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ORIGINAL ARTICLE

Hans J. Morgenthau's Critique of Legal Positivism: Politics, Justice, and Ethics in International Law

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Abstract

Modern jurisprudence has typically been presented as a debate between legal positivism and natural law. Though the demise of legal positivism has been touted despite its pre-eminence in past decades, it is clear that there remains a vigorous debate surrounding this theory. It is noteworthy that Hans J. Morgenthau's legal thought and critique of legal positivism have remained unexplored in the context of this debate. Largely forgotten, his legal thought answers questions that lie at the heart of the natural law and legal positivist debate. It showcases his deeply nuanced understanding of legal and political theory and contains a powerful and insightful commentary on the fundamental problems faced by international law. Building on existing literature, this paper unearths Morgenthau's critique of legal positivism. It does this by re-examining his works, which address the question of whether moral considerations are relevant to determining the content of the law in force. It brings his legal thought to light, which highlights the artificiality of the division between law and morality and offers a nuanced analysis of problems inherent in international law. Ultimately, the paper challenges the claim that the law can be determined without resorting to moral judgement and shows how Morgenthau's insights remain relevant to legal positivism and natural law debates today.

Keywords Morgenthau · Realism · International law · Legal positivism · Natural law

1 Introduction

Modern jurisprudence has typically been presented as a debate between legal positivism and natural law,[1] with the legal order fluctuating between the pursuit of the good by the establishment of organised bodies of clear and precise rules, or

[1] See, for example: Coyle (2007), 14; Kramer (1999), 21; Tuori (2002), 6.

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principles of justice which define the extent of individual rights.[2] Legal theory, however, is in a process of transformation.[3] There has been a pronounced and noteworthy revival of natural law thought.[4] Furthermore, though the demise of legal positivism—the dominant theory of law today—has been touted despite its pre-eminence in past decades, it is clear that there remains a vigorous debate surrounding this theory in the literature, particularly through its juxtaposition with natural law.[5] Despite this, there remain a number of aspects of these theories which have remained outside of legal debates. This particularly concerns the central problem at the heart of the debate between legal positivism and natural law: the relationship of law and morality and the role which justice plays in relation to it.[6]

It is noteworthy that Hans J. Morgenthau's legal thought has remained unexplored in the context of this debate, particularly due to his prominent critiques of positivism.[7] When read carefully and in context, Morgenthau's works emerge as a sophisticated interrogation of the relationship between power and politics.[8] The often-assumed close identity between realism as a set of scientific truths and those who happened to wield power is 'is at best too simple, and at worst seriously misleading'.[9] Morgenthau saw himself as contributing to the preservation of the social fabric of democracy from the threats posed to it by the untrammelled exercise of power.[10] He committed himself neither to the view that politics is a predictable matter nor to the position that science must abstain from morality, worrying that the Hobbesian state of nature closed our eyes to the ways in which ethics and law regulated state action.[11]

The utility of Morgenthau's legal thought in relation to the ongoing debate between legal positivism and natural law is clear. Before reaching notoriety as an American international relations scholar, Morgenthau was a European jurist concerned with the theoretical problems which international law presented.[12] He wrote his works within the discipline of international law, only rarely referring to contributions from other disciplines.[13] His works have, as the growing body of literature on classical realism have brought to light, a deeply nuanced understanding of the

[2] This has not always been the case, however, as Finnis and MacCormick's refined understandings of the relationship between law and morality show. George (2004), 228.

[3] Coyle (2007), 39; Waluchow (1994), 1.

[4] MB Crowe (1977), p.246; J Crowe (2016), 93–94; Biggar and Rufus (2000), xiii.

[5] See, for example: Somek (2017), xi; Sebok (1995), 2054–2055; Sebok (1998), 1; Kammerhofer and d'Aspremont (2014), ix; Siliquini-Cinelli (2019), 5; Tamahana (2017), 1; Waluchow (1998), 387–390; Kaye (1987), 317–318; Dyzenhaus (2004), 40; Petroski (2011), 692; Finnis (2000), 1597; Finnis (2011), 18–19; Campbell (1996), 1; Murphy (2006), 22–24; MacCormick and Weinberger (1992), 111–112.

[6] Paulson and Paulson (2002), 3; Goldsworthy (1990), 449–450; Moore (2001), 115.

[7] The legal aspects of his thought are, as shown in Koskenniemi's outstanding analysis, considerable. Koskenniemi (2004), 437–460; Koskenniemi (2006), 198–201.

[8] Williams (2004), 634.

[9] Cox (2007), 168–169.

[10] Molloy (2020), 338; Karkour (2022), 584.

[11] Tjalve (2008), 131; Scheuerman (2011), 16.

[12] García Sáez (2018), 32; Frei (2017), 57; Söllner (1996), 247–248.

[13] Amstrup (1978), 170; Jütersonke (2007), 94; Bernstorff (2016), 65–86.

relationship between ethics and politics.[14] There are further depths to his thought than those that have been conventionally accepted, particularly in relation to morality and law.[15] Morgenthau's analysis of international law and of legal positivism addresses directly the question of whether moral considerations are relevant to determining the content of the law in force.[16] Through this, his works answer and grapple with questions which lie at the heart of the natural law and legal positivist debate, confronting them directly. This confrontation provides the foundations for his political realism. His interpretation of international law—deeply inspired by this confrontation—transcends the notion that politics, ethics, and law are separate domains of international society. In critiquing positivism, he addresses the dangers instrumental reason can bring to international law by making the rule of law be regarded as a panacea.[17]

Building on existing literature, this paper will unearth and bring Morgenthau's legal thought and critique of legal positivism to light.[18] It will do so by re-examining his works, which highlight the artificiality of the division between law and morality and offer a nuanced analysis of problems inherent in international law.[19] In examining Morgenthau's legal thought and critique of legal positivism, this paper will challenge the claim that the law can be determined without resort to moral judgement and show how Morgenthau's insights remain relevant to legal positivism and natural law debates today.[20] The argument will develop in five stages. First, the paper will establish Morgenthau's theory of law—that is, of norms. Second, the paper will examine Morgenthau's analysis and critique of legal positivism and positivism at large. Third, this paper will engage with Morgenthau's analysis of the nature of international law. Fourth, it will explore the relationship between politics, justice, and ethics, after which it will examine Morgenthau's concept of the political. Finally, this paper will bring these previously separate aspects of Morgenthau's thought together, showing the profound effect his legal thought had in his political realism. In doing this, this paper will show that the solutions he offers retain their relevance both in contemporary international society and in current legal positivist and natural law debates. It questions the notion that Morgenthau's theory was void of ethics and explores both the different elements of his critique of legal positivism and their relation to his proffered answers for how to enhance and ensure the effectiveness of international law.

[14] Lang (2007), 18; Rengger (2007), 118–122; Molloy (2006), 31–32; Molloy (2018), 182; Rösch (2017), 15; Neacsu (2009), 1–2; Williams (2007), 217 and 234–235.

[15] Through his legal background, he brought his sophisticated understanding of the relationship between law and politics with him to the USA. Jütersonke (2010), 4–5; Scheuerman (2009), 4.

[16] Murphy (2019), 304.

[17] Jütersonke (2010), 146.

[18] For example, in addition to the aforementioned works referenced above: Lebow (2003); Karkour and Giese (2020), 1106–1128; Rösch (2015).

[19] García Sáez (2014), 229; García Sáez (2016), 314.

[20] Dyzenhaus (1989), 376.

2 Morgenthau's Theory of Law

Morgenthau opens *La Realité des Normes* with a discussion on the nature of norms and laws. This work—based upon his *Habilitation* manuscript—constitutes a painstaking attempt to save Kelsen from the allegedly hollow conceptualisations of neo-Kantianism.[21] 'A norm' he writes is a 'prescription of the will: it designates, from various possible actions, the one that must be chosen'.[22] Norms are comprised by two main elements: the expression of the will that makes something happen, that is to say, the normative disposition; and the abstract faculty of determining this will, that is to say, the validity of the will which realises it.[23] The validity of a norm is one of the preconditions of its effectiveness: Whilst a law's effectiveness cannot be conceived without validity, validity can exist outside of all effectiveness.[24] If a norm possesses the power to determine the will of others, it is then subjectively effective. As soon as it possesses this power, both in principle and abstractly, it is valid regardless of anything being able to be concluded on its practical effectiveness. Validity, then, represents the normative existence of a norm, whilst its objective effectiveness is merely the positive result of its normative function.[25]

These ideas of validity and effectiveness fundamentally underpin Morgenthau's legal thought. His thesis, as Koskenniemi notes, revolved around 'the apparent paradox that though there were no objective reasons for why the legal process could not be used for the resolution of any kinds of international conflicts, in practice only a very small number were submitted to it'.[26] If a norm is man's attempt to adapt the domain of being to that of values and to form reality from the representations in his mind, it must have the faculty of determining his will.[27] The validity of the normative disposition of a norm, however, is independent of the will of the individual who forged it.[28] Legal norms, then, are valid not because of possessing certain elements, but because they conform in their contents to a valid norm of morals or customs.[29] If the norm does not have material validity or if its material validity is not conjoined with its normative validity, we cannot, Morgenthau argues, justifiably speak of it being a legal norm at all.[30]

The first reaction that can occur in the mind of an individual enacting a norm will be directed against himself.[31] If the individual himself 'disturbs this order by a contrary attitude', he necessarily becomes 'the first object of the sanction intended

[21] Jütersonke (2012), 375–376.
[22] Morgenthau (1934), 22–23.
[23] Morgenthau (1935a), 478.
[24] Morgenthau (1934), 32.
[25] Ibid, 32–33.
[26] Koskenniemi (2004), 440.
[27] Morgenthau (1934), 34.
[28] Ibid, 36.
[29] Ibid, 36–37.
[30] Ibid, 37.
[31] Ibid, 51.

to ensure the realisation of the norm'.[32] In other words, he is, at the same time, the subject and author of the norm.[33] When a norm is addressed to the individual from outside, he cannot just refuse to carry it out, but can still 'purely and simply dispute the legitimacy of the appeal that the norm addresses to its will'.[34] He can also further deny the obligatory character of the norm by saying that as 'this prescription is not a norm of law (or respectively of customs) valid for me, I do not have to comply with it'.[35] For Morgenthau, this shows that the call which the standard of morality addresses to its will emanates from itself. An individual cannot avoid it by saying that a prescription does not matter as it was not made for them, as the standard of morality 'is inherent in the very existence of conscious will'.[36]

Conscience is, then, for Morgenthau, a specific sanction within the domain of morality. To say that a moral norm is valid is to hold that 'a given normative disposition obtains, by means of moral conscience … the abstract faculty of determining the will of these individuals and by that of realising the effective order which it prescribes'.[37] The judgement of value which one would make by virtue of a moral norm on the behaviour of others is not a true judgement of morality.[38] However, if it is followed by an empirically ascertainable reaction against others, the normative disposition which served as a basis for the evaluation and which originally belonged exclusively to the domain of morality becomes 'at the same time a heteronomous norm, either of law or of customs'.[39]

There are important links between Morgenthau's and Kelsen's legal theories in this respect, particularly in relation to the idea of validity.[40] Morgenthau's stress on validity as the distinguishing property of legal norms was clearly adopted from Kelsen.[41] This equation of the reality of norms with validity is both 'the key to Morgenthau's approach, and also completely in line with the work of Kelsen'.[42] Morgenthau's equation of the reality of norms with validity, together with his interactions with Kelsen and Lauterpacht, forms 'the basis for what would later become his realist theory of international politics'.[43] Morgenthau's characterisation of what comprises legal norms, to which the following section will turn, underpins his

[32] Ibid.
[33] Ibid.
[34] Ibid, 52.
[35] Ibid.
[36] Ibid.
[37] Ibid, 53.
[38] Ibid, 55.
[39] Ibid.
[40] The fact that Kelsen and Morgenthau shared a common intellectual background has been noted in previous literature. See, for example: Haslam (2002), 190–192; Jütersonke (2006), 182–184; Jütersonke (2010), 144–146; García Sáez (2014), 220; García Sáez (2016), 469; Bernstorff (2016), 85; Schuett (2021), 14–21; Rösch and Grima (2022), 84–85; Jütersonke (2022), 73–79.
[41] Koskenniemi (2001), 22.
[42] Jütersonke (2007), 105.
[43] Ibid, 94.

analysis and critique of legal positivism and provides the foundations for his examination of the role ethics and politics play in international law.[44]

3 Morgenthau's Critique of Positivism

3.1 Legal Positivism and Natural Law

The phenomena that we call norms give rise to these four fundamental problems: (a) the logical structure of the norms, (b) the reality of norms, (c) the contents of the norms, and (d) the realisation of the norms.[45] Of these problems, Morgenthau writes, the Vienna School recognises only the first as truly scientific and normative in nature, whilst traditional legal doctrine deals mainly with the third (the positivist problem) in the proper sense.[46] The last three require a conception of norms tied in some measure to reality, with that which creates the contents of the norms, with that which is formed by the contents of the norms, or which generates them as such.[47]

It is in confronting these four fundamental problems that Morgenthau touches on a series of other questions that appear as 'external ramifications of our fundamental problem and which we can therefore hardly neglect'.[48] The four fundamental problems outlined above affect the study of the law through how 'normative problems arise above all in the sphere and from the point of view of law', showing us 'because of its fragile reality, the systematic and constructive reach of our fundamental problem'.[49] It is here that the difference between legal positivism and natural law comes into play. Natural law 'according to Grotius … would be valid even if there was no God to sanction its validity'.[50] Natural laws are therefore, as such, necessarily effective: 'This form of validity has no beginning or end, it is immutable, inherent in the very nature of the world; it has an absolute character'.[51] Natural laws have no independent normative force; at most they will have a psychologically motivating force, as by neglecting a certain natural law, an individual may trigger the disadvantageous consequences of another.[52]

Norms of law, morals, or customs, by contrast, are inseparably linked to human communities.[53] They are real things which lend themselves to exact descriptions and

[44] The degree to which this aspect of Morgenthau's legal thought constitutes a defence or attack on Kelsen has, however, been disputed. See, for example: Koskenniemi (2001), 34; García Sáez (2014), 219; García Sáez (2016), 477; Scheuerman (2007a), 86; Schuett (2021), 13–14; Rösch and Grima (2022), 85–90.

[45] Morgenthau (1934), 2–3.

[46] Ibid.

[47] Ibid, 3.

[48] Ibid, 15.

[49] Ibid, 15–16.

[50] Ibid, 38–39.

[51] Ibid.

[52] Ibid, 40.

[53] Ibid, 38–39.

empirical verification rather than to metaphysical creations.[54] The science of law, therefore, deals with the norms of law that are in force rather than with imaginary ones that are only represented as valid. It deals with those that exist rather than those that ought to be positive laws.[55] Thus, legal positivism is a conception of the law which recognises legal norms as valid when they are laid down by valid legislative bodies.[56] It is empirical in nature and concerns the content of the rules in question, whereas natural law is of an 'ideological nature and may concern the material as well as the formal element of these rules'.[57] This positivism brings forth several errors which, Morgenthau argues, affect the interpretation and application of laws:

1. Legal positivism, like all kinds of positivism, combats metaphysics which aspire to enter the domain of science.
2. Traditional juridical positivism not only refuses to admit the existence of specific types of law, but also refuses to take into consideration a branch of law whose existence is obvious: juridical norms foreign to the state.
3. Legal positivism separates the law as an object of science from other neighbouring fields such as morality and politics.[58]

In committing the first error, legal positivism becomes the principal enemy of natural law. It excludes the empirical possibilities which reality could logically contain, discounting, denying, and not taking into consideration the existence of norms foreign to the state.[59] Morgenthau accuses positivists of 'mapping out a distorted picture of legal reality, in which law was artificially separated, on the one hand, from ethics and mores, and, on the other hand, from the factual realities of social power'.[60] By separating the law as an object of study from neighbouring fields, such as politics and morality, legal positivism modifies this principle of general positivism and moves it away from reality. The law—which for Morgenthau always participates in the destiny of ethics, faithfully following all its movements—carries the features of morality even when seemingly separated from it.[61] They are inherently and unequivocally linked, a fact which is misrepresented by legal positivism. In doing this, legal positivism forgets the 'purely hypothetical character of the separation of the legal sphere from the other normative domains'.[62]

In considering the law as an isolated phenomenon, legal positivism neglects a part of reality that would have otherwise concerned it.[63] It excludes elements—such as sociological, ethical, and other factors—that constantly penetrate into the legal

[54] Morgenthau (1936), 1.
[55] Ibid.
[56] Ibid, 1–2.
[57] Morgenthau (1934), 39–40.
[58] Morgenthau (1936), 3–5.
[59] Ibid, 3.
[60] Scheuerman (2009), 27.
[61] Morgenthau (1936), 6.
[62] Ibid, 6–7.
[63] Ibid.

rules.[64] It is because of this isolation that the normative proposals it formulates are unable to adequately characterise the legal phenomenon.[65] Traditional legal positivism is particularly affected by this problem, with Kelsen's positivism—held by García Sáez to be a transition between traditional legal positivism and legal realism in Morgenthau's thought—in turn suffering from its neo-Kantian base and its statist monism.[66]

Legal positivism can only have one object: real legal norms, that is, those that are in force. Despite this, it does not possess a 'scientific criterion which would allow it to distinguish the legal norms that are really valid from those that are only so in appearance'.[67] Positivism thus only knows two possible criteria that can give validity to legal norms, namely: (a) the declaration of a state, which enacts that a norm of such or such content is in force; and (b) the material concordance of the legal norm with a moral norm—with a natural law.[68] Legal positivism should know only one formal source of law: the laws set by the state. However, as there are legal norms in force which are not set by the state, this doctrine finds itself in the embarrassing position of 'having to explain the existence of these standards without, however, breaking its own assumptions'.[69] Its error lies in its dogmatic reliance on a notion of validity that 'qualified as law those rules that were not actually applied, and failed to include all those that were'.[70]

This leads, for Morgenthau, to the use of a concept which has become a panacea for the theoretical pains of traditional positivism: customary law, which is used to designate the totality of norms not laid down by the state.[71] This concept does not, however, reconcile legal positivism's assumption of 'the exclusive existence of legal norms set by the State' with the 'existence of norms foreign to the State'.[72] Legal positivism is therefore unfaithful to both its principles and methods; it is unable to know legal orders in an objective, theoretical, and systematic way.[73] A fact that proves, for Morgenthau, that the validity of a legal norm 'does not necessarily have to be based on another legal standard' and that the last norm of a system of legal norms cannot be normatively determined.[74]

3.2 Scientism, Positivism, and Rationalism

Morgenthau's analysis of natural law and legal positivism is fundamentally linked to his overarching critique of scientism and rationalism in theory at large. His analysis

[64] Koskenniemi (2006), 198.
[65] García Sáez (2014), 229.
[66] Ibid, 230–232.
[67] Morgenthau (1936), 7.
[68] Ibid.
[69] Ibid, 9.
[70] Koskenniemi (2001), 24–25.
[71] Morgenthau (1936), 9.
[72] Ibid.
[73] Ibid, 10.
[74] Morgenthau (1934), 81.

stands apart from the 'post-Enlightenment notion that the purpose of social inquiry is to expose the empirical regularities which govern the natural and social world'.[75] The philosophy of rationalism, through its inability to see that man's nature has three dimensions—biological, rational, and spiritual—misunderstands 'the nature of man, the nature of the social world, and the nature of reason itself'.[76] In neglecting man's biological and spiritual impulses, it therefore 'misconstrues the function reason fulfils within the whole of human existence', distorting the problem of ethics as well as the nature of politics and of political action altogether.[77] This fundamental error is caused through the assumption that the problems of social life are in essence similar to that of those of physical nature.[78] It ignores the fact that the ultimate decisions that confront the scientific mind are 'not intellectual but moral in nature'.[79] Thus, rationalism is unable to understand that, as modes of human behaviour, theoretical thinking and action are 'irremediably separated by way of their logical structure', with this same chasm existing between politics and a theoretical science of politics.[80]

Objectivity is 'not a naïve naturalism in the sense of scientific laws or rationalist calculation; it is a necessary engagement with a world that eludes one's will'.[81] By covering political reality with an ideological veil, theoretical thought 'cuts itself off from access to that reality and thereby loses its creative impulse'.[82] This critique is fundamentally built on Morgenthau's analysis of legal and natural law. 'As rationalism sees it', writes Morgenthau, 'the world is governed by laws which are accessible to human reason'.[83] Four conclusions are derived from this fundamental idea: (1) that the 'rationally right and the ethically good are identical', (2) that the 'rationally right action is of necessity the successful one', (3) that education leads man 'to the rationally right, hence, good and successful, action', (4) and that the laws of reason, as applied to the social sphere, 'are universal in their application'.[84] Positive law is inherently linked to the philosophic assumptions of rationalism—it assumes that a system of legal rules can be as precise, coherent, and calculable as the laws of physics.[85]

Morgenthau's analysis reflects not 'a simple rejection of reason, or its total subordination to more fundamental power dynamics' but an 'assertion about the political

[75] Crawford (2000), 33.

[76] Morgenthau (1947), 12.

[77] Ibid, 12.

[78] Thus, the existence of political problems such as war and revolution are assumed to be due to a lack knowledge or skill in the handling of a social or political situation, assuming that 'the abolition of politics can and will usher in an ideal state of society'. Morgenthau (1962a), 313–314.

[79] Morgenthau (1972), 10.

[80] Ibid, 34.

[81] Williams (2005), 175–176.

[82] Morgenthau (1972), 52–53. See also: Morgenthau (1971), 611–618.

[83] Morgenthau (1947), 17. See also: Morgenthau (1975), 20–24.

[84] Actions that fall short of ethics are, therefore, seen to indicate a lack of knowledge of the natural laws of reason. Morgenthau (1947), 19–20.

[85] Ibid, 27.

limits and dangers of instrumental reason in an age of rationalisation'.[86] The belief in the redeeming power of the law, which reforms the conditions of man through its mere existence, is naught but 'the classical belief in the autonomous powers of reason'.[87] It demands that politics be reformed and rationalised.[88] This 'dominating thought of political thought', writes Morgenthau, has brought forth the idea that 'reason would reign supreme through the medium of the political scientist, the economist, the sociologist, the psychologist, etc.'.[89] It attempts to exorcise 'social evils by the indefatigable repetition of magic formulas', keeping to its assumptions despite suffering 'constant defeat from experience'.[90]

The focus on 'certainty, rationality, and objectivity as natural, as the unproblematic theoretical basis for practice', is, for Morgenthau, nothing short of 'politically disastrous'.[91] The age is 'forever searching for the philosophers' stone, the magic formula which, mechanically applied, will produce the desired result and thus substitute for the uncertainties and risks of political action the certitude of rational calculation'.[92] This fundamentally affects the foundations of international law, with the abolition of war, and therefore of power, representing the fundamental problem confronting international thought.[93] It mistakes the nature of international society and propounds the wrong remedies, further confusing the domestic experience with the international experience.[94] Morgenthau was, in this sense, 'a Kelsenian formalist worried about the dangers posed by adherence to the dominant doctrine of legal positivism', which 'occluded a large part of reality' and 'incorporated into its analysis empirically unverifiable elements'.[95] The rule of law had 'come to be regarded as a kind of miraculous panacea which, wherever applied, would heal, by virtue of its intrinsic reasonableness and justice, the ills of the body politic'.[96] The problem of peace, 'in contradistinction to the problem of an air-cooled engine, is not closer to solution today than it was when it first presented itself to the human mind'.[97] Having established Morgenthau's critique of legal positivism, we will now turn to his to his analysis of international law, which is fundamentally affected by it.

4 The Nature of International Law

Morgenthau's analysis of international law is grounded in both his theory of law and his critique of legal positivism and positivism at large. García Sáez and Jütersonke have explored this idea through their different analyses of

[86] Williams (2005), 184.
[87] Morgenthau (1947), 30.
[88] Ibid, 31–32.
[89] Ibid, 34.
[90] Ibid, 39–40.
[91] Williams (2005), 126–127.
[92] Morgenthau (1947), 86.
[93] Ibid.
[94] Ibid, 89–90.
[95] Jütersonke (2010), 146.
[96] Morgenthau (1947), 100.
[97] Ibid, 183–184.

Morgenthau's early works. 'A number of notions central to Morgenthau's realism', writes Jütersonke, 'were the result of a series of reflections on the way the justiciability of disputes was discussed in international legal scholarship'.[98] García Sáez has emphasised the substitution of Morgenthau's fledgling legal realism by his eventual political theory.[99] For Morgenthau, there is no area of law more needed of a profound sociological analysis than international law.[100] It is his critique of legal positivism that formulates his analysis of international law.[101]

The reach and nature of domestic and international law are, for Morgenthau, markedly different. Within the internal domain of the state, a legal order must be able to give an answer to the four following questions:

Who has the legal power over a given object, say over a desk? How can the legal power over this desk change hands? How will a dispute on the legal power over this desk be settled? Finally, in what way will the person who holds legal power over this desk be protected in the exercise of it?[102]

A legal order which does not provide an answer to the first of these questions is, Morgenthau argues, unable to have a material basis to solve the other three questions. A failure to give an answer to the second question leads to a fatal conflict 'with the living forces which call for modifications in the domains of powers'.[103] If the legal does not give an answer to the third question, its constitutive elements remain 'in the state of theoretical principles without ever being able to be realised in practice', so that 'it will no longer be possible to ensure its sanction'.[104] Finally, if a legal order fails to answer the fourth question, 'its material decisions, and itself with them, would risk remaining ineffective'.[105]

It is only by answering all four questions that a legal system, Morgenthau writes, can do what falls under the responsibility of any legal order: 'justice and peace'.[106] A domestic legal order can fulfil this completely.[107] International law, however, is unable to do so. It only gives a more or less satisfactory answer to the first question. Its answers to the second and fourth questions are 'absolutely insufficient', and its answer to the third question, whilst 'satisfactory in theory, remains largely devoid of practical efficacy'.[108] The legal order of the state has, from the point of view of international law, a position that is markedly different from that of any non-state legal order, making it incomparable to

[98] Jütersonke (2010), 73.
[99] García Sáez (2014), 233–234.
[100] Ibid, 221.
[101] Ibid, 233.
[102] Morgenthau (1933), 7.
[103] Ibid, 7–8.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Morgenthau (1934), 144–145.
[108] Morgenthau (1933), 8.

that of any other normative order.[109] Amstrup has remarked on this aspect of Morgenthau's thought:

Morgenthau points to a very important problem. An international convention cannot be literally interpreted, but must be seen in relation to the political circumstances, not just at the time of its conclusion, but also and in particular at the moment of interpretation. International conventions cannot be interpreted in the same way as national laws.[110]

The state of affairs on which international law makes legal consequences depend—that is, the highest degree of effectiveness of legal norms and sanctions empirically observable on a certain territory—represents the distinctive element which separates legal orders of a state nature from those of a non-state nature.[111] A legal order, upon reaching such a degree of efficiency within a particular territory, acquires automatically, according to the norms of international law, a 'State character without the need for other legal events'.[112] The legal concepts contained within the norms of international law thus correspond 'to a higher degree than the notions established by any other legal order' to the requirements of theory.[113] International legal norms are, therefore, developed according to the objective requirements of the international social reality. That is to say, they impose their power on states which, in order to 'regulate their respective relations in a normative manner', have no other choice but to form 'the norms of international law according to these requirements or to renounce any normative regulation of their relations'.[114]

Morgenthau's legal realism assumes that just like every legal order, international law is 'an autonomous system of norms culminating in a basic norm that was of necessity in the realm of morals or mores'.[115] Decentralised systems of legal enforcement, however, suffer from 'relatively substantial doses of irregularity and inconsistency'.[116] International law cannot generate through its own forces 'a state legal order, as it cannot otherwise prevent the spontaneous generation of the legal order of a state'.[117] It neither says that it is 'necessary to engender, on such and such territory, the legal order of a State' nor that it is 'necessary to destroy the legal order that a State engenders on such an such territory'.[118] The legal orders of states can therefore only be said to be subordinate to the norms of international law in two different ways: On the one hand, international law establishes 'the conditions under which a new state legal order can be engendered', and, on the other, it delimits 'the domains of validity of norms-sanctions as well as the material norms of the different

[109] Morgenthau (1934), 129.
[110] Amstrup (1978), 172.
[111] Morgenthau (1934), 136.
[112] Ibid, 138–139.
[113] Ibid, 139.
[114] Ibid, 139–140.
[115] Jütersonke (2010), 117.
[116] Scheuerman (2011), 119.
[117] Morgenthau (1934), 179.
[118] Ibid, 179–180.

state orders by protecting them against any encroachment'.[119] These two functions are typical in any legal order: the creation of subjects of law and the delimitation of their spheres of competence.[120] If aiming to apply these conclusions to international law, however, we must first establish that its norms are legal norms valid as such and that their object is to regulate relations between men or groups of men.[121]

The concept of the normative structure and validity of laws—grounded in his theory of law—is the key to both Morgenthau's analysis of international law and his later realist theory.[122] If international law exists as law, it must, for Morgenthau, 'logically take precedence over the internal legal orders of States'.[123] If what we call a state is the domain of validity of norms and sanctions that reach the highest degree of effectiveness empirically observable in a determined territory, then, to say that international law is a law governing states is then to hold that it: 'normatively determines the relations between groups of men subject to the personal domain of validity of various legal orders'.[124] Thus, if we consider the norms of international law from the point of view of their normative structure, the problem that we have to solve—that is, the reality of the norms of international law—can be reduced to the following two questions. First, who are 'the bearers of this reality' and, second, 'what is the particular nature of the element of validity of norms of international law'.[125] The first of these two questions raises the following two additional problems: What is the 'nature of the element of validity of the normative provision on which the validity of the entire legal order depends' and what is the 'nature of the element of validity of norms of international law'.[126]

If in seeking to answer the first of these two questions, Morgenthau writes, we ask what the contents of the fundamental norm of international law is, many authors will answer that it is the normative provision of *pacta sunt servanda*.[127] This standard, however, cannot serve as the fundamental norm of international law, as it 'requires that all the norms of a legal system … can derive their validity from this norm'.[128] If *pacta sunt servanda* were to be the fundamental norm of international law, it should be formulated in the following way: 'The head of the international community must be the guarantor of international conventions, the bearer of their validity'.[129] However, as the international legal order also includes non-conventional norms, this fundamental norm is, instead, as follows:

The head of the international community must be the guarantor of the international legal order, the bearer of its validity. We therefore need to know who is the

[119] Ibid, 181–182.
[120] Ibid.
[121] Ibid, 213.
[122] García Sáez (2014), 235–236.
[123] Morgenthau (1934), 213–214.
[124] Ibid, 214–215.
[125] Ibid, 216.
[126] Ibid.
[127] Ibid, 216–217.
[128] Ibid, 217.
[129] Ibid.

guarantor of this entire legal order, that is to say the supreme guarantor, and what are the guarantees by which the validity of this fundamental norm is ensured.[130]

The international legal order is, however, decentralised by nature; no single man or group or men are the bearers of its validity.[131] The validity of international law rests 'not on the fundamental norm of international law, but on the fundamental norm of state law'.[132] This represents the dualism of international law. Morgenthau's analysis of international law transcends the notion that politics and law are separate domains of international relations with their own distinctive rationalities and consequences.[133] The bearers of the validity of the norms of international law are all the individuals which belong to the states that form the international community. In order for them to become the bearers of legal validity, 'the nature and the modalities of this validity must be normatively determined'.[134] It is this that leads Morgenthau to analyse the preeminent role that ethics and politics both play in international law, which will be examined in the next section.

5 Politics, Justice, and Ethics

Politics and ethics are, for Morgenthau, fundamentally linked. The juxtaposition of power politics and moral politics is, he argues, mistaken and leads to the assumption that it is possible to replace the principles of politics with those of morality.[135] No politician can accept this incompatibility, however, as it is in the appearance of being moral whilst seeking power than peace of mind and elements of power are found.[136] The 'curious dialectic of ethics and politics' thus prevents the latter from escaping the former's 'judgment and normative direction'.[137]

This misunderstood aspect of Morgenthau's has been examined in recent literature, particularly in relation to his misrepresentation as the amoral father of realism. Molloy's analysis of Morgenthau has clearly shown the prominent role ethics play in his analyses of both international law and international politics.[138] Lang has similarly noted on this aspect of Morgenthau's ethical framework, revealing its Aristotelian origins, with Scheuerman similarly noting the profound influence of ethics and morality in his theory.[139] Morgenthau produced the 'outline of a political ethics that asked for a shift in policymaking

[130] Ibid.
[131] Ibid, 217–218.
[132] Ibid, 218.
[133] Reus-Smit (2004a), 1.
[134] Morgenthau (1934), 219–220.
[135] Morgenthau (1974), 163; Morgenthau (1958), 1–2; Morgenthau (1944), 91–92.
[136] Facing the conflict between ethics and politics thus 'places an intolerable burden upon our actions or our consciences'. Morgenthau (1962b), 15–16.
[137] Morgenthau (1945), 5.
[138] Molloy (2018), 182.
[139] Lang (2004), 8–9; Lang (2007), 18–38; Scheuerman (2009), 8.

and even a reconsideration of its purpose'.[140] His political project and theory is 'profoundly different from the scientistic, determinist, and cynical images that have regularly surfaced the collective memory of IR'.[141] Through this ethical thought, it is 'more sophisticated than the crude power politics privileged by standard interpretations of his thought and offers avenues for addressing issues of morality and ethics in contemporary debates'.[142] Williams has given voice to this aspect of Morgenthau's thought, arguing that:to see Morgenthau's realism simply as a crude reduction of politics to pure power is mistaken. In fact, when read carefully and in context, his realist theory emerges as a sophisticated, self-conscious, and highly political interrogation of the relationship between power and politics … his realism is marked by an attempt to recognize the centrality and complexity of power in politics while avoiding the extreme conclusion that politics is nothing but violence.[143]

This complexity is particularly evident in Morgenthau's analysis of the role that ethics and politics both play in international law. Morgenthau was 'aware of the ethical dilemmas presented by international relations in an anarchic world' and, like other realists, was haunted by the 'element of tragedy in human history'.[144] His legal thought outlines the preeminent role ethics in both politics and law. Morgenthau worried that the Hobbesian metaphor of an international state of nature was misleading, and that it 'closed our eyes to the myriad ways in which ethics, mores, and law regulated state action even absent world government'.[145] By depriving the political act of ethical significance altogether, the modern age reveals 'its inability to understand and solve the problem of political ethics with its own intellectual means'.[146] This idea is echoed and expanded upon in *Scientific Man vs Power Politics*, where Morgenthau argues that harmony is sought 'not in the reality of actual behaviour but in ethical judgment'.[147] Indeed:

Neither science nor ethics nor politics can resolve the conflict between politics and ethics into harmony. We have no choice between power and the common good. To act successfully, that is, according to the rules of the political art, is political wisdom. To know with despair that the political act is inevitably evil, and to act nevertheless, is moral courage.[148]

The ideal of justice—a quality of interpersonal and, ultimately, social relations—finds itself affected by this dichotomy.[149] Justice requires that men 'give to others, and receive from others, what is their due'.[150] This, however, gives rise to

[140] Rösch (2018), 15.
[141] Tjalve (2008), 131.
[142] Jütersonke (2010), viii–ix.
[143] Williams (2004), 634.
[144] Gismondi (2008), 151.
[145] Scheuerman (2011), 16.
[146] Morgenthau (1945), 6.
[147] Morgenthau (1947), 155.
[148] Ibid, 173.
[149] Morgenthau (1974), 166.
[150] Morgenthau (1970), 63.

the question of where it is that we find the standards by which we measure the adequacy of what a man receives and gives.[151] It is here that power comes to affect justice: We 'look at the world and judge it from the vantage point of our interests', taking for granted that the 'peculiarities of our perspective can serve as universal laws for all mankind'.[152] International politics are, for Morgenthau, inherently bound to power.[153] Adherence to a particular conception of justice whilst having enough power to make it prevail necessarily gives rise to two convergent political consequences. Parochial justice will be 'meted out with unshakable self-confidence', whilst other conceptions of justice will be judged and dealt with 'in the light of the one which has been taken to be the reflection of the universal order'.[154] A great power imbued with the conviction that its particular conception of justice reflects the order of the universe will thus be tempted to make it prevail in the rest of the world.[155] This makes justice 'a screen for parochial interests and dependent on power for its realisation'.[156] Man therefore 'must see to it that justice is done, and he cannot admit that it cannot be done'.[157]

Misrepresenting Morgenthau's analysis of the dialectic of ethics and politics in realism distorts 'its ethical dimensions, and ironically risks supporting forms of political naïveté and irresponsibility in the name of political Realism'.[158] Morgenthau critiqued the Hobbesian picture and solution of the state of nature and Machiavellianism.[159] Distancing himself from the troublesome legacy of these two thinkers, he outlined 'a refreshingly demanding political ethics'.[160] In the dialectic between power and justice, power therefore gets the better of justice. The reason for this, for Morgenthau, is clear. Whilst 'the work of justice is never done and always dubious; the work of power, however ephemeral it may be, is clearly seen and simply enjoyed'.[161] Thus, the quest for justice can neither be satisfied nor eradicated.[162] It cannot be satisfied 'because we are ignorant of the order of the universe which is invoked to supply justice to a concrete case', with this invocation justifying and rationalising 'parochial interests which can only maintain themselves supported by power'.[163]

[151] Ibid.
[152] Ibid, 64.
[153] Molloy (2006), 75.
[154] Morgenthau (1974), 172.
[155] Power will be used 'on behalf of that conception of justice' within the territorial limits of a state 'with uncompromising consistency'. Ibid, 172–173.
[156] Morgenthau uses the application of the principle of national self-determination in the interwar period within Central and Eastern Europe as a particular example of this. Ibid, 173.
[157] Morgenthau (1970), 66.
[158] Williams (2005), 170.
[159] Guzzini (2003), 24.
[160] Scheuerman (2011), 99.
[161] Morgenthau (1970), 67.
[162] Morgenthau (1974), 174.
[163] Ibid.

Morgenthau feared that science had entered a state of moral crisis due to the positivist mode of inquiry.[164] His conception of the ways in which justice is affected by power lies at the heart of his analysis and critique of both legal positivism and international law. It gives rise, as Koskenniemi has noted, to Morgenthau's calls for interdisciplinarity.[165] Lawyers should 'develop a better understanding of the relationship between law and ethics' and not be blind to the sociological context of economic interests, social tensions, and aspirations of power which are motivating forces in the international field.[166] It is only in the combination of 'political wisdom, moral courage, and moral judgement' that man 'reconciles his political nature with his moral destiny'.[167] Power is fundamentally related to ethics and justice in international law. This challenges the core assumptions of legal positivism, giving rise to the question of what the concept of the political is in legal questions.

6 The Concept of the Political

Morgenthau's interest in the concept of politics originally arose both from his attempt to oppose Schmitt's oppositional vision of the concept of the political and his desire to construct a viable liberal politics in the light of the collapse of Weimar and the rise of fascism.[168] Schmitt is the key position against which his understanding of a limited politics emerges.[169] Schmitt's distinction between friend and foe, for Morgenthau, is of little scientific value when attempting to determine the concept of the political.[170] This is due to the fact that this opposing pair represents 'tautological relations derived from the quality of the respective value spheres of the moral and the aesthetic, and are of no use to an analysis attempting to delineate one sphere from another'.[171]

Morgenthau's antithesis to Schmitt's concept of politics is an important aspect of his theory at large. Correctly understood, the concept of politics 'provides an ethical (fundamentally democratic) position from which, and in the name of which, strategies of enmity can be resisted in both domestic and foreign policy'.[172] Political

[164] Bain (2000), 452–453.

[165] Zajec's analysis of the interdisciplinarity of legal and political realism in the USA in the 1920s and 1930s is also particularly relevant in relation to this. Zajec (2015), 51–70.

[166] Koskenniemi (2004), 459.

[167] Morgenthau (1947), 173.

[168] Williams (2005), 8–9.

[169] Ibid, 118.

[170] Koskenniemi has argued against this interpretation. 'Morgenthau', he writes, 'appreciated the way Schmitt founded his legal work on the centrality of the political … But he felt that Schmitt never succeeded in building more than a fragmentary set of proposals for a new public law; that Schmitt had gone only half-way, failing to see that at the heart of the political lies the unchanging psyche of the human being, his lust for power'. Scheuerman has also emphasised the links between Schmitt and Morgenthau, who together with Nietzsche and Weber 'made a decisive imprint on his idiosyncratic brand of realist theory'. Koskenniemi (2001), 19; Scheuerman (2008), 30.

[171] Jütersonke (2006), 199.

[172] Williams (2005), 157–158.

questions in international society, he argues, are those that are 'likely to have an influence on the relations of a State with other States, on the situation of a State within the international community'.[173] As any action by the state outside of itself ultimately affects its relations with other states, from the point of view of the goal they pursue, all external actions of the state are always political. Morgenthau contrasts this position with the idea that the difference between political and other international questions lies in the fact that political questions have no legal character, and that, therefore, 'the notion of a political question would thus be equivalent to that of a question of pure interest'.[174] This differentiation cannot be substantiated upon an examination of the facts, as historical experience 'abounds with cases where questions of law unquestionably took on a political character'.[175]

The notion of an international legal standard is, therefore, a fundamental problem faced by international law, particularly as international law cannot be the object of a universally accepted solution in its present state. Any examination of legal disputes must necessarily 'pose the question of the notion of law in general'.[176] It is this question that allows us to see the difficulties that arise in international law in relation to the contents and concept of the law. A definition of legal disputes must establish an objective criterion through which we can distinguish, from amongst the allegations of the parties invoking legal grounds, between those which 'cannot rely on positive law' and those whose relationship 'with positive law cannot be admitted without examination'.[177] Though the norms of international law make it possible to say whether or not the allegations of a state party invoke existing legal rules, they are not able to determine the nature of its legal motivation. This is because the norms of international law provide no 'direct point of reference for the discrimination of the various demands of this category'.[178] The affirmation of the legal character of a dispute does not, therefore, necessarily imply that it is not political. Politics and law do not form an antithetical couple.[179]

The political character of these questions depends on circumstances of place and time, and do not arise from a sole principle. There cannot be a single question which can once for all be qualified as political in nature; instead, all that can be said is that in certain circumstances, certain questions acquire 'regularly a political character, which they would not have in other circumstances'.[180] Morgenthau illustrates this idea through the debates which took place during the second Hague Conference. Certain questions which a certain state considered from the point of view of its interests 'as devoid of any political character' appeared to other states as having

[173] Morgenthau (1933), 24.
[174] Ibid.
[175] The question of whether the territorial integrity of China was violated in 1931 by Japan was, Morgenthau argues, despite its legal character, of 'great political importance'. Ibid, 25–26.
[176] Ibid, 14.
[177] Ibid, 16.
[178] Ibid, 17.
[179] Ibid, 26.
[180] Ibid, 30.

'a political character, or at least as likely to have one'.[181] Morgenthau's concept of politics, through this, emerges as more than Reus-Smit's characterisation of realism and power: International is not merely 'epiphenomenal' nor does it exclusively serve the political purposes of powerful states.[182] We must conclude, Morgenthau argues, that it is impossible to distinguish 'between political and non-political questions', as the concept of the political 'is not necessarily inherent in certain determined objects, just as it is not necessarily absent from other determined objects'.[183] It does not have a fixed contents which can be defined once and for all. Rather, it is a 'quality, a tonality, which can be specific to any object, which attaches preferentially to some of them, but which does not necessarily attach to any'.[184]

Morgenthau's conception of politics is a moral and political project.[185] His arguments, Koskenniemi argues, lead 'beyond law as the banal application of (formal) rules but also beyond sociology and ethics as scientific disciplines or bureaucratic techniques'.[186] They bring into existence 'international relations as an academic discipline that would deal … with the functioning of eternal human laws in a condition of anarchy'.[187] The scope of the political for international law does not consist only in that the political 'serves international law as a social support' but that it is, as such, an 'intrinsic element of international law itself'.[188] The norms which are at the base of this problem all refer to this political element and represent the general problem of the relationship between international law and the political in all its aspects.[189] Politics, then, is a quality which can be found, to varying degrees, in 'in all subjects', and just how one cannot say that of a body that it is its essence to be hot, 'nor can one say of a given matter of international relations that it possesses, by its very nature, a political character'.[190] There is no possible objective measurement for the scope of the political in international law.[191] Williams has emphasised the importance of this aspect of Morgenthau's thought. His refusal to accept an exclusive delineation of the political, he argues:allows him to examine the ways in which political reality is structured according to the interpenetration of different social spheres, while still maintaining that politics has a distinctive core that must not be reduced to other spheres.[192]

[181] Ibid, 31.
[182] Reus-Smit (2004b), 16.
[183] Morgenthau (1933), 32.
[184] Ibid.
[185] Williams (2005), 124.
[186] Koskenniemi (2004), 470.
[187] Ibid.
[188] Morgenthau (1936), 19–20.
[189] Ibid.
See, for example: Morgenthau (1938–1939), 109–128; Morgenthau (1939), 473–486.
[190] Morgenthau (1933), 35.
[191] Morgenthau's conception of politics, Tellis argues, is fundamentally born from his rejection of the notion that 'these objective laws could be derived by the abstract and deductive methods of rationalist inquiry'. Tellis (1995), 44–45.
[192] Williams (2005), 125.

It is the lack of an objective measurement for the scope of the political that leads Morgenthau to conclude that, in its broadest sense, the concept of the political 'applies to events that go far beyond the domain of the State'.[193] Any foreign policy is therefore nothing but the will of a state to 'maintain, increase or assert its power'.[194] These three manifestations of political will, in turn, translate into the fundamental empirical forms of 'status quo politics, imperialist politics, and prestige politics', with the policy taken representing the will of a state to maintain, increase, or assert its power.[195] Politics in the specific sense, therefore, for Morgenthau, consists of 'the particular degree of intensity of the relationship that the will to power of the State creates between its objects and the State'.[196] This fundamentally affects international law in all its facets, linking it irrevocably with politics.

7 Conclusion

Morgenthau's critique of legal positivism and his legal theory at large offer valuable insights for contemporary discussions on the nature of international law, legal positivism, and natural law. They profoundly affect his political realism and his proffered answers for how to enhance and ensure the effectiveness of international law. Morgenthau's legal formalist heritage, as Jütersonke has previously shown, 'incited him to make repeated calls for greater emphasis on the "reality" of international legal norms'.[197] It is this heritage that makes him addresses the dangers of viewing international law and the fundamental norm of *pacta sunt servanda* as a panacea. Morgenthau's analysis—which critiques the idea that the law can be wholly divorced from the influence ethics, justice, and politics—bridges 'issues of power, emotion, and insufficiency' and offers a view of 'subjectivity which is thus far unique in IR theory'.[198] His theory provides us with answers as to the relationship between politics and international law, which is best encapsuled through the following extract:

For, by virtue of the very essence of law, every legal order possesses a certain static tendency; the principles of order, rationality, predictability, which are immanent in the nature of law and which all proceed from the principle of legal certainty, in fact require, above all, the delimitation and preservation of the spheres of power given in reality and in a pre-existing way, which the legal order is called upon to govern.[199]

The static tendencies which exist within every legal order fundamentally affect how it functions, with the tendency to modify the domains of power also stemming, in the same way as 'the tendency to preserve existing domains of power, from

[193] Morgenthau (1933), 42.
[194] Ibid, 61.
[195] Ibid.
[196] Ibid, 63–64.
[197] Jütersonke (2010), ix.
[198] Solomon (2012), 203.
[199] Morgenthau (1933), 66–67.

sociological necessities'.[200] No legal order can survive in the long run if it aims to push these principles to their final consequences.[201] There is an insoluble antinomy between the static and dynamic tendencies of legal orders, where each tries to mark the internal structure of the law and, as a rule, leads to a more or less lasting modus vivendi where the static element predominates.[202] No legal order can fully separate itself—as explored in the pages above—from the influence of justice, ethics, and power, as it is in the combination of 'political wisdom, moral courage, and moral judgement' that man 'reconciles his political nature with his moral destiny'.[203] In other words, rather than being merely affected by its underdeveloped nature and decentralised structure, politics are inherent in international law.[204] In asserting the antinomy between the static and dynamic tendencies of legal orders, Morgenthau questions the central tenets of legal positivism, linking them to his analysis of international law and its different problems.

Morgenthau's analysis and critique of both legal positivism and international law are in this sense, as held by García Sáez, akin to those of Danilo Zolo in relation to contemporary international law.[205] His legal thought, critique of legal positivism and positivism at large, exploration of politics, justice, and ethics and his concept of the political show Morgenthau was aware of Reus-Smit's critique that the 'proposition that international law is simply a codification of the interests of powerful states' requires us to turn a blind eye to 'much that is rich, complex, and intriguing about the contemporary politics of international law'.[206] Morgenthau's thought stands out from contemporary iterations of political realism. He attacks enlightenment rationality, and its misapplication in politics and law distinguishes between the 'natural world of phenomena and the world of human affairs in which human consciousness plays the central role'.[207] Morgenthau's legal theory and critique of legal positivism exemplifies Crawford's assertion that:

Neither party to the growing epistemological dispute in IR seems able to recognize that its distorted, lopsidedly realist, construction as an academic discipline has suppressed rather than eradicated its natural and perennial philosophical diversity.[208]

International law, for Morgenthau, stems from more than the permanent interests of states: it is uniquely affected by power politics and moral politics.[209] This due

[200] Ibid, 67.
[201] Ibid, 67.
[202] Ibid, 69.
[203] Morgenthau (1947), 173.
[204] Post-WW1 international society is, for Morgenthau, a particularly prominent example of this. Rather than give rise to a fundamental change in international law, the League of Nations only modified 'the ideologies made to legitimise it and the technical legal means to achieve it'. Thus, it justified itself through a new ideology of international solidarity and peaceful cooperation without changing the structure of international society, which is determined by the existence of a plurality of states. Morgenthau (1935b), 827 and 830–831.
[205] García Sáez (2018), 54.
[206] Reus-Smit (2004b), 44.
[207] Gismondi (2008), 152.
[208] Crawford (2000), 58.
[209] Reus-Smit (1999), 16.

both to the fact that there does not exist 'any organised and monopolised physical force capable of sanctioning the validity of international law' and that the development of this type of law has not gone beyond the point where this fundamental function of any legal order originates.[210] Thus, despite the fact that international law 'creates norms capable of fixing a given state of law', these 'only exist in international law in quite a rudimentary way', with international law being distinctively static in nature through its dependence on the goodwill of interested states.[211] It is fundamentally affected by both the power and moral considerations of different states.

The impossibility of empirically comparing the needs of different states complicates this. Where is it possible to find, asks Morgenthau, 'a universally accepted measure of values' which would make it possible to decide in a universally binding manner 'the merits of the contradictory claims of States?'[212] Though these problems fundamentally affect international law, they are not, Morgenthau argues, insurmountable. International law is not fully at the mercy of the political. International relations are not only 'a realm of power and interest'.[213] 'To deny a positive legal order effective sanctions is', Morgenthau writes, 'nothing other than to abandon it to the mercy of its adversaries who will strive … to replace it with a legal order at their convenience'.[214] Anyone who raises the question of the legitimacy of an international legal order only raises the moral or political question of whether such an international legal order deserves to be protected by sanctions, in other words, whether it deserves to exist.[215] Morgenthau's conclusion, as Scheuerman has shown, originates in his critique of legal positivism and positivism at large, wherein:a naïve faith in natural science led too many of its admirers to advance simplistic answers to deeply rooted political and social dilemmas for which we can only hope to find unavoidably fragile and provisional resolutions.[216]

Morgenthau's solutions and proposed answers for how to enhance and ensure the effectiveness of international law bear the mark of his critique of legal positivism. The role played by ethics and justice is key amongst these. An international morality should be formed, 'for there can be no stable legal order without a moral foundation, a truth which the classical internationalists from Vittoria and Suarez to Grotius and Wolf were not unaware of'.[217] The stability of the legal order, however, is ensured only 'on the condition that the proportionality of the sanctions is achieved in a definitive manner' and that, therefore, the sanctions which are available to the legal order 'are sufficient to defend it against any foreseeable attack'.[218] Thus, having achieved this moral consensus, the belief or conviction of the most influential members of the

[210] Morgenthau (1935b), 70.
[211] Ibid.
[212] Ibid, p. 76.
[213] Donelly 2004, p. 9.
[214] Morgenthau 1935b, p. 829–830.
[215] Ibid, p. 830.
[216] Scheuerman 2007b, p. 506–507.
[217] Morgenthau 1935b, p. 833–834.
[218] Ibid, 834.

international legal order 'should be the other ideal support of the international community'.[219] Neither a complete dependence on the letter of the law nor a surrender to power and politics are appropriate answers. If international law seeks to develop and exist, it must rely on an international morality, justice, and ethics.

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