

Cambridge University Press

978-0-521-51618-1 - The Public International Law Theory of Hans Kelsen: Believing in Universal Law

Jochen von Bernstorff and Thomas Dunlap

Table of Contents

[More information](#)

## CONTENTS

*Preface* page xiii

Introduction 1

**PART I The quest for objectivity: the method and construction of universal law 13**

- 1 Method and construction of international law in nineteenth-century German scholarship 15
- A Kaltenborn and the “objective principle” of international law 15
- I The “subjective principle” in Kant and Hegel 17
- II Humanity as a “community of law” [*Rechtsgemeinwesen*] in Kaltenborn 18
- B Bergbohm and Fricker: “The problem of international law revisited” 21
- C Jellinek as synthesis 26
- I The free will of the state as the formal ground of all law 28
- II The concept of “self-obligation” [*Selbstverpflichtung*] and the obligatory nature of public law 30
- III The theory of the guaranteed norm 32
- IV Jellinek’s “objective international law” 32
- 1 The “nature of the thing” [*Natur der Sache*] as a principle of objectification 32
- 2 “Shared interests” and “purpose of the state” as the final sociological foundation of objective international law 35
- D Heinrich Triepel and the “common will” [*Gemeinwille*] as a principle of objectivization 38
- Conclusion 42

Cambridge University Press

978-0-521-51618-1 - The Public International Law Theory of Hans Kelsen: Believing in Universal Law

Jochen von Bernstorff and Thomas Dunlap

Table of Contents

[More information](#)

viii

## CONTENTS

- 2 Kelsenian formalism as critical methodology in international law 44
- A A new methodological tool kit 44
- I Methodological dualism as the starting point 45
- II Methodological critique through the “identity thesis” 50
- III The anti-ideological thrust of the new methodology 54
- B The function of the critical methodology: law as a universal medium for shaping society 56
- I *Volk*, nation, and state in international law 56
- II Law as a universal medium of societal change 60
- C The fundamental critique of the conceptual apparatus of international law 61
- I The conceptual uncoupling of the notion of sovereignty from the “state as a legal person of will” [*willensfähige Staatsperson*] 61
- 1 Critique of the conception of sovereignty as a core stock of state competencies 63
- 2 Sovereignty as a hierarchy-creating, ordering element of the legal system 64
- II The critique of the doctrine of self-obligation 67
- III The critique of a dualism of state law and international law 70
- 1 A critique of the duality of sources 70
- 2 A critique of the duality of regulatory objects 71
- D The opponents of the critical method: Kelsen’s abstract conceptual world as a “radical-logicistic metaphysics” 73
- 3 An “objective” architecture of international law: Kelsen, Kunz, and Verdross 78
- A Constructing a unitary system 78
- I Systemic unity as an epistemological postulate 79
- II “Delegation” as a unity-creating structural principle 80
- III The idea of unity in the discourse on international law 82

Cambridge University Press

978-0-521-51618-1 - The Public International Law Theory of Hans Kelsen: Believing in Universal Law

Jochen von Bernstorff and Thomas Dunlap

Table of Contents

[More information](#)

## CONTENTS

ix

B	International law as law endowed with the power of coercion	84
I	Central compulsion and the “world state trap” [ <i>Weltstaatsfalle</i> ]	84
II	Reprisals and war as decentralized means of coercion	87
III	The coercive character as an evolutionary achievement	90
C	The primacy thesis: the construction of an international law above the state	93
I	The delimitation of the state’s spheres of competence through international law	93
II	The primacy thesis and the problem of norm conflicts	96
III	The defense and further development of the primacy thesis	97
IV	The primacy thesis, domestic jurisdiction, and the decisions of the Permanent Court of International Justice (PCIJ)	100
D	The quarrel over the choice hypothesis [ <i>Wahlhypothese</i> ]	104
E	The opponents of the construction of a universal law and the notion of the “world state”	108
I	Universal law, the “world state,” and the <i>civitas maxima</i>	108
II	The universal system of law as natural law?	112
III	The abuse of the idea of universalism	116
<b>PART II</b>	<b>The outlines of the cosmopolitan project – the actors, sources, and courts of universal law</b>	<b>119</b>
4	The new actors of universal law	123
A	Legally organized communities above the state	125
I	Unions of states as a dynamic continuum of legal integration	126
1	Unions of states as a particular international legal community	127
2	The doctrine of centralization and decentralization	130
3	Sovereignty as the state’s direct subordination to international law [ <i>Völkerrechtsunmittelbarkeit</i> ]	132
II	The legal nature of the League of Nations	133
1	The League of Nations as a personified sub-order of international law	136
2	The League of Nations as a community of joint ownership [ <i>Gemeinschaft zur gesamten Hand</i> ]	140
III	The opponents of an “integration-friendly” theory of international law	143

Cambridge University Press

978-0-521-51618-1 - The Public International Law Theory of Hans Kelsen: Believing in Universal Law

Jochen von Bernstorff and Thomas Dunlap

Table of Contents

[More information](#)

x

## CONTENTS

B	The individual	146
	I Positive law	146
	II The critique of Scelle and Politis	148
C	Universal law as a dynamic system of integration	150
5	Legal sources as universal instruments of law-creation	153
	A Sources beyond metaphysics and consensus	153
	I The critique of metaphysical dualism	154
	II The critique of the positivist consensus model	157
	III The hypothetical character of international law: the basic norm of international law	160
	B The legal sources of international law and the hierarchical structure of the law	165
	I Customary law	167
	1 Dispensing with the <i>opinio iuris</i>	168
	2 The replacement for the <i>opinio iuris</i>	170
	II An objective doctrine of treaties	172
	1 The creation of the treaty-based legal order	173
	2 The international treaty's mode of action	176
	C The theory of legal sources as a self-limitation of legal scholarship	179
	D The opponents of a "dematerialized" doctrine of legal sources	181
	I Rematerialization as a strategy of revision	181
	II Pure Theory of Law and the "unjust" status quo	185
	III Replacing the ideal of justice with the ideal of peace	188
6	The international judiciary as the functional center of universal law	191
	A Peace through compulsory jurisdiction	191
	I The politico-legal approach: the Permanent League for the Maintenance of Peace	193
	II The socio-historical approach: compulsory jurisdiction as a necessary step toward a centralized, universal legal system	198
	III The doctrinal approach: the fundamental critique of the doctrinal limitation on the judicial function in international relations	203

Cambridge University Press

978-0-521-51618-1 - The Public International Law Theory of Hans Kelsen: Believing in Universal Law

Jochen von Bernstorff and Thomas Dunlap

Table of Contents

[More information](#)

## CONTENTS

xi

B	The theoretical classification of the judicial decision	212
I	The function of the judicial decision within the hierarchical structure of the law	212
II	The nature of judicial decision-making	214
III	The postulate of compulsory jurisdiction as the consequence of a system-oriented conception of the law	218
C	Realist opposition to the quest for a strong international judiciary: compulsory jurisdiction as another “distinguished international lawyer’s dream”	220
7	The role of the international legal scholar after Kelsen – a concluding reflection	225
	<i>Postscript – on Kelsenian formalism in international law (2010)</i>	233
	<i>Career sketches: Hans Kelsen, Alfred Verdross, and Josef Laurenz Kunz</i>	272
	<i>Bibliography</i>	286
	<i>Index</i>	316