

International law and nationalism as two essentially related concepts

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Abstract

The principal aim of the present essay is to explore the relationship between international law and nationalism, whilst arguing that both concepts cannot be viewed as two separate and self-contained realities, but should rather be considered in light of their mutual interaction. The external actions of a nation are reflected internally. Similarly, its internal actions have external repercussions. In this work, such consequences are examined in a nation-state with an authoritarian structure as opposed to those found in a democratic nation-state. Additionally, the concept of nationalism is studied in its variant forms in both these contexts, leading to the premise that an aggressive and expansionist nation-state is unlikely to be guided by a constitution that places a high value on democracy and freedom. A nation which does not respect the liberties of its own nationals will undoubtedly disrespect other States and their nationals, and vice-versa. This begs the question: should international law be irresponsive and neutral in these cases?

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1. Introduction

Are international law and nationalism two completely self-contained and separated realities?

There may be those who would, at first sight, answer this question in the affirmative. I consider, however, that we should mistrust first impressions and rather seek to discover whether they are justified and on what they are based.

It is said that international law, as the name indicates, is basically concerned with relations between nations politically organised into States, and is situated in the ambit of their external affairs, whereas nationalism is internal in scope, the two being, therefore, clearly separate. I do not feel, however, that such an absolute distinction is acceptable. The separation between internal and external results from an incorrect and over-simplified perspective. The internal and the external are closely interrelated. What one nation-state does depends upon its position in relation to the others, and, at the same time, what the others do is a function of what the first does. The external attitude of a State is a projection of attitudes which are termed 'internal', and these may be dependent on the way in which the nations are organised externally. We are dealing, that is to say, with two sides of the same coin, which are essentially inseparable. It can be said that the *praxis* of a nation is simultaneously

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‘internal’ and ‘external’. As Mayall rightly affirms “It is...a mistake to draw a distinction between domestic principles of political legitimacy and those that obtain in international relations”². The external actions of a nation are reflected internally, and its internal actions are reflected externally. A nation-state with an authoritarian structure presents an external posture different from that of a democratic nation-state. An aggressive and expansionist nation-state is unlikely to be guided by a constitution that places a high value on democracy and freedom. A nation that does not respect the liberties of its own nationals will undoubtedly not respect those of other States and their nationals, and vice-versa. Therefore, the argument for the separation of the external and the internal does not stand. To give a specific example, we may remember that, as has been pointed out by some authors, including Charles A. Kupchan, nationalism was the principal cause of the 1914-18 and 1939-45 world wars, showing that nationalism can lead to a policy of war and aggression³.

2. Justice as fairness

On the other hand, in Rawls' view, for international relations to be guided by justice, which he equates with *fairness*, requires that the peoples that participate in such relations also have a just internal constitution themselves. The condition for a law of peoples is that each of the peoples integrated in such a law must have a liberal regime, or at least what may be termed a decent one. Rawls writes “The idea of public reason for the Society of Peoples is analogous to the idea of public reason in the domestic case”⁴. In “a reasonably just society”⁵, there must be “reasonable pluralism”⁶. “In the Society of Peoples, the parallel to reasonable pluralism is the diversity among reasonable peoples”⁷. “These peoples have their own internal governments, which may be constitutional liberal democracies or non-liberal but decent governments”⁸. Rawls goes on to clarify, “I use the term ‘decent’ to describe nonliberal societies whose basic institutions meet certain specified conditions of political right and justice (including the right of citizens to play a substantial role, say through associations and groups, in making political decisions) and lead their citizens to honor a reasonably just law for the Society of Peoples”⁹. As Tsagourias points out, for Rawls “It is only states which satisfy the principles of justice at the national level which enjoy international equal liberty, that is non-intervention”¹⁰.

² James Mayall, *Nationalism and international society* (Cambridge, Cambridge University Press, 1993), p. 26.

³ Charles A. Kupchan, *Introduction: Nationalism Resurgent* in Charles A. Kupchan (ed.), *Nationalism and Nationalities in the new Europe* (Ithaca, Cornell University Press, 1996), p. 3.

⁴ John Rawls, *The Law of Peoples*, (Cambridge, Massachusetts, Harvard University Press, 1999), p. 19.

⁵ *Ibid.*

⁶ *Ibid.*, at p. 18.

⁷ *Ibid.*, at p. 11.

⁸ *Ibid.*, at p. 3.

⁹ *Ibid.*

¹⁰ Nikolaos K. Tsagourias, *Jurisprudence of international law*, (Manchester University Press, 2000), p. 23.

3. International law and domestic justice

Passing on from Rawls, Tesón may also be referred to as one of the firmest defenders of the thesis that “international law and domestic justice are fundamentally connected”¹¹.

Bearing in mind that the maintenance of peace, respect for treaties, and mutual non-aggression among nations are the dominant concerns of international law, it will be shown that nationalism may come into conflict with all of these. There are no self-contained realities here. We should not forget, however, that what Kupchan says is that nationalism can give rise to belligerency and aggression, not that, *a fortiori*, it must do so. This raises the question, in what circumstances will this occur? It is this question that has led me to a deeper and more rigorous study of nationalism in its different forms and examples.

The law allows for the foundation of nations, as a manifestation of human freedom, giving legitimacy, in these circumstances, to loyalty and fidelity to the nation. This fidelity and loyalty is nationalism, a nationalism of personalist origins because it is based on law (for me a synonym of natural law) directed by justice, which ordains respect for the freedom of individuals and groups¹². As Carty says “It is imperative for the international lawyer to understand the phenomenon of nationalism, if only because its appearance in the form of the right to self-determination touches upon so many aspects of what is commonly regarded as the province of international law. Any other course will involve him in self-denying limitations which will usually take the form of supposed distinctions between law and politics taking him away from concrete investigation of the possibilities for obligation in international relations”¹³.

4. Suprapersonalist nationalism

It may happen that the group-nation takes upon itself divine status, in effect using human freedom to reject justice. This represents an alienation of this freedom, giving rise to something that will metaphorically devour it. The nation-states are considered absolute, acknowledging no restrictions. Or, if they are not considered absolute, they are believed to rank immediately after the absolute. Such a

¹¹ Fernando Tésón, *A Philosophy of International Law*, (Boulder, Westview Press, 1998), p. 1. With a view to showing the connection between international law and the internal regime of a nation see also, e.g., William J. Aceves, “Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation” 41 *Harvard International Law Journal* (2000).

¹² On the personalist conception of nationalism see e.g. James Mayall, *Nationalism and international society* (Cambridge, Cambridge University Press, 1993), pp. 50f.; Anthony D. Smith, *Nations and Nationalism in a Global Era* (Cambridge, Polity Press, 1995), pp. 147f.; David Miller *On Nationality* (Oxford, Oxford University Press, 1999), pp. 61f.; David P. Calleo, “Reflections on the Idea of the Nation-State” in Charles A. Kupchan (ed.), *Nationalism and Nationalities in the new Europe* (Ithaca, Cornell University Press, 1996), pp. 29f.

¹³ Anthony Carty, *The decay of international law?* (Manchester, Manchester University Press, 1986), p. 36.

nationalism, termed suprapersonalist¹⁴, comes immediately into conflict with international law, on the one hand, to the degree to which the latter implies the mutual recognition of nation-states, and, on the other, because international law demands that each nation respect the freedom of the individual subjects who form its basis. Such a nationalism, inasmuch as it justifies aggressions and tyrannies, constitutes a threat to international law and must be condemned by such law, because the latter is an *ought to be* based on justice, which seeks to impose itself by coercion, even though this coercion often does not succeed and does not have a similar positivity, such as, for example, criminal law.

5. The role of international law

International law, being a law between nation-states, based on a conception of *value* that is a unity of multiplicities, must involve the justification of personalist nationalism, as representing the right to existence of the various national groups, multiple elements of the unity which ensures their mutual respect. In this sense, nationalisms of this type are children of international law, and no theory of the latter would be complete that failed to consider and approve such nationalisms. Equally, this theory must direct its reflections towards the supra-personalist nationalisms, because these represent, in the above analogy, a son who has risen up against his father. The relationship between unity and multiplicity, which forms the foundation of international law, is here distorted, and this question must be confronted, otherwise one of the salient aspects of this law would be insufficiently considered. Supra-personalist nationalism makes each nation-state an entity that absorbs the plurality of its human subjects. At the same time, it makes each nation-state an element that is not submissive to any unity, thus turning it into a factor of international anarchy. It is the responsibility of international law to remedy this; by not doing so it contradicts its very essence. It is incumbent upon international law to unite the nation-states in mutual respect for their autonomy and, at the same time, to require from each of them respect for their human subjects and for the smaller groups that those subjects, exercising their rights, freely choose to form. Respect for human rights is an imperative of international law, always consistent with order, balance, and harmony (that is, with justice). It might be said that the study that I propose to make is mere theory¹⁵, without any practical interest. More thoughtful consideration, however, acknowledges that theory, in itself, as a contemplation of the truth, must

¹⁴ A typical example of suprapersonalist nationalism was the *Action Française* of Charles Maurras, which inspired the *Associazione Nazionalista Italiana*, the *Acción Española*, the *Integralismo Lusitano* and other lesser movements. On the relationship between Fascism and Nazism with nationalism see, e. g., Anthony D. Smith, *Theories of nationalism* (London, Duckworth, 1983), pp. 4, 5 and Appendix B.

¹⁵ On the importance of theoretical analysis within international law see, e.g., Patrick Capps, "Incommensurability, Purposivity and International Law" 11 *EJIL* (2000), p. 638. "international lawyers *must rationally* take account of theoretical issues...of theoretical concerns if their descriptions of empirical reality are to be justifiable or possess validity...the solution...requires a theory of international law that is rationally defensible".

not be put aside or separated from practical interests. To live without seeking truth is to live irrationally, responding to whims and passions, without framework or limits. Moreover, quite apart from these considerations, it can be argued that this study has substantial practical relevance. Less than a century ago, exacerbated nationalisms cast the world into a catastrophe of unprecedented proportions. International law was set aside and violated without scruples. This example immediately raises the question: to which international law am I referring? One that is merely positive? In that case, a nation-state which claims intrinsic superiority may embark on limitless expansion, and justify it in the name of international law. The theory of international law that I seek to develop, in which the idea of *value* is central, is the one that can be presented against aggressive nationalism that either calls its pretensions ‘international law’, or simply disregards that law. A well-founded condemnation of supra-personalist nationalism cannot be formulated from the simple fact of being, with effectiveness and validity, that is, from positivity. Instead, this condemnation should rather look on supra-personalist nationalism from a jusnaturalist perspective that indicates what *ought to be* and does not restrict itself to the mere positive fact. What enables us to distinguish between the legitimate nationalism of oppressed peoples and the nationalisms without restraint whose objective is to enslave other nations, if not international law based upon logically irrefutable principles, not upon mere articles and paragraphs of positive law, which may represent only what is effective, which was based upon brute force or demented support (or both) as in the case of Nazism?

Would a rational, philosophical solution to these problems have no practical interest? If not, it would, effectively, leave the practical in the hands of blind chance, of *fortuna* as Machiavelli said¹⁶.

Does international law have nothing to do with nationalism? Does international law, then, have nothing to do with the conduct of nations? And does this conduct have nothing to do with the way nations are organised? Such arguments would turn a blind eye to what has, since Kant’s *Perpetual Peace*¹⁷, been clearly shown. Does ‘theory’ necessarily mean that we observe without taking action? Was it not through despising and disregarding the correct theories that international affairs reached historic depths in the last century? Nor are these questions only for the last century. Contemporary examples, in Austria¹⁸, and later in Norway, show that we still face renewed and present threats. The sudden growth of Islamophobia warrants the concern of the entire international community. Indeed, “A face of Norwegian openness - its tolerance of diversity - was one of the things that fuelled Mr Breivik’s mass slaughter. The Labour Party, the dominant force in Norwegian politics for decades, came into his cross-hairs because of its staunch defence of both

¹⁶ Niccolò Machiavelli, “Il Principe”, in *Opere, a cura di Mario Bonfantini* (Milano, Napoli, Riccardo Ricciardi Editore, 1945), p. 5 “acquistonsi...o per fortuna o per virtù”. He also refers to *fortuna* on pages 4, 8, 21.

¹⁷ I. Kant, *Perpetual Peace*, trs. by L. Beck (Englewood Cliffs, Macmillan, 1957).

¹⁸ Richard Burchill, “The Promotion and Protection of Democracy by Regional Organizations in Europe: The Case of Austria” 7 *European Public Law* (2001).

diversity and tolerance. AUF, the party youth wing that organised the camp on Utoya island, was a doubly attractive target in his twisted ideology: it is fervently anti-racist and many members come from Norway's ethnic minorities.”¹⁹. We need to know how to oppose those totalitarian threats with theoretically solid strategies. It is not enough to offer mere exegeses of positive norms, which change as the wills that give them positivity change, without a safe compass to point the way. Of course, having a compass does not, in itself, ensure that the right path will be followed. But it is certain that without the compass, we cannot follow the path, and disorientation will reign.

As previously mentioned, we can find throughout history an individualist or personalist type of nationalism that is totally compatible with the concept of international law espoused in the course of this study. In the case of Switzerland, for example, the unifying factor was neither race nor language, but rather the free will of its people. The initial confederation gathered men of German, French and Italian origins, speaking their own languages and respecting each other. It became a country of four official languages – German, French, Italian, and Romansch – although in practice only the first three languages are common. In addition to language, other factors could have caused division. The different religions that separate the several cantons have not managed to question the consistency of the initial confederation. In 1938, when Switzerland had borders with totalitarian countries, such as Germany and Italy, the Federal Council addressed a message to all citizens in which it was stated: “Our Swiss democracy has been built up...from the smaller units to the larger units, from the township to the canton, and from the canton to the federal state. Next to federalism and democracy, Switzerland is based upon respect for the dignity of the individual. The respect for the right and liberty of human personality is so deeply anchored in the Swiss idea, that we can regard it as its basic concept and can proclaim its defence as an essential task of the nation”²⁰. Swiss, as well as North-American nationalism, represent paradigms of an individualist type of nationalism. Nations, regarded within this perspective, arose from the two great Western revolutions, the American and the French. For example, the French crowds gathered with cries of *vive la nation* for the *Fête de la Fédération*. As for the Americans, they also consider the nation to be synonymous with the people. We see, for example, in the constitution of Vermont “That all power being originally inherent in, and consequently, derived from the people”²¹ and in the constitution of Massachusetts “The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State”²², the wording of Part I, Art. VII of the New Hampshire constitution being almost identical²³. And it is not difficult to recognize a similar position in Amendments IX, X and XV of the

¹⁹ *The Economist*, July 30th, 2011, p. 18.

²⁰ Hans Kohn, *Nationalism and Liberty. The Swiss Example* (Westport, Connecticut, Greenwood Press Publishers, 1978), p. 129.

²¹ Bilingual edition (Italian/English) by Felice Battaglia, *Le carte dei diritti a cura di Felice Battaglia*, (Firenze, Sansoni, 1947), Ch. 1, V, p. 47.

²² *Ibid.*, at Part the First, Art. 1, p. 83.

²³ *Ibid.*, at p. 93.

constitution of the United States²⁴. Here we have a clear recognition of nations as associations of individuals who decide their own destinies.

Kazakhstan may also be regarded as a nation that has embraced individualist or personalist nationalism, as defined in this study. The people of Kazakhstan, known as the Kazakhstani, comprise several different ethnic groups, among them Kazakhs (60%), Russians (30%), Ukrainians (3%) and Uzbeks (2%). The Kazakh language is spoken by the vast majority of people (64%), while Russian is also in wide usage. In addition, English is becoming increasingly significant within the country's multicultural context. With regard to religion, Muslims account for more than half the country's population, with Russian Orthodox Christians coming in a close second at 40%. It is also important to note the existence of a considerable number of synagogues. Such diversity represents a society which displays tolerance at all levels, including religious. It may be relevant to emphasize that Kazakhstan is a predominantly Muslim society which has demonstrated a notable degree of tolerance towards other faiths. Similar religious tolerance was found in the 8th century during the occupation of the Iberian Peninsula by the Arabs. During this period, the so called *ahl al-kitab* or 'people of the Book' (the Bible or the Torah), that is, the Christians and Jews, were not forced to convert to Islam but rather allowed to maintain their own faith²⁵. John Rawls, an American philosopher who, as previously mentioned, was a strong supporter of liberal democracy, "showed how people who differ over metaphysics – say Catholics and atheists – can coexist politically on the basis of a deep compromise, on certain conditions. They must believe in reason, and see the political system as reasonable in their own terms. Mohammed Fadel, an Egyptian born political scientist at the University of Toronto, has argued that Islam – even in conservative readings – can find a happy place in a Rawls-style democracy. In medieval times, he recalls, Islamic thought divided between the Mutazilites, who stressed human reason, and the ultimately victorious Asharites who thought that God alone could adjudicate right and wrong. But even within the latter school, there is some place for human reason – enough to make it possible for conservative Muslims to live quite comfortably in a Rawlsian world."²⁶ Furthermore, "Vali Nasr, an American political scientist, thinks Western Islam watchers put too much stress on philosophy and not enough on social and economic factors. In his view, wherever the middle class is strong (as in Turkey), it will re-emphasize the moral rules of Islam – over honest trading, say – and downgrade Islam's real or imagined prescriptions for politics and law."²⁷

6. Conclusion

Only a conception of nation based on the free choice of men deserves full respect. It should not be rooted only in the right of association. It is unquestionable

²⁴ *Ibid*, at pp. 103-105.

²⁵ M. J. Almeida Costa, *História do Direito Português* (Coimbra, Almedina, 2010), p. 172.

²⁶ *The Economist*, August 6th, 2011, p. 21.

²⁷ *Ibid*

that all rights are inseparable and they are all based on the freedom of man. Both freedom of association and freedom of thought (including of expression and religion) are needed because the latter without the former would be *ab initio* limited in its options. On the other hand, freedom of association implies political freedom because without suffrage and free elections the former could not exist as those associations – the political parties - which play such important roles in modern societies would be banned. And the reciprocal would also apply. Without providing detailed explanation, I would like to assert that it is obvious to our understanding that suffrage and free elections without freedom of association (groups and political parties), of thought and expression is a farce as was pointed out so well by Kelsen²⁸, and confirmed by history with the plebiscite and pseudo-choice of representatives in Nazi Germany and Fascist Italy. In the unity within multiplicity formula that I defend there is a place for a true nationalism, which can be called individualist or ‘civic’ (to use the terminology of MacCormick²⁹). In this type of nationalism, there is a place for diverse races, cultures, languages and religions that should be treated without discrimination precisely because they should be regarded as equally human without any prevailing or defining character as to how a nation should be.

Bibliography

1. Aceves, William J., “Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation” *Harvard International Law Journal* (2000), vol. 41.
2. Almeida Costa, M.J., *História do Direito Português* (Coimbra, Almedina, 2010).
3. Burchill, Richard, “The Promotion and Protection of Democracy by Regional Organizations in Europe: The Case of Austria”, *European Public Law* (2001), vol. 7, pp. 79-102.
4. David P. Calleo, David P., “Reflections on the Idea of the Nation-State” in Charles A. Kupchan (ed.), *Nationalism and Nationalities in the new Europe* (Ithaca, Cornell University Press, 1996).
5. Capps, Patrick, “Incommensurability, Purposivity and International Law” *European Journal of International Law* (2000), vol. 11, pp. 637-661.
6. Carty, Anthony, *The decay of international law?* (Manchester, Manchester University Press, 1986).
7. Gellner, Ernest, *Nations and nationalism* (Oxford, Blackwell, 1992).
8. Kant, I., *Perpetual Peace*, trs. by L. Beck (Englewood-Cliffs, Macmillan, 1957).
9. Kelsen, Hans, *Esencia y valor de la democracia*, trs. by Rafael Tapia and Luis Legaz y Lacambra (Barcelona, Editorial Labor S.A., 1934).
10. Kohn, Hans, *Nationalism and Liberty: The Swiss Example* (Westport, Connecticut, Greenwood Press Publishers, 1978).
11. Kupchan, Charles A., “Introduction: Nationalism Resurgent” in Charles A. Kupchan (ed.) *Nationalism and Nationalities in the new Europe* (Ithaca, Cornell University Press, 1996).

²⁸ Hans Kelsen, *Esencia y valor de la Democracia*, trs. by Rafael Tapia and Luis Legaz y Lacambra (Barcelona, Editorial Labor, S.A., 1934), p. 141.

²⁹ Neil MacCormick, *Questioning Sovereignty* (Oxford, Oxford University Press, 1999), p. 169.

12. Felice Battaglia, *Le carte dei diritti a cura di Felice Battaglia*, (Firenze, Sansoni, 1947).
13. MacCormick, Neil, *Questioning Sovereignty* (Oxford, Oxford University Press, 1999).
14. Machiavelli, Niccolò, "Il Principe" in *Opere, a cura di Mario Bonfantini* (Milano, Napoli, Riccardo Ricciardi Editore, 1945).
15. Mayall, James, *Nationalism and international society* (Cambridge, Cambridge University Press, 1993).
16. Miller, David, *On Nationality* (Oxford, Oxford University Press, 1999).
17. Rawls, John, *The Law of Peoples* (Cambridge, Massachusetts, Harvard University Press, 1999).
18. Smith, Anthony D., *Nations and nationalism in a global era* (Cambridge, Polity Press, 1995).
19. Smith, Anthony D., *Theories of nationalism* (London, Duckworth, 1983).
20. Tésón, Fernando R., *A Philosophy of International Law* (Boulder, Westview Press, 1998).
21. Tsagourias, Nikolaos K., *Jurisprudence of international law*, (Manchester University Press, 2000).