DOWNLOAD PDF THE POSITIVE LAW OF NATIONS AND ITS INTERPRETIVE PRINCIPLES

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By the eighteenth century, concepts of the ius gentium as the common law of humanity, or customs shared by almost all peoples, or that aspect of positive law immediately deduced from the first principles of natural law had been largely marginalized.

International law has been defined to be "the rules which determine the conduct of the general body of civilized states in their dealings with each other" American and English Encycl. Different writers have given varying views of the foundation of the law of nations, some holding that it is founded merely upon consent and usage, and others that it is the same as the law of nature , applied to the conduct of nations in the character of moral persons susceptible of obligations and laws. Chancellor Kent holds that neither of these views is strictly true ; that the law of nations is purely positive law founded on usage, consent, and agreement, but that it must not be separated entirely from natural jurisprudence , since it derives its force "from the same principles of right reason , the same views of the nature and constitution of man, and the same sanction of Divine revelation , as those from which the science of morality is deduced ". It follows, then, that by the natural law every state is bound to conduct itself towards other states in accordance with the rules of justice , irrespective of the general rules that have arisen from long established custom and usage. International law is a part of the law of the land of which the courts take judicial notice, and municipal statutes are construed so as not to infringe on its doctrines. The rules of international law are to be found in writers of recognized authority, in treaties between civilized nations, in the decisions of international tribunals, in state papers and diplomatic correspondence, and its application is to be sought especially in the decisions of the courts of the different nations where the rules have been defined in litigated cases, arising especially in the admiralty where judgment has been sought in prize cases. The first great modern authority on the subject was Grotius. His works have been followed by those of Puffendorf, Burlamaqui, Bynkershoek, and Vattel. The works of these learned authors have been adapted and expanded by various writers, so that now there is a vast body of literature upon the subject representing great learning and ability. The law of nations is essentially the product of modern times. Ancient nations looked upon strangers as enemies, and upon their property as lawful prize. Among the Greeks prisoners of war might lawfully be put to death or sold into slavery with their wives and children, and there was no duty owed by the nation to a foreign nation. Some beginnings of diplomatic intercourse may be traced in the relations of the Greek states towards one another, by agreements relating to the burying of the dead and the exchange of prisoners , while the Amphictyonic Council affords an instance of an attempt to institute a law of nations among the Grecian states themselves. The Romans show stronger evidence of appreciation of international law, or at least of the beginnings of it. They had a college of heralds charged with the Fetial Law relating to declarations of war and treaties of peace, and as their power and civilization grew, there came an appreciation of the moral duty owed by the state to nations with which it was at war. After the establishment of the empire, especially in its later periods, the law of nations became recognized as part of the natural reason of mankind. After the fall of the empire there was a relapse into the barbarism of earlier ages, but, when in the ninth century Charlemagne consolidated his empire under the influence of Christianity , the law of nations took on a new growth. As commerce developed, the necessity of an international law providing for the enforcement of contracts, the protection of shipwrecked sailors and property , and the maintaining of harbours, became more apparent. In addition to these there were various bodies of sea laws notably the maritime law of Wisby, the customs of Amsterdam , the laws of Antwerp , and the constitutions of the Hanseatic League. All of these codes contained provisions extracted from the earliest known maritime code, the Rhodian Laws, which were incorporated into the general body of Roman law , and were recognized and sanctioned by Tiberius and Hadrian. During the long period between the fall of the Roman Empire and the definitive beginning of modern European states the greatest influence working for a recognition of international law among all peoples was the Church. A common faith , imposing the same

obligations upon the individual members of the Church among all nations, obviously tended to the establishment and recognition of rules of justice and morality as among the nations themselves; and, when the more general acceptance of the obligations of Christianity became the rule, it followed naturally that the Head of the Church , the pope holding the Divine commission, should become the universal arbiter in disputes among nations. For centuries the great offices of state, especially those having to do with foreign relations, were held by bishops learned in canon law, and, as canon law was based upon Roman law and especially adapted to the government of the Church whose jurisdiction was not bounded by state lines, it naturally suggested many of the rules that have found a place in international law. The pope became the natural arbitrator between nations, and the power to which appeals were made when the laws of justice and morality were flagrantly violated by sovereigns either in relation to their own subjects or to foreign nations. As the empire founded by Charlemagne gained in power and extent, the controversies precipitated by the conflicting claims of civil and ecclesiastical jurisdiction developed still further the position of the pope as the highest representative of the moral power of Christendom. It has been justly said therefore that, "of all the effects of Christianity in altering the political face of Europe throughout all its people, and which may therefore very fairly be denominated a part of its Law of Nations, none are so prominent to observation during these centuries as those which sprang from the influence and form of government of the Church " Ward, "Law of Nations", II,

At first without territory or temporal power, on account of his spiritual influence alone the pope was recognized as the ultimate tribunal of Christendom , and as such was known as the Father of Christendom. Under the Holy Roman Empire from the time of Otho I, as is pointed out by Janssen , there was a close alliance between the Church and the State , though they were at no time identical. These two powers would, however, be in a state of continual contention were it not for a Divine Law of equilibrium keeping each within its own limits. Christian princes were to respect the priesthood in those things which relate to the soul , and the priests in their turn to obey the laws made for the preservation of order in worldly matters; so that the soldiers of God shall not mix in temporal affairs, and the worldly authorities shall have naught to say in spiritual things. The province of each being so marked out, neither power shall encroach on the prerogatives of the other, but confine itself to its own limit. It was this idea which inspired the popes with the desire to found the Holy Roman Empire, whose Emperor would deem it his highest prerogative to protect the Christian Church. The Gospel was to be the law of nations. In this ideal we find the medieval conception of the State. Although the ideal was never completely realized, yet it met such general acceptance that the emperor became the chief protector of law and order and the arbiter between lesser princes. The growth of the power of the State gradually diminished that of the feudal barons, whose petty contentions and the violence of whose lives were a hindrance to the development of international justice. Until this phase of the beginnings of civilization changed there was little to ameliorate the brutality of conduct between warring peoples, except as the individual education of knights in chivalry affected their conduct. Another influence of great importance in the formation of international law were the general councils of the Church , affecting as they did all Christian nations and laying down rules of faith and discipline binding alike upon individuals and governments. The history and development of rules of international law from these early beginnings have been traced to contemporary times, and, notwithstanding periods when the influence of a lofty and Christian ideal of the relations between nations seems almost to have been lost, it will appear that there has been a steady advance in the recognition of the existence of a moral law of nations whose sanction is the public opinion of the world. So far has this system progressed that its underlying principles are, in the main, well-defined, universally recognized, and constantly appealed to, both in times of war and in times of peace, by all civilized nations. Rules governing the acquisition of territorial property , jurisdiction over rivers and seas, protectorates over independent peoples; measures allowed to compel the rendering of justice , short of war ; intervention in the affairs of foreign nations, have all been measurably settled; and so far as relates to the rights and duties of belligerents and of neutral states in declaring and carrying on war , the fixing of the character of property , the regulating of the effect of intercourse between individuals , many vexed points have also been carefully

defined and to a large extent settled. Some of the most delicate questions, such as the right to visit and search the blockaded ports of the enemy, and the character of correspondence permitted between the subjects or citizens of neutral states and the belligerents, may be considered as well settled and recognized by decisions of the highest courts of all civilized nations as any of the rules of municipal law. Earnest and intelligent efforts to bring about a permanent court of arbitration have resulted in the formation of an international tribunal at The Hague , which has already been accepted by the voluntary action of the various nations as a proper forum for the decision of many international questions specially referred to it. The principles of arbitration accepted by the United States and Great Britain in the settlement of the so-called Alabama Claims and the frequent agreements between the contending parties over questions of boundary, fisheries, and damages to private property of their respective citizens or subjects, have given emphasis to international law. Its rules have enforced respect for private property on the part of contending armies, and, under certain conditions, when such is carried by ships, have forbidden the use of certain destructive missiles, and in very many ways have alleviated the horrors of war. While there must always remain questions that no self-respecting nation would be willing to submit to arbitration, yet the field for the exercise of the latter is indefinitely great, and, as the demands of modern civilization, the means of communication between nations, and the development of trade relations increase, questions more frequently arise requiring appeal to some tribunal, acceptable to both parties, whose decision shall be final and absolute. Until the revolt against the Church in the first quarter of the sixteenth century, this power of arbitration, as has been stated, rested in the pope. With the decline of recognition of this moral power, religious sanctions in the relations between nations have gradually lessened. Instead of a decision of the pope , bearing with it the impress of the revealed truth of religion, the agreements of modern courts of arbitration or other referees for the settlement of international disputes have for their sanction the general sense of justice existing naturally among men, strengthened by such faith in revealed religion as may exist among them irrespective of the teaching of the Church. This is the great difference between the sanction of modern international law and that existing previous to the so-called Reformation. Previous to that event the power of the Church was exercised merely in a moral way by an appeal to the faith and consciences of all men and nations, enforcing the decrees of the arbiter of Christendom â€” the pope. Controversy concerning this arbitration has been carried on, at first with great violence , but since with a calmer and fairer recognition of the exceeding advantage to nascent civilization of such power as that exercised by the popes during the Middle Ages. It has been insisted that the popes not alone wished to vindicate their supreme spiritual power, but cherished a desire to reduce all princes to a condition of vassalage to the Roman See. This is a grave error. The Church has never declared it to be an article of faith that temporal princes, as such, are in temporal matters subject to the pope. The confusion of thought has arisen from the fact that in the eyes of the Church the kingly power has never been looked upon as absolute and unlimited. The rights of the people were certainly not less important than those of the ruler, who owed them a duty , as they owed a duty to him. They did not exist for his benefit, and his power was to be employed, not for his own ends, but for the welfare of the nation. He was to be, above all, the servant of God , the defender of the Church , of the weak, and of the needy. In many states the monarch was elected only on the express condition of professing the Catholic Faith and defending it against attack. In Spain , from the seventh to the fourteenth century, the king had to take such an oath , and, even when it was no longer formally administered, he was still understood to be bound by the obligation. The laws of Edward the Confessor, published by William the Conqueror and his successors, expressly provide that a king who does not fulfil his duties towards the Church must forfeit his title of king. Kings were constantly reminded that their temporal power was given them for the defence of the Church , and that they should imitate King David in their submission to God. With this intimate relation of Church and State , the clergy , by reason of their education and force of character and the respect paid to them because of their office, took an active part in the civic affairs of the various nations, and, until the controversies arose between them and the emperors who succeeded Charlemagne , the civil and religious powers existed harmoniously in the main. Owing to the limitations of human nature , and especially because

the support of both Church and State necessarily came from voluntary or enforced contributions of the people, causes of friction would arise from time to time between the two powers. The decrees of the councils of the Church were confirmed as laws of the empire to secure their being put in force by the civil power , and the sentence was pronounced at Chalcedon that imperial laws that were contrary to canon law should be null and void. Freedom and religion were mutually supported because the Church , in which religion was incorporated, was at the same time the guardian of freedom. The power of the pope as Head of the Church Universal gained somewhat, but not sufficiently to affect in a very marked degree his influence as the Head of Christendom from the fact of his becoming a temporal prince during the eighth century. Again and again the popes have declared it was part of their duty to make and preserve peace on all sides; to mediate between royal families ; to hinder wars or bring them to a speedy close; to defend Christendom against the incursions of the Mohammedans ; to incite Christian nations to carry on the crusades for the recovery of the Holy Places of Jerusalem. Whoever felt himself oppressed turned to the Roman See , and, if it did not give him help, the pope was thought to have neglected his duty. The great Protestant writer Grotius says: Much misunderstanding as to the attitude of the popes has arisen from the Bull of Pope Alexander VI , when, acting at the solicitation of the sovereigns of Castile , he drew the limits of a line from the North to the South Pole, Spanish leagues to the west of the most westerly island of the Azores ; all that was east of the line belonged to Portugal , and all that was west of it to Spain. By this decision it has been said that the maxim "de externis non judicat ecclesia" has been violated, and also the further maxim that the conversion of subjects to the Catholic Faith takes nothing from the rights of infidel princes. The true explanation of this Bull will be found when it is remembered that the pope was acting as arbitrator between two nations of explorers, when it was most desirable that a line of demarcation should be drawn between the fields to be explored. It was intended only to prevent dissension and struggles likely to arise from rival pretensions, and, since by its terms it precluded any Christian prince from interfering within the boundaries assigned to each nation, it was a powerful preventive of wrong-doing. It being admitted that sovereignty over uncivilized peoples can be claimed under certain conditions by civilized nations, the pope sought only to regulate the rights of such nations so as to avoid war. It must be borne in mind, moreover, that the principal motive, as professed by the Spanish explorers, was not commerce or the acquisition of wealth alone, but the conversion of heathen nations to the Christian Faith. It will appear from a review of the history of the centuries from the accession of Charlemagne to the crown of the Holy Roman Empire until modern times, the power of the pope as the supreme and common tribunal between nations has been exercised for the advantage of mankind in the extension of justice to all. In England , the excommunication of King John compelled the submission of a monarch, who, according to the Protestant writer Ward, had "by his violence and depravity drawn down upon himself the just detestation of mankind ". In the example of Emperor Lothair of Lorraine in the ninth century, an instance may be found of an intervention of the pope to prevent the repudiation by this monarch of his lawful wife in order that he might marry another. The pope intervened to secure the release of Richard I of England from the prison , of the Duke of Austria and the emperor. By his interposition in he procured the liberty of the three daughters of King Tancred of Sicily ; who had been unjustly carried off and retained captive by Emperor Henry VI. So in the case of the infant son of the King of Aragon. Many other instances of equal importance show the reverence of peoples and sovereigns for the pope and for the fearless and impartial way in which his authority was exercised. The same author, from whom these instances have been quoted, speaks of the Councils of the Church. He says they were "composed of delegates from every nation of Christianity , and under this appearance Europe may fairly be said to deserve the appellation which has sometimes been bestowed upon it of a Republic of States. The influence of the structure of the Roman State, with the emperor as the supreme ruler in temporal matters, educated the minds of the northern peoples, especially the Germans , who, on the fall of the Empire, gradually took possession of its former territory. After the acceptance of Christianity as the state religion in the reign of Constantine, it was not difficult for even the most ignorant of men to grasp an idea of the dual powers ruling human life â€” that of the sovereign with supreme jurisdiction in temporal matters,

and that of the pope , the primate of all the bishops , the successor of St. Peter , the Head of the Church , the visible representative of the moral power of God on earth. While, in his human capacity, the pope in any given era may have been affected by the prevailing habit of thought of that era, and as a man has been subject to the limitations of our common nature, it may be safely said of the papacy that no institution has had so profound an effect upon the evolution of the laws of justice and right in the conduct of nations, and that without such a power of moral influence modern civilization would not have attained a higher plane than that of Imperial Rome. The sense of duty and obligation , which is a cardinal principle of Christianity , has been enforced among princes and peoples, so that even in our day the various nations, although to a great extent separated from the Catholic Faith , still recognize that the pope , as the head of the most venerable and most numerous body of professed Christians , embodies the moral power of Christianity and must be respected accordingly. Christendom and the Church have had a powerful influence upon both these conditions. In giving an address at the conference held under the auspices of the Civic Federation in Washington on 18 Jan. They have established an international postal union; they have agreed upon and put into force rules for the protection of industrial property , patents, copyrights, and trademarks; they have established rules for sanitation or control, and, to some degree, the prevention of disease, under which each country binds itself to so legislate and so enforce its laws as to prevent its being a nuisance to the other countries with whom it is in conference. International law, like all other systems, will be found to be but an endeavour to bring into the affairs of life the eternal principles of right at all times taught by the Christian Church. Bulletin, VII , About this page APA citation. In The Catholic Encyclopedia. Robert Appleton Company,

Chapter 2 : Natural Law and the Law of Nations | Natural Law, Natural Rights, and American Constitutional

The Constitution as Treaty continues with an examination of what international law is and its major interpretive principles in order to set the stage for examining how different sources and principles of international law are intrinsically integrated into U.S. constitutional law and, thereby, are available to federal courts for deciding cases.".

It was first articulated by Greek and Roman classical philosophers and jurists. In the Institutes of the Roman jurist Gaius â€" , the ius gentium is closely associated with the ius naturale. That law which a people establishes for itself is peculiar to it, and is called ius civile as being the special law of that state, while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called ius gentium as being the law observed by all mankind. Athenians were governed by Athenian law, while Romans were governed by Roman law. The problem was determining what law was applicable to a person e. To address potential conflicts, a Roman body of law had emerged by the first century B. In his Etymologiae , Isidore listed a number of institutions such as peace treaties and the treatment of prisoners in wartime that he regarded as belonging to the law of nations. The medieval treatment of ius gentium differed slightly from that of the Roman jurists. For Aquinas, an example of this is the norm of pacta sunt servanda agreements are to be performed. On one level, making a contract is a social convention which has developed and been given legal force because it has been proved to serve the common good. Yet contract is so essential for justice and social order in any human community that it should be understood as immediately deducible from principles of natural law. It thus belongs to the ius gentium rather than the ius civile. In short the convention of contract would be meaningless unless there was a general natural law principle that promises should be kept. To this extent, Aquinas held that fulfilling contracts is not a principle of natural law per se. Rather it is a principle of ius gentium, which is nonetheless a matter of natural law. To some Jesuit and Dominican scholastics, it seemed that the precepts of the law of nations could be assigned to either the natural law or the positive law, thus rendering the category of ius gentium redundant. The first group was those laws that were part of the domestic law of most commonwealths, such as laws governing property and domestic commerce. These intrinsically belonged to the civil law. Examples included the laws governing war, international commercial interactions, and the treatment of diplomats. Rather all peoples were expected to have independently recognized its content. These arguments underwent further modification following the rise of the modern nation-state with its particular claim to sovereignty and the increasing instances of war between such states after the Reformation. The effect was to generate an appropriation and rethinking of the principles of the ius gentium as part of the public international law designed to govern relations between sovereign nation-states after the Treaty of Westphalia He did, however, stress that the ius gentium â€" like all positive law â€" was the result of human will. Another prominent seventeenth-century philosopher and jurist, Samuel von Pufendorf , played a major role in weakening the links between the older traditions of natural law and the idea of the ius gentium. But Pufendorf also believed that the peaceful relations naturally prevailing between states were sufficiently weak that laws were inevitably developed to maintain the peace. By the eighteenth century, concepts of the ius gentium as the common law of humanity, or customs shared by almost all peoples, or that aspect of positive law immediately deduced from the first principles of natural law had been largely marginalized. In his highly influential Droits des Gens , Emer de Vattel presented the law of nations as simply the law of nature of individuals in the state of nature applied to states. Whittuck, with an historical introduction by A. Clarendon Press, , 1. Ius gentium is interpreted as the law common to humans and derived from human reason See Justinian, Institutes, trs. Cornell University Press, , Book I, 2. OUP, , pp. OUP, , 5. The Society of Jesus and the State, c. CUP, , p. De legibus, ac deo legislatore, ; Defensio fidei catholicae, et apostolicae adversus anglicanae

Chapter 3 : Legal Positivism | Internet Encyclopedia of Philosophy

General principles of law are basic rules whose content is very general and abstract, sometimes reducible to a maxim or a simple concept. Unlike other types of rules such as enacted law or agreements, general principles of law have not been "posited" according to the formal sources of law. Yet.

References and Further Reading 1. The Pedigree Thesis The pedigree thesis asserts that legal validity is a function of certain social facts. Borrowing heavily from Jeremy Bentham , John Austin argues that the principal distinguishing feature of a legal system is the presence of a sovereign who is habitually obeyed by most people in the society, but not in the habit of obeying any determinate human superior Austin , p. The severity of the threatened sanction is irrelevant; any general sovereign imperative supported by a threat of even the smallest harm is a law. One problem is that there appears to be no identifiable sovereign in democratic societies. In the United States, for example, the ultimate political power seems to belong to the people, who elect lawmakers to represent their interests. Elected lawmakers have the power to coerce behavior but are regarded as servants of the people and not as repositories of sovereign power. The voting population, on the other hand, seems to be the repository of ultimate political authority yet lacks the immediate power to coerce behavior. Thus, in democracies like that of the United States, the ultimate political authority and the power to coerce behavior seem to reside in different entities. Since constitutional provisions limit the authority of the legislative body to make laws, Austin is forced to argue that what we refer to as constitutional law is really not law at all; rather, it is principally a matter of "positive morality" Austin , p. Courts regard the procedural and substantive provisions of the constitution as constraints on legal validity. The Supreme Court has held, for example, that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it is, in legal contemplation, as inoperative as though it had never been passed. Shelby County, U. Moreover, these constraints purport to be legal constraints: While every legal system must contain so-called primary rules that regulate citizen behavior, Hart believes a system consisting entirely of the kind of liberty restrictions found in the criminal law is, at best, a rudimentary or primitive legal system. As Hart points out, the rules governing the creation of contracts and wills cannot plausibly be characterized as restrictions on freedom that are backed by the threat of a sanction. But what ultimately distinguishes societies with full-blown systems of law from those with only rudimentary or primitive forms of law is that the former have, in addition to first-order primary rules, secondary meta-rules that have as their subject matter the primary rules themselves: They specify the way in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined Hart , p. Hart distinguishes three types of secondary rules that mark the transition from primitive forms of law to full-blown legal systems: According to Hart, there is no difference between the Austinian sovereign who governs by coercing behavior and the gunman who orders someone to hand over her money. In both cases, the subject can plausibly be characterized as being "obliged" to comply with the commands, but not as being "duty-bound" or "obligated" to do so Hart , p. Legal rules are obligatory, according to Hart, because people accept them as standards that justify criticism and, in extreme cases, punishment of deviations: The subject who reflectively accepts the rule as providing a standard that justifies criticism of deviations is said to take "the internal point of view" towards it. Instead, Hart argues that what is necessary to the existence of a legal system is that the majority of officials take the internal point of view towards the rule of recognition and its criteria of validity. All that is required of citizens is that they generally obey the primary rules that are legally valid according to the rule of recognition. But the situation is no different if the gunman takes the internal point of view towards his authority to make such a threat. Similarly, in the minimal legal system, only the officials of the legal system take the internal point of view towards the rule of recognition that endows them with authority to make, execute, adjudicate, and enforce the rules. The mere presence of a belief in the officials that they are entitled to make law cannot give rise to an obligation in other people to comply with their enactments any more than the presence of a belief on the part

of a gunman that he is entitled to issue orders gives rise to an obligation in the victim to comply with those orders. The Separability Thesis The second thesis comprising the foundation of legal positivism is the separability thesis. In its most general form, the separability thesis asserts that law and morality are conceptually distinct. This abstract formulation can be interpreted in a number of ways. For example, Klaus Faber interprets it as making a meta-level claim that the definition of law must be entirely free of moral notions. This interpretation implies that any reference to moral considerations in defining the related notions of law, legal validity, and legal system is inconsistent with the separability thesis. More commonly, the separability thesis is interpreted as making only an object-level claim about the existence conditions for legal validity. Hart describes it, the separability thesis is no more than the "simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so" Hart , pp. Insofar as the object-level interpretation of the separability thesis denies it is a necessary truth that there are moral constraints on legal validity, it implies the existence of a possible legal system in which there are no moral constraints on legal validity. Exclusive Positivism Though all positivists agree there are possible legal systems without moral constraints on legal validity, there are conflicting views on whether there are possible legal systems with such constraints. Prominent inclusive positivists include Jules Coleman and H. Hart, who maintains that "the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values In contrast, exclusive positivism also called hard positivism denies that a legal system can incorporate moral constraints on legal validity. Exclusive positivists like Joseph Raz , p. On this view, the sources of law include both the circumstances of its promulgation and relevant interpretative materials, such as court cases involving its application. At first glance, exclusive positivism may seem difficult to reconcile with what appear to be moral criteria of legal validity in legal systems like that of the United States. For example, the Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. Taken at face value, these amendments seem to make moral standards part of the conditions for legal validity. Exclusive positivists argue that such amendments can require judges to consider moral standards in certain circumstances, but cannot incorporate those standards into the law. When a judge makes reference to moral considerations in deciding a case, she necessarily creates new law on an issue-and this is so even when the law directs her to consider moral considerations, as the Bill of Rights does in certain circumstances. On this view, all law is settled law and questions of settled law can be resolved without recourse to moral arguments: The law on a question is settled when legally binding sources provide its solution. In such cases judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from those sources and does not call for moral acumen. If a legal question is not answered by standards deriving from legal sources then it lacks a legal answer-the law on such questions is unsettled. In deciding such cases courts inevitably break new legal ground and their decision develops the law Naturally, their decisions in such cases rely at least partly on moral and other extra-legal considerations Raz , pp. If the judge can resolve an issue involving the First Amendment merely by applying past court decisions, then the issue is settled by the law; if not, then the issue is unsettled. Insofar as the judge looks to controversial moral standards to resolve the issue, she is going beyond the law because the mere presence of controversy about the law implies that it is indeterminate. They cannot incorporate moral requirements into the law. The Discretion Thesis Third thesis commonly associated with positivism is the discretion thesis, according to which judges decide difficult cases by making new law in the exercise of discretion. Ronald Dworkin describes this thesis as follows: On this view, a judge cannot decide a case that does not fall clearly under a valid rule by interpreting or applying the law; she must decide the case by creating or promulgating a law that did not exist prior to the adjudication. Thus, the discretion thesis implies that judges are empowered with a quasi-legislative lawmaking authority in cases that cannot be decided merely by applying law. The pedigree and separability theses purport to be conceptual claims that are true of every possible legal system. These two claims jointly assert that, in every possible legal system, propositions of law are valid in virtue of having been manufactured according to

some set of social conventions. On this view, there are no moral constraints on the content of law that hold in every possible legal system. But many positivists regard the discretion thesis as a contingent claim that is true of some, but not all, possible legal systems. Hart, for example, believes there will inevitably arise cases that do not fall clearly under a rule, but concedes a rule of recognition could deny judges discretion to make law in such cases by requiring judges "to disclaim jurisdiction or to refer the points not regulated by the existing law to the legislature to decide" Hart , p. Moreover, the discretion thesis is consistent with some forms of natural law theory. But insofar as the natural law is incomplete, there will inevitably arise issues that have multiple outcomes consistent with the natural law. Since none of the relevant outcomes in such cases offend the natural law, there is nothing in the assumption of necessary moral constraints on the content of law, in and of itself, that precludes Blackstone from endorsing the discretion thesis in such cases. Of course, if Blackstone believes the natural law contains a principle denying discretion to judges, then that commitment is inconsistent with the discretion thesis. But the assertion there are necessary constraints on the content of law, in and of itself, is consistent with the discretion thesis, even construed as a conceptual claim, as long as there are cases to which the natural law is indifferent. In any event, Dworkin distinguishes three different senses in which a judge might be said to have discretion: Even the Supreme Court can be reversed by Congress or by constitutional amendment. Thus construed, the discretion thesis is inconsistent with ordinary legal practice. Even in the most difficult of cases where there is no clearly applicable law, lawyers do not ask that the judge decide the relevant issue by making new law. As a practical matter, lawyers rarely, if ever, concede there are no legal standards governing a case and ask the judge to legislate in the exercise of discretion. Indeed, lawmaking authorities in legal systems like the U. Even the legislative decisions of Congress, the highest legislative authority in the nation, are always constrained by constitutional standards. For example, under the Fourteenth Amendment, Congress cannot enact a law that sets one speed limit for male drivers on interstate highways and another for female drivers. For his part, Hart concedes that judicial lawmaking authority is limited in two respects: The judge cannot decide such a case merely by applying existing law because there is more than one available outcome that coheres with existing law. In such instances, it is impossible to render a substantive decision as opposed to simply referring the matter back to the legislature without creating new law. The discretion thesis is vulnerable to one powerful objection. Insofar as a judge decides a difficult case by making new law in the exercise of discretion, the case is being decided on the basis of a law that did not exist at the time the dispute arose. If, for example, a judge awards damages to a plaintiff by making new law in the exercise of discretion, it follows that she has held the defendant liable under a law that did not exist at the time the dispute arose. And, as Dworkin points out, it seems patently unfair to deprive a defendant of property for behavior that did not give rise to liability at the time the behavior occurred. While Dworkin acknowledges the existence of difficult cases that do not fall clearly under a rule, he believes they are not resolved by an exercise of judicial discretion. Of course, it sometimes takes a judge of Herculean intellectual ability to discern what the right answer is, but it is always there to be found in pre-existing law. Since the right answer to even hard legal disputes is always part of pre-existing law, Dworkin believes that a judge can take property from a defendant in a hard case without unfairness Dworkin , pp. But if fairness precludes taking property from a defendant under a law that did not exist at the time of the relevant behavior, it also precludes taking property from a defendant under a law that did not give reasonable notice that the relevant behavior gives rise to liability. Due process and fundamental fairness require reasonable notice of which behaviors give rise to liability. As long as Dworkin acknowledges the existence of cases so difficult that only the best of judges can solve them, his theory is vulnerable to the same charge of unfairness that he levels at the discretion thesis. Classic Criticisms of Positivism a. Fuller argues that law is subject to an internal morality consisting of eight principles: P1 the rules must be expressed in general terms; P2 the rules must be publicly promulgated; P3 the rules must be for the most part prospective in effect; P4 the rules must be expressed in understandable terms; P5 the rules must be consistent with one another; P6 the rules must not require conduct beyond the powers of the affected parties; P7 the rules must not be changed so frequently that the subject cannot rely on them; and P8 the rules

must be administered in a manner consistent with their wording Fuller , p. A system of rules that fails to satisfy P2 or P4 , for example, cannot guide behavior because people will not be able to determine what the rules require. Accordingly, Fuller concludes that his eight principles are "internal" to law in the sense that they are built into the existence conditions for law: These internal principles constitute a morality, according to Fuller, because law necessarily has positive moral value in two respects: Since these moral principles are built into the existence conditions for law, they are internal and hence represent a conceptual connection between law and morality that is inconsistent with the separability thesis. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles.

Chapter 4 : OHCHR | International Convention on the Elimination of All Forms of Racial Discrimination

The primacy of natural law over positive law is prominent, as is the idea that the natural law is rooted in the common nature of man, such that the natural law is universal to all mankind.

First page of the edition of the Napoleonic Code. Civil law is the legal system used in most countries around the world today. In civil law the sources recognised as authoritative are, primarily, legislationâ€”especially codifications in constitutions or statutes passed by governmentâ€”and custom. Modern civil law systems essentially derive from the legal practice of the 6th-century Eastern Roman Empire whose texts were rediscovered by late medieval Western Europe. Roman law in the days of the Roman Republic and Empire was heavily procedural, and lacked a professional legal class. Decisions were not published in any systematic way, so any case law that developed was disguised and almost unrecognised. From â€” AD the Byzantine Emperor Justinian I codified and consolidated Roman law up until that point, so that what remained was one-twentieth of the mass of legal texts from before. As one legal historian wrote, "Justinian consciously looked back to the golden age of Roman law and aimed to restore it to the peak it had reached three centuries before. Western Europe, meanwhile, relied on a mix of the Theodosian Code and Germanic customary law until the Justinian Code was rediscovered in the 11th century, and scholars at the University of Bologna used it to interpret their own laws. Both these codes influenced heavily not only the law systems of the countries in continental Europe e. Greece , but also the Japanese and Korean legal traditions. Common law and equity[edit] Main article: Common law King John of England signs Magna Carta In common law legal systems , decisions by courts are explicitly acknowledged as "law" on equal footing with statutes adopted through the legislative process and with regulations issued by the executive branch. The "doctrine of precedent", or stare decisis Latin for "to stand by decisions" means that decisions by higher courts bind lower courts, and future decisions of the same court, to assure that similar cases reach similar results. In contrast , in " civil law " systems, legislative statutes are typically more detailed, and judicial decisions are shorter and less detailed, because the judge or barrister is only writing to decide the single case, rather than to set out reasoning that will guide future courts. Common law originated from England and has been inherited by almost every country once tied to the British Empire except Malta, Scotland , the U. In medieval England, the Norman conquest the law varied-shire-to-shire, based on disparate tribal customs. The concept of a "common law" developed during the reign of Henry II during the late 12th century, when Henry appointed judges that had authority to create an institutionalized and unified system of law "common" to the country. The next major step in the evolution of the common law came when King John was forced by his barons to sign a document limiting his authority to pass laws. In , for instance, while the highest court in France had fifty-one judges, the English Court of Common Pleas had five. From the time of Sir Thomas More , the first lawyer to be appointed as Lord Chancellor, a systematic body of equity grew up alongside the rigid common law, and developed its own Court of Chancery. In developing the common law, academic writings have always played an important part, both to collect overarching principles from dispersed case law, and to argue for change. William Blackstone , from around , was the first scholar to collect, describe, and teach the common law. Religious law Religious law is explicitly based on religious precepts. Examples include the Jewish Halakha and Islamic Sharia â€”both of which translate as the "path to follow"â€”while Christian canon law also survives in some church communities. Often the implication of religion for law is unalterability, because the word of God cannot be amended or legislated against by judges or governments. For instance, the Quran has some law, and it acts as a source of further law through interpretation, [88] Qiyas reasoning by analogy , Ijma consensus and precedent. This is mainly contained in a body of law and jurisprudence known as Sharia and Fiqh respectively. This contains the basic code of Jewish law, which some Israeli communities choose to use. Nevertheless, Israeli law allows litigants to use religious laws only if they choose. A trial in the Ottoman Empire, , when religious law applied under the Mecelle Main article: Since the mids, efforts have been made, in country after country,

to bring Sharia law more into line with modern conditions and conceptions. The constitutions of certain Muslim states, such as Egypt and Afghanistan, recognise Islam as the religion of the state, obliging legislature to adhere to Sharia. I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou givest up, thy right to him, and authorise all his actions in like manner. Thomas Hobbes, Leviathan, XVII The main institutions of law in industrialised countries are independent courts , representative parliaments, an accountable executive, the military and police, bureaucratic organisation, the legal profession and civil society itself. John Locke, in his Two Treatises of Government , and Baron de Montesquieu in The Spirit of the Laws , advocated for a separation of powers between the political, legislature and executive bodies. Judiciary A judiciary is a number of judges mediating disputes to determine outcome. Most countries have systems of appeal courts, answering up to a supreme legal authority. The European Court of Human Rights in Strasbourg allows citizens of the Council of Europe member states to bring cases relating to human rights issues before it. For example, in Brown v. Board of Education , the United States Supreme Court nullified many state statutes that had established racially segregated schools, finding such statutes to be incompatible with the Fourteenth Amendment to the United States Constitution. In most countries judges may only interpret the constitution and all other laws. But in common law countries, where matters are not constitutional, the judiciary may also create law under the doctrine of precedent. The UK, Finland and New Zealand assert the ideal of parliamentary sovereignty , whereby the unelected judiciary may not overturn law passed by a democratic legislature. By the principle of representative government people vote for politicians to carry out their wishes. Although countries like Israel, Greece, Sweden and China are unicameral , most countries are bicameral , meaning they have two separately appointed legislative houses. In the UK the upper house is appointed by the government as a house of review. One criticism of bicameral systems with two elected chambers is that the upper and lower houses may simply mirror one another. The traditional justification of bicameralism is that an upper chamber acts as a house of review. This can minimise arbitrariness and injustice in governmental action. Normally there will be several readings and amendments proposed by the different political factions. If a country has an entrenched constitution, a special majority for changes to the constitution may be required, making changes to the law more difficult. A government usually leads the process, which can be formed from Members of Parliament e. However, in a presidential system, the government is usually formed by an executive and his or her appointed cabinet officials e. The executive in a legal system serves as the centre of political authority of the State. In a parliamentary system , as with Britain, Italy, Germany, India, and Japan, the executive is known as the cabinet, and composed of members of the legislature. The executive is led by the head of government , whose office holds power under the confidence of the legislature. Because popular elections appoint political parties to govern, the leader of a party can change in between elections. Examples include the President of Germany appointed by members of federal and state legislatures , the Queen of the United Kingdom an hereditary office , and the President of Austria elected by popular vote. The other important model is the presidential system , found in the United States and in Brazil. In presidential systems, the executive acts as both head of state and head of government, and has power to appoint an unelected cabinet. Under a presidential system, the executive branch is separate from the legislature to which it is not accountable. In presidential systems, the executive often has the power to veto legislation. Most executives in both systems are responsible for foreign relations , the military and police, and the bureaucracy. Military and police[edit] U. Customs and Border Protection officers While military organisations have existed as long as government itself, the idea of a standing police force is a relatively modern concept.

Chapter 5 : Law - Wikipedia

The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns Emer de Vattel G.G. and J. Robinson, - War (International law) - pages.

He is the foremost classical proponent of natural theology , and the father of the Thomistic school of philosophy, for a long time the primary philosophical approach of the Roman Catholic Church. The work for which he is best known is the Summa Theologica. Consequently, many institutions of learning have been named after him. Aquinas distinguished four kinds of law: Eternal law refers to divine reason, known only to God. Man needs this, for without it he would totally lack direction. Natural law is the "participation" in the eternal law by rational human creatures, and is discovered by reason. Human law is supported by reason and enacted for the common good. All other precepts of the natural law are based on this School of Salamanca[edit] Main articles: School of Salamanca and ius gentium Francisco de Vitoria was perhaps the first to develop a theory of ius gentium the rights of peoples , and thus is an important figure in the transition to modernity. He extrapolated his ideas of legitimate sovereign power to society at the international level, concluding that this scope as well ought to be ruled by just forms respectable of the rights of all. The common good of the world is of a category superior to the good of each state. This meant that relations between states ought to pass from being justified by force to being justified by law and justice. Working with already well-formed categories, he carefully distinguished ius inter gentes from ius intra gentes. Ius inter gentes which corresponds to modern international law was something common to the majority of countries, although, being positive law, not natural law, was not necessarily universal. On the other hand, ius intra gentes, or civil law, is specific to each nation. Thomas Hobbes In his treatise Leviathan, , Hobbes expresses a view of natural law as a precept , or general rule, found out by reason , by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same; and to omit that by which he thinks it may best be preserved. He believed that society was formed from a state of nature to protect people from the state of war between mankind that exists otherwise. Life is, without an ordered society, "solitary, poor, nasty, brutish and short". The English Civil War and the Cromwellian dictatorship had taken place, and he felt absolute authority vested in a monarch, whose subjects obeyed the law, was the basis of a civilized society. Fuller defended a secular and procedural form of natural law. He notably emphasised that the natural law must meet certain formal requirements such as being impartial and publicly knowable. To the extent that an institutional system of social control falls short of these requirements, Fuller argues, we are less inclined to recognise it as a system of law, or to give it our respect. Thus, law has an internal morality that goes beyond the social rules by which valid laws are made. John Finnis Sophisticated positivist and natural law theories sometimes resemble each other more than the above descriptions might suggest, and they may concede certain points to the other "side". In particular, the older natural lawyers, such as Aquinas and John Locke made no distinction between analytic and normative jurisprudence. But modern natural lawyers, such as John Finnis claim to be positivists, while still arguing that law is a basically moral creature. His book Natural Law and Natural Rights , is a restatement of natural law doctrine. But as a matter of pure logic, one cannot conclude that we ought to do something merely because something is the case. So analysing and clarifying the way the world is must be treated as a strictly separate question to normative and evaluative ought questions. The most important questions of analytic jurisprudence are: Historical School[edit] Historical jurisprudence came to prominence during the German debate over the proposed codification of German law. In his book On the Vocation of Our Age for Legislation and Jurisprudence, [26] Friedrich Carl von Savigny argued that Germany did not have a legal language that would support codification because the traditions, customs and beliefs of the German people did not include a belief in a code. The Historicists believe that the law originates with society. Sociology of Law The effort to inform jurisprudence systematically with sociological insights developed strongly from the beginning of the twentieth century, as sociology began to establish itself as a distinct social science, especially

in the United States and in continental Europe. Ernst Fuchs, Hermann Kantorowicz and Eugen Ehrlich encouraged the use of sociological insights in judicial development of law and juristic theory. In the s a significant split between the sociological jurists and the American legal realists emerged. In the second half of the twentieth century sociological jurisprudence as a distinct movement declined as jurisprudence came more strongly under the influence of analytical legal philosophy but with increasing criticism of dominant orientations of Anglophone legal philosophy in the present century it has attracted renewed interest. Legal positivism Positivism simply means that law is something that is "posited": The positivist view on law can be seen to cover two broad principles: Firstly, that laws may seek to enforce justice, morality, or any other normative end, but their success or failure in doing so does not determine their validity. Provided a law is properly formed, in accordance with the rules recognized in the society concerned, it is a valid law, regardless of whether it is just by some other standard. Secondly, that law is nothing more than a set of rules to provide order and governance of society. No legal positivist, however, argues that it follows that the law is therefore to be obeyed, no matter what. This is seen as a separate question entirely. What the law is lex lata - is determined by historical social practice resulting in rules What the law ought to be lex ferenda - is determined by moral considerations. Bentham and Austin[edit] Main articles: Bentham was an early and staunch supporter of the utilitarian concept along with Hume , an avid prison reformer, advocate for democracy , and strong atheist. Austin was the first chair of law at the new University of London from Hans Kelsen Hans Kelsen is considered one of the prominent jurists of the 20th century and has been highly influential in Europe and Latin America, although less so in common-law countries. His Pure Theory of Law aims to describe law as binding norms while at the same time refusing, itself, to evaluate those norms. Hart[edit] Main article: Hart In the Anglophone world, the pivotal writer was H. Hart , who argued that the law should be understood as a system of social rules. Hart revived analytical jurisprudence as an important theoretical debate in the twentieth century through his book The Concept of Law. Rules, said Hart, are divided into primary rules rules of conduct and secondary rules rules addressed to officials to administer primary rules. Secondary rules are divided into rules of adjudication to resolve legal disputes , rules of change allowing laws to be varied and the rule of recognition allowing laws to be identified as valid. The "rule of recognition" is a customary practice of the officials especially barristers and judges that identifies certain acts and decisions as sources of law. A pivotal book on Hart was written by Neil MacCormick [29] in second edition due in , which further refined and offered some important criticisms that led MacCormick to develop his own theory the best example of which is his recently published Institutions of Law, In recent years, debates about the nature of law have become increasingly fine-grained. One important debate is within legal positivism. One school is sometimes called exclusive legal positivism, and it is associated with the view that the legal validity of a norm can never depend on its moral correctness. A second school is labeled inclusive legal positivism, a major proponent of which is Wil Waluchow, and it is associated with the view that moral considerations may determine the legal validity of a norm, but that it is not necessary that this is the case. Joseph Raz Some philosophers used to contend that positivism was the theory that there is "no necessary connection" between law and morality; but influential contemporary positivists, including Joseph Raz, John Gardner, and Leslie Green, reject that view. As Raz points out, it is a necessary truth that there are vices that a legal system cannot possibly have for example, it cannot commit rape or murder. Any categorisation of rules beyond their role as authority is better left to sociology than to jurisprudence.

Chapter 6 : CATHOLIC ENCYCLOPEDIA: International Law

Positive Law. Those laws that have been duly enacted by a properly instituted and popularly recognized branch of government. Positive laws may be promulgated, passed, adopted, or otherwise "posited" by an official or entity vested with authority by the government to prescribe the rules and regulations for a particular community.

Yet, general principles of law are considered to be part of positive law, even if they are only used as subsidiary tools. They constitute necessary rules for the very functioning of the system and, as such, are inducted from the legal reasoning of those entitled to take legal decisions in the process of applying the law, notably the judiciary. They also constitute integrative tools of the system as they fill actual or potential legal gaps. In international law, general principles of law have been the object of much doctrinal debate based on the different meanings attributed to the notion and the theoretical problems that they pose. The common perception is that these principles find their origin in the domestic legal systems. Once there is the conviction that some of these general tools are commonly shared principles that can be found in the domestic systems, they can also be applied in international law. They are logic inferences that can be found in any legal system: The judiciary has also developed a number of general principles of law, such as audiatur et altera pars, actori incumbit onus probandi, or the fact that the judge of merits is also judge of the incidental jurisdiction. However, they are also logic inferences that are related to particular areas of international law, giving room for the emergence of general principles specifically applicable in the realm of international law, for example the principle of humanity in international humanitarian law. Given the definitional problems that the notion poses, the first references will be to works and jurisprudence on the topic so as to set the field under scrutiny. Reference Works In spite of what many authors of standard manuals of international law have stated in introduction to their own theories, there is a surprising dearth of literature, given the importance and difficulty of the topicâ€”and compared to the literature dedicated to treaty and custom law. Also, much of the literature usually addresses the general principles in an encompassing manner, dealing with all the aspects of the topic, be they its history, its definition, its illustrations, and so forth. Given these two specific features, much of this literature can therefore be considered referential. Another interesting feature lies in the fact that this general literature is quite time-bound, with obvious waves of works having been published at certain periods of time, such as during the years following the entry into force of the Permanent Court of International Justice PCIJ and International Court of Justice ICJ Statutes, or during the s. More recent works have also been written on the topic, yet without diminishing the intellectual aura those earlier works still possess. In view of the number of works, they are classified into three categories: On a last linguistic note, the majority of the literature, especially the renowned historical part of it, is either in English or in French. Users without a subscription are not able to see the full content on this page. Please subscribe or login. How to Subscribe Oxford Bibliographies Online is available by subscription and perpetual access to institutions. For more information or to contact an Oxford Sales Representative click here.

Chapter 7 : Positive Impact â€“ United Nations Environment â€“ Finance Initiative

UNEP FI's Positive Impact Initiative explores solutions to the financing gap for sustainable development and the Sustainable Development Goals (SDGs). The Initiative helps move the financial sector towards a more thorough and deeper integration of impact analysis in decision-making.

Ever since, the development of, and respect for international law has been a key part of the work of the Organization. This work is carried out in many ways - by courts, tribunals, multilateral treaties - and by the Security Council, which can approve peacekeeping missions, impose sanctions, or authorize the use of force when there is a threat to international peace and security, if it deems this necessary. These powers are given to it by the UN Charter, which is considered an international treaty. As such, it is an instrument of international law, and UN Member States are bound by it. The UN Charter codifies the major principles of international relations, from sovereign equality of States to the prohibition of the use of force in international relations. This main body of the UN settles legal disputes submitted to it by States in accordance with international law. It also gives advisory opinions on legal questions referred to it from authorized UN organs and specialized agencies. The Court is composed of 15 judges, who are elected for terms of nine years by the General Assembly and the Security Council. Courts and Tribunals In addition to the International Court of Justice, a wide variety of international courts, international tribunals , ad hoc tribunals and UN-assisted tribunals have varying degrees of relation to the United Nations such as the tribunals for the former Yugoslavia and Rwanda , the Special Court for Sierra Leone , the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon. These are established by and are Subsidiary Organs of the Security Council. What Is International Law? International law defines the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries. Its domain encompasses a wide range of issues of international concern, such as human rights, disarmament, international crime, refugees, migration, problems of nationality, the treatment of prisoners, the use of force, and the conduct of war, among others. It also regulates the global commons, such as the environment and sustainable development, international waters, outer space, global communications and world trade. The Security Council and International Law Some of the action of the Security Council have international law implications, such as those related to peacekeeping missions, ad hoc tribunals, sanctions, and resolutions adopted under Chapter VII of the Charter. In accordance with Article 13 b of the Rome Statute, the Security Council can refer certain situations to the Prosecutor of the International Criminal Court ICC , if it appears international crimes such as genocide, crimes against humanity, war crimes, the crime of aggression have been committed. The General Assembly and International Law The UN Charter gives the General Assembly the power to initiate studies and make recommendations to promote the development and codification of international law. Many subsidiary bodies of the General Assembly consider specific areas of international law and report to the plenary. Most legal matters are referred the Sixth Committee, which then reports to the plenary. The General Assembly also considers topics related to the institutional law of the United Nations, such as the adoption of the Staff Regulations and the establishment of the system of internal justice. International Law Commission The International Law Commission promotes the progressive development of international law and its codification. UN Treaty Database The Status of Multilaterial Treaties Deposited with the Secretary-General online database provides the most detailed information on the status of over major multilateral instruments deposited with the Secretary-General of the United Nations and covers a range of subject matters, such as Human Rights, Disarmament, Commodities, Refugees, the Environment, and the Law of the Sea. This database reflects the status of these instruments, as Member States sign, ratify, accede to, or lodge declarations, reservations or objections. The Internal Justice System at the United Nations A new Internal Justice System for the United Nations was introduced in , with the goal of having a system that was independent, professionalized, expedient, transparent and decentralized, with a stronger emphasis on resolving

disputes through informal means, before resorting to formal litigation. Because the United Nations has immunity from local jurisdiction and cannot be sued in a national court, the Organization has set up an internal justice system to resolve staff-management disputes, including those that involve disciplinary action. Legal Resources and Training The historic archives at the Audiovisual Library of International Law provide a unique resource for the teaching, studying and researching significant legal instruments on international law. Such assistance includes the provision of advice, expertise, research, analysis, training or other assistance.

Chapter 8 : The Foundation of International Human Rights Law | United Nations

Guiding Principles had been developed by the then Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 1.

Olawale Adeosun Natural Law vs. BY Natural Law vs. A Comparison of Outlook and Content Every generation, it is said, finds new reason for the study of natural law1-Heinrich A. Rommen The above assertion underscores enduring nature of the running battle between natural law and positive law. From the beginning of the organized society, natural law theorists and legal positivists have differed in their opinion of what is law. The arguments has always centered on the validity or the legitimacy of a law. The questions have always been; what makes a valid law? What is a legitimate source of law? Of what effect is the content of a law to its validity, and, or general acceptance? Or posing the question more directly; which is more important to the question of legitimacy of a law; its source? This term paper will attempt a comparison of the two theories of law, explain and differentiate between positivism and natural law and how these schools of thoughts perceived the meaning, function and purpose of law and ascertain whether there exist any points of convergence. Natural law Natural law theory is a philosophical and legal belief that all humans are governed by basic innate laws, or laws of nature, which are separate and distinct from laws which are legislated. The position of the natural law theorists on the question of what is lawis summarized by the following statement of Cicero in the 1st Century B. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is asin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or people; we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in future, but one eternal and unchangeable law will be valid for all nations for all times, and there will be one master and one ruler, that is God over us all, for He is the author of this law, its promulgator, and its enforcing judge. The laws arise through the use of reason to analyze human nature and deducing binding rules of moral behavior. This theory is built on the idea of perfect law based on equity, fairness, and reason, by which all man-made laws are to be measured and to which they must as closely as possible conform. Natural law theory has heavily influenced the laws and governments of many nations, including England Magna Carta and the United States Declaration of Independence It has also informed the publications of international legal instruments like the Universal Declaration of Human Rights and African Charter on Human Rights Positive law Positive law is law made by human beings. Specifically, positive law may be characterized as law actually and specifically enacted or adopted by proper authority for the government of an organized society. A body of man-made laws consisting of codes, regulations, and statutes enacted or imposed within a political entity such as a state or nation. AbiolaSanni, OAU Press Ltd 2 According to the legal positivists, law is only positive law; that is statute law and such customary laws as recognized by the state. Positive law sets the standards for acts that are required as well as those that are prohibited and penalties are usually prescribed for violation of positive law. Those who are physically present where the positive laws have governing power are typically required to obey such laws. The positivist is ever looking for the written or actually enforced factual decisions of the will which converts potential norms into actual norms. He is concerned with the formal origin of law, with the source of the norms and its manner of formation, not with its content. The question of whether something can be wrong in the law itself is meaningless to the positivist. Whether it be or be not is one enquiry; whether it be or not be conformable to an assumed standard is a different enquiry. Thus positive law sometime leads to manifest absurdity, as were the case 3Dworkin, Ronald M. Press 3 inOkumagba v Egbe6 , where the court had to adhere to the strict letters of the law, allowing the accused to get away with mischief. The Contrast Natural law is typically based on moral principles, natural order, and ethical code that people share as human beings. It is inherent and may not require government enforcement. On the other hand positive law is the legal rules that people are typically expected to

follow; it is artificial order and consists of rules of conduct that people place upon each other. Legal positivists are of the view that for a law to be valid, it should be codified, or written down, and recognized by some type of government authority. They reject the theory that people will obey inherent law based on moral values. Positivists espouse relativism and subjectivism with respect to what is proper or improper. Natural law opposes the idea that moral law is relative, subjective, and changeable. Thomas Aquinas, Second and Revised Edition, Literally translated by Fathers of the English Dominican Province. Though the Natural Law Theorists will insist a positive law conforms to certain moral standards in order to be valid, the history of law has revealed that in concrete instances the concept of natural law either prevail or lose. Where they prevail, they become part of positive law and are thenceforth also acceptable to the positivists. Sometimes the legal institutions themselves are made the object of non-legal power struggle In such instances appeal is made to natural justice in determining what is right or wrong. In conclusion therefore, modern law derives legitimacy neither from legality nor validity, but from purpose. Thus the end or object of a law becomes the criterion by which it is judged right or wrong, or valid or invalid. And how well it serves its purpose determines its legitimacy or otherwise!

Chapter 9 : Positive law - Wikipedia

Jurisprudence or legal theory is the theoretical study of law, principally by philosophers but, from the twentieth century, also by social calendrierdelascience.comrs of jurisprudence, also known as jurists or legal theorists, hope to obtain a deeper understanding of legal reasoning, legal systems, legal institutions, and the role of law in society.

The Universal Declaration of Human Rights is generally agreed to be the foundation of international human rights law. Adopted in , the UDHR has inspired a rich body of legally binding international human rights treaties. It continues to be an inspiration to us all whether in addressing injustices, in times of conflicts, in societies suffering repression, and in our efforts towards achieving universal enjoyment of human rights. It represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights. Whatever our nationality, place of residence, gender, national or ethnic origin, colour, religion, language, or any other status, the international community on December 10 made a commitment to upholding dignity and justice for all of us. Foundation for Our Common Future Over the years, the commitment has been translated into law, whether in the forms of treaties, customary international law, general principles, regional agreements and domestic law, through which human rights are expressed and guaranteed. Indeed, the UDHR has inspired more than 80 international human rights treaties and declarations, a great number of regional human rights conventions, domestic human rights bills, and constitutional provisions, which together constitute a comprehensive legally binding system for the promotion and protection of human rights. The two Covenants have developed most of the rights already enshrined in the UDHR, making them effectively binding on States that have ratified them. They set forth everyday rights such as the right to life, equality before the law, freedom of expression, the rights to work, social security and education. Over time, international human rights treaties have become more focused and specialized regarding both the issue addressed and the social groups identified as requiring protection. The body of international human rights law continues to grow, evolve, and further elaborate the fundamental rights and freedoms contained in the International Bill of Human Rights, addressing concerns such as racial discrimination, torture, enforced disappearances, disabilities, and the rights of women, children, migrants, minorities, and indigenous peoples. Universal Values The core principles of human rights first set out in the UDHR, such as universality, interdependence and indivisibility, equality and non-discrimination, and that human rights simultaneously entail both rights and obligations from duty bearers and rights owners, have been reiterated in numerous international human rights conventions, declarations, and resolutions. Today, all United Nations member States have ratified at least one of the nine core international human rights treaties, and 80 percent have ratified four or more, giving concrete expression to the universality of the UDHR and international human rights. International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights. Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. The domestic legal system, therefore, provides the principal legal protection of human rights guaranteed under international law. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual and group complaints are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.