An Outlook on The Theories of Monism and Dualism within the Context of International Law

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This article was originally submitted as a seminar paper as part of the Philosophy of Law study-unit (CVL1024) and is being reproduced on the OLJ with the author's permission. In it, **Thomas Cilia** presents the two doctrines of legal monism and dualism in international law and explores their validity in today's legal world.

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1. Introduction: The Relationship between International Law and Domestic Law

International law consists of 'rules that govern the relations between the members of international society',[1] whilst national law applies at State level and regulates the conduct of State citizens between each other and with the State. Despite this difference, the interaction between both gives rise to a fascinating and complex interrelationship.

Various difficulties attach to the attempt to theorise such a relationship, as Gragl opines that this question 'is far from being definitively answered'.[2] Numerous factors, such as the fact that various matters are subject to both international and municipal legislation, have only helped to further complicate this conundrum.[3]

Attempts to define this relationship have given rise to the competing theories of legal monism and dualism.[4] These doctrines are central to paramount issues such as the solutions to normative conflicts and shall be explored hereunder.

2. Legal Monism within the Context of International Law

2.1 What is Legal Monism?

The doctrine of monism finds its basis in pure philosophy, as Parmenides of Elea initially professed that one single thing exists.[5] Amongst the various existing forms of monism, the prevalent philosophy in this context is that of predicational monism, conveying the notion that each unit that exists may only hold one predicate.[6]

Within the context of international law, monism denotes the idea that international law and domestic law, whilst being different entities, really form part of the same legal system.[7]

Exponents of this ideology demonstrate a refusal to view international and

[1] Ilias Bantekas and Efthymios Papastavridis, *International Law Concentrate: Law Revision and Study Guide* (5th edn, Oxford University Press 2021).
[2] Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (1st edn, Oxford University Press 2018).
[3] ibid 5.
[4] ibid.
[5] Gragl (n 2) 21.
[6] Patricia Kenig Curd, 'Parmenidean Monism' (1991) 36(3) Phronesis 241 <http://www.jstor.com/stable/4182390> accessed 19 April 2022.
[7] European Commission for Democracy through Law, 'Report on the implementation of international human rights treaties in domestic law and the role of courts, adopted by the Venice Commission at its 100th plenary session' Study No 690/2012 (8 December 2014) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)036-e> accessed 21 May 2022.

municipal law as two distinct legal orders, arguing that they form 'part of the same order' in the same way that 'contract law and criminal law […] are both part of the English legal system'.[8] Monism is clearly characterised by the exclusivity it affords to the overriding notion that law is to be understood as a united order whose validity may be derived from one source.[9]

A legal system's commitment to this approach may be identified in numerous manners. States such as the Netherlands, for example, have opted to make use of an 'incorporation clause', which is usually traceable to a nation's Constitution and utilised to signify that international law becomes part of a domestic legal order as soon as it enters into force. Thus, the Dutch Constitution states that '*Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published*'.[10]

Other sources of law, such as court judgments, may also shed light on adherence to monism, with the case of *Hungary v Slovak Republic*[11] representing an apparent shift towards monism by the Court of Justice of the European Union.[12] By whichever means used to arrive at this objective, the prevalent idea remains that of having a single legal system.

2.2 An Analysis of the Various Outlooks towards Legal Monism

Although every monist adheres to the idea of having a single legal order, there is no uniform concept of legal monism since this doctrine has been developed by different schools of thought. According to Gragl, various versions of monism may be characterised by unique features pertaining to their positivistic or non-positivistic nature, as well as the solutions they provide for situations of normative conflict.[13] Numerous theories regarding legal monism have been proposed, with each provoking considerable discussions.

Hegel, for instance, provides a radical non-positivistic approach towards monism, which further affords primacy to domestic law.[14] He favours the supremacy of national law over international law, as the latter's creation is only possible through the will of individual States.[15] Hegel's State-centred approach, enshrined in his view that the State is 'the absolute power on Earth',[16] also argues for the automatic invalidation of any treaty at odds with

[8] Bantekas and Papastavridis (n 1) 52.
[9] Gragl (n 2) 19.
[10] *De Grondwet*, Article 93.
[11] Case C-364/10 *Hungary v Slovak Republic* [2012] ECLI:EU:C:2012:630.
[12] G Ferreira and A Ferreira-Snyman, 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism' (2014) 17 Potchefstroom Elec LJ 1470.
[13] Gragl (n 2) 20.
[14] ibid 22-23.
[15] ibid.
[16] Georg Wilhelm Friedrich Hegel, *Hegel's Philosophy Of Right* (SW Dyde tr, 1st edn, G Bell 1896).

the aforementioned State wills.[17]

Non-positivistic monism may also hold international law to be superior to State law. Hugo Krabbe argued for the supremacy of international law on account of its wider range of addressees in comparison with national law.[18] A radicality similar to Hegel's is also evident in Krabbe's works, as his solution to normative conflicts effectively invalidates domestic law. This is clearly an unrealistic doctrine.[19]

Jellinek, like Hegel, argues in favour of a monistic approach favouring the primacy of national law; he contends that the positivistic foundation of international law mirrors that of State law, and only the State is truly a law-creating entity, with international law based on collective State wills.[20] International law is binding, according to Jellinek, on the basis of State law itself and the voluntariness of a State to subject itself to international law. Nevertheless, in situations wherein State interests are inhibited, such State may depart from the adherence to such obligations.[21] Interestingly, other philosophers, such as Wenzel, affirm the claim that international law is dependent on national law.[22]

Kelsen is indubitably a principal exponent of monism.[23] He views law as a science to which unity is central. Furthermore, this unity should apply to the relationship between international and domestic law, and according to Kelsen, dualism fails to explain this.[24] Consequently, monism appears to be the only possible explanation.

Kelsen views this monistic relationship in terms of a hierarchy of norms, a notion that is crucial to his overall legal philosophy. His views in this regard were not static so that, whilst the younger Kelsen expressed a devotion to the primacy of international law within a form of monism that ultimately invalidates domestic law violating international law on account of the latter's superiority in terms of the hierarchy of norms, his views became more moderate at a later stage, embracing the idea that domestic law violating international law does not lose validity until such law is properly abrogated through the relevant domestic legal mechanisms.[25] He also later professed that both versions of monism affording primacy to international law and national law are valid.[26]

[17] Gragl (n 2) 23.
[18] ibid 24.
[19] ibid.
[20] ibid 28.
[21] ibid 29.
[22] ibid.
[23] Joseph G Starke, 'Monism and Dualism in the Theory of International Law' in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon 1998).
[24] Torben Spaak, 'Kelsen on Monism and Dualism' in Milenko Kreća and Marko Novaković (eds), *Basic concepts of public international law : monism & dualism* (Faculty of Law, University of Belgrade, Institute of Comparative Law, Institute of International Politics and Economics 2013).
[25] Gragl (n 2) 32-33.
[26] ibid 33.

Whilst Kelsen's views are particularly respected, they remain susceptible to criticism. Particularly, the idea of the possibility of a choice between two different versions of monism has been criticised by George Scelle, who lamented that this leaves 'an impression of insecurity'.[27] Kunz and Ratnapala also disagree with this choice of hypothesis; whilst the former opines that the only possible hypothesis is that affording primacy to international law,[28] Ratnapala suggests that the legal unity in question may only be displayed through the supremacy of national law.[29]

2.3 Concluding Remarks

Monism has developed beyond the realms of pure philosophy into one of the principal legal doctrines which seeks to define the interrelationship between international and domestic law. Notwithstanding this fact, the doctrine leaves much to be desired in relation to a learned understanding of this relationship at present.

3. Legal Dualism: Dualism within the Context of International Law

3.1 What is Legal Dualism?

As opposed to legal monism, the cornerstone of the doctrine of dualism is the idea that there exist two kinds of things.[30] Applied to law, dualism embraces the idea of different legal orders as completely distinct,[31] even though such orders may regulate similar issues. In dualist States, provisions of international law are excluded from the national law unless they are duly incorporated into the national statute book.[32] Hence, in order for a treaty provision to be legally binding within a national jurisdiction, it must be incorporated into national law[33] via domestic legislation. Such incorporation into national law occurs through various means such as transformation, which is a literal incorporation of the international law, or adaptation, through which parts of a legal provision may be altered prior to entry within the national law.[34] Also, where international law is applied in national judgments without being transformed or adopted, the method of adoption is evident.[35]

A further difference between the two doctrines is apparent in relation to the approaches taken towards normative-conflict resolution; whilst monists argue that normative conflicts cannot exist within a unitary legal system since 'hierarchically superior norms always invalidate inferior norms'[36], dualists

[27] Starke (n 23) 546.
[28] ibid.
[29] Suri Ratnapala, *Jurisprudence* (2nd edn, Cambridge University Press 2013).
[30] 'Dualism' (*Plato.stanford.edu*, 2022) <https://plato.stanford.edu/entries/dualism/> accessed 20 April 2022.
[31] Gragl (n 2) 7.
[32] Ratnapala (n 29) 93.
[33] Gragl (n 2) 7.
[34] European Commission for Democracy through Law (n 7) 9.
[35] ibid.
[36] Gragl (n 2) 8.

resort to the 'domestic law itself and its rules of reference' in order to solve issues relating to normative conflicts.[37]

The Maltese legal system embraces a dualist approach. In fact, the Ratification of Treaties Act[38] provides that '*No provision of a treaty shall become, or be enforceable as, part of the law of Malta except by or under an Act of Parliament*'.[39] Consequently a treaty may not be enforced by a Maltese Court, unless this is transformed into municipal law.

3.2 An Analysis of the Various Outlooks towards Legal Dualism

Heinrich Triepel and Dionisio Anzilotti stand out amongst the various legal dualists who have attempted to theorise the relationship between domestic and international law. The former depicted such a relationship in true dualist fashion, contending that the two constitute completely independent legal systems.[40] This distinction is based on various features. Firstly, Triepel argues that a divergence exists in relation to those bound by these laws; whilst international law regulates inter-State relations, State law regulates all matters within a defined territory.[41] The sources of these differing bodies of law, Triepel opines, suggest a further dissimilarity, as whilst international law is based on the common will of the States, the source of State law emanates solely from the will of an individual State[42], as no other State can possibly dictate the laws of another State. Consequently, these differences lead to a further contrast pertaining to the substance of these different legal bodies.[43]

Triepel's ideas have been the subject of various criticisms. Starke, for instance, rejects the initial argument pertaining to the different addressees of these two legal bodies. The evolution of international law has led to a situation wherein the individual is increasingly seen as the vehicle through which rights and obligations are claimed, with Starke citing the replaced Brussels Slavery Convention of 1890, which delineates the sanctions applicable to those engaging in trade of slaves.[44] Therefore, difficulties in accepting Triepel's initial thesis are notable.

Anzilotti, whilst sharing common ideals with Triepel, also differs in some respects. Importantly, he supports the view that these separate legal bodies address different subjects; whilst international law 'govern[s] relations between coordinated and autonomous entities […] norms of municipal law govern relations within a society'.[45] Additionally, Anzilotti supports the notion that the hypothesis of these different normative orders is different; he views

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[37] ibid 7.
[38] Chapter 304 of the Laws of Malta.
[39] Ratification of Treaties Act, Chapter 304 of the Laws of Malta, Article 3(3).
[40] Ralf Poscher, 'Heinrich Triepel' in Arthur J Jacobson and Bernhard Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2001).
[41] Starke (n 23) 541.
[42] ibid.
[43] Gragl (n 2) 36.
[44] Starke (n 23) 542.
[45] Dionisio Anzilotti, *Scritti Di Diritto Internazionale Pubblico* (CEDAM 1956).

State law as being based on the principle of obeying the lawmaker's commands, and international law as being grounded on the maxim *pacta sunt servanda*,[46] essentially meaning that agreements, in this context between States, must be kept.

Objections to Anzilotti's comments have been made, particularly directed at the latter suggestion. The principal issue in this regard, is that such a hypothesis fails to accommodate for customary international law.[47] Furthermore, laws such as *ius cogens* norms, are commonly binding on States without their consent in terms of each and every individual norm.[48]

A distinguishing element in Anzilotti's philosophy is that 'he never carried his views to an extreme',[49] and quite contrarily, it may be disputed that he promoted strict dualism only to a certain extent, as he acknowledged that various domestic legal systems feature mechanisms, such as the doctrine of consistent interpretation,[50] that help to secure adherence with norms of international law. Dissimilarities between the two mentioned dualists, are therefore, noticeable.

3.3 Concluding Remarks

Legal dualism, although not without its critics, appears to be the more reasonable, plausible, and realistic depiction of the relationship between international and domestic law. This is a view which many theorists, such as those mentioned, have taken.

4. Conclusion: Monism and Dualism Today

Whilst the competing notions of monism and dualism were popularly debated, particularly in the preceding century,[51] one may note that they find themselves in a state of theoretical decay.

Criticism in relation to these doctrines has not been limited to the individual theories but has also targeted the dichotomy as a whole. Von Bogdandy, for instance, refers to the theories as 'intellectual zombies',[52] and argues that such explanatory theories are ineffective in their task of depicting the relationship between national and international law.[53] A significant element of criticism is that these theories fail to truly explain the workings of international and State law in modern practice. Moreover, one could hardly contend that a concept

[46] Gragl (n 2) 37.
[47] Starke (n 23) 544.
[48] Gragl (n 2) 39-40.
[49] Giorgio Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3 Eur J Int'l L 123.
[50] Gragl (n 2) 37.
[51] 'Monism And Dualism In International Law' (*obo*, 2022) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0168.xml> accessed 21 April 2022.
[52] Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 International Journal of Constitutional Law 397.
[53] Gragl (n 2) 42.

such as a ‘purely’ monist or dualist State exists[54] – most legal systems exhibit characteristics stemming from both theories in a hybrid-like fashion. These criticisms, in turn, have paved the way for other theories such as legal pluralism.[55]

Nevertheless, monism and dualism may still depict the attitude a national legal system exhibits in relation to international law, and as such both theories may still serve an academic use.[56] It is unsurprising, therefore, that monism and dualism still feature frequently in numerous textbooks pertaining to international law.

[54] ‘Monism And Dualism In International Law’ (n 51).
[55] Gragl (n 2) 42.
[56] ‘Monism And Dualism In International Law’ (n 51).

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