

## **Georg Jellinek and the Origins of Liberal Constitutionalism in International Law**

Jochen von Bernstorff<sup>\*</sup>

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<sup>\*</sup> Prof. Jochen von Bernstorff, Chair for Constitutional Law, International Law and Human Rights, University of Tuebingen; member of the German delegation to the UN-Commission on Human Rights 2003-2005 and the UN-Human Rights Council in 2006.

## Abstract

At the end of the 19th century, Georg Jellinek developed a new theoretical foundation of international law, which he termed a “positivist” approach to international law. It became by far the most influential theory of international law developed in the 19th century in Europe. The structural ingredients of his attempt to construct a “scientific” foundation of international law as a binding and objective law of an “international community” continue to encapsulate the cornerstones, paradoxes and limits of liberal constitutionalist thinking in international law. In the 20th century reception of his international law works, Jellinek’s concept of “auto-limitation” was often portrayed as a staunch apotheosis of German (hegelian) notions of absolute State sovereignty (by Kelsen and Lauterpacht). Although this somewhat distorted reception during the interwar period seems to have buried a more nuanced understanding of Jellinek’s sophisticated theory of a “proto-constitution” of international law, it has after all had an arguably lasting impact on our modern concept of international law.

## A. Introduction

At the end of the 19th century, Georg Jellinek developed a new theoretical foundation for what was at the time known as European international law, which he termed a “positivistic” approach to international law. It became by far the most influential theory of international law developed in the 19th century in Europe. Georg Jellinek’s works synthesized the various 19th century German international legal “positivisms” and arguably shaped our contemporary understanding of international law more than any other author of the 19th and early 20th century.<sup>1</sup> Generally, German universities at this time were renowned for avant-garde scholarship and had an unrivaled and highly influential position in various academic disciplines in and beyond Europe. Georg Jellinek, who after his *Habilitation* had left Vienna because of anti-Semitic tendencies at the university and later became the first Jewish dean of the Heidelberg law faculty, became the most influential figure in late 19th century German

<sup>1</sup> On Jellinek’s life and international law works, see R. Y. Paz, *A Gateway Between a Distant God and a Cruel World: The Contribution of Jewish German-Speaking Scholars to International Law* (2012).

public law scholarship.<sup>2</sup> The structural ingredients of his attempt to construct a “scientific” foundation of international law as a binding and objective public law of an “international community” continues to encapsulate the cornerstones, paradoxes and limits of liberal constitutionalist thinking in international law.

What are these basic characteristics of modern liberal constitutionalism in international law? Given that the constitutionalist literature has recently grown into a quantity that defies any attempt to comprehensively reconstruct the debate, I will confine myself to highlight some fairly abstract features of modern constitutionalist thought in international law. This is not to say that all constitutionalist approaches to international law necessarily endorse these features, but most of the theories will support all or at least some of the following characteristics:<sup>3</sup> First, international legal constitutionalism, through imitating its domestic counterpart, arguably involves a notion of hierarchy. It is therefore being used to describe a legal-political process, in which a certain set of legal norms acquires a higher status than the rest of the norms of the international legal order. Second, most constitutional approaches work with the notion of

<sup>2</sup> The following reconstruction of Jellinek’s theory of international law and its reception in European international law builds on the more detailed analysis of 19th century German international law in J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010), 15-55.

<sup>3</sup> Debating the transfer of domestic constitutionalist to international law P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010); with discussions of various features of constitutionalism from different angles O. Diggelmann & T. Altwicker, ‘Is There Something Like a Constitution of International Law?: A Critical Analysis of the Debate on World Constitutionalism’, 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008) 3, 623; I. Ley, ‘Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich’, 69 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2009) 2, 317; M. Weller, ‘The Struggle for an International Constitutional Order’, in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009), 179; I. de la Rasilla del Moral, ‘The Unsolved Riddle of International Constitutionalism’, 12 *International Community Law Review* (2010) 1, 81; C. E. J. Schwöbel, ‘Situating the Debate on Global Constitutionalism’, 8 *International Journal of Constitutional Law* (2010) 3, 611; *id.*, *Global Constitutionalism in International Legal Perspective* (2011); on value oriented approaches J. d’Aspremont, ‘The Foundations of the International Legal Order’, 18 *The Finnish Yearbook of International Law* (2007), 219, 221-228; strongly defending constitutionalist approaches T. Kleinlein, ‘Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law’, 81 *Nordic Journal of International Law* (2012) 2, 79.

an “international legal community”<sup>4</sup> and the related idea, that international law at least in part constitutes a public law of a legally integrated community of sovereign States and or individuals, which to a certain extent has emancipated itself from the will of individual sovereigns. And third, the attempt to empirically verify the existence of the assumed constitutional norms through reference to specific acts or communications of State organs.

Through this lens, Georg Jellinek is the single most important precursor of constitutionalist thinking in international law in the nineteenth century. He explicitly conceptualizes international law as the public law of an international legal community and constructs a hierarchically subordinated layer of norms within the international legal system on explicit positivist premises. This proto-constitution has emancipated itself from State-consent. While acknowledging the importance of the sovereign will of the State as the formal basis of all law, the binding nature of these fundamental rules in Jellinek is ultimately based on the notion of shared fundamental interests in a historically created international community of States. State sovereignty is understood as being defined and thus limited by the proto-constitution of this assumed international community, notably for him in the 1880s consisting of “European civilized nations” (*Europäische Kulturvölker*).

Jellinek’s international law theory was an answer to a specific 19th century debate among German constitutional law scholars over a “scientific” foundation of the modern law of nations. It is also an answer to the explosive growth of international treaty law and the resulting significance of international law in the so called first globalization in the mid-nineteenth century. It is a product of the 19th century intellectual currents in German-Austrian public law, which oscillated between optimistic liberal universalism and ethnic nationalism, the latter component becoming ever more visible towards the end of the century.

## B. “Legal Positivism” and the Heritage of German Idealism

Those German-speaking writers who thought of themselves as “positivists” used different methodological conceptions in their search for

<sup>4</sup> Cf. on the development of this notion A. L. Paulus, *Die Internationale Gemeinschaft im Völkerrecht* (2001).

an “objective” principle of international law. This principle was to contribute to a theoretical harmonization of the presumed binding nature of international law, on the one hand, with the assumption that the empirically verifiable sovereign will of the State formed the basis of international law, on the other. Such a construct posed considerable problems for those who wrote about international law, because in contrast to State law, there was no central authority that stood above the States, which was charged with enacting norms and enforcing the law. Those who created the law and those to whom it was addressed were one and the same. Starting from various definitions of law, the selected nineteenth century authors sought to provide what they considered a methodologically superior answer to the challenge of Kant’s and Hegel’s question of whether law was possible at all between sovereign entities, and if so, how. This question assumed central importance in the second half of the nineteenth century also because a simple identification of international legal norms with rules of morality and reason seemed increasingly untenable under the rule of various sequential strands of “positivism” in general German jurisprudence.

Both in his first monograph on international law, *Die rechtliche Natur der Staatenverträge* (The Legal Nature of State Treaties), and in his *Lehre von den Staatenverbindungen* (Theory of International Federations), Jellinek claimed to be introducing a new, “more secure method”<sup>5</sup> for the study of the basic concepts of international law. What Jellinek was after was a theoretical construct of an objective and binding international law that was to be erected without recourse to the principles of natural law.<sup>6</sup> Jellinek sought to arrive at an objective international law by proceeding in a positivistic manner and thus positing a sovereign will of the State as the basis from which the law of nations drew its validity. Jellinek explicitly invoked Hegel, who had demonstrated that as long as there was no power that was superimposed upon the States, the rights and duties of the States

<sup>5</sup> G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882), 10 [Jellinek, *Staatenverbindungen*] (translation by the author).

<sup>6</sup> On this, Jellinek unambiguously remarked, in line with the positivistic tradition of Kaltenborn and Bergbohm: “While all other areas of the law have long since recognized the untenability of a doctrine that creates both legal subjects and rights and duties on the basis of a legal order that precedes positive law and commands it, the old natural law is still celebrating its well-known orgies in the systems of international law, which are only now and then rudely interrupted by a ‘denier of international law’ and then soon begin again.” G. Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd ed. [1905] (1919), 311 [Jellinek, *Rechte*].

could find their origins only in their particular will.<sup>7</sup> Consequently, only norms that could be traced back to the will of the State could be regarded as law. The legal scholar could not and should not – in his view – recognize any formal ground of the law other than the free will of the community of nations and States.<sup>8</sup> The German debate about the nature and binding force of international law in the 19th century revolved around the idea of the free will of the State and the repercussions this central assumption had for the validity of international law. German idealism through Kant, Fichte, Schelling and Hegel had profoundly shaped the philosophical ground for this debate.

For Kant, “a state, as a moral person, is considered as living in relation to another state in the condition of natural freedom and therefore in a condition of constant war.”<sup>9</sup> This tenet, which goes back to Hobbes and which Kant took from Pufendorf,<sup>10</sup> applied the state of nature between humans to relations between States. For Kant, however, the goal of international law in the sense of an a priori postulate of reason was the gradual overcoming of the subjective will of the States by creating universal peace as a legal state of affairs (*Rechtszustand*). Although “perpetual peace” remained for Kant an “unachievable idea”, the constant approximation to this condition through a permanent league or congress of States was a task for humans and States.<sup>11</sup>

Hegel, by contrast, described international law as “external state law” (*äußeres Staatsrecht*). The foundation of this law was the “autonomy” of nations, which originally, and here he agreed with Kant, were in a state of

<sup>7</sup> *Id.*; G. W. F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrechts und Staatswissenschaft im Grundrisse* [1832-1845], 12th ed. (2011), § 333 [Hegel, *Grundlinien*].

<sup>8</sup> G. Jellinek, *Die rechtliche Natur der Staatenverträge: Ein Beitrag zur juristischen Construction des Völkerrechts* (1980), 3 (note 3) [Jellinek, *Staatenverträge*].

<sup>9</sup> I. Kant, *The Metaphysics of Morals* [1797] (1996), § 53, 114 [Kant, *Metaphysics*].

<sup>10</sup> T. Hobbes, *Leviathan* [1651] (1968), chapter 13; on the history of the reception of Hobbes see H. Steiger, ‘Völkerrecht’, in O. Brunner, W. Conze & R. Koselleck (eds), *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, Vol. 7 (1992), 97, 112-123.

<sup>11</sup> Kant, *Metaphysics*, *supra* note 9, § 61, 119; this was not a world republic or world State, which Kant regarded as impossible because of the fear of despotism by a supreme ruler; see H. Steiger, ‘Völkerrecht und Naturrecht zwischen Chr. Wolff und A. Lasson’, in D. Klippel (ed.), *Naturrecht im 19. Jahrhundert* (1997), 45.

nature in their relationships to one another.<sup>12</sup> The law between States rested merely on its recognition, interpretation, and application by the individual States.<sup>13</sup> Because of the principle of autonomy, the rights of States toward each other had their reality only in a special, and not in a constitutionalized, general will.<sup>14</sup> Given that treaties of international law in the Hegelian system had no reality within the “general will,” their observance should, in the final analysis, also be left to the discretion of the States: “A mere ought-to-hold (*Haltensollen*) of the tractates takes effect. This ought is a coincidence.”<sup>15</sup> Hegel herewith for the first time develops a central theme of the realist critique of international law, refined by Hans Morgenthau a hundred years later. International law has no autonomous validity outside the particular recognition by an individual State in a given historical situation. Its *Sollens* (*ought*) structure is entirely dependent on the coincidental and passing overlap of interests among States. Hence, strong interests of States could never be regulated by this medium.

Moreover in Hegel, in contrast to Kant, a continuous approximation to a “perpetual peace” through the gradual overcoming of the subjective principle in the sense of an a priori postulate of reason is not possible. Rather, in Hegel the place of the Kantian league of peace is taken by the historical-philosophical assumption of “world history as world judgment”, in which competing “national spirits” struggle for hegemony.<sup>16</sup> War between States was thus inevitable and ultimately a positive element of international relations, without which the life of a nation would end up in lazy stagnation and rottenness.<sup>17</sup>

According to the Hegelian approach of “external state law”, later adopted by Karl Theodor Pütter,<sup>18</sup> international law thus has its reality only in the sovereign will of individual States. For Pütter, the “peculiar nature of

<sup>12</sup> G. W. F. Hegel, *Die Philosophie des Rechts: Die Mitschriften Wannenmann (Heidelberg 1817/18) und Homeyer (Berlin 1818/19)*, edited and annotated by Karl-Heinz Ilting (1983), § 159 [Hegel, Philosophie].

<sup>13</sup> *Id.*, § 161, and Ilting’s commentary on page 348.

<sup>14</sup> *Id.*, § 162.

<sup>15</sup> *Id.* (translation by the author).

<sup>16</sup> Hegel, *Grundlinien*, *supra* note 7, §§ 341-343 (translation by the author).

<sup>17</sup> *Id.*, §§ 324, 334.

<sup>18</sup> K. T. Pütter, ‘Die Staatslehre oder -Souveränität als Princip des practischen Europäischen Völkerrechts’, 6 *Zeitschrift für die gesamte Staatswissenschaft* (1850) 2/3, 299, 304-305; on page 307, Pütter himself points to Hegel’s philosophy of law as the theoretical foundation of his own scientific elaborations.

international law lies in the fact that the will of the state, in its conduct toward other nations, is self-determined with absolute freedom.”<sup>19</sup>

At the same time, Hegel had philosophically introduced the notion of an organic State as the particular form of a nation (Volk als Staat) in a given historical situation. The “will of the state” (*Staatswille*) as a legal person, not of the prince or the government, becomes the central source of all law, be it internal or “external” State law. This theoretical innovation of the State as a unified individualistic person capable of “will” became a mantra of 19th century German public law scholarship.<sup>20</sup> Interestingly, in the late 1830s for Hegel it was highly questionable whether peoples on a “lower civilizational level” such as nomadic people could ever be recognized as “states” in this sense.<sup>21</sup>

The criticism that other German scholars, such as Bluntschli and v. Mohl had directed against Pütter’s incorporation of the Hegelian concept of will into international law<sup>22</sup> was rejected by Jellinek, who argued that this criticism negated the applicability of the general concept of law to the law of nations and in so doing prevented that area of the law from becoming more deeply pervaded by public law scholarship.<sup>23</sup> But Jellinek at the same time wanted to go beyond Hegel’s sceptical approach to international law by constructing a truly binding law of nations on the shared voluntaristic premise. With this endeavor, Jellinek was turning against the theory of the “external state law,” which had denied that international law possessed its own binding quality as an objective law.

<sup>19</sup> Quoted in C. Kaltenborn von Stachau, *Kritik des Völkerrechts nach dem jetzigen Standpunkte der Wissenschaft* (1847), 163 (translation by the author).

<sup>20</sup> Usually the public law scholar Albrecht is seen as the author who introduced the specific and related notion of the State as a “juridical person” (Juristische Person), W. E. Albrecht, ‘Romeo Maurenbrecher, Grundsätze des heutigen deutschen Staatsrechts’ (Review), *Göttingische Gelehrte Anzeigen* (1837) 3, 1489, 1492.

<sup>21</sup> Hegel, *Grundlinien*, *supra* note 7, § 331 (translation by the author).

<sup>22</sup> R. v. Mohl, *Die Geschichte und Literatur der Staatswissenschaften*, Vol. 1 (1855), 382; J. C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*, 3rd ed. (1878), 60.

<sup>23</sup> Jellinek, *Staatenverträge*, *supra* note 8, 3 (note 3). Bluntschli, in his review of this work, criticized precisely this starting point of the destructive Hegelian “juristic construct” and pointed instead to the “originary natural law” as the foundation of every legal statute; see J. C. Bluntschli, ‘Kurze Anzeigen: Dr. Georg Jellinek, Die rechtliche Natur der Staatenverträge’, 3 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (1880), 579, 581.

### C. A Verifiable and Formalized Ground of all Law

Jellinek's intent was to show that "the same notion of law that underlies the unquestioned parts of the law also forms the essence of the provisions that are valid for international relations."<sup>24</sup> With this, Jellinek was turning away from the assumption of a special substantive source for the law of nations, as for example the legal consciousness of the nations (Savigny, Hälschner)<sup>25</sup>, or the idea of a reasonable order of the international community (v. Mohl).<sup>26</sup> Instead, Jellinek, following the positivist scholar Bergbohm, insisted that the same formal foundation had to be demonstrated for international law as for the other sub-fields of law.<sup>27</sup>

It was this quest for a monistic conception of law that led Jellinek to the nation (*Volk*) as an organized entity and to the State as a basis of his conception. From a strictly positivist perspective, one could recognize the legal character only of those propositions that could be traced back to a scientifically verifiable act of establishment. However, only the State – which established law as the "sovereign will of all"<sup>28</sup> – was a candidate as a law-creating organ. Here Jellinek also explicitly invoked Hegel, who had demonstrated that as long as there was no power that was superimposed upon the States, the rights and duties of the States could find their origins only in their particular will.<sup>29</sup> Consequently, only propositions that were demonstrable as the will of the State could be regarded as law. In this way,

<sup>24</sup> Jellinek, *Staatenverträge*, *supra* note 8, 1 (translation by the author).

<sup>25</sup> P. E. Hälschner, 'Zur wissenschaftlichen Begründung des Völkerrechts', 1 *Zeitschrift für volkstümliches Recht und nationale Gesetzgebung* (1844), 26 adopted Savigny's conception.

<sup>26</sup> R. v. Mohl, 'Die Pflege der internationalen Gemeinschaft als Aufgabe des Völkerrechts', in *id.*, *Staatsrecht, Völkerrecht und Politik*, Vol. 1: Staatsrecht und Völkerrecht [1860] (1962), 579, 584; for another, later example see F. v. Martens, *Das internationale Recht der civilisierten Nationen*, Vol. 1 (1883), 200.

<sup>27</sup> Jellinek, *Staatenverträge*, *supra* note 8, 2; the critical review of this work by Bulmerincq opposed this approach: "Every legal discipline is sovereign as a science and will not tolerate mediatization by other legal disciplines [...]. The law of nations, however, remains a legal discipline also with a different legal principle and a different legal systematics." (A. v. Bulmerincq 'Georg Jellinek: Die rechtliche Natur der Staatenverträge' 4 *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich* (1880) 3/4, 254, 257 (translation by the author)). For Bulmerincq, the international belief in the law was the source of the law of nations (*id.*, 256).

<sup>28</sup> Jellinek, *Staatenverträge*, *supra* note 8, 2 (translation by the author).

<sup>29</sup> *Id.*; Hegel, *Grundlinien*, *supra* note 7, § 333.

the legal quality of international law was directly linked to the empirically verifiable process of creation.

The attempt at a theoretical separation of the question of legal character (*Rechtsqualität*) from the norm-creating entity (States) by invoking the notion of the “idea of law” (*Rechtsidee*) was dismissed, in classic positivist fashion, as “speculation” from the realm of formal jurisprudence. Although Jellinek did not go so far as to describe the free will of the State as the final philosophical basis of the law, which he, too, believed could be found only in an “objective-metajuridical” principle, the jurist could not and should not recognize any formal ground of the law other than the free will of nations belonging to an international community of States.<sup>30</sup> Otherwise he would relinquish the boundaries he had so laboriously drawn around his subject, and that could very likely cast the legal scholar “into the confusion and lack of clarity that is to him the real chaos”.<sup>31</sup>

Therefore, the legal character of international law – and for Jellinek there was no getting around this if one took a strict positivist approach – had to be grounded in the sovereign will of the State:

“The sharp formal development that the concept of law has undergone through the systematic work of the last decades, causes all demands that flow solely from the idea of law, for all the other value they may possess, to appear no longer as a law that can assert its existence alongside, above, or even against positive law [...] With this, the only possible path for a legal grounding of international law is indicated. It must be shown to be grounded in the free will of states or nations.”<sup>32</sup>

But Jellinek at the same time wanted to go beyond Bergbohm and construct a truly binding law of nations on the shared voluntaristic premise.<sup>33</sup> With this endeavor, Jellinek was turning against the theory of the “external state law”, which had denied that international law possessed its own quality as objective law. How, then, did Jellinek attempt to escape the

<sup>30</sup> Jellinek, *Staatenverträge*, *supra* note 8, 3 (note 3).

<sup>31</sup> *Id.* (translation by the author).

<sup>32</sup> *Id.*, 2 (translation by the author).

<sup>33</sup> Cf. on Jellinek’s strategy to reconcile the free will of the State with a binding international law compared to John Austin’s theory: M. Koskenniemi, *From Apology to Utopia* (1989), 128-130.

dilemma of the voluntaristic foundation of international law? Jellinek's answer was two-tiered. First, by way of an abstract, preliminary examination, Jellinek discussed the question of how the free will of the State can be thought of as law in the first place. Here he introduced the figure of the self-obligating will. It was only in the second step that Jellinek raised the question whether the law created by the free will of the State could be objectified.

#### D. The Concept of “Self-Obligation” (*Selbstverpflichtung*) and the Emergence of an “Objective” International Law

It is the idea of law's binding nature that Jellinek linked with the free will of the State when he wrote: “It does not exhaust the nature of law that it is the will of the State, for it is not the will of the State as such that is law, but the binding will of the State.”<sup>34</sup> The verifiable act of will was merely the formal legal basis of the obligation. The final, psychological basis of every legal obligation, however, lay in the fact that the will regarded itself as bound by its expression.<sup>35</sup>

Jellinek thus ascribed the idea of the binding nature of the law not to a normative-theoretical manifestation, but to the psychological manifestation of “the feeling to have obliged oneself” (*das Sichverpflichtetfühlen*). For Jellinek, the law was a psychological phenomenon inherent in human beings.<sup>36</sup> The validity of the law ultimately rested on the belief in its validity among those to whom a legal norm was addressed.<sup>37</sup> Jellinek carried out the subsequent, inductive demonstration of the concept of self-obligation by way of State- or constitutional law (*Staatsrecht*):

“It must be shown that a reflexive element exists within national constitutional law – that there are legal norms that emanate from the State and bind the State. Should this demonstration succeed, the legal basis of international law will have been found.”<sup>38</sup>

<sup>34</sup> *Id.*, 5-6 (translation by the author).

<sup>35</sup> *Id.*, 17.

<sup>36</sup> G. Jellinek, *Allgemeine Staatslehre*, 2nd ed. (1905), 324 [Jellinek, *Staatslehre*].

<sup>37</sup> *Id.*

<sup>38</sup> Jellinek, *Staatenverträge*, *supra* note 8, 6-7 (translation by the author).

In the realm of constitutional law, he concluded, we are dealing with norms by which the State limited itself. Public law, including international law, was, in the final analysis, a self-limitation of the will of the State.<sup>39</sup> Still, Jellinek, too, proceeded from the assumption that this psychological validity of the law had to be “guaranteed”.

Such a guarantee existed if “socio-psychological forces” reinforced the motivating power of the prescriptions, thereby endowing them with a general ability to assert themselves against countervailing, individual motivations of the addressees of the norms.<sup>40</sup>

Jellinek thus gave preference to the broader notion of “guarantee” over that of “coercion”. As *guarantees* of State law Jellinek pointed to the organization of the State, and for international law to the conditions of international relations and other shared interests of the community of States.<sup>41</sup> On the basis of this psychological approach, international law was placed on an equal footing to national law, and via the “theory of the guaranteed norm” it acquired, for Jellinek, the quality of binding law in spite of the absence of a supra-ordinated coercive power. He thus conceptualized the sovereign will of the State as the final *formal ground* of the law and the “feeling of self-obligation” as the final *psychological ground* of the law. But what rules had the quality of objective international law that could not be modified by individual preferences of the State? Jellinek’s interest was directed above all at those legal rules that dealt with the creation, duration, and termination of treaties in international law:

“Treaties between states can have the character of law only when there exist norms that stand above the treaties, and from which the treaties receive their legal validity.”<sup>42</sup>

These norms created a standard against which individual treaties between States had to measure themselves, and they were – to that extent – “objective in nature”.<sup>43</sup> With this, Jellinek had arrived at the central question, namely, how such general norms that are the equivalent of constitutional law can be conceived between sovereign actors on the level of

<sup>39</sup> *Id.*, 27.

<sup>40</sup> *Id.*

<sup>41</sup> Jellinek, *Staatslehre*, *supra* note 36, 328.

<sup>42</sup> Jellinek, *Staatenverträge*, *supra* note 8, 5 (translation by the author).

<sup>43</sup> *Id.*, 4 (translation by the author).

international law. To answer that question, Jellinek searched for a principle of objectification that could hold up to the arguments that the idea of self-obligation always implied simultaneously the possibility that the State could also free itself later again from any possible content of will. The possibility, inherent in free will, of self-liberation through a change of will had to be limited in Jellinek's construct through an objective principle. Jellinek at this point revealed to his curious readers the – long withheld – final *philosophical* ground of law, which could be found only in an “objective principle”:

“This principle, which we must now name, is the nature of the conditions of life that require legal normativization. This nature is as untouchable by the will of the State as nature is by the will as such [...]. Here, then, we have an objective barrier to the will that is beyond any question.”<sup>44</sup>

According to Jellinek, the objective nature of the relations between States thus entailed a logically inherent limitation on the individual will of the State. It was among the elementary purposes of a State to engage in relations with other States in an ever more interdependent international community, and to that extent it was also a demand of the nature of the State to create norms by which the relations to other States were regulated.<sup>45</sup> By doing so – by legally cooperating – the objective nature of some fundamental norms of cooperation between States was automatically acknowledged by the State. In other words: if States use the language of international law, they automatically recognize some fundamental rules of co-existence and co-operation. This is the very essence of constitutional thinking in public law – the assumption that a politically powerful entity

<sup>44</sup> *Id.*, 43 (translation by the author); on the “nature of the thing” as an instrument for objectifying legal argumentation and for an overview of the relevant legal-theoretical literature see T. Mayer-Maly, ‘Die Natur der Sache und die österreichische Rechtspraxis’, in W. Krawietz, T. Mayer-Maly & O. Weinberger (eds), *Objektivierung des Rechtsdenkens: Gedächtnisschrift für Ilmar Tammelo* (1984), 273.

<sup>45</sup> Jellinek, *Staatenverträge*, *supra* note 8, 45; here the connection to Jellinek's doctrine of the purposes of the State becomes apparent, though it is striking that Jellinek rejected the existence of objective State purposes in the general theory of the State. For Jellinek this must therefore be a subjective purpose of State, though one that is inherent in all States because of its objective nature. On the doctrine of the purpose of the State see Jellinek, *Staatslehre*, *supra* note 36, 223-258; on Jellinek's strategy to reconcile the free will of the State with a binding international law through references to the purpose of the State Koskeniemi, *supra* note 33, 129-130.

limits its freedom of action by abiding to a set of meta-rules, be they of a procedural or substantive nature, that cannot be modified unilaterally in an *ad hoc* fashion. Odysseus is tying himself to the mast, in order to limit his freedom of action and to prevent the order from being destroyed.

Behind the objective nature of international relations as a barrier to the sovereign will of the State stood Jellinek's own conception of an international "community of states". For him, however, this community of States was not an idea of natural law, but the sociological product of the growing international intertwining of (European) State interests, of the kind that had become especially apparent in the nineteenth century.<sup>46</sup> From Jellinek's perspective, the State could no longer be described abstractly as an entity that was autarkic and without obligations, since the assumptions derived from such a premise utterly failed to reflect the real conditions of international life.<sup>47</sup> Instead, the State was contingent on the totality of the States in all aspects of its existence and actions. The "community of states" was a fact, and ignoring it made any deeper comprehension of the problems related to international law impossible.<sup>48</sup> This was especially true in the realm of the "civilized" European nations, which was, in Jellinek's words, wrapped in a "web of international legal norms".<sup>49</sup> Through membership<sup>50</sup> in the "community of states", the State was bound by "objective international law".

It is also in this context that one should place Jellinek's critique of the construction of so-called "basic rights" of States. These were nothing other than a description of the "*status libertatis*" under international law. However, claims were being arbitrarily deduced from the notion of basic rights derived from natural law. Instead of describing what was permitted to the State, the point was for Jellinek to examine the limitations on the State's freedom through the objective law of nations.<sup>51</sup> It is noteworthy that for Jellinek this objective international law, which arises from the nature of the relations between States, constituted only about one tenth of the tenets of international law.<sup>52</sup> In that sense, the objectification of international law

<sup>46</sup> Jellinek, *Rechte*, *supra* note 6, 320.

<sup>47</sup> Jellinek, *Staatenverbindungen*, *supra* note 5, 92.

<sup>48</sup> *Id.*, 92-93.

<sup>49</sup> *Id.*, 96 (translation by the author).

<sup>50</sup> A State acquired membership in turn through the instrument of recognition under international law: Jellinek, *Rechte*, *supra* note 6, 320.

<sup>51</sup> *Id.*, 316-320.

<sup>52</sup> *Id.*, 321.

comprised for Jellinek only the sphere of an elementary constitution, which was in the final analysis deduced from an “objective nature” of the community of States that was an objective phenomenon produced by European history.

The content of this constitution remained vague. It comprised those fundamental norms, such as *pacta sunt servanda*, that European sovereigns at the time had recognized explicitly or implicitly as the very basis of the legal relations amongst one another. As such it had an exclusive character and gave rights and duties only to European nations. Given that this theory was developed at the high point of European colonial expansion in Africa and the Far East, it shows how restricted and naturally Eurocentric Jellinek’s liberal universalism was.

## E. Conclusion

Georg Jellinek attempted to explain and defend the validity of international law as an autonomous legal order, which can theoretically be distinguished from morality, power and particular State interests. He distanced himself both from Hegel’s concept of international law as mere temporary coincidence of corresponding individual wills of sovereign States and the alleged old fashioned “natural law” concept of a world State. Under the conscious and subconscious influence of German idealism, the crux of the German 19th century international law debate was the conversion of the subjective and verifiable sovereign will of one or more States as formalized legal persons into a binding legal order without centralized legislative, executive and judicial institutions. It was Georg Jellinek who solved the irresolvable task by developing the first constitutionalist theory of international law under what he called “positivist” premises.

Since then, with every new constitutionalist theory of international law, new norms have been elevated to constitutional rank through the respective scholars. For instance, when neo-scholastic natural law notions became more popular again among international lawyers in the 1920s and 1930s, specific value oriented norms were being given constitutional status by authors such as Alfred Verdross.<sup>53</sup> From then on, a thicker substantive

<sup>53</sup> Regardless of the value oriented content of these constitutional norms, Verdross insisted on portraying these norms as legal rules, which also formed part of “positive” international law based on state-consent, A. Verdross, ‘Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle’, in *id.* (ed.), *Gesellschaft, Staat, und Recht*:

understanding of constitutionalism has developed in Europe in the second half of the 20th century, building on the notion of *ius cogens* or other “fundamental” norms of an international community. Under these post-war pink lenses, Jellinek’s procedural proto-constitution turned into a hierarchical universal order based on an alleged harmony of interests, universally shared moral values or an accomplished international community.

The problem with those constitutional approaches that proceed from an international legal system grounded in morality is that they are in danger of endowing, out of well-intentioned motives, certain morally charged norms of international law with greater scholarly weight than they have in legal and political practice. In the attempt to advance the development of the law in a “progressive” direction, they can unwittingly abet the rhetorical misuse of these norms within international politics. Certain legal norms, elevated into constitutional rank, can thus turn into a façade without lasting effects on legal practice, a façade behind which international power politics and unrestrained exploitative economic and legal structures continue to operate as usual.<sup>54</sup>

Or to put it differently: at what point do moral idealizations of international law become so far removed from the concrete human effects of law and politics that they themselves, for all their good intentions, take on affirmative characteristics? Charles de Visscher in 1971 held that the international community “est un ordre en puissance dans l’esprit de l’homme; dans les réalités de la vie internationale, elle en est encore à se chercher, elle ne correspond pas à un ordre effectivement établi”<sup>55</sup>. Despite

*Untersuchungen zur Reinen Rechtslehre* (1931), 354, 358; strikingly similar in his recourse to neo-scholastic notions of humanity is C. Tomuschat ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, 281 *Recueil des Cours de l’Académie de Droit International* (1999), 9.

<sup>54</sup> I have tried elsewhere to describe in greater detail the basic dilemma of the turn to rights in international law: J. v. Bernstorff, ‘The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law’, 19 *European Journal of International Law* (2008) 5, 903; more generally on moral foundationalism in international law J. v. Bernstorff & I. Venzke, ‘Ethos, Ethics, and Morality in International Relations’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. III (2012), 709; cf. on international humanitarianism D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2005).

<sup>55</sup> C. De Visscher, ‘Positivism et “Jus Cogens”’, 75 *Revue Générale du Droit International Public* (1971), 5, 8.

the subsequent move from “bilateralism to community interests”<sup>56</sup> in many areas of positive international law, deep seated conflicts over what the common interests and shared values actually are continue to persist.

<sup>56</sup> See the comprehensive and early study of B. Simma, ‘From Bilateralism to Community Interests in International Law’, 250 *Recueil des Cours de l’Académie de Droit International* (1994), 217.