Quadrant II - Transcript

Paper Code: PIN0301
Module Name: Theoretical foundation of International law
Module No: 02

I am Assistant Professor Aamod Shirali, from V.M. Salgaocar College of Law, Miramar, Goa. and in this module we will be discussing the theoretical foundation of international law. In this module, more particularly we will be discussing about the theories of nature and theory of positivism, Is international Law true law, and international vanishing point of jurisprudence. At the end of this module, the students will be able to understand the theoretical foundation of international law, Describe the theories as to the law of nature and positivism. Identify. If international law is true law, Asserting whether international law is a vanishing point of jurisprudence.

So let us proceed to understand what is the theory of law of nature, which is the foundation of international law. The chief exponents of this theory are Hugo Grotius. Samuel Pufendorf Vettel. Christian Thomas and others. This theory of law of nature. Relates back or can be traced back to the Greeks, the Romans, Jews and even during the medieval times. This theory found expression in the philosophy of Saint Thomas Aquinas who state that law emanates from God, or Natural law was nothing but divine law. So international law is also a system of law which emanated from God and subsequently emanated from reason or models. This was the belief.

However, Hugo Grotius secularized this concept and detached natural law from theology. Theology is the study of religious beliefs and study of religion. So he

said. That it is a body of rules. Which nature dictates to human reason? Now what is the underlying premise of natural law theory? The states in their relations with one another submit to international law because international law derives its binding force from. Law of nations. and states regardless of nations. As one which regulates the relations between states. So international law derives its binding force from natural law. Is the premise of this theory. What is the meaning of nature or **law of nature**? When you say law of nature, what is the meaning of nature? So it is capable of. Embodying within itself the meaning, reason, justice, utility, necessity, general interest of the international community and religious dictates.

Vettel's theory of Droit de Gens- He said that we refer to law of nations as that law, which is the result of application of natural law to nations because natural law, States are absolutely bound to observe. and natural law dictates precepts to States. **Precepts** means the general rule of how to believe and what to think. Hugo Grotius also brought in the concept of internal Law of nations, now within a legal system, if you analyze the things, there is a State, and within State there are men and these men in governance. Determine policies and these policies or laws are subject to natural laws. So if natural law is the principle which is followed within the Legal system of a country, then natural laws should also regulate international relations.

Moving to the criticism of natural law theory, one of the most important criticism is that it lacks precision. It lacks clarity, and it is prone to confusion. Now why this is said so because what is nature or what is law of nature and from where it emanates is not quite clear. So it is susceptible to different meanings and therefore there is no clarity on this. But this theory is

also subjective and not objective beccause it does not take into account the practical realities at all. But however, natural law theory has an influence.

Moving on to the theory of Positivism, now some of the leading exponents of this theory are been Bynkershoek, John Jacob Moser. George Friedrich de Martens Anzilotti and so on. Bynkershoek regarded customs and treaties as the basis of international law, and he said with the change in custom the law of nations also changes. So he give thrust on customs and treaties as the basis of international law. Modern positivists are of the opinion that rules of international law are of the same character as positive municipal law, since they are also issued from the will of the state now within a domestic legal system, in as much as these laws which are emanating from the legislature are coming, because of the consent of the legislature or the will of the state. So similarly in international law the consent of the state is also equally important.

Brierley very classically explains that international law is a sum of rules by which states have consented to be bound, and nothing is law to which they have not consented. So consent is something which is very important in this theory. Now the underlying premise of this theory is that state which is a **metaphysical reality.** It is to this state which has value and significance, and State is regarded as having a will of its own. It is to this State will I shall say that the positives have tributed complete sovereignty and authority. So therefore, manifestation of consent is crucial in making international law binding on states.

Triepel explains that obligatory force of international law stems from the agreement between states to become bound by common consent, and the States cannot unilaterally withdraw the consent in a multilateral treaty, what happens many States come together and give their consent to be bound by the

Treaty, so no state can unilaterally withdraw the consent. Anzilotti, another jurist said that the binding force of international law. It derives its force from the fundamental principle that agreement between states are to be respected. He called it Pacta sunt servanda. He said in as much as treaties involves consent of the States, customary rules of international law also involves an implied agreement which is binding on the states. But this was, however criticized by many. He also said that Pacta sunt servanda, is a norm of 'jus cogens'. It is a superior normal from which no derogation is possible.

So this positivism theory can be criticized. In different ways. Firstly, the notion of state will is binding this has not been explained how the State will is binding is not quite clear. When you say state will You say State will or State has entered into a treaty. It is not the will of the State, it is the will of the individual. Who is in governing that State whose will is the only will that operates, so it is the individual will of the head of the government or head of the State which matters. and it is not the State will. So the state will concept is not well explained. Secondly, it fails to explain in many instances of customary rules how the theory of consent applies with regard to consent, because in many states in Africa received independence after 1957 because of decolonization, but all these states had not consented to be bound by international law. Yet international applied to them, so the theory fails to explain with regard to customary rules how the implied agreement works out. Thirdly, whether a rule when a rule of international law is invoked against a particular state. The question is not whether that State has given consent or not. The only thing that is looked at is whether all the states had generally accepted that particular rule. So this again is a very important point and with regard to law making treaties, the states which have not consented to law making treaties are also bound by law-making treaties. So this is how we criticize the positivist theory.

Now the question is whether international law is true law and John Austin was the person who felt that international law is not true law. He called it a code of rules of moral force only. He said international law is not law because it does not emanate from a sovereign determinate legislative authority. And international law has no sanctions. Now he said that if a law does not emanate from a determinate sovereign legislative authority, or if there is no determinate sovereign legislative authority, those rules cannot be termed as legal rules. They will be only reduced to ethical or moral value only. And therefore he said that international law is positive international morality. However, his theory can be criticised in his own country. In England he fails to explain how common law applies in the common law, does not emanate from a sovereign determinate legislative authority, but yet it applies in England and it's a significant part of the legal system. So Austin fails to explain that. Secondly, in many communities a system of law existed. In the absence of a sovereign authority, many communities had a religious head or leader who emanated who created rules and everybody followed those rules this again he fails to explain. The customary rules. Have today's times have been translated into treaties and therefore. You know these are binding on the states. So during Austin's time, he visibly could not find international law because it was more customary in nature. It was customary rules of international law, which approval the authoritative machinery which is responsible for international law or international organization of states like the United Nations. They regard international law as a true law. So therefore, Austin's theory completely fails on this count.

Another question is whether international law the vanishing point of jurisprudence. Is it gradually going to reach that point where it is going to vanish? So Holland was of the opinion that international law is the vanishing

point of jurisprudence is gradually wither away and why he said this is because international law, he believed should be kept out of the category of law, because it does not have any sanctions, any country. Like the Mighty powers like United States or the United Kingdom, they can do any such act which may be contrary to international law and yet do it with impunity. Secondly, he said there are rules of international law followed by courtesy. It is more based on comity. It is more based on views of the States and therefore the binding element is lacking and he also said that there is no judge or arbiter to decide international disputes. Holland theory can be again criticized. Many of the developed countries regard international law as part of their legal system. Article 6, paragraph 2 of the United States Constitution says that international law is part of our law, and Justice Gray of the Supreme Court once expressed that international law is part of our law and must be administered by courts of appropriate jurisdiction. Secondly, International Court of Justice in Article 38 of the Statute of the International Court of Justice, the International Court of Justice is has to decide cases in accordance with international law, which again signifies that international law is very much existing. Non observance of international law can lead to sanctions from United Nations Security Council under chapter seven of the Charter of the United Nations. So in the past, sanctions were imposed on Congo in 1961 and North Korea in on Iraq in 1991 Gulf War and merely because there is no there is a weakness in the enforcement machinery of International law it is not correct to say that international law does not exist

Here are some references.

Thank you very much.