Hegelian influences. As is well known, neither Hegel's theory nor Marxism could have been formulated without a thorough grounding in theology. Kelsen was little influenced by Husserl's phenomenology, as the thinkers inspiring the Vienna School were rather Kaufmann and Schreier.

Meanwhile, Legaz shows himself closer to Max Scheler and personalist ethics in his own theory,[52] which is an important fact in his career remarked upon by Rivaya, who comments on the curious way he would later distance himself, moved by political

[48] Legaz (1933b, p. 151), where the author refers to Verdross (1914, p. 329 ff).

[49] Duguit (1920–1921).

[50] Legaz (1933b, p 173).

[51] Legaz (1933b, p. 194, see the footnote to page 257).

[52] Legaz (1933b, p. 195).

circumstances.[53] Another of Legaz's criticisms of Kelsen is that there cannot be an equality of values between two hypotheses such as the proposition, "International Law persists through revolutions" and the proposition, "Revolution is inexplicable if the primacy of the state is accepted." Kelsen believed both propositions have the same juridical value, and that a choice could be made between the two only on subjective grounds. Legaz, in contrast, holds that the two hypotheses are not of equal value.[54]

In contrast to Kelsen, Verdross held that the fundamental hypothetical rule is not a hypothesis but an axiom, the reality of which must be proved in some other way.[55]

In his criticism of Kelsen's notion of sovereignty, Legaz maintains that "the ethical and legal rule, *pacta sunt servanda*, not only obliges States to abide by any pacts they may make, but also to delegate in making them. The State, then, is a member of the international legal community and creates its Law by delegation. Even so, the State is still sovereign, as the difference between the State and a Municipality is not removed if the primacy of the international legal order is accepted but subsists in at least the following two points, as Verdross argues: a) the State receives its competence directly from International Law, but local entities do so from the State; b) the competence granted by International Law to States is wider than that granted by States to local entities."[56]

## 10.6 Legaz's Criticism of the Total Identification of State and Legal System in Kelsen's Strict Monism

On this point, Legaz also criticizes the rigid identity defended by Kelsen, an area in which Kelsen himself is not particularly consistent. According to Legaz, "There is something that escapes from the total identification of the State and the legal system, and there is room for some differentiation."[57] Furthermore, it was Verdross, he says, who remarked on this point, distancing himself from Kelsen, "… as he not only separates Law and State, but also breaks with the identification of the Law and the Law of the State. Verdross refers to the Law of the legal community, which he understands to comprise not only the State but also the international legal community, which is evidently not the State, and the Church, which is also not a State but is unquestionably a legal community."[58]

[53] Rivaya (2010, pp. 122–124).

[54] Legaz (1933b, p. 241).

[55] Legaz (1933b, p. 243, see note 324).

[56] Legaz (1933b, p. 252).

[57] Legaz (1933b, p. 275).

[58] Legaz (1933b, pp. 275–276).

Legaz also draws on ideas from other authors like Hauriou,[59] appealing to the idea of the State *qua* institution. Referring to Smend, he affirms that "… the State is thus a part of a spiritual reality. It is a cultural activity which, like all realities of spiritual life, is a vital movement requiring constant renewal and reconstruction,"[60] which appears to distance him from excessive Kelsenian formalism. Legaz thus contributes the idea that the law is a part of culture, a notion that is very much in tune with Ortega y Gasset's rational vitalism, a philosophy that had an immense influence on contemporary Spanish intellectuals, as did the ideas of *élan vital* propounded by the French philosopher, Henri Bergson. It is also known that Legaz was influenced by Bergson via his fellow countryman, Jacques Chevalier.[61]

The reasoning employed by Legaz to show that politics and law are related would also be applicable to International Law. On one hand, there is a reference to values in the State[62]: "It is sharing in certain values that keeps men united and not the coercive apparatus of the legal system."[63] On the other, Legaz asserts that "… a State without legal order is not possible, but not any legal order implies the existence of a State."[64]

He also drew on Del Vecchio to argue the primacy of the international legal system[65] according to the perspective adopted. On one hand, the law of the state is the law of a legal community (Stammler), "(…) but the legal theorist must rise to the standpoint of the primacy of the international legal system. The legal validity of state Law derives its position from the sovereign social will, but this social will must be conceived legally as delegated by the international 'constitution', which converts it into a member of the international legal community".[66]

In support of his position Legaz cites Recaséns, according to whom the "complete and absolute identification of the State and the legal system must, then, be extirpated."[67] In the philosophy of the State and the Law, not only logical but also meta-juridical problems must be addressed, which is to say the foundations on which strict juridical science rests. In a highly pertinent criticism of Kelsen's positivism, Legaz concludes on this point that a pure theory of Law cannot provide the basis for a theory of the State, because a Theory of the State is a prior requisite for a legal study of the law-governed State.[68] Legaz also criticizes Kelsen's positivism

[59] Hauriou (1928).

[60] Legaz (1933b, p. 279).

[61] Gil Cremades (2002, p. 49).

[62] Cf., Legaz (1933b, p. 279).

[63] Legaz (1933b, pp. 279–280).

[64] Legaz (1933b, p. 282).

[65] The Italian jurist indubitably influenced contemporary Spanish scholars, especially Recaséns Siches, who in turn oriented Legaz's work although he did not direct his thesis. For a discussion of Del Vecchio's influence in Spain, see Rivaya (2010, p. 51).

[66] Legaz (1933b, p. 283).

[67] Legaz (1933b, p. 283)

[68] Legaz (1933b, p. 285).

by including the relationship of legal norms with values and the relationship between ethics and law, arguing that the legislator indeed takes value-based positions and must seek the right and the just. Legaz turns to Suárez in support of his arguments, citing Recaséns' thesis with regard to this author.[69] According to Legaz "The value of norms is an ethically necessary feature, as any act establishing a position in Law points to (positive or negative) values, which lend it meaning. Meanwhile, the intention of the legislator is "ethically good" precisely because it points to a positive value. The Law realises values of different kinds… The fact that the legislator wants something is not a sufficient ground to recognise that something as ethically valid and obey, but rather the fact that the outcome the legislator seeks is itself right and just…".[70] On this point, then, he follows the arguments of Thomas Aquinas, Cayetano, Soto and Suárez, something is not good because God wants it to be good (voluntarism), but rather God wants only what is good and necessary.[71]

Kelsen distinguishes clearly throughout his work between legal validity and moral validity. He argues in his earlier work that there can be no clashes between law and morality from the legal point of view, but this is not the same as conflating legal and moral validity.[72] But Legaz wants to scape from Kelsen's positivism supporting the existence of possible conflicts between legal and ethical validity, in order to clarify that the valid law could be not ethically valid. In this way for Legaz can be clashes between law and morality from a legal point of view. Law must try to be just nad morality is a reference for Law. For this reason Legaz distinguishes the Theory of Law from the Philosophy of Law. In this case, the example he uses refers precisely to International Law.

The following quotation is highly illustrative for the purposes of our discussion:

> "In pure legal theory and in the Philosophy of Law we must be aware that it is necessary to accept a minimum in Metaphysics (which is the translation of the principle of transcendence in each problem) as objectively valid and anthologically existent. For example, the international community and the correlative principle, *pacta sunt servanda*, is the indispensable metaphysical minimum required to make the unity of the legal image of the world possible, but it is not an empty logical construction that is divorced from the realities of life, because the international community must recognise itself as a metaphysical reality. This metaphysical remainder not only makes it possible to construct legal theory, but also to draw the attention of the Philosophy of Law to the need to eschew any warlike temperament, in place of which it is necessary to cultivate the urge to Justice and the cultural community of peoples."[73]

Legaz's criticisms of Kelsen are far-seeing. Legaz follows Kelsen in stressing the importance of the validity of legal norms. Moreover, the ethical validity demanded by natural Law also held a key position for Legaz, that of value, the reason for being

[69] Recaséns Siches (1927).

[70] Legaz (1933b, p. 293).

[71] Legaz (1933b, p. 293).

[72] I would like to thank Jonathan Crowe, author of the monography´s referees for this clarification, in order to distinguish Kelsen thought from Legaz's summary of Kelsen's views.

[73] Legaz (1933b, pp. 316–317).

of the Law. As he sees it, the key to the difference between the Pure Theory of Law, which relates to legal validity, and the Philosophy of Law, which is concerned with ethical validity, and it is the latter that provides the superstructure for the whole of the legal system. Legaz brings in the notion of justice as a point of reference for any legal norm, an idea that he would also apply to International Law. According to Legaz, legal norms are not imperatives that must be obeyed unconditionally, even though they are unjust. The Law and ethics should not be conceived as two separate worlds. Their reason for being is not merely a formal 'ought' but refers to values, and this allows Legaz, in my opinion, to establish the relationship between International Law and Justice, rejecting the foundation of International Law as merely the sovereign power of States and their use of force.

Legaz appealed to Max Scheler to defend this position.[74] However, Legaz does not defend a simple, classical idea of natural law which affirms that an unjust norm is not law, but brilliantly distinguishes that juridical propositions must be applied even where they are unjust if they are legal, which is to say the oblige the State even where their content is unjust. However, valid but unjust norms do not oblige individual people, because the individual can refuse to comply with a juridical proposition that he considers unjust.

Furthermore, Legaz does not follow a strict positivism in his thesis, because he sees legal reason as based on a minimum value, such as the fact that legal certainty is a value. In contrast to a certain excessively classical approach to natural law, meanwhile, unjust law does not lose its juridical validity for Legaz. Thus, the metaphysical minimum allows him to resolve apparent contradictions and make the Theory of Law compatible with the Philosophy of Law without reducing the two to the same thing. In other words, he combines "both the equal rightness of both points of view and their mastery as exclusively valid points of view."[75]

## 10.7 The Incompatibility Between the Validity of the Legal Image of the World and the Validity of International Law

In a few brief pages, Legaz departs from Kelsenian monism in his view of International Law, abandoning Kelsen's skeptical relativism and clearly expressing himself in favour of Verdross' truly ontological objectivism, at the same time adopting the moderate monism defended by the latter.[76] Legaz in fact considers that Kelsen himself had overcome his anti-vital formalism by accepting some of Verdross' arguments.

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[74] On Scheler, see Legaz (1933b, pp. 293–295).

[75] Legaz (1933b, p. 321 and p. 323).

[76] Legaz (1933b, p. 324). He does not state this explicitly, but initially only points to the evolution of the Vienna School. Legaz (1931, 1977). He recognises here that he has since maintained a position in line with that of Verdross (see, p. 1).
Recaséns Siches (1932).

Following his usual method of contrasting apparently irreconcilable theories, he expounds the dualist position, which gives pride of place to State laws, to that of the monists, who defend a world legal unity implying the superiority of International over State law.

Legaz grounds the universalist note in International Law.[77] In doing so, he lists the scholars he has followed, citing Spann and Luis Mendizábal among others.[78] This chain of connections allows Legaz to link up with the Natural Law group in Zaragoza and its leader, Professor Luis Mendizabal,[79] the father of Alfredo Mendizabal.

Legaz refers to the early works of a still strictly monist Verdross, explaining how he substituted the "Kelsenian hypothesis" for an ethical principle that was rooted in values in his later theories beginning in 1933. It is to this position that Legaz himself adheres.[80] In one of his works, Verdross himself asserts that:

> … the jurisdiction of the international community is legally unlimited, because it holds the jurisdiction over jurisdiction. However, this is not an absolute sovereignty, if the term is to be understood as denoting an arbitrary power, because the international community is itself entrusted with a social mission. Thus, the International Community, as the supreme jurisdiction in the pyramid of temporal authorities, is indeed legally unlimited, but it is subject at least to the rules of humanity and justice.[81]

According to Legaz, the individual and the social group exist at one and the same time. Hence, States exist and at the same time the International Community. He endeavours here to show that universalism and individualism do not conflict. Furthermore, the individual may not be dissolved in the social group.[82] Legaz argues that communities are needed to support the existence of an international community above the state, in the same way that the nation, *qua* community, is above the individual and something more than merely the sum of its individual citizens. His reasoning consists of showing that the international community existed as an ethical community before its constitution as a legal international community.[83]

Taking a step further, Legaz ties universalist thinking to the traditional doctrine of Thomas Aquinas, Vitoria and Suárez, adding that the merits of these scholars were recognised by the Vienna School, and in particular by Kunz[84] and Verdross.

The basic argument for the purposes of this paper is that Legaz adopts the classical Spanish thinkers as the starting point for a monist construction that gives pride of place to the system of international law. Indeed, Verdross' thinking would develop

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[77] Legaz (1933b, p. 325), note 404. In this case he is explicit, using the plural to affirm "Our universalist theory…."

[78] On p. 325, note 404 Legaz refers to Mendizabal, L. *Derecho Natural*, cap. VI.

[79] See Gil Cremades (2002, p. 40).

[80] Legaz Lacambra (1933b, p. 325, note 404). Verdross (1923).

[81] Verdross (1927). The original is in French. The translation is ours.

[82] This argument contrasts with certain positions taken by the later Legaz, such as the foreword to Larenz.

[83] Legaz (1933b, p. 330).

[84] Kunz (1962. pp. 77–86). Spanish translation by Antonio Pastor Ridruejo.

increasingly along these lines, as we may observe in the successive editions of his famous handbook of International Public Law. Yet Verdross had already shaped his moderate monism in the years when Legaz worked with him, as the Viennese scholar considered that the international constitution was created via the intervention of States in making treaties and by custom. This international constitution delegates the determination of the bodies through which it is realised in the constitutions of States.[85]

Legaz's interpretation of Verdross' development coincides with the position that the internationalist Truyol would expound years later in his *Fundamentos de Derecho Internacional Público.* In a brief digest, Truyol describes the evolution of Verdross' position in very similar terms to those already employed by Legaz. Indeed, we would even go so far as to assert that Legaz already sensed, or perhaps even influenced, the future direction the Viennese jurist would take, which would end years later with his adoption of the classical Spanish theory of natural law.

As explained above, Verdross started out as a positivist internationalist. In a paper published in 1914 on the "construction of natural law",[86] he maintained a monist stance and the primacy of national law, seeking to combine a certain dualism with Kelsen's monist thesis. However, he changed his position after this paper, adopting a moderate monism that gave primacy to international law and diverging from Kelsen. One of the reasons that led him to this shift was precisely that the *pacta sunt servanda* rule had to be drawn from the will of States.[87]

## 10.8 The Principle of *Pacta Sunt Servanda* in Legaz

In short, Legaz flatly rejected Kelsen's monism, according to which International Law would be above State constitutions in exclusivist terms, arguing rather that "Neither International Law is subject to National Law, nor all National Law is subject to International Law." What is above States is only the international constitution: the rest of International Law arises from procedures that may depend exclusively on national constitutions.[88]

Having arrived at this point, we must now answer the question of what Legaz understood by the International Constitution. This basic norm to which all States must submit to create international law is the principle of *pacta sunt servanda.* In contrast to Kelsen, however, Legaz did not see this as merely a formal principle, but refers to an ethical imperative that imposes the duty to respect it. The obligation to keep agreements thus has a meta-juridical basis. It is not sufficient for Pacts to be

[85] Legaz (1933b, p. 331 quotes Verdross, in *Einhei*t, p. 126).

[86] Verdross (1914).

[87] Truyol (1977, p. 74).

[88] Legaz (1933b, p. 331).

respected but their contents lead to international peace, cooperation and mutual comprehension between States, "… and it is not merely required that pacts be kept, but these pacts must respond to and realise the idea of Law, being a 'just' international Law."[89] Once again on this point, the Pure Theory of Law must be filled out by the Philosophy of Law. "None can deny that a superior jurisdiction exists above States, although this may be only an idea (in its entirety), but at the same time it is an absolute imperative that demands realisation."[90]

Truyol agrees with Legaz, including Kelsen's theory as expressed in *Law and Peace in International Relations* in his classification of positive doctrines of International Law. According to this thesis the *pacta sunt servanda* principle stands at the top of the pyramid of norms as a positive legal precept.[91] Although *Law and Peace in International Relations* dates from 1942[92] (it contains lectures given between 1940 and 1942) and is therefore much later than the formalist Kelsenian conception of the principle found in the inter-war period, Legaz had precociously perceived this very early on. Truyol also sees this position as begging the question, or a vicious circle, because the *pacta sunt servanda* rule on which conventional international law is based is itself founded on custom, which is the fruit of an intent, the mandatory nature of which must also be grounded.[93]

In his consideration of the *pacta sunt servanda* rule, Legaz appears once again to ally himself with Verdross' position. Indeed, his analysis of the principle "led Verdross increasingly towards an objectivist position" as Truyol sees it.[94] Verdross had in fact already begun to shift towards the philosophy of values. "The *pacta sunt servanda* rule is subsumed in the sphere of absolute values. If it is a legal norm, insofar as it has been incorporated into positive sources, it is also an ethical rule, which is to say an *evident* value, or one that can be logically deduced from an absolute rule, such as the *suum cuique* principle. Verdross, then, professes a philosophy of values which reconciles the absolute nature of values with their relative perception by man, as a result of which positive law will express them more or less perfectly. Positive law is, of course, a *relative* value, which varies depending on the development of civilization, but it is nevertheless based on the absolute value of the idea of justice. From this position to the classical doctrine of natural law, there was but a short step, which Verdross took in his manual of International Public Law."[95]

In the 1930s, Verdross still held a position similar to that of Josef L. Kunz, who was also followed by Legaz. In an article translated by Pastor Ridruejo and published in the Zaragoza journal *Temis* (once again a chain of connections), Kunz

[89] Legaz (1933b, p. 333).

[90] Legaz (1933b, p. 333).

[91] Truyol (1977, p. 63).

[92] Kelsen (1942). The contents consist of the 'renowned Oliver Wendell Holmes Lectures published'. Lectures delivered between 1941 and 1942.

[93] Truyol (1977, p. 63).

[94] Truyol (1977, p. 74).

[95] Truyol (1977, p. 74).

argued that natural law is not law but ethics, as the true natural law is not a system of legal norms but a system of overarching principles.[96] This article was published in 1955, and it is therefore striking that the young Legaz should have seen in Kunz a defender of the need for the reference to ethics in International Law in the course of his stay in Vienna more than 20 years earlier.

By 1955, when the paper was published, historical circumstances were very different to what they had been in the inter-war period, and the United Nations Organisation had been created to replace the League of Nations, yet the questions Kunz raises with regard to the utility of natural Law in international public Law already appear in Legaz's thesis.[97]

## 10.9 Verdross' Shift Towards the Classical Spanish School of International Law

Verdross made a return to a realist epistemology but with an admixture of law as culture,[98] which affected his understanding of international law and led him to employ the concept of 'nature'. This is in fact a return to metaphysics, to which Legaz explicitly refers in his thesis, noting that it had been sidelined by scientific and legal positivism.[99] In all of this, we may observe a drive to develop beyond the Kantian thought in which Kelsen was steeped.

Verdross' development is accurately summed up by Truyol:

> On the classical Spanish school, Verdross affirms that law can only be understood if it is considered from a universal standpoint presided over by a teleological principle. Only those who perceive that the universe constitutes a meaningful order within which law plays a certain role will therefore be able to penetrate the meaning of law. To the objection that an 'ought' cannot be drawn from the nature of things, from what is, Verdross replies that nature as contemplated in a teleological conception is not the nature of the natural sciences, which is subject to the principle of causation, but the totality of the real, which is also called nature. And this nature contemplated in a teleological conception is not the nature of the natural sciences subject to the principle of causation, but the totality of the real, which is also called nature. This nature in the wide sense embraces not only the nature of the natural sciences, but also the sphere of culture, which is structured in partial domains including law. In this way, Verdross arrives at the idea of natural law, which is neither more nor less than the set of principles that necessarily arise from the idea or nature of human groups. In order to determine the content of natural law, then, it is necessary to begin with the natural sociability

[96] Cited by Truyol (1977, p. 70), referring to Kunz (1962, pp. 77–86). Truyol cites pp. 84, 85 and 86.

[97] Idem, cited by Truyol (1977, p. 70).

[98] The notion of law as culture also appears clearly in Legaz. This distinction between natural sciences and cultural sciences is very typical of the debate in German intellectual circles. See Truyol (1977, p. 74), and in Legaz's thesis, he expressly asserts, "Law is rather a cultural product".

[99] Verdross cites Legaz y Lacambra. Cf., Verdross, p. 63 of his manual of International Law, Legaz Lacambra (1947, pp. 9–28).

> of mankind. The supreme source of natural law in each group is the idea or nature of the group. The respective principles, meanwhile, are reflected in the legal consciousness and sentiment of the group's members. Thus, the precepts that spring from this consciousness or sentiment generally display features that differ depending on the people, the time and the place. On this basis, positive law can finally be deployed, either resulting from custom or as expressly established.[100]

Both Legaz and Truyol follow the framework proposed by Verdross, according to which different positions can be summed up as dualist and pluralist, or as monist theories, the former starting from national law and the latter from International Law. There are two variants of monist theory, namely *radical* monism and *moderate* monism.

Verdross refers to Triepel and Anzilotti as the founders of dualism. The basic argument in these theories is that International Law and national law are two completely separate legal systems with different foundations in terms of validity and subjects. When the two legal systems are separated in this way, the conclusion must be that "national laws that conflict with International Law must legally be obeyed".[101] In a footnote, Verdross asserts that Kelsen has adopted the theory that he himself goes on to explain, according to which national laws that are contrary to international law are valid. In his phase of strict monism, however, Kelsen claimed that such laws were void as they contradicted a superior hierarchical norm, which was International Law.

Verdross clearly argues that dualism makes no sense, but its weaknesses cannot be resolved from a position of radical monism.[102] He also adds that the requirement to exhaust domestic process before turning to the international courts proves that the latter jurisdiction is above the former. This leads Verdross to his final position of moderate monism, which he defines as follows, "For all of these reasons, only a theory that recognises the possibility of conflict between International Law and national law but observes that such conflicts are not definitive but find their solution in the unity of the legal system can account for legal reality. I call this theory *moderate monism* based on the primacy of International Law, because it maintains the distinction between international and national Law but at the same time underlines that they are connected within a unitary legal system based on the constitution of the international legal community."[103]

It is, then, abundantly clear that Legaz followed Verdross, who also explained why it is wrong to talk of the delegation of International Law in domestic law, and why one should rather refer to a transformation of international into national law, since any international legal norm must be implemented by a law or regulation to be applied by the national courts and authorities.[104]

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[100] Truyol (1977, p. 74).

[101] Verdross (1955a, p. 64).

[102] Verdross (1955a, p. 64).

[103] Verdross (1955a, p. 65).

[104] Cf. Verdross (1955a, p. 68).

The first constitution to make provision in this respect was that of the Weimar Republic in 1919, article 4 of which established that all universally recognised norms of International Law formed a mandatory part of German Law. The wording included in the Government's Bill for the Constitution was misunderstood, however, and on the first reading the commission amended it as follows: "International treaties and agreements, and the universally recognised rules of International Law shall govern the relations of the German Reich with foreign States, as well as the provisions of the Treaty governing the League of Nations, if the Reich joins that organisation". Precisely because this formulation could also give rise to misunderstandings, Verdross[105] observed that the wording only took the international validity of International Law into account, but not its domestic validity, and he wrote an article[106] which persuaded the commission to review its initial agreement along the lines of the initial wording proposed by Prof. Preuss on the advice of the Austrian internationalist.

Briefly, Verdross' interpretation of article 4 of the Weimar Constitution is that International Public Law would simultaneously circulate both inwards and outwards. This formulation was also included in article 9 of the Austrian Federal Constitution, which was inspired by its German forerunner. Both constitutions in fact only enshrined in writing what was already common practice in the independent courts: the national courts could directly apply ordinary International Law or the law of nations without the need to wait for implementation in a law enacted by the State (Judge Blackstone's formula).[107] This "ought" means that internal legal norms must be interpreted in light of International Public Law. However, if a clear contradiction were found between International Public Law and a State norm, the courts should apply the latter. This is because the principal under which International Public Law forms an integral part of a country's national law means that its norms are equivalent to those of the national law, but they be rendered void by subsequent national legislation. The principle that the latest law repeals any earlier law thus also holds in this case.

Verdross then went on to examine the different ways in which countries structure the acceptance of International Public Law in their own internal law in order to show that these processes cannot be explained by dualist theories. In general, all of the mechanisms established in European constitutions promulgated after World War I confirm the theory of moderate monism, "… as the possibility of conflicts between national law and International Public Law remains, but they may also be resolved through an international legal procedure."[108]

[105] Seidl-Hohenveldern (1994, pp. 98–102). On p. 98 Seidl-Hohenveldern recounts how proud Verdross had been that his 1919 article had influenced the Weimar Constitution.

[106] Verdross (1919, p. 281).

[107] Cf. Verdross (1955a, pp. 68–69).

[108] Verdross (1955a, p. 71).

Nevertheless, Verdross recognised that the absence of a mandatory jurisdiction was a key weakness of International Public Law, as the relevant courts and tribunals are competent only where the parties recognise their competence.[109] He contrasts these objections with the fact that International Public Law precedes national law, although he has to admit that its effect depends on States' submitting to the jurisdiction of international courts.[110]

## 10.10 Verdross and the Law of Nations in the Spanish School

Verdross explains how the Spanish School employed the concept of the natural sociability of mankind and the constitution of a universal community. The community of States does not require a declaration of intent for its constitution but rests on the principles of *natural law*.

Francisco de Vitoria (1480–1546) substituted the time-honoured expression *ius Gentium* for that of *ius inter Gentium*. *"Quod naturalis ratio inter omnes gentes constituit, vocatur jus Pentium"*. The difference is that the phrase now embraces the whole of humanity and not just the West. The natural law provides the basic principles governing human behaviour, but it must be made explicit via a positive international Law based on custom (*consuetudo*) and agreement (*pactum*). "However, positive International Law according to Vitoria does not hold only between the parties but has the force of law, because the whole world constitutes a community with the capacity to issue norms that are universally to be obeyed. It is in this way that Vitoria arrives at the concept of a common International Law that obliges everybody, anticipating the transformation of European *universal* International Law".[111]

According to Suárez, the *ius naturale* foundations of International Law, and indeed International Law itself, are part of natural Law, even where this is positive law. "The law of nations, which does not derive from a central legislator but from the consent of mankind, or at least the majority of mankind, is so close to natural law that it is easily confused with it."[112] It was, in fact, established by the force of rational nature. This international law pursues the common good of humanity. Suárez was the first to describe the possibility of organising the international community. States are free to eschew war and can create a supranational jurisdiction with coercive power.

Verdross' could hardly be more ringing in his endorsement of Suárez's thought. "These words are so clear and convincing that they require no further comment. This text of Suárez is held to be the best formulation of the fundamental problem of

[109] Verdross (1955a, p. 71).

[110] Cf. Verdross (1955a, p. 72).

[111] Verdross (1955a, p. 50). The idea of universality, to which Legaz also refers, is clear here.

[112] Verdross (1955a, p. 51).

International Law, and it reveals the clarity, realism and fruitfulness of his natural law method, which is in turn rooted in Aristotle's social philosophy. In the end, we see from these words that the natural law method is not in any way based on aprioristic constructions, as claimed by philosophical legal positivism, but rests on the consideration of the social reality and its values."[113]

Following Vitoria and Suárez, Verdross again refers the international community as ultimately founded on the common values of order and peace in the concluding remarks to his manual. It is also based on the principle of *bona fide* or good faith. Hence, the ultimate effectiveness of International Law does not depend on sanctions but on States' own respect for and ethical recognition of the law.

Meanwhile, the organisation of the international community in turn produces new values such as good neighborliness and tolerance, and goodwill in the pursuit of a common goal consisting of the good of all humanity. Once again, this is an idea that can be traced back to Suárez. However, organisation must be coupled with "the conviction that all men are brothers as all are the children of a great family, brought together by God and in God."[114] Verdross continues, "Hence we see that the new International Law is rooted in universal human values. Consequently, its progressive realisation depends on the peoples and its institutions are imbued with the spirit of fraternity. Some institutions of the international community are already working in the service of this noble end, and (in contrast to the States) they have no special interests to pursue."[115]

These values should not be ignored by relativists, who deny the universal validity of the moral law, as even they may recognise that positive International Law presupposes certain values. "It is strictly impossible to separate positive International Law from its axiological foundation."[116] The merit of this assertion is that it is by no means naïve but was made by a man who had lived through two world wars and had taken part as a judge in international conflicts.

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[113] Verdross (1955a. p. 52).

[114] Verdross (1955a. p. 570).

[115] Verdross (1955a, p. 570).

[116] Verdross (1955a, p. 570), referring to Verdross (1953, p. 129).

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