Positive Law and International Law

Author(s): Roberto Ago

Source: *The American Journal of International Law*, Oct., 1957, Vol. 51, No. 4 (Oct., 1957), pp. 691-733

Published by: Cambridge University Press

Stable URL: http://www.jstor.com/stable/2195350



# POSITIVE LAW AND INTERNATIONAL LAW *

By Roberto Ago

*Professor of International Law, University of Rome*

1. One of the most representative authors of modern analytical philosophy, T. D. Weldon,[1] has pointed out recently how he and his English and American colleagues have come to realize that many of the problems which their predecessors found insuperable arise not from something mysterious or inexplicable in the world around them, but from the peculiarities of the language with which we try to describe the world itself. This Oxford philosopher remarks that many errors in political doctrine and in various branches of philosophy are caused by "carelessness over the implications of language." This carelessness, he goes on to say, is often due to the mistaken idea that words, and especially the words that normally recur in discussions on matters of political doctrine, have an intrinsic and essential meaning of their own, more or less in the same way as children have parents. But in fact words only have a use: to know their meaning is to know how to use them correctly "in such a way as to be generally intelligible, in ordinary and technical discourse."

This obvious and time-honored truth [2] may be usefully repeated in the field of law as well as in that of politics or philosophy; care over language is no greater in the former than it should be in the latter. It is easily forgotten that words have no meaning of their own, endowed with an objective existence which one has only to specify in order to ensure exact understanding; that they only have the meaning which is conferred on

* Translation by Miss Judith A. Hammond of the article, "Diritto Positivo e Diritto Internazionale," in Vol. I, of Studi in Onore di Tomaso Perassi. It appears in German in Vol. 6 of the Archiv des Völkerrechts, No. 3 (August, 1957), at pp. 257–307.

[1] T. D. Weldon, The Vocabulary of Politics. An Enquiry into the Use and Abuse of Language in the Making of Political Theories 9 ff. (London, 1953).

[2] Another philosopher of the same school, L. S. Stebbing, Logic in Practice 51 ff. (4th ed., London, 1954), recalls how Aristotle first noted that words are only sounds to which a meaning is conventionally attributed. And yet, she observes, it is important to stress this "conventional element," because there is a tendency to forget it, and therefore not be sufficiently aware of the fact that meaning does not belong to the verbal sign as such, but only "to the sign as used." The author then gives a series of typical examples, both political and economic, of the confusion in thought caused in discussions by those taking part using the same word and giving it different meanings, often without warning.

In Italy Bobbio, "Scienza del diritto e analisi del linguaggio," in 1950 Riv. trim. di dir. e proc. civile 342 ff., and Scarpelli, Filosofia analitica e giurisprudenza 9 ff. (Milan, 1953), have pointed out the importance for legal science of this analysis of language carried out by analytical philosophy, founded as it is on the desire to control the use of language more strictly in order to introduce more exactitude into speech and to avoid ambiguities and misunderstandings.

them by use; and that therefore one must use them with the greatest care if the meaning one wishes to convey is to be correctly understood. Words are often not used in their sense which, being correspondent to the original etymological meaning of the word or, more especially, to the traditional and common use of it, is in fact more correct, because more apt to facilitate understanding and avoid ambiguity. So it often happens that discussions are falsified because different authors make use of the same term but give it different meanings, or on the other hand because they use different terms to mean the same thing. Further complications arise when an author uses the same word with different meanings without being aware of it, or at any rate without warning his reader. In all these cases the utility of scientific dialogue and of the confrontation of ideas is considerably compromised.

It seems appropriate to recall this before beginning a paper on the subject of positive law and international law, not only because, if these expressions are not clearly understood, it is vain to embark on an examination of the question, but also and more particularly because ambiguity of language is certainly at the root of some of the disputes which have developed and are still developing on the subject, and the ambiguity which has unfortunately crept into the use of certain terms is undoubtedly not one of the least considerable reasons for the difficulties which many continue to meet in discussing the subject with which this paper is concerned.

2. According to legal historians the term "*jus positivum*" is probably of mediaeval origin. In a passage of the *Summa decretalium* by the Bolognese Canonist, Damaso, published between 1210 and 1215, Kantorowicz came across an early definition of "*jus positivum*" as "*expositum ab homine.*"[3] Kuttner found the same term used by a number of mediaeval authors prior to Damaso, amongst whom is Abelard, whose definition of "positive" law he quotes as "*quod ab hominibus institutum.*"[4] Basing himself on these texts he comes to the conclusion that the Canonists of the Middle Ages used the words "*jus positivum*" to make a distinction between natural law and "*toutes les lois dont l'origine remonte à un acte législatif, comme par exemple les commandements que Dieu donna au peuple juif par la bouche de Moïse, ou les lois civiles et les 'canones'.*"[5]

Keeping close to the mediaeval Canonist tradition and basing itself directly on the etymology of the word, the internationalist doctrine of the 17th and 18th centuries always understood positive law to be that part of law which is laid down by exterior creative bodies set up for that purpose.

[3] The passage from Damaso, quoted by Kantorowicz, is the following: "Juris autem species sunt duae. Est enim jus naturale, quod natura animalia docuit. . . . Est etiam jus positivum sive expositum (lies: positum?) ab homine, ut sunt leges seculares et constitutiones ecclesiasticae." V. Kantorowicz, "Das Principium decretalium des Johannes de Deo," n. in 12 Zeitschrift der Savigny-Stiftung f. Rechtsgeschichte (Kan. Abt.) 440 and f. (1922); and Damasus, n., 16 *ibid.* 332 (1927).

[4] St. Kuttner, "Sur les origines du terme droit positif," in 15 Revue hist. du droit français et étranger (4 Sér.) 730 (1936). The definition quoted is given by Abelard in his dialogue *Inter Philosophum, Judaeum et Christianum:* "Jus quippe aliud naturale, aliud positivum dicitur. Naturale quidem jus est. . . . Positivae autem justitiae quod ab hominibus institutum, ad utilitatem scil. vel honestatem tutius muniendam, aut sola consuetudine aut scripti nititur auctoritate. . . ."

[5] *Ibid.* 728.

Pointing out the identity of the terms *"lex positiva"* and *"jus positum"* mentioned by Connan in his *Commentaria iuris civilis,* Suárez defined positive law as:

> *illam legam vocari positivam, quae non est innata cum natura, vel gratia, sed ultra illas ab aliquo principio extrinseco habente potestatem posita est.*

And he added: *"inde enim positiva dicta est, quasi addita naturali legi, non ex illa necessario manans."*[6] If, however, Grotius did not use the term *"jus positivum"* but *"jus voluntarium"*[7] it is only because, having been inspired by the same Aristotelian source as Suárez and in agreement with him, he saw in the "positing" of a law an act not only of intelligence but also necessarily of will. Later on Rachel uses the term *"jus positivum"* as a synonym for those words he uses more frequently: *"jus legitimum"* of Aristotelian origin and especially *"jus arbitrarium."* By the last he means to stress both the origin of this part of law *"a legislatorum libera voluntate,"* and particularly in the case of international law, *"a pasciscentium vel contrahentium libera voluntate,"* and its discretional nature and its being inspired by a practical criterion of social utility rather than the protection of a higher moral requirement.[8] After this the use of the term "positive law" to indicate law which is created by an act of will became widespread; and those who continued the Grotian tradition in the 18th century, from Christian Wolff to Emer de Vattel and George Frederick de Martens, were agreed that "positive international law" within the body of law in force in international society is that part of law which is laid down by the tacit and expressed consent of the different states.[9]

[6] F. Suárez, *Tractatus de legibus ac Deo legislatore,* Conimbricae, 1612, phot. repr. in The Classics of International Law. Selections from three works of Francisco Suárez (Washington, 1944), lib. I, cap. III, 13, p. 18. In the following paragraph 14 Suárez then divides "lex positiva" into "divina" and "humana," according to the Canonist tradition, deducing the distinction "a proximo principio unde manat."

[7] H. Grotii, *De jure belli ac pacis libri tres* (ed. Amstelaedami, MDCCXX), *Prolegomena,* 12, p. X and ff.; 15, pp. XII and ff.; and lib. I, cap. I, XIV & XV, p. 17 and f. "Jus voluntarium" differs from "jus naturale" by its origin, and is divided by Grotius, too, into "Divinum" and "Humanum." Leibnitz also speaks of a "jus voluntarium" as distinct from natural law, and "receptum moribus vel a superiore constitutum"; see Leibnitz, *Codex Juris Gentium Diplomaticus* (Hannoverae, MDCXCIII), *Praefatio ad Lectorem,* p. 8.

[8] S. Rachelii, *De jure naturae et gentium dissertationes,* Kiloni, MDCLXXVI, phot. repr. in The Classics of International Law (ed. by L. v. Bar, Washington, 1916), *diss. prima,* II–III, p. 2 and f.; VIII–IX, p. 5 and f., LVIII, p. 55; *diss. altera,* I–V, pp. 233 and ff.; XCII, p. 308; etc.

[9] According to Wolff, *Jus gentium methodo scientifica pertractatum,* ed. acc., Francofurti et Lispiae, MDCCLXIV, phot. repr. in The Classics of International Law (ed. O. Nippold, Oxford, 1934), *Prolegomena,* § 25, pp. 8 and ff., *"Jus gentium positivum* dicitur quod a voluntate Gentium ortum trahit." This voluntary law differs from "jus gentium necessarium," "internum," "naturale," on which it is based (see also Wolff, *Institutiones juris naturae et gentium,* Venetiis, MDCCXCII, pars quarta, cap. I, §§ 1089–1090, p. 374 and ff.) and it includes law which originates in the presumed (jus voluntarium), expressed (jus pactitium) or tacit consent (jus consuetudinarium)

It is also well known that the writers of this school and many others who follow them throughout the 19th century, do not consider that the law of the society of states differs in composition from that of the separate national societies; both are made up partly of natural law and partly of positive or voluntary law,[10] this last being able to be created by the tacit or express consent of the different *"Gentes"* no less than by the unilateral will of an internal legislator. In other words, this dualistic composition

of states. The tripartition of consent used by Wolff is the one already indicated by Rachel, *De jure naturae, op. cit., diss. altera,* X, pp. 242 and ff., who had distinguished between the "commune" and the "proprium" (particulare) in the "jus gentium" (arbitrarium). For Wolff too "jus voluntarium" is common on the basis of the presumption that *"maxima pro voluntate omnium gentium habendum erat, quod maiori eorum parti visum fuerit" (Jus gentium, op. cit.* § 20, p. 7), while both "jus pactitium" and "jus consuetudinarium" are "jus particulare" (§§ 23 & 24, p. 8). Giuliano, *"La comunità internazionale e il diritto,"* in Pubblicazioni della S. I. O. I., Studi, III (Padua, 1950), pp. 35, 61, going back partly to points made by von Ompteda and Nippold, observes that Wolff's "jus gentium voluntarium" is "voluntarium" only by virtue of the imaginary "Civitas Maxima" with a Rector at its head who is endowed with the power of laying down laws, and that it is therefore voluntary only in name. This objection can be allowed if it is understood that Wolff includes under voluntary law a law which would be defined today as non-voluntary; and it would also stand for Wolff's "jus consuetudinarium" and for the "jus voluntarium" of Grotius and those 17th, 18th and 19th-century authors who base customary law on the consent of states. Giuliano maintains (p. 27) that the "consensus" would not have been understood by the whole of classical doctrine to be a manifestation of will so much as a manifestation of psychological feeling, the "common sentiment" of the peoples. Put in these words, however, the assertion needs some reservations, no less than the parallel affirmation (pp. 19, 35) which is that in Wolff and in Vattel, the *Jus naturae* would no longer fulfill a precise function within the scientific construction of the international order. However, the interesting thing for us is that Wolff qualifies "jus voluntarium" as "positive" only insofar as he can show it to be voluntary in some way, by making it derive from the presumed consent of states.

The division of law adopted by Vattel is identical with that of Wolff; see Vattel, Le Droit des gens ou principes de la loi naturelle appliquée à la conduite et aux affaires des Souverains (nouv. éd. par P. Pradier-Fodéré), Tome I (Paris, 1863), *Préliminaires,* § 27, pp. 105 and f. For C. F. De Martens, Précis du droit des gens moderne de l'Europe (2ème éd. par Ch. Vergé), Tome premier (Paris, 1864), Introduction, §§ 5, 6, p. 44 and ff., the "droit des gens positif et particulier" rests on tacit or recognized conventions or on simple customs, but is distinguished from the "droit des nations naturel, universel et nécessaire."

[10] See for example Klüber, Droit des gens moderne de l'Europe 1 and f. (nouv. éd., Paris, 1861), for "Ce droit (des Nations) est *naturel,* en tant qu'il dérive de la nature même des relations qui subsistent entre les États, *positif* lorsqu'il est fondé sur des conventions expresses ou tacites." The adjective "positive" is used similarly in the thought of the 19th century to indicate the particular part of international law in force which is produced by the consent of states, as opposed to that part for which the adjective "natural" or "necessary" is reserved. See Manning, Commentaries on the Law of Nations 66 (new ed. by S. Amos, London, 1875); Sir Robert Phillimore, 1 Commentaries upon International Law (3rd ed., London, 1879), c. III, XXII, p. 15; Travers Twiss, 1 Le droit des gens ou des nations (nouv. éd. rev., Paris, 1887), Ch. VI, p. 134 (this author uses "positif" and "établi" as synonyms); Fiore, 1 Trattato di diritto internazionale pubblico (4th corr. ed., Turin, 1904), cap. II, pp. 115 and f. (Fiore defines positive law as *"jus positum"*); 1 Ferguson, Manual of International Law 63 (London, 1884); Bonfils-Fauchille, 1 Traité de droit international public (8th ed. rev.), Pt. I, 22 (Paris, 1922).

is held to be typical of the law in force in both types of society, and in both it is positive law which depends for its existence on natural law, because it is a norm of natural law which confers the power to set up obligatory norms on the will of the national legislator on the one hand, and on the consent of the states on the other.

3. One cannot say that the substantial unity of the idea of international law in the thought of the 18th and 19th centuries was impaired because a different attitude towards the problem of the relationship between positive and international law was taken by the school which denied the existence of a "positive" part of international law and saw this as composed entirely of *"jus naturale."* The idea of positive law followed by this school did not differ in fact from that of Suárez and Grotius in substance but only perhaps in scope. For Pufendorf *"jus positivum"* meant still and more than ever law laid down by voluntary acts; furthermore, under the influence of Hobbesian [11] ideas, he regarded as a voluntary act capable of creating positive law only the emanation of a precept from a superior legislator, and not an agreement between different sovereign states.[12] It follows that Suárez' and Grotius' dual idea of natural law-positive law, admitted by Pufendorf in the case of national law, was denied by him in that of the law of the society of nations, which he held only to be natural law.

If positive law thus came to be excluded from the field of international law,[13] it is due to the fact—the consequences of which will not fail to be felt in later thought—that the scope of the concept of positive law had become narrower. But this did not prevent Pufendorf's thought from resembling that of those predecessors whom he contradicted. For him as for

[11] T. Hobbes in Leviathan (London, 1651, re-ed. by M. Oakeshott, Oxford), Part 2, Ch. 26, 7, p. 186, had divided laws into natural and positive, defining the latter as "those which . . . have been made laws by the will of those that have had the sovereign power over others."

[12] S. Pufendorfii, *De jure naturae et gentium libri octo* (ed. ult. Amstelodami, MDCLXXXVIII), phot. repr. in The Classics of International Law (ed. W. Simons, Oxford, 1934), lib. I, cap. VI, § 18, p. 77: "lex . . . dividitur in *naturalem* et positivam . . . haec est . . . quae ab solo legislatoris arbitrio proficiscitur." After this the author goes on to deny "positivum aliquod jus gentium, a superiore profecto." Hobbes' and Pufendorf's ideas on the exclusion of the existence of a "jus gentium positivum" are shared by various writers: see C. Thomasii, *Fundamenta juris naturae et gentium ex sensu communi deducta* (Halae et Lipsiae, MDCCXIII), lib. I, c. V., §§ XXIX–XXXIV, p. 108 f., §§ LXV–LXXVIII, p. 115 f.; J. W. Textoris, *Synopsis juris gentium* (Basileae, MDCLXXX), phot. repr. in The Classics of International Law (ed. L. v. Bar, Washington, 1916), cap. II, 4–6, p. 9; J. Barbeyrac, in the notes on the translation of Le droit de la guerre et de la paix par Hugues Grotius, tome premier (Basle, MDCCLXVIII), p. 56, n. 3; and also substantially T. Rutherforth, Institutes of Natural Law (Cambridge, MDCCLIV–LVI), Vol. First, Ch. I, V, p. 8; Vol. Second, Ch. IX, I, pp. 462 ff.

[13] With this conclusion Pufendorf and his followers did not intend to deny the legal character of international law as Giuliano has quite rightly pointed out in La comunità internazionale, *op. cit.*, pp. 33 f., 75 f., showing that for these writers "jus positivum" was only a *kind,* an aspect, a *form* of law. Therefore if the norms followed in relations between states were norms *jus naturale,* this only meant that they were norms of another type of law, but still of law.

them it was the fact that law comes from determined and pre-established extrinsic creative factors which confer a positive character upon it: positive law is therefore always, and even more especially, *"jus positum."*

And so to conclude, traditional thought, in spite of its different attitudes, never gives up the basic idea that the adjective "positive" joined to the noun "law" stands to indicate the particular way in which the existence of the law so qualified came about historically. And this thought always sees positive law as being necessarily limited to only one part of that law which it considers as being endowed with obligatory force: a part which can even annul itself altogether, as in international law according to Pufendorf and his followers, but which can never extend to include the whole of the law in force in a given legal system.

4. If with the passing of time so-called legal positivism opposed the traditional doctrine, it was because the new school of thought, which quarreled with the possibility of considering any principle of *jus naturale* as law or, at any rate, deduced by reason, came to see positive law as the only "true" law and therefore the one legitimate object of study for legal science.[14] It is from this attitude that the positivist doctrine of law took its name. The idea that it is derived from the philosophical school of the same name is not correct, and it even expressly denied any link with that school.[15]

[14] "The matter of jurisprudence is *positive law*": with these words Austin begins his treatment of the subject. Austin, Lectures on Jurisprudence or the Philosophy of Positive Law (abr. by R. Campbell, thirteenth impr., London, 1920), part I, sec. I, introductory, p. 5. "Ein . . . nicht positives oder Naturrecht . . . kein Erkenntnisobjekt der Rechtswissenschaft, weil juristisch überhaupt gar kein Recht ist," Bergbohm offers on his side. Jurisprudenz und Rechtsphilosophie, Bd. I (Leipzig, 1892), p. 549. Later on Carré de Malberg, "Réflexions tres simples sur l'objet de la science juridique," in Recueil d'études sur les sources de droit en l'honneur François Gény, I (Paris, 1937), pp. 201 and ff., will confirm that: "la science juridique se trouve toujours ramenée à ne connaître que du droit positif . . . elle répugne à l'idée du droit incréé, c'est-à-dire non édicté—ou tout au moins estampillé—par une autorité attitrée, tout comme la nature a horreur du vide."

[15] To clarify the meaning of the term "positive" Bergbohm, in Jurisprudenz, *op. cit.* 51, in a note observes: "Mit dem 'Positivismus' und der positiven Philosophie Aug. Comtes . . . hat dieser Terminus natürlich nichts zu thun." He is decidedly opposed to those philosophers' ideas on law (see also p. 311). In spite of this some authors hold that there remains some link of derivation between legal and philosophical positivism. Morgenthau in "Positivism, Functionalism and International Law," 34 A.J.I.L. 261 (1940), after having pointed out that positivist philosophy "restricts the object of scientific knowledge to matters that can be verified by observation, and thus excludes from its domain all matters of an *a priori*, metaphysical nature," goes on to say that legal positivism transfers this restriction into the sphere of law. The fact that legal positivism turns its attention not to all possible manifestations of law, but, as the same writer points out, only "to the legal rules enacted by the state, and excludes all law whose existence cannot be traced to the statute books or the decisions of the courts" is certainly not the result of an application of the experimental principle put forward by the positivist philosophy, to which it is obviously opposed (and Morgenthau recognizes this on p. 269). It is rather a consequence of the influence of *a priori* principles of different schools of philosophy, some of which preceded the positivist school.

These same points can be of value in respect to the assertion of Del Vecchio in Dispute e Conclusioni sul Diritto Naturale 7 and f. (2nd ed., Rome, 1953), that Bergbohm's identification of law with positive law is a consequence of the "prejudice" on the part of

However, the idea of positive law held by the positivists is not really different from that of traditional thought, and it is, like the latter, clearly bound up with the way in which law comes into existence. It is rather thanks to the positivist doctrine, often more careful than the earlier one in defining its conceptions, that a more precise definition was sought for this old idea. Positive law is, for the positivists as well, law which is laid down (*gesetzt*), and the character of positivity is always conferred on the legal norm by its being derived from some creative act which actually came into being, thus being historically perceptible. "*Positives Recht sein und auf einem geschichtlichen Wege ins Dasein als verbindliche Regel gesetzt sein, ist schlechthin ein und dasselbe,*" says the strictest theoretician of positivism, Karl Bergbohm.[16] The meaning of this "historical" be-

positivist philosophy, whereby the only knowable reality is that of the senses. The same writer (Sulla positività come carattere del diritto, Modena, 1911) had, however, been obliged to point out how philosophers of other schools had come close to the idea of this identification: Vanni had made this point before him, while criticizing Petrone in "La filosofia del diritto in Germania e la ricerca positiva. Nota critica," in 22 Riv. it. per le scienze giuridiche 80 and f., 92 and f. (1896), with particular reference to Lasson. However, it is Hegel himself who asserts in Grundlinien der Philosophie des Rechts (hrgb. E. Gans, 2d ed., Berlin, 1940), Einleitung, § 3, p. 24 and f.: "Das Recht ist *positiv* überhaupt . . . und diese gesetzliche Autorität ist das Prinzip für die Kenntnis desselben, *die positive Rechtswissenschaft.*" It is interesting to note that, following this tradition, the representative of the most modern German neo-idealistic movement, Binder (Grundlegung zur Rechtsphilosophie) will repeat almost a century later (the work came out in 1935) that positive law and only positive law is law, and that its validity and force rest on the "identity of its existence and of its being laid down."

The necessity of avoiding confusion between juridical positivism "consistant à n'admettre le droit que sous sa forme positive," and philosophical positivism has been strongly affirmed by Gény in "La notion du droit en France," Archives de Philosophie du Droit et de Sociologie juridique, prem. année, 1931, p. 26, note 1. Waline agrees with this affirmation, for the most part, in "Positivisme philosophique, juridique et sociologique," Mélanges R. Carré de Malberg 519 and ff. (Paris, 1933). If this writer recognizes the existence of a link between positivism in philosophy and positivism in law (which he divided again into "legal positivism" and "sociological positivism"), it is only in the sense that, in his opinion, a follower of philosophical positivism could not admit the existence of a natural law.

[16] K. Bergbohm, Jurisprudenz und Rechtsphilosophie 546. See also the note on p. 52: "Alles Recht ist positiv, alles Recht ist 'gesetzt,' und nur positives Recht ist Recht." In German terminology the identification of positive law with "gesetzt" law had already been made by Hegel, Grundlinien, *op. cit.*, dritter Teil, § 211, p. 265, and it will be found again in more recent authors like Stammler who, in Theorie der Rechtswissenschaft (Halle, 1911), II, p. 3, translates the Latin word "positivum" as the German "gesetzt." For Lasson, System der Rechtsphilosophie (Berlin, 1882), § 25, p. 231, law is "eine äusserliche Ordnung mit dem Charakter des Fixirten" and in this sense it is "*positives Recht.*" In English thought, Austin, Lectures, *op. cit.*, part I, sec. I, lec. V, p. 60, justifies the term "positive law" by the fact that it is a question of law "set by men." Among the Italian philosophers of law of the same period a positivist like Vanni, Lezioni di filosofia del diritto (racc. per O. Petrone, Rome, 1900–01), lit., p. 96, defines law as "*norma in civitate posita*"; and an author, who is a critic of German positivism and defends the theoretical legitimacy of natural law, like Petrone, "Contributo all' analisi dei caratteri differenziali del diritto," in 22 Riv. it. per le scienze giuridiche 340 (1896), considers *positive* law to be law "storicamente avvenuto e divenuto," as opposed to natural law "meremente ideale e potenziale";

ginning is further outlined by him. In order that a norm of positive law may exist, a juridical nature must have been conferred on it by a "competent" body of legal production, through a proper procedure which is externally recognizable and belongs therefore to history, thus constituting a "formal source" for the norm in question.[17]

In the positivist doctrine the same thing happened, therefore, as we have just seen came about in traditional thought: that is, a further limitation of the meaning of "positive law," which, however, now was identified with the idea of law itself. Not only was it stated that law created by formal sources is the only true law, but all those acts which are not direct or indirect manifestations of the will of the state are excluded from the category of "formal sources" of positive law, for only the state has the power to lay down legal norms. This limiting conception just described is shown in English doctrine, where the ideas of Hobbes, previously mentioned, were brought into line with strict positivism by Austin and the followers of his school. They only recognized as law those laws which are laid down directly by a political superior or are at any rate the results of his will.[18] The same conception found even more favorable conditions in Germanic doctrine where it was particularly aided by the Hegelian idea of the state.[19]

---

and in the continuation of the same study he identifies the objectivity of law with its "*determinazione esteriore e positiva*" and sees in the *Décis*, the *Satzung*, the laying down of law, its truly distinctive character, its "forma essenziale" and the "vero fondamento" of its existence.

[17] Jurisprudenz u. Rechtsphilosophie 549. See also by Bergbohm, Staatsverträge und Gesetze als Quellen des Völkerrechts 40 and f. (Dorpat, 1877): "Ein Recht ist positiv, im Gegensatz zu einem bloss gedachten . . . wenn und soweit er der 'erklärte Rechtswille einer Rechtsquelle ist' . . . nur die Erklärung . . . durch den competenten rechtsbildenden Willen macht es zum positiv geltenden." Here the link with Hegel is clear. Hegel, having stated that law is positive inasmuch as it is "in seinem objektiven Dasein gesetzt," points out that "die positive Rechtswissenschaft ist isofern eine historische Wissenschaft, welche die Autorität zu ihrem Prinzip hat." (Grundlinien, *op. cit.*, dritter Absch., § 212, p. 268 and ff.) Besides the numerous writers quoted by Bergbohm (p. 41, n. 2), Nippold is also in agreement, Der völkerrechtliche Vertrag 18 (Bern, 1894): "Wir verstehen also unter Recht, positivem Recht . . . den Inbegriff derjenigen Normen, die thatsachliche Geltung haben, weil sie die erklärte Wille der rechtsschaffenden Autorität sind." Later on, Somló, Juristische Grundlehre 87 (Leipzig, 1917), defined law, which he identified with positive law, thus: "Das Recht *ist* eine Norm, die einer bestimmt gearteten Quelle *entstimmt.*" In the Italian positivist doctrine Vanni, Lezioni, *op. cit.* 96, speaks of the positive norm as "thought and willed by certain minds and established externally in a fixed form."

[18] J. Austin, Lectures, *op. cit.*, Pt. I, sec. I, lec. VI, p. 60: "Every positive law, or every law simply and strictly so called, is set by sovereign power, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme." Similarly Holland, The Elements of Jurisprudence, Ch. IV, p. 41 (10th ed., Oxford, 1906): "A Law, in the sense in which that term is employed in Jurisprudence, is enforced by a sovereign political authority. . . . In order to emphasise the fact that laws, in the strict sense of the term, are thus authoritatively imposed, they are described as 'positive' laws."

[19] Since the state is for Hegel (Grundlinien, *op. cit.*, dritter Absch., § 257, p. 305) the "Wirklichkeit der sittlichen Idee," law cannot but depend on the state and have its reality in the state. Consequently (§§ 211–212, p. 265 and ff.) he identifies "was Recht ist und gilt" with "das Gesetz" and affirms that "hat nur als Recht Verbind-

The idea which reduced legal positivism itself to a mere state voluntarism was widely accepted; and the myth of the will of the state as the only origin of law was created.[20] This myth becomes rooted deeply in the thought of various countries and its harmful consequences are felt particularly—if certainly not exclusively—when it comes to understanding the international legal system. Now once having accepted the positivist assumption of the identity of law and positive law, to make use of a solution like Pufendorf's, which denied the existence of a positive international law, would be purely and simply to deny the existence of any international law at all. This is precisely what some authors do when they relegate this "law" to the field of moral or of "rational" law, of mere usage or of so-called "international relations," etc.[21] Most of them, not

lichkeit was Gesetz ist." He therefore must conclude that even in relations between sovereign states law does not have its "Wirklichkeit" in a general will "zur Macht über sie konstituirten," but in their own particular will (§ 333, p. 419).

[20] "Der Staat ist die einzige Quelle des Rechts," Rudolph von Ihering affirms curtly in Der Zweck im Recht, Vol. I, 2nd ed., p. 318 (Leipzig, 1884). "Der *verpflichtende* Staatswille ist Recht." Georg Jellinek states for his part Die rechtliche Natur der Staatenverträge (Wien, 1880), p. 6. The entire dependence of law on the state has also been asserted briefly by Lasson, System, *op. cit.* 412; by Nippold, Des völkerr. Vertrag, *op. cit.* 18 and f., and later by Hölder, "Das positive Recht als Staatswille," in 23 Arch. f. öff. Recht (1908), and Somló, Juristische Grundlehre 330, for whom "die Quelle, aus der das Recht fliesst, letzten Endes die Rechtsmacht des betreffenden Staatswesens selbst ist." At the beginning Kelsen, too, in Hauptprobleme des Staatsrechtslehre 97 and ff. (Tübingen, 1911), adopted the principle that objective law is the will of the state and that (p. 101) "alles Recht . . . soferne es Recht ist, Wille des Staates sein muss."

Under the influence of German legal thought the idea of the dependence of law on the state was widely accepted at the beginning of this century by theorists of both public and private law. Romano names the most important of these in L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto, Pt. I (Pisa, 1917), p. 96, note 1, at the beginning of a criticism of the concept indicated here. This criticism is approved and confirmed successively by Orlando, "Recenti indirizzi circa i rapporti fra Diritto e Stato," in Riv. di dir. pubblico, 1926, first part, p. 273 and ff. Also on this point see Del Vecchio's criticism in "Sulla statualità del diritto," Riv. int. di fil. del diritto, anno IX, fasc. 1, 1929, p. 3 and ff. Among modern writers "*statualità*" is considered to be a necessary feature of the legal system by Carnelutti, Teoria generale del diritto 75 (Rome, 1951, 3rd rev. ed.). However, the writer explains that by this formula he means the principle of systematization or completeness, and that "statualità should not be understood to mean that the state is its source, as many in fact do understand it."

In France the theory which makes all law depend on the state was less well received. Of the more recent writers the most determined representative of this school of thought is Carré de Malberg, Contribution à la théorie de l'État. Gény also recognizes the same idea in substance, although much less dogmatically and with some reservations. Gény, Science et Technique en Droit privé positif, I, pp. 55 and ff., 63 (Paris, 1914): "Le droit positif ne s'établit que grâce à une société fortement organisée et renfermant en elle-même un pouvoir capable de préciser et d'imposer, par des moyens adéquats, les règles qui en forment le contenu nécessaire"; the only "droit positif dont nous puissions avec fruit serrer de près la notion" is law which is "constitué dans et par l'État."

[21] According to Austin, Lectures, *op. cit.*, Pt. I, sec. I, lec. V, pp. 65, 74 and f.; lec. VI, p. 85, the rules generally known as "international law" are of "positive international morality," and of "international morality" according to Pomeroy, Lec-

wishing to deny the existence of international law and yet wanting to maintain the idea that all law has its origin in the state, sometimes make ingenious, but inevitably vain, attempts to reconcile two obviously irreconcilable elements. This is, however, not the place to consider these attempts, which are already too well known.

5. The aspects of positivist thought which I would like to clarify here are different. Once having affirmed and defined the traditional idea of positive law, as we have already seen, this doctrine asserted at the same time that "positive" law is also the only law "in force." The innovation introduced by legal positivism did not therefore consist of a revision of the idea of positive law but of the reduction of all law to positive law. It meant the exclusion of any juridical norm, which had not been laid down in an externally recognizable manner by a formal source, from an historically existing legal system, and from having obligatory force. "Positive law" thus became a term applicable to all existing law, to any form of law which has been so created in history, as opposed to all forms of abstract and ideal law, or law created only by thought. Besides positive law and positive legal norms "positive legal order" was now spoken of to stress this idea that a system of law in force is always made up exclusively of norms "set" by certain creative bodies; it is the same in the case of "positive legal science" which was so called in order to reassert the principle that legal science can only have positive law as its exclusive object of study.[22]

The most important consequence of the adoption of this outlook was that "legal character" was necessarily destined to become, for the posi-

tures on International Law in Time of Peace, § 28, p. 23 and ff. (ed. by Woolsey, Boston and New York, 1886). For Wheaton, Éléments du droit international, Pt. I, Ch. 1, § 10, p. 22 (2d ed., I, Leipzig, 1852), "entre les nations il n'y a qu'une obligation morale résultant de la raison" and it is only in a metaphorical sense that international law can be called law. Stephen, International Law and International Relations, Introduction, IV ff., 10 ff., 45 ff. (London, 1884), is convinced that relations between states are always non-legal; according to Lasson, Prinzip und Zukunft des Völkerrechts, 8 ff., 35 ff., 52 ff., etc. (Berlin, 1871), there are only non-legal "Staatensitte" in relations between states; Hagens, Staat, Recht und Völkerrecht 34 (München, 1890), sees international society as a mere "Interessengemeinschaft" and international law is reduced to mere rational law, to "ein vernunftpostuliertes Recht."

In more modern thought a writer like Burckhardt, Die Organisation der Rechtsgemeinschaft 351 ff. (zweite neu durchges. u. ergänzte Aufl., Zürich, 1944), does not admit the existence of a positive international law because it is not created by manifestations of the will of an authority, and he reduces international law to a merely rational law. Also for Carnelutti (Teoria generale 75 ff.), international law is not true law because it lacks "that completeness which is expressed through the idea of 'statualità'." Giuliano (La Comunità internazionale 75 and 93 f.) has called attention to the link between the attitude to international law taken up by writers like Carnelutti and that of 19th-century authors who followed the teaching of Austin. It is also interesting to notice the relatively similar outlook of an author like Stephen, above mentioned, and a modern writer like Corbett, Law and Society in the Relations of States 8 ff., 91 ff. (New York, 1951), for whom states now follow "patterns of practice" in their relations, rather than real legal norms.

[22] *E.g.*, Nippold (Der Völkerr. Vertrag 2 ff., 12, etc.) speaks of "positive Rechtsordnung" and, like Hegel, of "positive Rechtswissenschaft" and "positive Rechtslehre." Later others will follow this example.

tivists, a merely reflected feature, deriving simply from the fact that some norms come from a definite origin, and that they are the product of a given creative process. In other words, law was not in their eyes a phenomenon which could be distinguished by certain characteristics of its own and for the effects it had; in the end it was only something which had been created by a given body in a given way. Internally law is that which the state has willed, internationally it is that which several states have willed and established collectively. From the principle indicating that the distinctive character of law, of all law, is its historical derivation from certain pre-established "formal sources," there comes logically, as a corollary, the idea that legal science has no other means of knowing the legal force of a norm in any given system but to ascertain whether it was "laid down" historically by a "formal source" of that system. Thus the method of deducing the legal nature of the norms from their origin in given creative factors is considered to be the only one permissible in this science.

What is interesting is that these conclusions concerning the nature of "legal character," and the method which legal science could use to determine it, were destined to survive the very premises of legal positivism with which they were so closely linked. When convictions have been accepted for a long time in a doctrine it is easy to lose sight of their derivation from certain assumptions; they therefore continue to be regarded as truths, even when these assumptions have been discarded.

This is exactly what did happen when, in the course of a critical revision of the positivist idea, the later theorists were led to realize not only the presence in every legal order of rules the existence of which did not seem to depend on the will of states, but also the certain existence of some legal rules which could not be proved to be the product of any definite law-making process. For indeed an understandable conservative instinct made it difficult to draw from such a realization the conclusion that it was necessary to put under review the notion, sanctified as it was by long acceptance, that the "legal character" of the law in force should always and only derive from its "having been laid down," and that law is something which has been willed and created by a given body in a given way. And consequently, when legal thought realized the insufficiency of the method which went back to the functioning of certain productive processes in order to establish the existence of rules, the persistent conviction that "legal character" was a derivative quality conferred on certain rules by their particular historical origin, was enough to stop the recognition of the legitimacy of legal science using a different method from that which was still considered to be exclusive, according to an opinion which had already had time to become generally accepted. This inevitably led to obstacles and hesitation towards recognitions and developments which should have followed logically.

6. If we consider now in its development the school of thought which followed the positivist school, we see how long and troubled was the maturing process before we can reach the recognition not only of the presence and operation in every single system of law, and particularly in international law, of a whole series of rules which have not been laid down by a special

law-making procedure, but also of the fact that the "legal nature" of these laws does not constitute an anomaly and that their existence can be recognized and proved by legal science by another method but no less validly than the existence of the rules which can be traced back to the activity of a source.

The foundations for a criticism of legal positivism had already been laid to some extent by the assertions of its own more alert theorists. Defining the concept of the "formal source" by which law must be "laid down" in order to exist as such, Bergbohm, for example, speaks of a "*kompetente* rechtbildende Macht," [23] almost in the same way in which, centuries earlier, Suárez had spoken of the "laying down" of positive law "ab aliquo principio extrinseco *habente potestatem.*" Now the "competence" of the authority creating law has no sense if it is not a legal competence established by law; [24] if, in turn, law can only be the product of the law-making activity of a "competent" authority, there is clearly a vicious circle from which legal positivism cannot escape. This vicious circle is no less evident when, as we have seen, other writers of the same school say that the "laying down" of law must come about according to certain predetermined productive processes, because the determination of these forms and the establishment of procedures can obviously only be the work of law. Tomaso Perassi, in his study on the sources of international law, which in some ways marks the beginning of modern Italian thought on the subject, points out that only a "relevant legal fact," a fact, that is, which is in turn taken into consideration by another rule, can be the source of legal norms.[25] The legal nature of a rule is therefore deduced, not from the fact which has produced it materially and historically, but from that other legal rule which considers this "*fact*" as a "source" of legal rules.[26]

[23] Jurisprudenz, *op. cit.* 549.

[24] "Wann ist eine normierende 'Macht' eine 'kompetente'?" Kelsen asks with reference to Bergbohm. Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts 89, note 1 (Tübingen, 1920). And he replies: "nur darum sind ihre Normen 'positive' Rechtsnormen, weil sie—*von Rechtswegen*—kompetent ist, Normen zu setzen!" Similarly Ross, Theorie der Rechtsquellen 6 (Leipzig and Vienna, 1929), observes, with reference to the definition of law as "l'oeuvre du pouvoir compétent" given by Gény, that "die Kompetenz keine sinnlich wahrnehmhare Tatsäche, vielmehr selber ein normativer Begriff ist und so wiederum das Rechtsproblem voraussetz, das gelöst werden sollte." The same could be said with reference to Carré de Malberg, who insists, on the one hand (Contribution, *op. cit.* 207; Réflexions, *op. cit.* 203), on the notion of positive law as "créé ou déclaré par l'autorité compétente," and on the other (Contribution 67), denies the priority of law with regard to the state.

[25] T. Perassi, "Teoria dommatica delle fonti di norme giuridiche in diritto internazionale," 11 Riv. di dir. internazionale 196 (1917).

[26] Vanni (Lezioni 126) had already based the proof of the "legal nature" of a rule on the "pre-existing legal system," pointing out that "una norma giuridica deve considerarsi come l'ultimo anello di una catena, i cui anelli precedenti costituiscono appunto l'ordine giuridico preesistente, il quale attribuisce ad alcuni la facoltà di stabilire delle norme, e per conseguenza attribuisce carattere giuridico alle norme stabilite." And Romano, "Sui decreti legge e lo stato d'assedio in occasione del terremoto di Messina e di Reggio Calabria," 17 Riv. di Dir. Pubb. (Pt. I) 260 and f. (1909), had noticed that "quando si indaga il fondamento obbligatorio di una legge, tale fondamento si rinviene in una legge precedente che stabilisce gli organi competenti ad emanarla ed i loro poteri."

Since, in the process of deducing the "legal nature" of every rule from a formerly existing "rule on legal production," one cannot go back indefinitely, the author concludes that a rule, "at least one," must be presumed, whose legal nature cannot be established with the same method, because it is that "rule on legal production" which concerns the first law-making fact beyond which it is impossible to find an earlier legal norm.[27]

Following this conclusion the positivist criterion, which identified "legal nature" with "positive nature" because it excluded the possibility of any rule that was not laid down by "a source of a given legal system" having a legal character, and saw that character as the mere consequence of this laying down, had to stand the shock of a logically inevitable but extraordinarily important exception. Furthermore, it was, in fact, deprived of its meaning. The legal nature of any rule dependent on the first "norm on juridical production" did not now appear as a quality determined by the fact which gave birth to it; it was a quality which, directly or indirectly, was derived only from the legal nature of that first rule, which certainly was not the product of a source and could not therefore draw its legal character from such an origin.

Therefore it can be said that the recognition of the existence of rules in force which are "legal" but not "laid down" had now imposed itself in no uncertain manner, even if for the moment it was limited to one rule. But there still remained an obstacle to the admission of these rules. Once he had recorded the irrefutable need to recognize the existence of a norm, whose legal nature could not be established through the same deductive "scheme" on which the recognition of other rules depended,[28] Perassi did not investigate the possibility of a different method of determining the recognition of that particular rule. It is in fact well known that he considered this form of determination to be impossible, at least in the field of legal science he called "dogmatic," because of the single method by which it could formulate the judgment on the validity of any rule in a given system: that is, the method of deducing it from the validity of a preceding rule which considers as a "source" the fact which produced the rule in question. Legal dogmatism must limit itself to accepting as a postulate the existence and legal nature of the first rule of the system,[29] leaving the explanation of it to other "branches of knowledge" like sociology.[30]

[27] T. Perassi, *loc. cit.* 197 and ff. Romano, *loc. cit.* 261, having pointed out also that in the search for the basis of all law "we must stop at some point having reached the first law," had, however, seen the origin of the obligatory force of this law in the "necessity which determined it," agreeing with his principle that necessity "is the first and original source of all law."

[28] T. Perassi, *loc. cit.* 199.

[29] "To pose the problem of the juridical nature of this rule," observes Perassi (*loc. cit.* 204 ff.), "is to pose the problem of the origin of the legal system. Dogmatism would cease to be dogmatism, if it was capable of solving the problem."

[30] *Ibid.* 202 and f. According to Perassi, sociology, in its branch concerning law, has the task of studying "le relazioni tra l'ordinamento giuridico e la società di cui è la sovrastruttura," while dogmatism aims at the scientific result "di conseguire la conoscenza sistematica di un ordinamento nella sua funzione di sistema di canoni di valutazione delle relazioni sociali" (see Corso di istituzioni di diritto pubblico (2d ed., Naples, 1922), Pt. I, Introduzione alle scienze giuridiche 20 and 23).

Legal science was now confined within the bounds of mere "dogmatics" and forced to renounce the possibility of solving the problem of the legal nature of the most essential rule of the whole legal system, the knowledge of which is its essential aim.[31] This latter idea can only be seen and explained in the light of the conviction, mentioned earlier, and now well established, owing to the long rule of legal positivism, that juridical nature was only a character conferred on certain rules by their creation by definite bodies and according to determined forms; and that legal science could only recognize those rules which had been historically and externally created in this way. It was precisely the persistence of this conviction which prevented doubt from being cast on the value and consequences of the idea that the legal force of a rule in a given system could only be proved by showing that it was created by a formal source of that system. In other words, having recognized that one rule of the legal system, at least, the one which is considered to be the most essential, was not and cannot be a rule which had been "laid down," legal science was still not in a position to solve the contradiction between this fundamental recognition and the ideas on "legal character" which were still dominant. It therefore felt itself constrained to do nothing but presume the juridical nature of that rule as an undemonstrable truth.

Similarly, the conviction that only norms produced by a "source"—or rather, to use Kelsen's words, by an act that is perceptible by the senses and has taken place in space and in time[32]—were legal and capable of being known by the science of law, was still the reason why the "*Grundnorm,*" in which the Viennese School saw the indispensable point of departure for legal production, could only be presented as a mere undemonstrable hypothesis of legal science.[33] The writers of this school pointed out as well that an external event could not have the quality of a legal source in itself and that this quality could only be conferred on it by a rule;

[31] With a variety of attitudes, which I shall not consider here, the idea of legal science as "dogmatic" and of its limitations has been criticized by the most recent Italian students of international law. See in this connection the ideas developed by Ziccardi, La costituzione dell'ordinamento internazionale 44 and ff. (Milan, 1943); Sperduti, La fonte suprema dell'ordinamento internazionale 114 and f. (Milan, 1946); and "Norme giuridiche primarie e fondamento del diritto," Riv. di dir. int., 1956, fasc. 1, p. 26; Giuliano, La comunità internazionale, *op. cit.* 115 ff.; and this writer Scienza giuridica e diritto internazionale 44 f. (Milan, 1950).

[32] This expression is used in the revised and augmented French edition of the Reine Rechtslehre; see Kelsen, Théorie pure du droit 33 and f. (Neuchâtel, 1953).

[33] The concept of the "Grundnorm" as being the hypothesis on which the unity of legal norms is based was introduced by Kelsen in "Reichsgesetz und Landesgesetz nach österreichischer Verfassung," in 32 Archiv des öff. Rechtes 216 and ff. (1914). Therefore, as he himself recognizes in the preface to the second edition of Hauptprobleme der Staatsrechtslehre (Tübingen, 1923), p. XV and f., it was Verdross, "Zur Problem der Rechtsunterworfenheit des Gesetzgebers," in Juristische Blätter (45 Jahr, 1916), who developed the idea of the basic rule as a constitution in the logical and legal sense and who presented it (p. 4) as a "Wissenschaftshypothese" necessary to give legal science a basis on which to construct systematically the material of positive law. The works of Pitamic and Merkl, which followed, completed the definition of this school's thought, showing the Grundnorm to be the hypothesis of legal knowledge and the basis of the "Stufentheorie des Rechtes" at the same time.

they concluded from this that the construction of a theory of the "dynamics of law" must start from one "*der Rechtsordnung begründende Ursprungsnorm, aus der sich das Rechtssystem ableitet,*" [34] *i.e.*, from a first "*Rechtssatz*" which, unlike the others, was not "*ausserlich gesetzt,*" but simply "*vorausgesetzt.*" [35] But just because it was a question of a norm which had not been "laid down," its existence and validity as a legal norm were condemned to remain a mere hypothesis, even if this hypothesis was necessary in order to consider all "positive" norms as legally valid and to interpret as law the empirical material which presents itself as such.[36] Remaining attached to the positivist idea of the necessity of every norm's being produced by a source in order to have legal validity, Kelsen was forced to contradict himself. He had to assert, even quite recently, that law is always "positive" law—in the literal and traditional sense, since for Kelsen its positivity lies in the fact that it is created and annulled by human acts [37]—while he himself has recognized that the most important of all the norms, the one whose juridical nature conditions that of all the others in his opinion, is not "positive" because it "is not created in a legal procedure by a law-creating organ."[38] And the same fact pre-

[34] H. Kelsen, Das Problem der Souveränität 93.

[35] Thus Verdross, "Völkerrechtsquellen," in 3 Wörterbuch des Völkerrechts und der Diplomatie 293 (fortges. u. hrgb. v. K. Strupp, Berlin and Leipzig, 1929). The same idea had already been expressed in similar terms by this writer in Die Verfassung der Völkerrechtsgemeinschaft 21 (Vienna and Berlin, 1926): " . . . die oberste Norm, die *Grundnorm,* nie und niemals durch einem Organakt gesetzt, sondern selbst zur Begründung der obersten Organakte schon *vorausgesetzt werden* muss." Küntzel expresses himself similarly in Ungeschriebenes Völkerrecht, Ein Beitrag zu der Lehre von der Quellen des Völkerrechts 1 (Königsberg, 1935). "It is not a law which is laid down, but merely one which is presumed," says Morelli on the subject of the "fundamental law" in Nozioni di diritto internazionale 7 (4th rev. ed., Padua, 1955). Also according to Guggenheim, 1 Traité de droit international public 7 (Geneva, 1953), "la norme fondamentale . . . est présupposée et constitue l'hypothèse première et indémontrable pour la science juridique, d'où dérivent les règles positives."

[36] "Die Grund—oder Ursprungsnorm—als Hypothese," writes Kelsen (Allgemeine Staatslehre 104 (Berlin, 1925)), "muss von der Rechtserkenntnis eingeführt werden, um das Recht zu begreifende Material . . . 'Recht' zu erfassen." And he confirms this in the more recent General Theory of Law and State 116 (Cambridge, 1946): "To interpret these acts of human beings as legal acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm."

[37] General Theory, *op. cit.*, 114.

[38] No less clearly, according to Morelli, Nozioni, *op. cit.* 22, the fundamental norm is not a *positive* norm because it does not originate from a formal source; and according to Guggenheim, Traité, *op. cit.* 7, the fundamental norm, not having been created by a law-making procedure, "n'est donc pas elle-même une norme positive."

In pointing out the contradiction that the presence of the "non-positive" basic norm represents in relation to the assertion of the necessary "positivity" of all the norms of law, the writer had shown (Scienza giuridica, *op. cit.* 40 ff.) that in order to deduce the validity of "positive" norms from the validity of the "non-positive" basic norm the latter must belong to the same world as the former. He had then remarked that if the positive norms constitute, as Kelsen says, the empirical material to which the jurist must be able to give a systematic unity, the basic norm must be presupposed to live in the same empirical world as the positive norms. Scarpelli, in Filosofia analitica, *op. cit.* 68 f., had objected that from the point of view of the "normativische" legal science,

vents this author and others of the same school from taking that further step which could otherwise be made towards the recognition on the part of legal science of the existence and the not merely hypothetical knowableness of an empirical law, valid and forceful without having been laid down by "sources," once the essential fact had been realized—that the reason for the "legal nature" of at least one norm, undoubtedly endowed with this character and undoubtedly valid, does not lie in an act of "laying down."

Later on, making use of the breach opened by the admission of the existence of a first "norm on legal production" with a "non-positive" origin, the recognition of the presence in every legal system, no longer of a single norm, but of a whole group of fundamental norms which do not originate in the functioning of a formal source, was accepted in legal thought. But there still persists the idea that these norms, because they are such, are only explicable historically and cannot be acknowledged by legal science except as postulates.[39] However unsatisfactory it may appear, this conclusion is a way of multiplying the number of postulates whose existence legal science can acknowledge without being able to prove it. It is clear that this conclusion is still imposed by the conviction, already recalled and from which it is difficult to liberate oneself, that "legal char-

---

the positive legal norms are not "living" in the empirical world, and that therefore it is not necessary to think that the fundamental norm is also living in the empirical world. This is not the place to linger over such an affirmation which contradicts the clear assertions of Kelsen himself. It is enough to observe that Scarpelli himself later on stressed logically, if on another level, the necessarily identical nature of the fundamental norm and the other normative propositions towards which the former acts as a "criterion of control of validity." This only confirms the foundation of the point made; that is, of the contradiction between the affirmation of the positivity of all legal norms on the one hand, and the necessary recognition of the existence of a norm, belonging to the same system and endowed with same nature, which is, however, clearly not positive, on the other.

[39] Perassi adopted this outlook right from the first edition of his Lezioni di diritto internazionale, Pt. I, p. 35 (Rome, 1933), and he has not altered it in later editions. "Lo stesso è a dirsi per le altre norme dell'ordinamento internazionale, il quale, come ogni altro, oltre che dalle norme create da atti o fatti che esso stesso contempla come processi di produzione giuridica, è costituito da un gruppo, sia pure estremamente scarso, di norme fondamentali, la cui formazione è solo storicamente spiegabile, e la cui giuridicità nell'ordinamento internazionale è quindi un postulato." Similarly Balladore Pallieri already affirmed in the first edition of his Lezioni di diritto internazionale, Fasc. I, lit., p. 29 (Milan, 1935): "Also the international community has, and cannot but have certain supreme norms which give validity to the others but receive it from none; norms that the jurist finds inexplicable." The latter, he reconfirmed in his 5th edition of Diritto internazionale pubblico, p. 14 (Milan, 1948), "parte assiomaticamente da alcune norme sopra cui impernia tutto il sistema e di cui presuppone, senza dimostrarlo, il valore." This assertion is omitted in later editions of the same work (see 7th ed., Milan, 1956, p. 16 ff.) in which, though without being very clear, the author seems to follow the criticism of more recent thought in taking up the idea of the demonstrability, by inductive methods, of the existence of "original" international unwritten norms (see p. 23 f.). Castberg, Problems of Legal Philosophy 50 f. (Bergen, 1947), follows the same order of ideas as Perassi. He states the existence of a number of "fundamental norms" which are not "positively determined norms" and "the validity of which we postulate."

acter'' is a character necessarily connected to the origin and the method of creation of law, and that therefore the only admissible way of proving the legal nature of a norm is by deducing a proof from the legal nature of the law-making fact which created it. In other words it is now clearly and definitely realized that a legal system in force is composed, even if in very different proportions, of norms ''laid down'' by law-making facts and of norms ''not laid down.'' But the original idea of the ''positivity'' of all law in force is still with us in its consequences, which make legal character appear as a mere effect of a certain ''laying down.'' This imposes the conclusion that only ''laid down'' norms can be known and so prevents legal science from fulfilling its function towards the other category of norms condemned to remain scientifically inexplicable.

Still later on, following the logical consequences of the ideas just mentioned, the most modern internationalist thought reacted against the idea of a limitation of the scope and possibilities of legal science, against its reduction to mere legal dogmatics and against the conviction of the applicability by it of a purely deductive method. But the idea of legality's being a character given to certain norms essentially by their being created by determined ''sources'' continued, often unconsciously, to be an obstacle to the achievement of looked-for results.

In fact, different authors have tried to overcome their difficulties by having recourse to new ideas of positivity. But while they do not get the hoped-for assistance from this, mostly for the reason already mentioned, they contribute, on the other hand, to the growing ambiguity of language concerning the concept of ''positive law.'' This, as we shall see, also constitutes a posthumous legacy of positivism and forms a further obvious hindrance to the clarification of the problem considered here.

7. The reduction of law to the product of given law-creating facts, carried out by legal positivism, could not in the long run be devoid of consequences even in the linguistic field. Within the field of positivist thought it was logical that some attributes of the term ''law,'' such as ''positive,'' ''in force,'' ''historical'' and even ''valid'' and ''efficacious,'' should have been considered by some people as pleonastic, since it was not admitted that one could speak strictly of a law which was not positive and in force, valid and efficacious at the same time. However, although these same attributes came naturally to be seen as different aspects all necessarily present in the same phenomenon,[40] this grouping together could

[40] ''Die Prädizierung des Rechts als 'geltendes' oder 'positives' enthält ohne Zweifel einen Pleonasmus,'' says Bergbohm (Jurisprudenz 49). But he immediately adds that it is a useful pleonasm for avoiding ambiguity with regard to those who may have the idea of a law of another kind. On the same page he adds: ''Wir sprechen z. B. von dem 'geltenden' Recht . . . von seiner formellen 'Giltigkeit.' . . . Wir meinen damit soviel wie Wirksamkeit, Verbindlichkeit, besonders geartete Verpflichtungskraft der als rechtliche bezeichneten Normen, kurz dasjenige im Recht, was da macht, dass man ihm zu gehorsamen verpflichtet ist.'' Further on, p. 132, he confirms: ''Die positivrechtlichen Normen haben eben diese ihre Eigenschaft durch einen geschichtlichen Vorgang erhalten, ohne den sie überhaupt nicht hätten geltendes Recht werden können.'' Agreeing with these remarks, Nippold (Der völkerr. Vertrag 7) says there is absolute cor-

not but have the effect of losing the idea of the respective autonomy and independence of these different aspects. Despite the fact that these adjectives were originally intended to express profoundly differing concepts, their permanently being together tends gradually to rub away the edges of each one so that the adjectives themselves become synonymous and even interchangeable.

A real transposition in the use of the same term from one meaning to another, took place very seldom at the beginning and almost unconsciously. Within the positivist school itself it is only in some writers that we begin to find the expression "positive law" no longer in the literal and traditional meaning of law "laid down," but transferred to indicate law existing in history or even law effectively applied.[41] It is in the school of thought following this that transposition becomes more frequent and is done more openly as we approach recent times. It is characteristic that instead of being checked by the growing distance of those original canons of positivism which would in some way have been able to justify it, this tendency to use the expression "positive law" in a different sense seems almost to be favored by such distance. Whatever may be the reasons for this—some will be made clear further on—the fact remains that gradually we reach that ambivalence, or rather polyvalence, of meanings of "positive law" which is a characteristic of the present situation.

In fact if one examines the vast field of the thought of the last thirty years from this point of view, one is struck by the plurality of different ideas of positive law which have been adopted.

First of all there is the important group of those who still remain faithful to the literal and traditional usage. Among German legal philosophers Stammler carries on, even in his most recent works, the identification of *"positiv"* with *"gesetzt"* and the idea that positiveness is a manifestation of a definite legal will.[42] His critic, Binder, also consistently makes clear that the meaning of "positive" law is the same as law laid down by human

respondence between the concepts of positive law and law "in force." The adjectives "positivo" and "vigente" are used to mean the same thing by Anzilotti, Corso di diritto internazionale 17 (3rd rev. ed., Rome, 1928): "Obietto della giurisprudenza è il diritto positivo; suo compito primo determinare e spiegare le norme vigenti, ordinandole nella forma logica di un sistema."

[41] Bierling does this, for example, 1 Juristische Prinzipienlehre 3 (Freiburg and Leipzig, 1894): ". . . alles Recht im juristischen Sinne nur als positives, d.h. irgendwo und irgendwam geltendes, auf irgend einen bestimmten Kreis von Subjekten beschränktes Recht"; and p. 47: "positives Recht ist, oder als solches erscheint, was irgendwo und irgendwam als Recht *gilt.*" In Romano (Sui decreti legge, *op. cit.* 261) can be found a slight sign that would indicate the adoption of an idea of positive law as corresponding, within the law of the state, to all the norms "which are enforced by State organs." This author can certainly not be considered as belonging to the positivist school.

[42] R. Stammler, Theorie der Rechtswissenschaft 74 ff. (2nd ed., Halle, 1923); Lehrbuch der Rechtsphilosophie 94 and f. (Berlin and Leipzig, 1922). The author explains the concept "des positiven oder *gesetzten* Rechts" by pointing out that "*'Positives' Recht ist das bedingte rechtliche Wollen*" (Theorie 75; Lehrbuch 95). Faithful to positivist canons he therefore adds that all historical law, in all its possible forms and manifestations, is positive law, "*gesetztes* Recht."

will and brought by this will into objective existence.[43] This adherence to the traditional meaning is also characteristic of the German writers who resort to the normative school of thought with more or less varied attitudes; in their view all law is substantially positive law, since it is law laid down, except—as we said earlier—for the basic norm, existence of which cannot be demonstrated and which must either be considered as an undemonstrable hypothesis or a postulate, or as a moral norm.[44] In Switzerland Burckhardt defines positive law as *"durch die Erklärung einer Autorität inhaltlich festgelegtes Recht."*[45] In French thought Carré de Malberg also in his latest works still supports the idea of the norm of positive law as a *"règle édictée par des autorités capables de contrainte"* and of the positive legal order as *"créé ou déclaré par l'autorité compétente,"*[46] and an author like Dabin sees the whole *"droit positif"* as a system *"des règles de conduite édictée d'avance par l'autorité publique."*[47]

In Italy Anzilotti has constantly maintained throughout all his works that the definition of positive law is "law laid down by a law-creating will, which is binding just because it is laid down by such a will";[48] Salvioli identifies positive law with voluntary law;[49] and Morelli has recently affirmed once more that positive norms are norms which have been laid down, created, by means of suitable procedures of legal production.[50] There are also some authors who react explicitly against the use of the term "positive law" in other senses and who draw attention to the inconveniences of this. Bobbio stands out among these for the clarity with

[43] J. Binder, Grundlegung, *op. cit.* 150 of the Italian translation.

[44] Kelsen always adheres to the use of the term "positive law" in the traditional sense of law "laid down." "Positiv, das heisst wörtlich 'gesetzt'," he says in Das Problem der Souveränität 93, "ist somit die einzelne Rechtsnorm, soferne sie in dem auf der juristischen Hypothese der Ursprungsnorm einheitlich gegründeten System einer bestimmten Rechtsordnung gesetzt ist." We have already seen how in his most recent works he has confirmed the idea that the positivity of a norm lies in its having been created by a law-making act which was set up in time and place. Similarly, according to Verdross, Die Einheit des rechtlichen Weltbildes auf Grundlage des Völkerrechtsverfassung 77 and f. (Tübingen, 1923), and Die Verfassung, *op. cit.* 6 f., the "positivity" of law lies in its "Erfüllung durch *tatsächlich* gesetzte Rechtsakte." Verdross also upholds this idea in the most recent edition of his Völkerrecht, p. 18 (3rd ed., Vienna, 1955). Also Guggenheim, "Was ist positives Völkerrecht?" in 8 Schweiz. Jahrb. f. internat. Recht 50 and f. (1951); and 1 Traité 7 (Geneva, 1953), although he sees positive law and law in force or "wirksam" as expressions meaning the same thing, maintains that the positivity of a norm is always given by its creation through an act of the will of a subject conforming to a law-making procedure whose point of departure is given by the fundamental norm, which is an hypothesis and not a positive norm.

[45] W. Burckhardt, Die Organisation der Rechtsgemeinschaft 351.

[46] R. Carré de Malberg, Réflexions 194, 203.

[47] J. Dabin, La philosophie de l'ordre juridique positif spécialement dans les rapports de droit privé 34 and f. (Paris, 1929).

[48] This definition is to be found in the third edition of the Corso di diritto internazionale 17 (Rome, 1928). In the first edition of the same work (Rome, 1912), p. 12, Anzilotti had asserted that "il diritto, come norma obbligatoria dell'umana condotta, non esiste se non in quanto è *posto* da una volontà idonea ad obbligare i consociati."

[49] G. Salvioli, "Les règles générales de la paix," in 46 Hague Recueil (1933, IV) 6, 9, 11.

[50] G. Morelli, Nozioni, *op. cit.* 22.

which he asserts the principle that the limitation of the scope and therefore the definition of the concept of positive law can only be made "through the appropriate use of the idea of a source," and for the firmness with which he therefore maintains that "the body of laws which can in some way be referred to a source, that is produced by law-creating acts . . . is positive law," openly deducing from this that if there is a law, valid but not brought into being by these acts, it is not positive law.[51]

However, other writers oppose this first group. These are now proceeding in the other direction and are entirely abandoning the use of the word "positive" in the sense of "laid down by law-creating facts," and are purposely giving this term a different definition, which wavers between the idea of law "in force" and that of law "effectively applied and caused to be observed." It seems that one should include Del Vecchio in this group, for example. He answers the questions as to when law is really positive, how it is fulfilled, and of what its laying down consists by denying that it is enough or necessary for a criterion of juridical nature to have been formulated by a specially constituted organ, and states that the social organization must execute and observe this criterion itself. Positive law thus becomes that which is really applied and observed at a given historical moment, that which *informs and effectively rules* the life of a people; positive norms must be understood to be those which are "effectively imposed and applied."[52] The character of positivity therefore moves away from that of historical derivation from determined law-making processes, and becomes that of effective observance, imposed by a "sufficient historical force." This change of meaning is still more clear-cut in Radbruch's thought. He defines the concept of *"Positivität des Rechts"* as *"die Wirksamkeit des Rechts in der Gesellschaft . . . seine Fähigkeit, sich in grösserem oder geringerem Grade die Gefolgschaft des Rechtsadressaten zu verschaffen"* and therefore concludes that *"Rechtspositivität"* and *"Rechtsgeltung in ihrer soziologischen Bedeutung"* are identical.[53] According to Cesarini-Sforza "law as it is revealed concretely, materially, in observable facts, is positive."[54]

[51] N. Bobbio, La consuetudine come fatto normativo 21 (Padua, 1942).

[52] Sulla positività, *op. cit.* 14 and ff.; Lezioni di filosofia del diritto 234 f. (3rd rev. ed., Rome, 1936). Del Vecchio therefore clearly distinguishes between positivity and legality. The former is a logical property superior to events and passage of time, the latter a historical element, extrinsic and accidental.

Carnelutti, in the third edition of his Teoria generale 71 f., maintained that while "according to formula and tradition" the difference between *positive law* and *natural law* "would concern the source of the legal system," in fact the difference only exists in the sense that "natural law is a collection of unsanctioned precepts."

[53] G. Radbruch, Grundzüge der Rechtsphilosophie 179 f. (Leipzig, 1914). The author distinguishes between the positivity of law, identified with "Rechtsgeltung" in the sociological sense, and "Geltung" in the sense of a norm, which he finds corresponds to the "Verbindlichkeit" of law.

[54] W. Cesarini-Sforza, Il concetto del diritto e la giurisprudenza integrale 104 (Milan, 1913). This is a pleonastic adjective, the author adds, "if one considers the legal phenomena, which can only be observable facts, so that a non-positive law is inconceivable; but useful if one wants to indicate the effective verification of legal phenomena with respect to the norms."

A similar tendency can be found in a number of French writers who belong to that school of thought which Waline defined as *"positivisme sociologique"* as opposed to the true *"positivisme juridique."*[55] Thus Capitant and May apply the expression *"droit positif"* to *"droit qui est en vigueur"* and *"droit existant actuellement"* among a definite people.[56] Ripert and Boulanger call the *"règles juridiques en vigueur dans un État, quel que soit d'ailleurs leur caractère particulier" droit positif.*[57] Julliot de la Morandière considers positive law to be *"le droit appliqué en fait," "l'ensemble des règles qui gouvernent en fait à une époque donnée une société humaine déterminée."*[58] For Carbonnier positive law is *"le droit effectivement appliqué dans l'État et dans le moment où l'on se trouve."*[59]

Among scholars of international law the use of the term "positive law" meaning "law which is actually applied" is clear in the case of Gihl,[60] whose thought has evidently been influenced by Hagerström's criticism of the positivist and statalist concept.[61] Hold-Ferneck, criticizing the narrowness of Burckhardt's conception of positivity, indicates as positive international law those norms *"nach deren Staaten und staatsähnliche Verbände in der Tat leben."*[62] And Küntzel, preoccupied with safe-

[55] M. Waline, Positivisme phil., *op. cit.* 525 ff. "Legal positivism," represented, according to the writer, by Kelsen (who would have called it "critical positivism") and Carré de Malberg, consists of admitting, as a determining criterion of the legal value of a norm, only its conformity to a fundamental legal norm "prise comme étalon des valeurs juridiques." "Sociological positivism," represented particularly by Jèze and Capitant, still according to Waline, sees positive law as "ce qui est effectivement appliqué en pratique, comme règle de droit, dans un pays donné à un moment donné." See also by the same author, "Défense du positivisme juridique," in Archives de Phil. du droit et de sociol. jur., neuv. année, 1939, p. 83 and ff.

[56] M. Capitant, Introduction à l'étude du droit civil 32 (4th ed., Paris, 1925); G. May, Introduction à la science du droit 57, 65 (2nd rev. ed., Paris, 1925).

[57] G. Ripert et J. Boulanger, Traité élémentaire de droit civil de Planiol, refondu et complété par G. Ripert et J. Boulanger, Vol. I, p. 2 (4th ed., Paris, 1948). "Ces règles sont *positives,*" the two authors add, "en ce sens qu'elles forment un objet d'étude concret et certain; elles ont une formule arrêtée et précisée."

[58] L. Julliot de la Morandière, "Introduction à l'étude du droit civil français," in 1 Introduction à l'étude du droit (L. Julliot de la Morandière, P. Esmein, H. Lévy-Bruhl, G. Scelle) 173, 178 (Paris, 1951).

[59] J. Carbonnier, 1 Droit civil 24 (Paris, 1955).

[60] T. Gihl, International Legislation 18 (Oxford, 1937). For a definition of positive law Gihl returns to Bergbohm's term: *was als Recht funktioniert,* but he obviously gives it a different value. According to the German legal philosopher only law produced exclusively by formal sources could function as such, while Gihl considers that all law which is functioning in reality, whatever its origin, is positive law.

[61] Criticism of the idea of law as a product of will, whether this will is that of the state or claims to be general, is to be found especially in two studies by Hagerström: Is Positive Law an Expression of Will? (first published in 1916), and On the Question of the Notion of Law (1916), both reproduced in Inquiries into the Nature of Law and Morals 17 and ff., 56 and ff. (ed. by K. Olivecrona, tr. by C. D. Broad, Stockholm, 1953).

[62] A. Hold-Ferneck, Lehrbuch des Völkerrechts, Vol. I, pp. 1 ff. (Leipzig, 1930). "Positive normen," he adds, "sind gelebte normen. Sie treten uns in der *Erfolgung* entgegen, die das Miteinander und Gegeneinander des Staatslebens entspricht."

guarding the positivity of the "general principles of law," defines as positive not only norms laid down in an externally visible way by a visible authority, but all those which have been established in society as efficacious norms.[63] The attitude of a part of recent Italian internationalist thought is typical: It considers that one of its tasks is to give a new and more scientific definition of the "positivity" of law. This school believes that it could use a new definition of "positive law" in order to save the principle of the "positivity" of all legal norms and in particular of all norms of international law. It tries thus to overcome the difficulties which would otherwise arise from the fact of the existence of a norm, or a number of norms, of every legal system but particularly the international system, which do not appear as the products of "legal law-creating facts." Ziccardi, for instance, believing that only legal science can define a concept of positive law, and convinced that the one object of legal investigation must be positive law, groups under the heading of "positive legal science" both the idea of science having "positive law" as its own object and that of science which "assumes data of empirical experience" or which "refers to a world of external factors." The meaning which is usually given to the word "positivity" in the language of philosophical positivism when it accompanies the noun "science" is therefore transferred to legal language by Ziccardi to determine the value to be given to this same attribute when it is used to qualify the noun "law." Positivity is held therefore to belong to that law which science determines as a concrete object, on the basis of data of experience: everything which is found to be existing in the "positive world of fact" therefore becomes "positive law."[64] Sperduti had gone perhaps still further, in the sense of a departure from tradition, when he defined positive law, on the basis of a meeting of various elements, as an "efficacious" system of propositions which, besides being structurally legal and based on experience, are endowed with "normative validity."[65] In the end, however, this writer simplified his definition in the sense that "positivity is the same as its historicity, *i.e.* its setting itself up as an effective system of social organization."[66] Quadri, criticizing the definition of positive law as "*jus positum,*" comes to see the distinctive character of the positivity of legal norms in the "coactive external guarantee" which they give. We therefore find him defining positive law in the sense that "whether or not it is laid down by acts of will" positive law is all "so-

[63] W. Küntzel, Ungeschriebenes Völkerrecht 82: ". . . der wahre Positivismus sieht das Wesen des Rechts nicht in festgefügten, äusserlich klarerkennbaren Rechtssätzen, die eine sichtbare Autorität nach bestimmten Regeln als Recht erklärt. . . . Positive Völkerrechtsnormen sind nicht nur solche Normen, die im Verfahren des Staatenkonsenses erzeugt worden sind, sondern auch solche, die in der Staatengemeinschaft sich als wirksame Normen durchgesetzt haben."

[64] P. Ziccardi, La costituzione 88 ff.; especially 93 ff.

[65] G. Sperduti, La fonte suprema 108 f., 112 ff. According to him the concept of positive law thus expressed is the result of the fusion of two ideas: the first idea sees positive law as a social product, the second as that of the human spirit.

[66] G. Sperduti, Norme giuridiche primarie 30. Therefore, according to him, all norms included in the system are now norms of positive law.

cially guaranteed law."[67] For Giuliano the method of creation of law in no way determines its "positivity." According to him positivity is identified with effective strength in a given social group; it is a question of "sociality," that is, of the norms which make up a given system corresponding to the "judgments of value" which are present and operate in a certain society. The concept of "positivity" absorbs those of "reality," "validity" and "obligatoriness."[68]

There is, finally, a third group of writers whose use of the term "positive law" seems uncertain and promiscuous. Sometimes they give one meaning to the adjective, sometimes another, sometimes both together. In Laun's teaching, for example, positivity is a fact which is given, at the same time, both by the heteronomy of legal commands and especially by their effective application and the fact that they are obeyed by the mass of those to whom they are addressed.[69]

In Nawiasky's conception in characterizing positive law it is difficult to distinguish between the idea of a *"tatsachliche Geltung"* or *"regelmässige Anwendung,"* and a *"Setzung"* or *"Position des Rechts."* He speaks of "positivity" sometimes to indicate the social reality of law and its effective observance, sometimes to draw attention to the fact that norms have been laid down and are therefore an expression of the will of those who *"die Setzung vorgenommen haben."*[70] For his part Coing defines positive law sometimes as *"diejenige soziale Ordnung, welche in einer konkreten sozialen Gruppe gilt,"* and therefore as a *"geschichtliche Erscheinung,"* and sometimes as a *"Willenssatzung"* of a definite group.[71] In France, Brethe de la Gressaye and Laborde-Lacoste define positive law at one time as law *"qui est en vigueur dans un pays à un moment donné,"*

[67] R. Quadri, Diritto internazionale pubblico 35, 79 f., 92 (2nd rev. ed., Palermo, 1956). Quadri gives no reason for his assertion that the definition of "positive law" can derive from its etymology (jus positum), however. See also, by the same author, "Le fondement du caractère obligatoire du droit international public," in 80 Hague Recueil (1952, I) 587.

[68] M. Giuliano, La comunità internazionale 158, 223 and ff.

[69] R. Laun, "La positività del diritto," in Riv. di dir. pubblico, parte prima, sez. II, anno XXV, 1933, p. 309 and ff., and especially p. 311: "The positivity of law is therefore only a state of fact. Positive law consists of those (heteronomous) orders, which are effectively applied, followed and imposed." The author has also confirmed this conception of positive law in the article "Naturrecht und Völkerrecht," 4 Jahrb. f. internat. Recht 37: "Dasjenige, was wir das positive Recht nennen, ist eine Summe oder ein System von heteronomen Befehlen, welche sich auf den organisierten Zwang des Staates stützen"; and p. 38: "Das positive Recht, auch das positive Völkerrecht, ist eine Summe von Kausalzusammenhängen, welche bewirken, dass bestimmte Befehle der Machthaber gegenwärtig und vielleicht auch in der Zukunft befolgt oder erzwungen werden. Positivität ist demnach Gehorsam als Massenerscheinung, sie ist *Massengehorsam.*" Constantopoulos agrees with Laun's conception of positivity, Verbindlichkeit und Konstruktion des positiven Völkerrechts, Einleitung, p. IX and f. (Hamburg, 1946).

[70] H. Nawiasky, Allgemeine Staatslehre als System der rechtlichen Grundbegriffe 19, 24, 129 (zweite durchgearb. u. erw. Aufl., Einsiedeln, 1948).

[71] H. Coing, Grundzüge der Rechtsphilosophie 226 f. (Berlin, 1950): "Das positive Recht . . . ist uns als historische Erscheinung gegeben, und in diesem Sinne positiv. . . . Das positive Recht gilt als Willenssatzung."

and at another as law decided and imposed by a creative will expressed "*par des . . . sources formelles.*" [72] Among scholars of international law Balladore Pallieri sometimes uses the term "positive norms" to mean norms "laid down" having "their origin in a fact, in a procedure actually followed," at others he states that one can speak of the positivity of legal norms to indicate "those norms the regular observance of which is obtained from those, to whom the norms are addressed, by means of sanctions, coercion, or any other outside pressure which can be exerted." [73] Rousseau speaks of positive international law to indicate sometimes "*celui qui est effectivement suivi par les États et pratiqué par les tribunaux internationaux,*" and sometimes that which is "*effectivement posé par les organes compétents.*" [74] These quotations could be carried on indefinitely.

8. It is not difficult to realize how harmful the consequences of this long-standing linguistic confusion in the use of the term "positive law," instead of the original unity of meaning, can be to scientific investigation. And it is natural that these consequences should be particularly obvious where international law is concerned. For many reasons, this is the classic field for disputes not only on its positivity or non-positivity but also on its very existence as a legal system.

In making this point there is, however, no intention of saying that the reason for this confusion and its negative effects lies in the fact that beside the original legitimate meaning of positivity another less legitimate one has grown up. Nor does it mean that a new definition nearer to truth has not yet succeeded in finally overcoming the earlier and less "true" definition. Often some writer in his search for a new and more satisfying definition of the "positivity" of law gives the impression that he wants to obtain the "true" meaning of positivity itself. What was said at the beginning of this article, however, should remind us that words do not possess their own intrinsic meaning; the object to pursue is not a greater "truth" in definition, but only the assurance of greater clarity and less

[72] J. Brethe de la Gressaye et M. Laborde-Lacoste, Introduction générale à l'étude de droit 7, 170 *et seq.* (Paris, 1947).

[73] G. Balladore Pallieri, Diritto internazionale 9, 22 (7th ed.). In the Corso di diritto costituzionale (2nd ed., Milan, 1950), the same writer states, on p. 5, that "Law is called positive law because of its belonging to a social organisation actually existing," and on p. 44 he indicates as the principle of the "positivity" of law the need for its norms "to be laid down to gain strength and to create an effectively working legal system." At p. 22 ff. of Diritto internazionale Balladore Pallieri replies to a point made by the author in Scienza giuridica, p. 95, note 1, "that the term natural law, in some ways correlative, is used with many meanings, and that it is obvious, therefore, that the term positive law used as its opposite, will take on just as many meanings." Setting aside all reservations concerning the interdependence of the two expressions, it is strange that Balladore Pallieri should not be aware of the fact that the eventual plurality of meanings attributed to the term "natural law," far from justifying the attribution of a similar number of meanings to the term "positive law," rather adds to the confusion and ambiguity of a scientific debate in which correlations, which are in fact different, seem to be the same only because different things are meant by the same words.

[74] 1 Rousseau, Principes généraux de droit international public 38, 42, 52 (Paris, 1944).

ambiguity in use. This aim has not been achieved because of the ambiguity which has crept into the use of the word "positive."

It sometimes happens that controversies arise over the "positive" or "non-positive" nature of the same norm or group of norms, without there being any quarrel as to the origin of the norms, but solely, even if unconsciously, on the basis of the different meanings attributed to "positivity." So it is that, as we have seen, Kelsen and the writers who are most directly influenced by his concept, consider as "non-positive" the fundamental norm which they see as the fountainhead of the international system, because they identify positivity with the laying down by legal law-creating facts, by formal sources, which cannot be envisaged in the case of the first norm. Whereas others like Ziccardi attribute a positive character to this norm, he shares the idea of a basic norm whose existence cannot be deduced from a "source," but he holds on the other hand that the positivity of a norm is simply its existence in the empirical world, however this has come about.[75] Similarly, it happens that in the broad doctrinal dispute about "general principles of law" and their value in the international order we find, for example, writers like Charles De Visscher, Spiropoulos and Verdross, who attribute a non-positive but certainly obligatory character to these principles.[76] This is because these writers consider the part of international law which they qualify as positive to be made up only of

[75] Sperduti (La fonte suprema 76) has quite rightly pointed out that the so-called basic norm both in Kelsen's system, Perassi's early system, and that of Ziccardi, is a positive norm if the opinion of the latter were to be favored. It must always be considered as a non-positive norm, however, if the positivity of a norm depends, "as Kelsen and traditional thought maintain, on its being traced back to a source."

[76] According to Charles De Visscher, "Contribution à l'étude des sources du droit international," Rev. de Droit int. et de Lég. comp., 1933, pp. 405 ff., not only the general principles of law recognized by the civilized nations are excluded from positive international law, but their mention by Art. 38 of the Statute of the Permanent Court of International Justice has explicitly recognized the insufficiency of positive international law, composed by formal sources such as custom and treaty, and the necessity of admitting as an indispensable complement the existence of other international norms based on natural law. Spiropoulos, Die allgemeinen Rechtsgrundsätze im Völkerrecht 63 (Kiel, 1928), states that the principles in question have the character of natural law, and puts them in the category of non-positive but "obligatory" international law. According to Verdross, "Les principes généraux du droit dans la jurisprudence internationale," 52 Hague Recueil 203 (1935), one must distinguish clearly between the norms of positive customary and conventional international law, and those principles of law which, not yet having penetrated into positive law, are implicitly presupposed by it. This writer's outlook has not changed substantially in the latest developments of his thought. In the third edition of his Völkerrecht, p. 23, he attributes to the general principles of law the function, which is extremely important for the construction of international law, of "die Grundlage des positiven Völkerrechts zu bilden." He now formulates the moral norm, which he sees as the basic norm of international order, in the sense that "sich die Völkerrechtssubjekte so verhalten sollen, wie es die allgemeinen Rechtsgrundsätze und die auf ihrer Grundlage erzeugten Normen des Vertragsrechts und des Gewohnheitsrechts vorschreiben" (*ibid.* 25). Despite the fact that they are directly covered by the "völkerrechtliche Grundnorm," Verdross still considers the general principles of law as "Grundsätze" which remain above and outside positive law when, and inasmuch as, no "positivization" on the part of a customary norm of an international instrument has taken place.

those norms which they regard as actually having been laid down by formal sources, that is to say, customary and conventional norms. However, another writer who generally keeps close to the same point of view, Küntzel, sees the *"allgemeine Rechtsgrundsätze"* as part of positive international law,[77] not because he differs from the others in imagining the existence of a special formal source apart from treaties and customs, and set up to create these principles; nor because he believes, like some others, that its positivity is based on the positivity of a norm customary or otherwise, which would expressly establish its force; but only because—as we have already seen—he bases his argument on a broader conception of positive law by which positivity is substantially identified with efficacy. It is interesting to note that Spiropoulos, replying to criticisms of his conception of the general principles of law as having the character of natural rather than positive law, but being at the same time endowed with effective authority in international relations, acutely observes that the problem of the nature of these principles depends only on the meaning given to the terms "positive law" and "natural law."[78]

However, the prejudicial consequences of the ambiguity which has arisen about the idea of "positivity" are not confined to these apparent contrasts between views which are substantially similar. It is more important that this ambiguity inevitably helps to confirm and perpetuate positivism's fundamental error concerning the nature of "legality" and the means of acknowledging it. This in turn can only make it impossible to get those results which some writers had hoped to obtain by the rather dubious process of changing the meaning of the terms used.

One might think that the adoption of a new and wider concept of positive law to take in all law which is effectively in force and operating in a given human society, if carried out clearly, eliminating any reference to the way in which the law was created, ought to correspond to a definite abandonment of the idea of any relation between law in force and law which has been laid down. It ought even to allow for the necessary distinction to be made, under a different name, and within the wider field of law still in its entirety known as positive, between norms which appear as the product of law-making facts and those which are in force and working without being the product of any "source." It ought therefore to be possible to outline the different characteristics of these two categories of norms, even though both were qualified as positive, and to define the ways in which they each could be recognized, besides determining their relationship to each other.

In practice, however, this is all prevented by the fact that even though one has expressed agreement with a new and broader definition of positivity, one is unable to break completely with the old and narrower con-

[77] W. Küntzel, Ungeschriebenes Völkerrecht 82 ff. The author reaches the conclusion of the positivity of general principles of law on the basis of the fact that they have shown themselves to be "wirksame Normen" in international society. Like Verdross, Küntzel maintains that the general principles of law "die 'formellen Quellen' des Völkerrechts, Vertrag und Gewohnheit, gegenüberstehen," and that they are still directly anchored to the ground norm of international order.

[78] J. Spiropoulos, Théorie générale du droit international 107 (Paris, 1930).

cept. This happens because one is still convinced that the determining and distinctive character of a norm's legality depends on its creation by a definite act of "laying down," and that therefore one cannot recognize its existence as a rule of law except by proving that such an act took place. And whether one likes it or not, to qualify all law "in force" as "positive," even if one intends to give it another meaning, can only help to perpetuate this conviction. For example, Balladore Pallieri, having identified "positivity" with efficacy and regular observance guaranteed by sanctions and coercion, would have a sufficient basis for including the norms he calls original and fundamental among the positive norms, once he had pointed out, that is, that they are efficacious and their regular observance is guaranteed. Instead he still feels it necessary to specify a "laying down" of these norms; he feels he must assert, as we have already seen, that the norms in question are positive also in the sense of having been "laid down," having their "source" in a fact, in a process which actually happened even though difficult to prove. And he concludes "exclusively for this reason" that these norms can be considered as existing in the international community.[79]

Now if it is obvious—as obvious as it is irrelevant to our immediate problem—that any norms existing in reality can only originate from causes or factors which have actually operated, even if this was in a way which cannot be determined or specified externally, it is no less obvious, first of all, that these causes and factors are quite a different thing from the "laying down" procedure; therefore these same causes and factors cannot be considered as law-creating facts, as "sources," [80] but it is not even certain that, wherever they functioned, a process of "laying down" must also have taken place. Furthermore, it is very certain that it is no step forward to claim to refer to a "laying down" on a "source," which was not provided or

[79] Diritto internazionale 21.

[80] This essential difference, pointed out in Scienza giuridica, p. 79, has been clearly reaffirmed by Barile, "Tendenze e sviluppi della recente dottrina italiana di diritto internazionale pubblico (1944–1951)," in 4 Comunicazioni e studi dell'Ist. di dir. internaz., Univ. di Milano 410 (1952); and "La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice," 5 *ibid.* 159 f. Sperduti also seems to realize the necessity for this distinction in his latest article on "Norme giuridiche primarie," p. 13 f., where he points out the difference between "a fact which bears exclusive and decisive relevance to the existence" of certain norms as legal norms, and of those facts as "antecedents," "factors," and "motives." Following these premises the writer goes on to say that in the case of the primary norms one cannot reconstruct a phenomenon "of psychical concrescience of law-creating factors with the force of an efficient cause of their legal existence." Because of this lack of an "fact of psychical consistency," whose specific function is to determine their legal existence, these norms are "norms of spontaneous law." One does not see how the author can reconcile these conclusions with the idea of a "source" for the "primary" norms, which has in common with the others, that is the "formal sources," set up as such by norms of the legal system, the "effect of determining the existence of legal norms" (p. 16). Apart from other considerations, where an "fact of psychical consistency," to use Sperduti's terminology, is clearly missing, there can be causes, reasons, factors, motives, but not a "source," not a "law-creating fact." If one counts causes and factors like this as sources, then the concept of a source changes fundamentally and loses its usefulness for legal science.

ordered by law, in order to deduce automatically the existence of some norms as legal norms. It is in fact a step backward in relation to the position reached by that school of thought which had effectively shown how the deduction of the legality of certain norms is only legitimate when based on a "legal" laying down and a "legal" source, arranged by the previous law for the creation of the new law; and how it cannot be effected without recourse to law-creating facts, which in turn possess the feature of legal nature.[81] By imagining the existence of sources which were not set up legally, to explain the existence of norms which do not seem to be the product of legal sources, we are only returning to the original overcome ideas of positivism. Criticism had already pointed out for a long time that the premise necessary for the deduction of the legal character of norms produced by a certain "source" can certainly not be found in the actual material elements of the fact to which the value of a source is given, but can only be given by the legal character of the norm, which is the basis for the source's being considered as such.[82] The return to so-called creative "facts," which remain as such and do not assume the aspect of law-creating "legal" facts, would still be irrelevant to the proof of the existence of a given norm as a norm of law, even if they were actually real: this proof must be sought in some other way. However, Balladore Pallieri, who seems to be nearing the right solution when he admits that the existence

[81] It is not easy to understand, therefore, how a legal philosopher like Guggenheim, (Was ist positives Völkerrecht? 53 f., n. 39), can think of qualifying certain norms as produced by "law-creating facts," for the simple reason that their content was determined "durch religiöse Vorstellungen und gesellschaftliche Gegebenheiten." It is from these premises that Guggenheim thinks he can deduce that "Auch diese sog., 'spontane' Normerzeugung kommt in einem Normerzeugungsverfahren zustande," disagreeing with the term "norms of spontaneous formation" given by this writer to those norms which do not appear as the products of real legal law-creating facts.

[82] Balladore Pallieri (Diritto Internazionale 18), recognizes this fundamentally when he asserts that the "sources," which he calls "original" because not effected by earlier norms, "cannot be defined in general terms, cannot have predetermined characteristics, and their force cannot derive from common, general characteristics which they possess; if this were so, if the presence of such characteristics were the basis of their force, it would postulate the presence of a norm which gives force to such general characteristics and confers the nature of a source on those acts which possess them." But if the character of sources must be conferred on certain facts by a norm, it is not possible to define, even as original sources, facts on which this character has not been conferred by a norm. One cannot understand the usefulness of the idea of a "source" which cannot be considered as such, either in virtue of a norm which effects it, or of its own intrinsic characteristics. There is also a certain confusion between the idea of a source and that of a norm in this recent expression of Balladore Pallieri's thought. One cannot but agree when he says that in every system "there must be some original norms" (*ibid.* 19); and he puts himself in a position similar to that which this writer adopted (Scienza giuridica 78) in distinguishing "between those norms which can be said to be of *spontaneous* formation and those whose formation is the work of *law-making facts*," when he asserts (p. 18) that "besides a 'derived' formation of law, we therefore have an 'original' formation." But this statement cannot be reconciled with the assertion that "besides derived sources we also find 'original' ones." There is a contradiction in terms between the idea of an "original" norm and that of a norm derived somehow from a source, even if that source was "original."

of the international norms, which he calls original, can only be inferred from certain manifestations and effects which presuppose the existence of the norms,[83] not only contradicts himself but excludes all possibility of any useful developments from this admission, when he asserts at the same time that these norms can be considered to exist in the legal system of the international community because, and only because, they are "laid down" by a "fact."

In fact only when it has been clearly and finally recognized that certain norms can be qualified as legal because of characteristics belonging objectively to the norms themselves, because of their function as norms of law and not as a mere reflection of their origin, will it be possible to realize that legal science has at its disposal other means of reaching a knowledge of the norms which are its object, besides the reference to an historical "laying down" or to a creative fact which produced them. This reference, which should in any case be used with all due caution,[84] can only be employed as a means of ascertaining the presence in a given legal system of those norms which have real "sources" behind them, in the legal sense of the word. As for the remaining norms, a no less valid and sure proof of their existence can be attained, but it can only be based on what is, in fact, the only certain method of establishing the existence of legal norms, that is, on a verification of their functioning effectively as norms of law within the society in question. One of the uses of the fundamental distinction which must be made concerning the origin [85] of legal norms lies just here: in making clear that the method, whereby some of them can be recognized, cannot be used to recognize others. The deductive method, by whose application the idea of the legal nature of a norm is shown to be the inference drawn from the

[83] Diritto internazionale 23.

[84] Reference is made here to what was already made clear in Scienza giuridica 80 f., that in practice it is impossible to set aside entirely the search for an inductive proof of the real and actual existence even of those norms which have been regularly laid down by the "source" of a definite legal order. It can happen otherwise that a norm is believed to exist and function, which in fact has ceased to exist because of the later formation of a norm which does not owe its origin to a legal law-making fact anticipated by the order in question. On the power of abrogation which custom must be granted over law, and the special power which must be recognized to this effect in the field of constitutional law, see Romano's remarks in "Osservazioni preliminari per una teoria sui limiti della funzione legislativa nel diritto italiano" (estr. dall'Arch. di dir. pubb., 1902, I), p. 24 ff.

[85] With reference to this distinction one must beware of believing that it is based on a more or less distant historical fact. Norms not deriving from formal sources not only arise at the beginning of the formation of a society, but are also continually arising after this. On the contrary written norms, of an original or revolutionary constitution, for example, are norms created by a real source in the legal sense, contrary to what Balladore Pallieri maintains in Diritto Internazionale 17 f. The laying down of constitutional norms by a certain original or revolutionary constituent assembly, for example, is a legal law-making fact, because a norm shows itself to be existing in the conscience of the members of society, which confers the necessary power on this assembly. This norm can certainly be said to be really original, in the sense that it was spontaneously formed in the conscience of the members and was not "laid down" by any creative organ, but the norms "laid down" by the assembly cannot. The assembly would produce "legal" norms even though it was not endowed with "legal" power to do so.

premise of the legal character of a pre-existing norm, can be of value with regard to norms which owe their existence to creative processes, which appear as legal law-creating facts in the light of pre-existing norms. To recognize all the other norms an inductive method is necessary;[86] that is the method which consists of inferring their existence from a convincing series of external manifestations, whereby it is proved beyond doubt that they live and function as legal norms within the order of that society and that they produce those effects which the science of law recognizes and characterizes as legal effects.[87] This distinction of the method which should be used to attain recognition of legal norms becomes a valuable criterion to confirm the truth or error of the solution given to the problem of widening alternatively one of the two categories of norms.

It is characteristic that a great number of authors who, while reacting against positivism, were induced to re-acknowledge the existence of norms which, however qualified, are commonly considered as the product of the operation of legally provided law-creating processes, are now trying to reduce the number of these norms to a minimum, and what is more, to one single norm, or one very narrow group of primary and fundamental norms. This happens not only in the case of those who are forced into caution by the still persistent conviction, already mentioned, of the possibility that legal science recognizes only norms created by legal law-creating facts. Even those who would like to break away from this dogma and who think it is the task of legal science to prove the existence of norms which cannot be traced back to facts of this kind, still seem to be afraid of deviating too

[86] The need for legal science to apply the inductive method, particularly in the case of international law, already explicitly recognized by some authors (see for example Ziccardi, La Costituzione, *op. cit.* 98 ff., 112, in Italy), has recently found a supporter in Schwarzenberger, International Law, Vol. I, p. XLVIII and ff. (2nd ed., London, 1949); and "The Province of the Doctrine of International Law," in Current Legal Problems 240 and ff. (1956). A reading of his remarks shows that Schwarzenberger, by opposing the deductive to the "inductive approach," intends to do away with the idea of a recourse to *a priori* deductions from theoretical or rational principles, or to confusions between *lex lata* and *lex ferenda* in the construction of international law and the determination of its norms. By opposing the deductive to the inductive method he therefore wants to stress the need for vigorous adherence to practice, especially to that which results from jurisprudence, in order to determine the law in force. This is a preoccupation not without foundation, but which has little to do with the study in question.

[87] It seems appropriate to point out that the inductive method applied by legal science reaches the conclusion of a norm's existence from a series of single external manifestations of its function as a legal norm and from a recognition of the effects which it produces as such. This recognition must be certain, to permit a valid inference. One must therefore be particularly careful when maintaining (as, *e.g.*, Sperduti, Norme giuridiche primarie 14, and La fonte suprema 214 ff.) that the recognition of legal norms "can be reached by a last inference subsequent to the others." This is not to say that in some cases the existence of a norm cannot be inferred from the existence of other norms which necessarily presuppose it. But this can happen only if the existence of those other norms is ascertained from other sources, and that the norm inferred from them is not claimed as their "basis of legal norms": one cannot infer a truth by induction from facts whose existence can be proved only through the very truth which it is hoped to prove.

far from the dogma and of profiting by the results of their assertion.[88] These authors subsequently draw a line [89] between the first norm or group of norms on the one hand, and customary law on the other. This line is

[88] A writer like Ziccardi, for example, though he has reached the conclusion that legal science is a science that operates exclusively from facts given by empirical experiment, and having therefore, by stating the validity of the inductive method, overcome the identification of legal science with a limited dogma whose only task was to deduce proofs of former legal norms, still felt it necessary to limit the application of these results to one norm, that is, the "suprema norma sulle fonti." Recognition of all the other norms would be reached by means of a deductive approach from that first norm, and that "source" contemplated by it (La Costituzione 126). Still more recently, Sperduti (Norme giuridiche primarie 12) maintained that "primary" or "fundamental" norms "include, and only consist of one or more norms concerning legal production."

[89] One does not find a distinction of this kind in writers who have thoroughly understood the nature of *jus non scriptum*. Vittorio Scialoja, p.es., "Sulla teoria della interpretazione delle leggi," Note in Studii giuridici dedicati e offerti a F. Schupfer, Pt. III, p. 306 (Turin, 1898), speaks of this law as "a tacit fundamental law, which is an immediate emanation from ordered social forces which can be called by the now traditional term of customary law." He then adds: "All written law is based on this customary law, because the law which governs laws can only be essentially customary."

It is particularly significant that Anzilotti, in the famous manuscripts which he added to his Corso di diritto internazionale (4th ed.), Con l'aggiunta di note inedite dell' autore e di un capitolo sugli accordi lateranensi, Vol. I, Opere di Dionisio Anzilotti a cura della S.I.O.I., p. 72, note 10 (Padua, 1955), maintained that "we must widen the concept of custom . . . to include what is true in the so-called necessary and constitutional law of international Society." Referring then to Raestad's work, "Droit coutumier" et "principes généraux" en droit international, Anzilotti refers to the latter's idea that there is no difference between customary law and general principles, "because general principles and the legal constitution have usage as their foundation," and he therefore deduces that it is proved "once more that one can give a wider meaning to the idea of custom in order to include the new general principles, in the sense of principles given with the constitution of the society in question." As for Raestad, he confirmed in a later posthumous work, La philosophie du droit international public 75 (Oslo, 1949), the idea of the fundamental unity of general principles and international customary law.

Giuliano (La comunità internazionale 179) points out quite rightly how, in writers who make a distinction between international customary norms and those other *superordered* norms which they call by different names, there is no "safe criterion of discrimination" between the two categories of norms. Again, according to this writer (p. 176), the adoption by many of the difference in name would in some way be a consequence of the necessity of making at least some fundamental norms of international law independent of the rigid scheme "of a source outside the consciences of the subjects" into which legal thought has more and more forced its representation of the "social factor which creates so-called customary law." However, historically, the idea of the so-called constitutional or fundamental principles was previous to the rigid forms of that description of custom as a law-creating procedure, based exclusively on the material element of *usus* to which Giuliano refers. Rather, that idea represents the slightest recognition of a logical necessity which legal thought, though restrained by the persistence of some canons of positivist derivation, could not deny altogether. If, in doing this, legal thought did not go so far as to include all *jus non scriptum* in the field of norms recognized as not produced by legally predetermined law-creating processes, but wished rather to make a clear separation between primary law on one side and customary law on the other, this seems simply to have been because of the difficulty of taking all at once such a vastly important step away from principles and ideas which previously had been almost entirely unquestioned.

based on a difference they claim between the two processes of formation, but it does not stand up to a critical examination. This is not the place to discuss the question whether in the vast field of *jus non scriptum* one can introduce, more or less legitimately or usefully, some distinction, *e.g.*, with reference to its greater or lesser universality [90] or its different content, yet founded on criteria which have nothing to do with the way in which the norms were formed.[91] It is, however, important to point out that no distinction can be based on the supposed fact that so-called primary or fundamental norms are not produced by legally anticipated and organized law-creating facts, whereas customary laws are, and that these last should be considered as secondary norms "laid down" by a law-creating process specially provided by one of those primary norms.[92] The writer has al-

[90] As has already been observed (Scienza giuridica 90, note 1), logically there is nothing to prevent us from admitting the existence of particular norms, besides the general ones, within the framework of customary norms. But logically there is nothing which forces us to think that these eventual particular customary norms must have a different origin from that of other norms of *jus non scriptum*, and in particular from that of the primary norms of the order. The need that Sperduti had felt for this (La fonte suprema 159 ff.) derived solely from the fact that he still conceived both types of norms as being the product of specific law-creating facts; hence his preoccupation that the process of legal production of primary norms should be suitable only for the production of absolutely universal norms. If we think of both types as having no specific legal law-creating fact as their origin, it is clear that the eventual presence, besides norms which are shown to be universally valid in practice, of norms which prove to have force only in a narrower sphere, would present no difficulty and would cause no need for a hierarchical differentiation.

[91] The irrelevance, for the problem of existence of international unwritten norms, of a distinction based on their content has already been pointed out by Barile, La rilevazione 161 f., who has also noted how international practice makes no distinction between principles and customs in the case of norms of international *jus non scriptum*.

Bentivoglio has given his approval to a distinction based on the content of norms, which aims at specifying, within the vast framework of unwritten international law, "a group of fundamental principles which give a clear expression of the essence and function of the order." "Interpretazione del diritto e diritto internazionale," in Pubb. dell'Univ. di Pavia, n. 119 (1953), p. 254 ff. It should, however, be made clear that according to this writer too the distinction he admits does not assume importance for the problem of the formation of norms of international unwritten law. In fact Bentivoglio also agrees with the idea that all universal international law is a law whose existence cannot be traced back to any qualified source of legal production.

[92] The idea that one of the "primary" or "constitutional" norms of the international order anticipates and organizes custom as a specific "legal law-creating fact" of that order, is to be found in the Italian school of thought, for example, in Fedozzi, "Introduzione al diritto internazionale e parte generale," in 1 Trattato di diritto internazionale per cura di P. Fedozzi e S. Romano 43 (2d rev. ed., Padua, 1933); Balladore Pallieri, Diritto internazionale 17, 20; Sperduti, La fonte suprema 209 ff., and Norme giuridiche primarie 12 ff., 24, note; Quadri, Diritto internazionale 81, 95; Monaco, Manuale di diritto internazionale pubblico e privato 48 ff. (Turin, 1949).

It is significant that if the writer from whom more or less all of those mentioned took the idea of the existence of "fundamental or constitutional principles" in the international community, that is, Romano, in his Corso di diritto internazionale 31 ff. (4th rev. ed., Padua, 1939), places a distinction between those principles and customary law, he bases this distinction exclusively on the fact that these principles were not formed gradually like customary law, but arose at the setting up of a community. He therefore has no thought of subordinating customary law to constitutional principles

ready had occasion to point out elsewhere how wrong it is to raise to the value of supposed moments of an imaginary legal law-creating process those so-called elements of custom which are nothing but the external data by which the existence and efficacy of a customary norm can be recognized, since it is a norm which is not otherwise manifested. And we saw then how attempts to present and describe custom as a "legal law-creating fact" had failed, and had been destined to fail.[93] One could add—and this is of importance to our study—that the error of excluding customary law from the field of law which is recognized as not being derived from legally pre-established law-creating processes, is still more obviously confirmed when one remembers that, in order to be able to recognize customary norms, legal science uses, and can only use, that same inductive method which it employs to establish the existence of those so-called primary or fundamental norms. This is generally the only method it can use in the case of all *jus non scriptum*.[94]

---

so that one of these should anticipate custom as a law-creating legal fact creating secondary norms. Romano, unlike some of his followers, is really consistent in his conception of customary law as having an "almost unconscious and therefore involuntary" origin, or (Corso di diritto costituzionale 357 (7th rev. ed., Padua, 1943)), "as a norm spontaneously formed without a particular act of will." This is a conception which logically excludes the possibility of inserting the idea of a special law-creating fact, legally anticipated and organized, whose task is to produce customary norms.

A similar idea of customary law is to be found in Esposito, "Il controllo giurisdizionale sulla costituzionalità delle leggi in Italia," estr. dalla 5 Riv. di dir. processuale 4 (1950, No. 4), who speaks of a "spontaneous rise and fall of legal rules in the field of custom, despite all the prohibitions of written law." Carnelutti (Teoria generale 34) says expressly that the customary formation of legal norms is purely "natural" and not "artificial" as is that of positive laws. Further afield, Olivecrona, Law as Fact 61 f. (Copenhagen-London, 1939), states that traditional customary law is not "formally constituted," and "is to a large extent developed more or less unconsciously."

[93] Scienza giuridica 84 *et seq.* On the difficulties which writers encounter in their effort to "make the action from which international customary law must have sprung, correspond with a process with more or less definite characteristics," see also Giuliano, La comunità internazionale 174 ff.

Sperduti (Norme giuridiche primarie 22 ff., note 22), wanted to make a final attempt as saving the idea that custom can be represented as a fact of legal production by imagining that the fact itself was a psychical creative action, though involuntary, whereby the conscience of the members would operate, so creating norms of law, because of a primary legal norm which would anticipate this action as a "source." The spontaneous formation of a norm in the conscience of the members of the social body, on which Sperduti bases his argument, can be a psychical concrescence. But this does not allow for it to be transformed into a psychical action which will "create" the norm in question. As I have already had occasion to make clear elsewhere, the birth of something cannot be presented as an action which will bring about this birth itself.

[94] The old expression "*jus non scriptum*," usually applied particularly to custom, did not mean a type of norm that was materially not written, so much as the type of norm which, not having been manifested by an appropriate creative act, can only be recognized as existing by the outward manifestations of its functioning in the conscience of members of the social body. Giuliano, in La comunità internazionale, *op. cit.* 179, observes correctly that also the "other norms of fundamental or constitutional or natural principles could only be recognized as existing on the basis of an analysis of

All these difficulties which legal thought encounters, despite the renewal of some points of departure, while trying to clarify the question of the different ways in which the law in force can be formed, and that of the essential distinction which must be established concerning them, all derive in the last analysis from the unresolved contradiction between two, or rather several ideas of "positive" law, and from which no definite choice has really been made. Despite assertions to the contrary and a professed agreement with different and broader conceptions of "positivity," the fact is that in practice it is impossible to give up completely an idea which is opposed to older tradition but firmly established by the profound influence of legal positivism. According to this idea all law in force is "positive" also in the sense of law "laid down," and that legality, rather than being a quality which certain norms are recognized as having because of certain specific characteristics of their structure and function,[95] is a character conferred on them by their origin, by their necessarily having been laid down. Until we are finally free from this idea, it is inevitable that we should end up by considering a purely material and not "legal" "laying down" as the determining factor of legality—and the fact that this "laying down" is carried out by one body rather than another, and takes place in this way rather than in another, obviously takes nothing from the arbitrariness of the conclusion—unless we are satisfied with merely postulating the premises of our deductions or a no less arbitrary assumption of them by a metajuridical sphere.

The profound though sometimes unconscious effect of the above-mentioned idea on even the most modern thought is proved by the attitudes of those writers of recent Italian internationalist works who have clearly repudiated the classic idea of "positive" law, and have proceeded along their own lines to a redefinition of "positivity" which aims at eliminating every link with the idea of *"jus positum."* Sperduti, for example, recognizes, as we saw, the existence of a small nucleus of primary and fundamental international norms, the first of which would be that which would confer the value of a legal "source" on the customary law-creating process. This nucleus is extremely small; and yet its positivity should not be doubted, even if it were proved that they were primary norms which had not been "laid down," since we know that the author gives a different meaning to this term. Despite this, however, he himself cannot give up the search for a source for a supreme law-creating fact even for these norms. This, he feels, can be found in the "process whereby international society is

fact and of international practice." More recently, the impossibility of establishing a distinction between customary norms and general principles, because of the identity of the procedures which the international judge follows in both cases, has been illustrated by Barile, La rilevazione, *op. cit.* 159 f.

[95] It had already been pointed out that the characterization of certain norms as legal norms must be based on the typical aspects of their way of operating, in Lezioni di diritto internazionale 7 (Milan, 1949–50), when the author indicated the specific value attached to the facts of social life by legal judgment as the element which distinguishes the legal sphere from those judgments of another nature. This idea has since been made clear and further developed in Scienza giuridica, *op. cit.* 69 ff.

fundamentally organized, itself laying down the highest principles of its own legal system," which he defines as a "pre-legal custom" as opposed to the other subordinate source of the customary norms, which he calls "legal custom."[96] This search for a supposed legal process creating primary norms ends, therefore, with the determination of a typically pre-legal fact which—apart from any other consideration—cannot, because of its very nature,[97] be used to prove that the norms "produced" by it are rules of law. The continued need for finding a "supreme" source can, therefore, only have been felt because of the persistence, in spite of everything, of some kind of idea that norms whose legality and positivity are affirmed on other grounds can become more "legal" and more "positive" if it can be established that they were also "laid down" by some creative organ. For his part Quadri defines "primary" law, which has a position of "pre-eminence of force" over all other international legal norms, as "positive" law which must, however, be clearly distinguished from "*jus positum.*"[98] However, he still thinks it indispensable, in order to explain their legal validity and efficacy, to make these primary norms depend on a "will," a "decision" of the social body, on what is substantially a "laying down" on the part of a supposed "supernational Authority." In fact he speaks in this way of these norms as having been "laid down *directly* by the social body." However suggestive, this is no more than a "*fictio,*" and, since it still only leads to the indication of a purely pre-legal fact, it can be of no use, for the reasons I have already stated, as a premise from which to "deduce" the "legality" of primary norms. If the writer falls back on it, it is because he is convinced that legal nature must be conferred on a norm by its having been decided and willed by a definite authority.[99] Here it is obvious that the much criticized ideas of traditional positivism are taking their revenge. Finally, even Giuliano does not entirely escape the influence of the idea of the "laying down" of all law by some "creative organ." This writer pointed out a while ago that for the more general legal principles of the international order there is no "real process of laying down, of production" and that their legal value does not derive from their "having been laid down by a definite process on which a legal norm has conferred this power."[100] And he also saw the inconsistency of

[96] La fonte suprema, *op. cit.* 212 f. In order to remain faithful to these ideas, Sperduti, in his latest article, "Norme giuridiche primarie," *loc. cit.* 16, has recourse to a use of the word "source" with which even he does not seem entirely satisfied.

[97] As we saw, the fact that primary norms belong to the legal system is determined, according to Sperduti, by inference from other norms of the legal system for which they form the necessary premises.

[98] Diritto internazionale, *op. cit.* 79, 88 f.

[99] The writer openly states this (*ibid.* 26) when he asserts that the legal norm is only the outward manifestation of the phenomenon of the *authority* of *social power.* Sperduti, Norme giuridiche primarie, *op. cit.* 16 f., criticizes Quadri's idea of a "will of the social body." But even reduced to a mere metaphor, as Sperduti would like, the idea of a "social will," while serving no useful purpose, could be the cause of misunderstanding.

[100] M. Giuliano, "Considerazioni sulla costruzione dell'ordinamento internazionale," in Comunicazioni e studi dell'Istituto di diritto internazionale e straniero dell'Università di Milano, Vol. II, p. 201 (Milan, 1946).

discriminating, as some would have liked to do, between those supreme principles and the rest of general customary law. And yet despite this, Giuliano then yields to the temptation of attributing a source, even though not legally anticipated, to those principles and to those customary norms. In order to do this he tries to present as a source, as a creative organ of international norms, the "consciences of the members of the whole international community"; or a "manifestation" of them; or again the international community itself, seen as a whole, as an organ of a general character which "formulates judgments of legal value," as opposed to the productive organs in which norms are formulated by only some of their members; or, finally, "the direct and immediate formulation of judgments of legal value by the community as a whole."[101] To imagine an organ of this kind as an organ which can produce law is, once more, nothing but a fiction, as dangerous as all fictions. At the same time it is of no use to legal science, like all other attempts to return to imaginary non-legal sources. Furthermore, it is a conviction that contradicts the idea which the same writer has expressed: that the general norms of the international legal order are the "opinions," the "legal convictions" of the international community taken as a whole:[102] someone who is convinced of something does not create or produce his own conviction, he simply has it. The fact that, in spite of this, Giuliano felt the need for this fiction proves that his rejection of the traditional idea of positivity is less fundamental than it might appear, and that the idea that the essence of positivity cannot altogether be detached from a creation of law by a definite productive organ, from its being "laid down" by a body—though this body may be society—still continues to influence him. It is bound up with the whole conception of law as "having been" produced by society, and linked to the premise—which cannot be eliminated when one identifies "positivity" with "sociality" as Giuliano does—of the necessarily "positive" nature of all existing legal norms. And so this idea prevents that writer from taking the final step, from recognizing unhesitatingly that there are norms, existing and in force,

[101] See, respectively, La comunità internazionale, *op. cit.* 162, 166, 174, 181, 226, 229. Similarly, in connection with "general principles of law recognized by civilized nations," Giuliano specifies as their "technical sources" "these same human societies organized as States."

[102] Already in Scienza giuridica 81, this writer had occasion to point out that a reference to the conscience of the members of the social body can only be legitimate if this conscience is considered not as a "source" but as the "seat" of the norms, the place in which they are born, live and die, where they are written ideally even though they are norms of "*jus non scriptum*"; on condition, that is, that the reflexive meaning of "conscience" is not confused with the active meaning of "creation" or "approval." It is obvious that one can speak of the "spontaneity" of the formation of certain norms only if one sets aside any idea of their being produced or formulated, either by this society as a whole, or by the conscience of its members. Spontaneous formation, production and formulation are words which naturally exclude each other. Giuliano particularly stressed the fact that the "formation or rejection of general international norms" is a "spontaneous and natural phenomenon," in his most recent book: I diritti e gli obblighi degli Stati. Tomo primo: L'ambiente dell'attività degli Stati, in Trattato di diritto internazionale (dir. da G. Balladore Pallieri, G. Morelli, R. Quadri, sez. prima, Vol. III, Padua, 1956), p. 39.

which differ from the others, not because they were produced by a source different from and superior to the law rather than anticipated by it, but because they are norms which have no "source" of any kind, which grew up in the conscience of the members of society without having been "produced" or "formulated" by any body, and whose nature can only be recognized in its different aspects when this fact has been realized.

It must be said that that part of modern international legal thought which likes to assert, often quite rightly, the "sociality" of law, is in danger, though to a different degree according to different authors, because it has not entirely rejected the idea of legality left behind by positivism. This is the danger of falling into a different, but not dissimilar, error from that of the statalist positivism, which it has often effectively opposed. It is not enough, after having proved that a definition of law as the will of the state or as all the laws created by the state, is wrong, simply to substitute for state a society more or less artificially personified. One must recognize that legality is not a quality conferred on norms because they were laid down by a given body, whichever that may be. What is of real value in the statement of the sociality of law is that law, as a social phenomenon —and "phenomenon" does not mean "product"—is manifested and operates in the life of society and that therefore one must look for it in society, and consider and understand it in relation to society and its needs. But this does not mean that "sociality" is the reason for "legal nature," that law is law because it is "created" by society, or because it is "the will of the social body" even in a metaphorical sense. One cannot say that society confers legality on its own norms [103] or, even if these norms are legal, that it is because society and its members want and consider them as such.[104] Legality is an attribute conferred, not by society or by any

[103] The fact that "social forces" cause its legal system to operate in society does not justify the inference that "it is society which confers legality on its system of legal organization," as Sperduti states, Norme giuridiche primarie, *op. cit.* 27. Whatever the idea which the author intended to express by this statement, this last idea certainly lends itself to ambiguity. To indulge, as he does, in such statements as "it is society which creates law" (p. 30), or in the use of the metaphor of law as an emanation of the will of the social body, confirms the reality of the danger just mentioned, as do some of Giuliano's expressions recalled above, and some of Quadri's, which go even further.

[104] In his Considerazioni sulla costruzione dell'ord. int., *op. cit.* 186, Giuliano had described legality as a force given to certain norms by the "conviction of the members." A reference to this subjective and "ideological" element was therefore enough to permit a distinction to be made between legal norms and other social norms. It would seem that this idea has been abandoned by the author in the second part of his next study, La Comunità internazionale, *op. cit.* 222 f., where one finds him accepting the idea that what makes the legal system different from other systems of social norms lies "*only* in the speciality of the *values,* or—if you prefer—the *meanings,* which legal judgments attribute to the social behaviour in question." To say this is to admit that these judgments are characterized as judgments because of an objective element inherent in them, and not because of a merely subjective conviction of the members of the social body. However, some doubt still remains as to whether Giuliano has in fact abandoned the first idea, since he seems to restate it more recently in Norma giuridica, diritto soggettivo e obbligo giuridico (Pubbl. della Fac. di giur. dell'Univ. di Modena, No. 84, 1952), p. 21, note 3.

other real or fictitious creating body, but by human thought which reflects on social phenomena; it is an attribute which is reserved for a certain category of norms, for a given group of judgments which it meets in social life, because they, and they alone, are found to possess as a whole definite objective characteristics. In other words it is legal science which, by discovering these characteristics and observing how they differ from those of other categories of judgments, which are also social, and present, and operating in the life of society, picks out the category of judgments in which it finds these characteristics and qualifies it as legal. The reason for their legality and their being qualified as norms of law lies in the objective presence of these characteristics, which legal norms reveal in their structure and in their common functioning: not in an imaginary "laying down" or "creation" or "formulation" by "society."

9. The discussion contained in the preceding pages should have provided convincing proof of the fact that legal science—and the international branch particularly—must make a further effort now to free itself finally from the last remnants of legal positivism which are preventing it from making and consolidating conquests indispensable for the future development of scientific investigation.

With the intention of isolating the sphere of law and distinguishing it from that of other orders of knowledge which was its great merit, and with the ambition of making only that which really can be called law the object of legal science, separating it clearly from everything that is only aspiration, subjective expression of ideal needs of justice, or no less subjective deductions from principles which are said to be rationalistic, legal positivism made one mistake: that of following an *a priori* concept of law which led it to be too restrictive in tracing the boundary line. And so only *"jus positum"* remained in the field of law—and sometimes not even that—while all law which, because it had not been *positum* and had been easily confused with non-legal elements in the past, but is still no less law than law which has been "laid down," and contains all the essential norms of every legal system, without which even law which had been "laid down" would not be law, was excluded from it. Ross has correctly observed how this idea, that there must be no other law besides that which has been positively formulated, has provoked and partly justified modern reactions in favor of natural law against positivist theories.[105] However, if these reactions have been well received in their criticism of positivism because of its mistake, there is no need to lose sight once more of something that had been usefully specified, to confuse law with non-law, thus making

[105] A. Ross, A Textbook of International Law 95 (London, 1947): "As will appear from the above, there is undoubtedly something right in this reaction. There are sources of law other than those positively formulated. Insofar one must agree with the naturalist theories." "But this does not mean," the writer adds straight away, "that there are also 'natural' (supersensual, *a priori*) sources of law, but merely expresses the socio-psychological reality that judicial decisions, as described above, are also determined by spontaneous free factors of many kinds." He points out that ambiguity of the term "positivism," which can be defined either as "what is based on experience" or as "what is formally established."

legal science take a step backwards instead of forwards in order to correct this mistake. On the contrary one must complete the view of the legal phenomenon by bringing back into the field of law the part that had been arbitrarily separated from it and consigned to a vague kind of limbo.

This return to the field of law of the part which seems to be the product of spontaneous germination and not of will or of a "laying down," must be carried out with the full knowledge that this law, although differently expressed, actually appears no less clearly and really existing and operating than that which was laid down by special productive organs,[106] and that it is therefore perfectly capable of being specified and known by legal science which is not a science for nothing.

However, as this writer has had occasion to say several times, in order for this full acceptance of the reality and legality of spontaneous law to be reached, it is absolutely essential to overcome the false idea, which gained ground owing to legal positivism, that legality is a kind of mark stamped on certain norms because they come from certain sources, because they were created by a given body whatever body that may have been. It is essential to recognize that legality is a qualification which legal science attributes to definite opinions, to given norms according to certain specific characteristics of their functioning in social life, and not because these opinions and these norms are propositions desired by certain bodies or produced by certain processes. Having recognized this, it is therefore a question of applying to that part of law which we have called spontaneous methods which correspond to its specific nature, and not to employ means which at best can only be used for law which has been laid down by special law-creating organs, or to hold that this law cannot be recognized by legal science only because these same limited methods cannot be applied to it. This law must be recognized for what it is: as a law which was formed spontaneously, following various causes and motives which have nothing to do with a formal process of production. There is no need to construct imaginary productive facts for it which are supposed to have "laid it down" wholly or partially, and then to go on perhaps to find a "foundation" for these productive facts in extrajuridical premises always with the illusion of making it still stronger. Again, one should recognize the real proportions of this law without reducing them arbitrarily as if faced with a worrying anomaly; one should specify the characteristics which effectively

[106] L'Esposito, Il controllo giurisdizionale, *op. cit.* 3, declares "that in every order beside the legal rules, formed within predetermined ways and limits, there exist rules which are also valid and efficient that arose outside legal channels." For A. P. d'Entrèves (Natural Law, An Introduction to Legal Philosophy 67 (London, 1951)) "Positive law does not exhaust the whole range of legal experience. There may be laws other than the commands of the sovereign, laws with a different structure yet nevertheless binding and formally perfect." And he quotes as an example the "laws of the international community."

According to Barile, La rilevazione, *op. cit.* 155, "International unwritten law of the present day could be called 'law in force' if this ambiguous phrase were understood, not in the sense that this law is not an historical fact, but that it has force in its existence as a purely legal phenomenon directly linked with the whole of historical reality and not bound by formally set rules."

distinguish it from law "produced" by law-creating organs, and draw from the existence of these characteristics all the important conclusions to which they lead. Finally, from the return of that part of law which had been arbitrarily excluded from the sphere of law, one should take the corollaries deriving from it which refer to the different problems or pseudo-problems of legal thought in general, and of international law in particular. In fact, the writer has already had occasion to draw attention to the fact that spontaneously formed law, present and essential in every legal order, takes on much greater importance in the international order, since, because of the equalizing structure of international society, all common international law is exclusively law of this nature.[107]

The final detachment of the idea of legality from that of a "laying down" seems to be the indispensable premise for the accomplishment on the part of legal thought, and particularly international thought—which for some time has not unreasonably assumed the task of leading the reaction against the arbitrary restriction of the sphere of law made by positivism—of the above-mentioned developments. It is also necessary for the happy conclusion, on the basis of these, of the efforts to which legal thought has been directing its energies for some time. There remains the question whether these developments, and the premise on which they depend, can actually and definitely be achieved while there is ambiguity, which has become progressively worse, concerning the meaning and value of the word "positivity." In the preceding pages we have been able to see at least some of the harmful consequences of this ambiguity. In particular, we have been able to realize how the two or more meanings of the term "positive law" constitute a serious obstacle to the determination of the very character of legality. The elimination of this ambiguity is therefore also an essential condition: more essential than we are usually prepared to think when it is a question of language.

The ways of reaching a clarification of this problem can be various. This writer is perfectly aware that the method he prefers of keeping to the use corresponding to its etymology and recognized by the longest tradition for a definition of "positive" is not the only theoretically possible or permissible one. From the beginning the writer has said that for "positive law," as for every other expression used in speech, there does not

[107] Scienza giuridica, *op. cit.* 107 f. See also Giuliano, La Comunità internazionale, *op. cit.* 228 f.; and I Diritti e gli obblighi, *op. cit.* Barile is concerned with an examination of some important consequences concerning problems of international law, which can be deduced from recognizing the "spontaneity" of common international law. Barile, La rilevazione e l'integrazione, *op. cit.* 144 ff., 162 ff., 191 ff., and "Interpretazione del giudice e interpretazione di parte del diritto internazionale non scritto," in Riv. di dir. internazionale, 1954, fasc. 2–3, p. 168 f. See also Bentivoglio, Interpretazione, *op. cit.* 247 ff. But there are certainly numerous and vast fields in which useful results may be obtained from a correct view of the characteristics of general international law as those of a spontaneously formed law. Note should be taken of the recent agreement of Sperduti, Norme giuridiche primarie, *op. cit.* 19 f., on some corollaries established for this recognition, particularly concerning the final elimination of the so-called problem of the "foundation" of law, especially that of international law.

exist a "true" or a "false" meaning, so that one must be adopted and the other repudiated. The only really indispensable thing is to see that the recognized use is as defined and unequivocal as possible not only in the scientific language of each writer, but also within legal thought in general and the international branch in particular.

However, there is nothing to prevent one, on principle, from severing all links with etymology and tradition, and using the term "positive law" as a synonym for "law in force," that is, as indicating all that law which experience reveals as having been historically accomplished, and making an effective part of one of those legal systems which live within the various existing human societies.[108] If this way were followed it would obviously be permissible, and even necessary, to conclude that even legal norms which had been formed spontaneously, rather than through the action of special creative organs, and revealed by a convincing variety of outward manifestations to be existing and operating in a determined society, and as belonging to its legal system, were also norms of "positive law." But in this case it would be necessary, on the other hand, to exclude most strictly the use of the same term "positive law" to indicate, within existing law, law which had really been "laid down" and produced by given law-creating legal organs, and another adequate and unambiguous term would have to be found to indicate this law. Above all one must not give in to the idea of seeking a "laying down" of law which was not "laid down" merely because it is qualified as positive, or to all those other ideas which are consequences caused by the contemporaneous attribution, consciously or unconsciously, of a variety of different meanings to the same word. And however much one is warned, this certainly is not easy. In fact we have been able to see how difficult it is, even for those authors who propose to do so, to free oneself entirely from the influence of a use which has been universally accepted for so long and which has, furthermore, the attraction of an etymological derivation in its favor. If it is eliminated on one side, it almost inevitably blossoms out on the other, often in the less apparent but certainly no less important guise of its consequences. And the idea of looking for the "source," the body, and the creative organ, even for that law which really arose independently of any source, continues to be a subject for serious study on the part of legal thought.

For this reason it seems that, in order to attain the necessary clarity of language, other ways must be preferred to that already suspect way of changing the traditional meaning of the terms employed. If one preferred one could entirely eliminate the use of the adjective "positive" and divide "law in force" into norms of spontaneous formation and those produced by legal law-creating organs. Or else, if it was felt to be wrong to give up this ancient and widely accepted term, the most correct and simple way would be to go back to traditional terminology and speak of "positive

[108] Sperduti has expressly shown his preference for this solution in the end, Norme giuridiche primarie, *op. cit.* 29 f. The analysis of legal thought which is carried out in the preceding pages could perhaps persuade this writer that his way of understanding "positive law" does not in fact correspond with "that which has always, or generally, been understood."

law'' only in the sense of *''jus positum,''* to point out clearly that there exists a distinct difference between the ideas of ''positive law'' and ''law in force,'' and to bring within the larger field of the latter the distinction between ''spontaneous law'' and ''positive law.'' [109]

However that may be, it is obvious that the adoption of one or other solution by linguistic use is not an end in itself; it is only a necessary measure to eliminate ambiguity in language itself and to obtain more easily those conditions which indeed are indispensable to anticipated developments in the scientific investigation of the legal phenomenon, and in particular the international one.

The essential thing is, as emphasized above, that the idea of legality should be detached from that of ''laying down'': that when it has to be ascertained whether a norm is legal and in force, it should no longer be held that it is indispensable—and sufficient—to find a ''source'' for that norm, to determine a body which has laid it down through some procedure; that we should be finally freed from the conviction that, in this sense at least, all law in force must necessarily be ''positive.''

Let it be clear that such an indispensable step implies nothing that could worry anyone. Once having taken it, we should certainly not go on the road back to positions we have already passed. Rather, the explicit recognition of the fact that a part of law in force is law of spontaneous ''formation'' constitutes just that indispensable correction, that perfecting of legal positivism, which can serve to eliminate attempts at a return to natural law and allow for the further evolution of legal thought in an entirely and purely scientific direction. It can never be repeated enough that law of spontaneous formation is no less really existing, nor less certain, nor less valid, nor less observed, nor less effectively guaranteed than that laid down by specific law-creating organs. It is rather the very spontaneity of its origin that is the reason for a more spontaneous, and therefore a more real, observance.

By recognizing that not all law in force, and therefore not all ''international'' law in force, is law laid down by special law-creating facts, and even that the most important part of that order is not, therefore, of positive but of spontaneous formation, the science of international law is in

[109] This solution, which the writer prefers, has also been followed in the most recent Italian international thought by Barile, La rilevazione, *op. cit.* 146, note 8. According to him, ''The expression 'positive' law . . . indicates that part of the law in force which having been formally laid down by a social will, whether by that of a dominant group or the will of the parties in a convention, can be in contrast with non-positive law, because of its content, but was formed spontaneously in the conscience of the members of a given organization.'' Elsewhere (Interpretazione del giudice, *op. cit.* 168 ff.) the same writer often uses the expression ''formally laid down law'' as a synonym of ''positive law'' and the opposite of ''spontaneous law.'' This expression is correct and legitimate in itself. The only danger is that it may suggest the idea—which we have seen willingly played with by others—of the existence alongside law ''formally laid down'' of a law which has not been ''formally laid down'' with the natural consequence that we are presented with ''layings down'' and ''sources'' which are not formal, not legally anticipated. These are in fact ideas which have no place in legal science, and a return to them is contrary to the clarification which we are seeking.

no danger of seeing the value and importance of its object of study diminish, or of furnishing an argument for the very superficial charges of non-legality or imperfection which are sometimes hurriedly made against the international legal phenomenon by followers of other disciplines. On the contrary, by aiming at this indispensable clarification, the science of international law can render a very great service to these other disciplines, by helping them to lay the foundations of a better understanding of the legal phenomena which they study. Where Italian international thought is concerned, the above-mentioned recognition, far from representing a break with or a deviation from the very united line of its development, only constitutes a logical and natural development, and a necessary premise for the further progress of that thought, so rich in important contributions, which started about forty years ago.