

THE DUALIST AND MONIST THEORIES. INTERNATIONAL LAW'S COMPREHENSION OF THESE THEORIES

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***Abstract:** By the principles that govern international law, states are committed towards respecting the treaties that they establish and also to determine their application by their own legal, executive and judicial institutions. Yet International Law doesn't rule on how the conditions in which legal provisions included in treaties are to be integrated in the states' internal legal system, so as they might be applied by the competent authorities. This matter of concern is left for the states to decide upon, ruling over it as sovereignties, and concordant with their views on the relation between international and internal Law.*

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By the principles that govern international law¹, states are committed towards respecting the treaties that they establish and also to determine their application by their own legal, executive and judicial institutions. Yet International Law doesn't rule on how the conditions in which legal provisions included in treaties are to be integrated in the states' internal legal system, so as they might be applied by the competent authorities. This matter of concern is left for the states to decide upon, ruling over it as sovereignties, and concordant with their views on the relation between international and internal Law.

The positivist solutions are inspired by two doctrines encompassed in constitutions or just simply practiced².

The dualist concept

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¹ Art. 28 Wien Convention.

² Ion Filipescu, Augustin Fuerea, *Drept instituțional comunitar european*, ediția a v-a, Editura Actami, București, 2000, p. 52-53.

The dualist or pluralist view on the relationship between internal and international Law was presented by H. Triepel, in a more rigorous form in his textbook “Volkerrecht und landrecht”³, and in its flexible form by many authors, including D. Anzilotti in “Cours de droit international”⁴, M. Virally, L. Oppenheim⁵.

Proponents of dualism consider that between internal and international provisions there cannot exist any kind of conflicts since these provisions don't have the same object – internal provisions are applied exclusively between the state's borders, and cannot intervene in the international legal system⁶.

In such conditions a perfect international treaty would only be effective at an international level. For it to be applied in a contracting state it is necessary for that state to adopt the legal measures from the treaty into a national provision or to introduce it through a legal plan that facilitates admission. In both ways we are confronted with a nationalization of the treaty, the international provision passing through a transformation, which allows it to be applied as an internal regulation, part of internal and not international Law⁷.

Also the subjects of Law can't be the same in both legal systems. Each system's application is well determined: one corresponds to relationships between states while the other to interpersonal relationships. International Law cannot rule over the relationships between individuals at an internal level.

The dualist theory teaches that Internal and International Law are two separate legal systems holding in common international responsibility⁸.

The two systems are different through their source of law. Internal Law originates in the will of the state itself; while International Law is based on the common will of contracting states.

Analyzing the dualist theory we reach the following conclusions:

- the basis for the mandatory force of internal law provisions is represented by the Constitution, while the basis for international law is represented by the principle *pacta sunt servanda*;

- legal measures in both systems can only be validated at their proper level. Furthermore, the international law provision can't influence the internal provision's validity and vice versa;

- the provisions included in the two systems must not be concurrent or conflicting;

- communication between the two systems is possible, but only the specific procedures to each system must be applied. Thusly the International Law provision is introduced in internal law by an internal provision, recognizing, naturalizing and introducing it through an internal measure and applied as such. Incorporation of the

³ Issued in Leipzig in 1899.

⁴ Issued in Paris, in 1921.

⁵ Tery Olsen, Paul Cassia, *Le droit international, le droit européen et la hiérarchie des normes*, PUF, 2006, p. 37; Abdelhaleq Berramdane, *La hiérarchie des droits – Droits internes et droit européenne et international*, L'Harmatan, Paris, 2002, p. 17-18.

⁶ Augustin Fuerea, *Drept comunitar european. Partea generală*, Editura All Beck, București, 2003, p. 43.

⁷ Ion Filipescu, Augustin Fuerea, *op.cit*, p. 53.

⁸ Abdelkhaleq Berramdane, *op.cit*, p. 18.

international norm in internal Law changes its nature and recipient. On the other hand, internal Law makes reference to international law, through a system of references and borrowings, the norm being nationalized and applied as an internal legal provision⁹.

This doctrine, even in its flexible form, developed by M. Virally – admits that the two orders are not rigorously separated and they accept each other's validity. This opinion is especially notorious due to its strictness. This strictness owes itself to more than one reason:

1. it's a historically significant doctrine. It appeared at the end of the 19th century, in a period in which international law was predominantly inter-state and when the notion of a nation state was just surfacing. On the other hand today International Law is gradually addressing itself to individuals.

2. from an institutional point of view, internal and international law do intersect, since international law doesn't dispose yet of it's own specific authorities, it's still up to the state's institutions to rule and enforce its own rules¹⁰.

The monist concept

The starting point of the monist theory, sustained by Decencière – Ferrandière, and temporarily by A. Verdross, is represented by the state sovereignty, as an absolute dogma. In fact it is the state's will that supremely establishes the relations with the other states. If the international law coerces the state, it happens because the state has agreed to limit its sovereignty: the state's self-imposed limitation by its freely complied will to take part in treaties and by the freely acceptance of the customary international law¹¹.

This theory, which turns the international law into a simple 'foreign state law' cannot be backed because if pushed to the extreme it represents the denial of international law itself, to which the states are not obliged to comply. G. Jellinek confirms this fact in his famous statement: 'the international law exists for the states and not the states for international law'¹².

The monist with its priority for international and European Union law is the predominant theory. It presumes the unity of juridical order with the priority of international law. There are more alternatives but roughly, two schools share this doctrine: the Normative School and the Sociological School.

A special place is reserved for the community school, which believes that the community law has got grounds, developed and gained its self-sufficiency.

The Normative School

The first published work inspired by monist appeared in 1899 in Stuttgart and was written by Wilhelm Kauffman. This theory sustains the unity of legal order and it is

⁹ Claude Blumann, Louis Dubois, *Droit institutionnel de l'Union Européenne*, Lexis Nexis, Litec, Paris, 2005, p. 536.

¹⁰ Abdelkhaleq Berramdane, *op.cit.*, p. 18.

¹¹ Claude Blumann, Louis Dubois, *op.cit.*, p. 536.

¹² G. Jellinek, *L'Etat moderne et son droit*, Paris, V. Giard et E. Brière, vol. I, 1911, p. 562 citat de Abdelkhaleq Berramdane, *op.cit.*, p. 20.

presented in more ways, developed by illustrious authors such as Hans Kelsen¹³, G. Scelle, A. Verdross¹⁴.

According to the monad theory, the international law applies directly upon the states legal order. Their relations are of interpenetration and are possible because of the affiliation to a unique system that is based on the identity of law subjects and law sources¹⁵. Thus the international law applies immediately, without being admitted or transformed within the legal systems of the member states.

The perfect international treaty integrates into the system of regulations that need to be applied by the national courts, and its stipulations are applicable by their initial capacity of international regulations¹⁶.

The monad theories also consider that the internal law precept places itself into the same sphere as the international one, with the existence between them of a super-ordinate/ subordinate relation.

The international law must be comprehended as a juridical order delegated from the state's legal system and therefore included in it, or as a total juridical order that delegates the state's juridical orders, it is super-ordinate to them and includes the partial juridical orders.

Each of the both interpretations represents a monad construction: one of them has the primacy of international order; the other one has the primacy of the juridical order of individual states¹⁷.

The first interpretation, of which's adept Hans Kelsen¹⁸ is, promotes the immediate application of the international public law on the internal law, without the necessity to 'nationalize' the international stipulation¹⁹.

¹³ Hans Kelsen, *Raporturile de sistem între dreptul internațional și dreptul intern*, R.C.A.D.I., 1926, p. 231.

¹⁴ Abdelkhaleq Berramdane, *op.cit.*, p. 19.

¹⁵ Augustin Fuerea, *op.cit.*, p. 43.

¹⁶ Ion Filipescu, Augustin Fuerea, *op.cit.*, p. 54.

¹⁷ Hans Kelsen, *Doctrina pură a dreptului*, Editura Humanitas, București, 2000, p. 388-389.

¹⁸ Hans Kelsen has analyzed the differences between internal law and international law regarding the existent sanctions in the two juridical orders, regarding the validity, regarding the centralization or decentralization of the two juridical orders. Kelsen highlights that although the sanctions are different in the two juridical orders (in international law we talk about reprisals and war, and in internal law we talk about punishments and forced execution), this is a relative and not an absolute distinction. Closely related to this distinction is also the fact that in international law the responsibility is collectively as to the individual responsibility from the internal law. In Kelsen's opinion the individual responsibility is not excluded from international law, as well as the collective responsibility is not excluded from internal law so according to this he considers yet again that the distinction between the international law and the national law is relative. Regarding the validity sphere of the two laws, Kelsen believes that the difference between international and internal law doesn't exist because the individual is the law subject in both systems. The international law imposes obligations and grants rights not for the states as legal persons, but directly for the individuals. He considers that the most important difference between the two systems is that the international law is somewhat decentralized while the internal law is a centralized and coercive order. This distinction manifests itself through the methods by which the two systems are created and applied. Customary international law and the treaties are the main sources of international law, and they are decentralized methods of law creation, the main source of internal law is the law, as a centralized method. In contradiction with the national law which confers the courts the competence to apply the law and has organs with exclusive powers in applying the sanctions, the international law doesn't have specific organs to assure that the sanctions are fulfilled, and are left to the consideration of the states as subjects of

Thus, Hans Kelsen believed that a dualist construction – which considers the multitude of juridical orders of the individual states (thought of rather as ‘pluralist’) – doesn’t have a logical support as long as the stipulations of international law as well as those of internal laws must be simultaneously valid²⁰.

In determining the relation between the internal and international law it is important the issue that if between the two systems can exist irresolvable conflicts, considering that if so, the unity between the internal law and the international law is excluded.

If irresolvable conflicts had existed between the internal and international law, and thus a dualist construction would be indispensable, with the internal law as a system of valid stipulations, the international law could be considered as not being law, as not being an obligatory normative order; the debated relations could have been interpreted either only from the internal law’s point of view, or either only from the international law’s point of view.

If this was valid for a theory that should presume irresolvable conflicts between internal and international law and considers the international law rather as international ethics then it wouldn’t exist any logical objection. Most of the dualist theory adepts consider the international law and the internal law as two concomitant valid systems, independent from each other and that could be in conflict with one another. This theory, from Kelsen’s point of view, cannot be sustained²¹.

Kelsen’s theory, developed by his disciples (A. Verdross, Kunz, Ch. Eisenmann), seductive from the juridical logic point of view, is vulnerable. Analyzing in detail, Kelsen reaches the fundamental original and hypothetical precept, necessary for its validation. But with this hypothesis he highlights an ethical fact, although Kelsen doesn’t validate anything. He acts as in mathematics, starting with a hypothesis, but he doesn’t demonstrate how this hypothesis is verified in practice. As a matter of fact, the juridical precept doesn’t hang between the earth and sky. Further more, to allege that the internal law is delegated by the international law seems difficult to back up concerning that the states had historically appeared previously and not concomitant with the international law. The international law stays as a product of the individual states. Nevertheless, it is true that once the state is created, in order to integrate into international affairs, it needs competences that cannot always be conferred by it and which are therefore offered by the international law²².

Sociological School

The most notable adept is Leon Duguit, for whom the law is a result of social solidarity. He considers that the social act gives birth to an ethic that is materialized by juridical rules. Based on this idea of solidarity, developed by the head of the Bordeaux School, G. Scelle will apply it for international law. Thus – he writes – ‘*inter-social collectivities elaborate (...) their own legal precepts, to maintain and develop the*

international law. - Hans Kelsen, *Principles of International Law*, Printed in United States of America, 1966, p. 551-552.

¹⁹ Augustin Fuerea, *op.cit*, p. 153.

²⁰ Gheorghe Emil Moroianu, *Actualitatea normativismului kelsian*, Editura Allbeck, București, 1998, p. 97.

²¹ Hans Kelsen, *op.cit*, p. 385.

²² Abdelkhaleq Berramdane, *op.cit*, p. 21.

solidarity which assures their bases. Any inter-social precept has priority upon the internal precept or if they are in contradiction it modifies or repeals it ipso facto'.

This statement of the priority of inter-social international law represents the corollary for another statement, that of knowing that '*the law subject is always and can not be any other but the individual... Individuals are the lone subjects of international law.*' But being aware that this inter-social structure lacks its own organs, G. Scelle would later admit, through the 'functional duality' phenomenon, that the governments and the state agents are simultaneously agents of the international law as well. The 'functional duality' law would be, according to the author the least damaging option. According to Scelle the only remedy for this situation would be 'the super-state institutionalization which develops in federalism'.

Scelle's vision, however universal and generous might be and foreshadowing at times of the role of the individuals in international affairs, is afar from reality. We can question ourselves how can the ethical necessity fold along the legal necessity? How can a state without legal status or sovereignty be able to make action at international level?

After all, this debate between dualists and monists on one hand comforts the defenders of sovereignty, especially those of parliamentary sovereignty, due to the fact that dualism implies the acceptance of international law mainly by the use of law, while on the other hand the defenders of the internationalism favourable to the individuals due to the fact that international law implies their direct application without the need for the existence of a legal filter.

However, in practice, the debate is somewhat limited, and consequently pure monism or perfect dualism is very rare to be found in real life. Practically, there is an entire set of intermediary situations that combine the elements of the two theories²³.

The other alternative of the monist conception promotes the priority of the domestic law as opposed to the international one. Among the promoters of these theory one can name: M. Wenzel, E. Kauffman, A. Zorn (The Bonn School) whose theoretical arguments bring a tribute to the philosophical conceptions of Hegel, who considered that due to the States' independency and full sovereignty, the relations that are formed among them are mainly based on force that generates and maintains a state of war. Under these circumstances, international law should only be considered a projection of rules that belong to domestic law, as a sum of the internal regulations of different States through which they settle their foreign relations²⁴.

The European Community School

The prevalent thesis of the supporters of this School is that of the specificity of EU Law in relation to the international one. This idea is firmly disputed by the supporters of international law, beginning with Alain Pellet, who considers that there is no difference of degree or of nature between the European Community and the international legal orders. However, Denys Simon has shown that although EU law stems from international

²³ G. Scelle, *Précis de droit des gens*, Paris, Sirey, 1932, p. 30-31 - citat de Abdelkhaleq Berramdane, *op.cit*, p. 23.

²⁴ Rodica Miha-Besteliu, *Drept internațional. Introducere în dreptul internațional public*, Editura Lumina Lex, București, 1998, p. 20; Ion Diaconu, *Tratat de drept internațional public*, vol. I, Editura Lumina Lex, București, 2002, p. 39.

law and it cannot therefore ignore it, the EU Community's legal order has progressively separated itself from the international one following a series of successive steps.

This specificity of the EU law stems from the jurisprudence of the European Communities' Court of Justice. In fact, after highlighting the inclusion of the EU law in the international law, by mentioning that "The Community represents a new legal order of international law"²⁵, the Court has settled in the well-known case of Costa /ENEL that "unlike international treaties, the EEC Treaty has implemented its own legal order, integrated in the legal system of the member States" and has continued to reiterate this principle in later cases²⁶.

This specificity is mainly based on the autonomy of the EU legal order as opposed to domestic laws and mainly to international law. The premise of this autonomy is represented by the construction of a shared economic space that cannot depend on the constitutional position of international law of one of the member States. The equation is a simple one: a shared market must be responded with shared regulations that benefit of a uniform application.

With the passing of the time, once the European construction is deepened and the autonomy developments are consolidated, the case-law will initiate a process of creation of a Constitution of the EU system, so that it marks even more its autonomy as opposed to international law.

The EU law is in fact integrated in the domestic laws of the member States. Its infiltration in the internal legal orders of the member States is direct, without a need for "receiving" or neutralizing mechanisms. This immediate incorporation of EU law, original or derived, although it has some similarities with the monist theory, is in fact independent both from dualist or monist conceptions of the constitutional systems of the member States. It is inherent to the nature of this right.

As a corollary, this integration is also a direct effect of EU law. Certainly, international law also implies the direct application but also on exceptional basis. As the Permanent Court of International Justice observed in the issue regarding the jurisdiction of the Danzig Courts "*only a well established principle of international law (...) an international agreement cannot directly create rights and obligations to private individuals.*" Nonetheless, in the same case, the Permanent Court of International Justice affirmed that "*it cannot be disputed that certain rules that create rights and obligations for the individuals and are susceptible of application in national courts could represent the object of an international agreement if this would be the intention of the signatory parties*". It is also presumed that "*the provisions of a treaty only constitute rights and obligations for the signatory parties*".

On the other hand, in the European Communities' Court of Justice's case-law this presumption is inverted. The exception of the international law represents the rule of the EU law. The EU law, through its nature and final purpose creates rights and obligations for its subjects that can use them once the provisions of this law meet the technical criteria of the direct effect²⁷. Moreover, the European Communities' Court of Justice has

²⁵ Van Gend en Loos, 5 februarie 1963, aff, 26/62, rec, p. 3.

²⁶ Jean-Victor Louis, *L'ordre juridique communautaire*, Commission des Communautés Européennes, 1993, p. 160.

²⁷ Van Gend en Loos, 5 februarie 1963, aff, 26/62, rec, p. 3.

extended the vertical and horizontal effect of the EU law's provisions allowing them to benefit of a larger application

The European Communities' Court of Justice has realized a separation between the direct applicability and the justifiability by generalizing the possibility of invocation, including the issue regarding the provisions that lack direct effect. Hence, the provisions that are not directly applicable and that theoretically cannot be invoked in front of national Courts, still benefit of three types of invocations: the invocation of the concordant interpretation, the invocation of reparation and the invocation of exclusion²⁸.

In conclusion, this integration in the law of each member State, of the provisions that derive from EU sources and generally, the terms and the spirit of the treaty have as a corollary the impossibility for the States to prevail, against this legal order accepted by them on the basis of reciprocity, a unilateral measure that would not be opposable towards it²⁹.

EU law postulates the monism and imposes its observance, in conditions that involve functions of normative power for the institutions; it operates only in monism-being the single system of integration.

In these circumstances the legal order of a State cannot be considered a legal order subordinated to the international one. Thus, the rule of international law is superior to the domestic norm, is mandatory for the States, these being obliged to execute it without the necessary for a procedure to transpose the international rule in the domestic law³⁰.

Therefore, member States have the possibility to keep the dualist conception regarding international law, but, from the EU law point of view, dualism is removed, EU norms being immediately applicable in conformity with the national order of the member States³¹.

This fact has three consequences:

- EU law is integrated in the domestic legal order of States without the necessity for a special wording of introduction;
- EU rules have their own place in the domestic legal order, as EU law;
- national judges are obliged to apply EU law³².

The institutive treaties have been included in the legal order of the founding States, through constitutional provisions, or through other types of legislative provisions. The treaties were formally admitted in dualist States having as an effect the involvement of the Treaty in the domestic law. The inclusion of the dualist States within the Communities does not have as a consequence the transformation of the Treaties' effects. These were adopted, and thus the national judge was obliged to take into consideration their provisions, as EU norms and not as domestic norms. The fact that a Treaty becomes applicable on the basis of a parliamentary act does not mean that this act should be regarded as an act that emanates from it. Regarding the derived law and that raised from

²⁸ Simon Denys, *Le système juridique communautaire*, PUF, Paris, 1997, p. 200.

²⁹ Jean Marc Favret, *Droit et pratique de l'Union Européenne*, Gaulino, Paris, 2005, p. 396.

³⁰ Paul Mircea Cosmovici, *L'Union Européenne dans le labyrinthe de l'avenir problèmes fondamentaux*, Revista Romanian Journal of European Affairs nr. 3/2003, p. 14.

³¹ Formularea Curții – el (dreptul comunitar) face parte integrantă din...ordinea juridică aplicabilă pe teritoriul fiecăruia dintre statele membre.

³² Ion Filipescu, Augustin Fuerea, *Drept instituțional comunitar European*, p. 53-55.

foreign relations of the Communities, one can assert that the regulations cannot be admitted in the legal order of the States, indifferently if derives from the States, or if derives from the national systems with normative functions. There are no problems regarding monist States due to the fact that the mandatory force of the regulations' provisions is not subordinated to the intervention of the member States' authorities. .

On the other hand, the directions and decisions addressed to the member States, impose domestic measures of applicability, but, the ability of the States' organs is one of execution and not one of admittance. These documents are immediately applicable only by their publication in the Official Journal of the European Communities or by the case, by notification. Also, the foreign Agreements concluded by the European Union Council and published in the Official Journal of the European Communities are introduced in the domestic legal order without being necessary the ratification or the publication at the national level. The conclusion is that EU law integrates automatically in the domestic legal order- the integration system, which stays at the basis of the entire European Communities' activity- as the only international organization from the world that managed to apply it³³ .

However, it is necessary to mention that, although there is an opening towards international law, the evolution that took place, in the last years in the law field, did not have as a consequence the disappearance of the two schools – the monist and the dualist ones. The great development of international law in the last decades and the expansion of the domains in which treaties have been signed, created a situation in which the delimitation between international law and domestic law has become difficult, and the approaches of these two schools more gradate. In practice neither of these two theories in pure form is still applicable. There were introduced elements of flexibility both in the monist approach but also in the dualist one. What is more important is the fact that there is a tendency of taking into consideration the international element, even if we left aside the case of EU provisions, the constitutional provisions adopted in the last period and which establish the treaty regime in the domestic legislation should be taken into account, but moreover the fact that, in some cases the treaty prevails over the provisions from domestic law.

Despite these facts, those two ways of approaching did no disappear and maintain their essential traits and the issue regarding the manner in which a provision of a treaty can apply in the legal order of a State persists is raised in the same terms³⁴ .

³³ Augustin Fuerea, *op.cit*, p. 154-155.

³⁴ Ion M. Anghel, *Tratatul internațional și dreptul intern*, Editura Lumina Lex, București, 1999, p.