

## Quadrant II - Notes

**Paper Code: PIN0301**

**Module Name: Theoretical foundation of International law**

**Module No: 02**

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Theories as to 'Law of Nature'

Prominent writers – Hugo Grotius (1583-1645), Samuel Pufendorf (1632-1694), Vattel (1714-1767), Christian Thomasius (1655-1728),

International Law is a system of law which emanates from God, reason, or morals. It is a body of rules which nature dictates to human reason.

The theory goes back to the Greeks, Roman jurists upto medieval times when it found expression in the philosophy of St. Thomas Aquinas. St. Thomas Aquinas had semi-theological association. Hugo Grotius later secularised the concept.

International law derives its force from natural law. States submitted to International law because their relations were regulated by the higher law. In Vattel's *Droit des gens*. Vattel said that we use the term Law of nations for that law which results from application of natural law to nations. States are bound to observe natural law since natural law applies to States. Natural law dictates precepts to States.

Hugo Grotius termed it as Internal Law of Nations. States comprise of men, policies are determined by men, and therefore, they are subject to natural law.

### **Influence of Natural law theory**

- Traces of Natural Law theory survive today.
- To observe and promote universal respect for Human Rights and Fundamental Freedoms.
- International Law Commission has worked on natural Law principles in punishing offenders of war crimes

## **Criticism of the Natural law theory**

The theory lacks precision, clarity, and is prone to confusion. It is subjective rather than objective.

## **Theory of Positivism**

Leading Exponents- Bynkershoek (1673-1743); John Jacob Moser (1701-1785); George Friedrich de Martens (1756-1821) ; Anzilotti (1867-1950). Bynkershoek regarded custom and treaties as the basis of International Law and pointed that- with change in customs, the law of nations also changed. Martens- referred to natural law to fill up gaps or lapses into positive law.

**Modern Positivists-** rules of International Law are of the same character as 'positive' municipal law (State law) since they are also issued from the will of the State.

**Starke is of the view that** International Law can in logic be reduced to a system of rules depending for their validity only on the fact that States have consented to them.

The underlying Premise of the theory is that State may be regarded as having a will. It is to this State will that the positivists attribute complete sovereignty and authority. Manifestation of consent is crucial in making International Law binding on the States.

**Triepel-** "Obligatory force of International Law stems from agreement between States to become bound by common consent, and that states cannot unilaterally withdraw consent."

**Anzilotti states that** '*Agreements between States are to be respected*' – called as 'Pacta Sunt Servanda.' He opines that just as in the case of treaties, customary rules are based on the consent of states that there is an implied agreement and hence binding. However, this argument is not convincing. He states that Pacta sunt servanda is itself a supreme norm and does not depend on a superior norm.

## **Criticism of Positivist Theory**

- How the notion of State will is binding?

- Fails in many instances of Customary rules
- Test- whether the rule invoked against a State is generally accepted.
- Law making treaties- applicable even if States have not consented.

### **IS INTERNATIONAL LAW TRUE LAW?**

International Law is not true law but a code of rules of conduct of moral force only. Austin is of the view that International Law is no law because it does not emanate from a **determinate sovereign legislative authority** with no sanctions. He asserts that International Law is not true law but *“Positive International Morality.”*

### **Criticism of Austin’s Theory**

Austin’s theory is widely criticised. Following are the points of criticism:-

- In many communities, a system of law existed in absence of Sovereign Authority, yet the rules were observed.
- Customary rules have now diminished and are now substituted by Int. Legislation or Law-making treaties.
- Authoritative machinery responsible for maintaining International Intercourse between states do not consider International. Law as a mere moral code e.g. United Nations.

### **IS INTERNATIONAL LAW THE VANISHING PONT OF JURISPRUDENCE?**

**Holland** remarked that *“International Law is the vanishing point of jurisprudence.”*

- i. The rules of International Law should not be kept in the category of law because it lacks sanctions.
- ii. They are rules of International Law followed by courtesy.
- iii. There is no Judge or arbiter to decide International disputes.

## **Criticism of Holland's Theory**

Holland's theory was criticised. Following are the points of criticism.

- Customary rules of International Law have now diminished and substituted by Law-making Treaties.
- Developed countries regard International Law as part of their own law.
- International Court of Justice is required to decide cases in accordance with rules of International Law.
- Non-Observance of International Law can invite sanctions from UN Security Council.
- Weakness in the enforcement machinery of International Legal system.