

turn stimulates disputes of an almost ideological nature concerning, for example, the relationship between free trade and environmental protection.¹⁷ To this may be added the pressures of democracy and human rights, both operating to some extent as countervailing influences to the classical emphasis upon the territorial sovereignty and jurisdiction of states.

Modern theories and interpretations

At this point some modern theories as to the nature and role of international law will be briefly noted.

Positive Law and Natural Law

Throughout the history of thought there has been a complex relationship between idealism and realism, between the way things ought to be and the way things are, and the debate as to whether legal philosophy should incorporate ethical standards or confine itself to an analysis of the law as it stands is a vital one that continues today.¹⁸

The positivist school, which developed so rapidly in the pragmatic, optimistic world of the nineteenth century, declared that law as it exists should be analysed empirically, shorn of all ethical elements. Moral aspirations were all well and good but had no part in legal science. Man-made law must be examined as such and the metaphysical speculations of Natural Law rejected because what counted were the practical realities, not general principles which were imprecise and vague, not to say ambiguous.¹⁹

This kind of approach to law in society reached its climax with Kelsen's 'Pure Theory of Law'. Kelsen defined law solely in terms of itself and eschewed any element of justice, which was rather to be considered within the discipline of political science. Politics, sociology and history were all

¹⁷ See e.g. *Myers v. Canada* 121 ILR, pp. 72, 110.

¹⁸ See e.g. D. Lyons, *Ethics and the Rule of Law*, London, 1984; R. Dworkin, *Taking Rights Seriously*, London, 1977; H. L. A. Hart, *The Concept of Law*, Oxford, 1961, and P. Stein and J. Shand, *Legal Values in Western Society*, Edinburgh, 1974. See also R. Dias, *Jurisprudence*, 5th edn, London, 1985.

¹⁹ See Hart, *Concept of Law*, and Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review*, 1958, p. 593. Cf. L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart', 71 *Harvard Law Review*, 1958, p. 630. See also D. Anzilotti, *Cours de Droit International*, Paris, 1929, and B. Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', 13 *EJIL*, 2002, p. 401.