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The moral person of the state: Emer de Vattel and the foundations of international legal order

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ABSTRACT

Emer de Vattel was the first writer systematically to combine three arguments in a single work, namely: that states have a fundamental duty of self-interestedness; that they nonetheless have reason to see themselves as inhabiting a kind of society; and that this society is held together by positive agreements between its members on rules that shall regulate their interactions. This article explores how Vattel arrived at his vision of international order. It points to the significance of his understanding of the state as being a 'moral person'. This was a description of the state introduced by Samuel von Pufendorf, who argued that the state was a moral person because it possessed the moral faculties of intellect and will. This helped to ground a constitutionalist theory of the state, for intellect and will, being represented by separate institutions of the state, in effect balanced each other. But the notion of the state as a moral person was later taken up in a rival intellectual tradition that allotted no independence to the will. This was the philosophical tradition to which Vattel belonged. In this altered context, the notion of moral personality was transformed. I argue that this was critical to the formulation of Vattel's theory.

Writing for the first time about 'the Grotian tradition in international law', Hersch Lauterpacht claimed that Emer de Vattel (1714–1767), above all other international jurists, 'gave emphatic and lucid expression to this analogy ... of states and individuals'.[1] Vattel imputed to states what were imputed to individuals in liberal theory: equal rights. From this, according to Andrew Hurrell, followed 'the principle of sovereign equality, that all states possess equal rights – or an equal capacity for rights', which Vattel was 'the first writer to elucidate clearly'.[2] He therefore envisaged 'a structure of coexistence, built on the mutual recognition of states as independent and legally equal members of society'.[3] Thus did Vattel develop a conception of what he called 'the great society established by nature between all nations'.[4]

Lauterpacht, however, also detected in Vattel's writings 'a hallmark of what is considered to be the realist approach to expatiate on the lower morality of states as compared with that of individuals'.[5] With Vattel we get the mere 'appearance of a recognition of a legal order among nations', when in fact by an 'elegant manner of evasion' he has invested states with such an inviolate sovereignty that the principles and instruments necessary to furnish such an order are excluded from the analysis.[6] Similarly, Andrew Linklater charges Vattel with endorsing a 'radical state-libertarianism' and 'a voluntaristic international order',[7] while Philip Allott traces to Vattel a 'spiritually and psychologically dislocated' vision of a world 'which requires each of us to be two people – with one set of moral judgements and social aspirations and legal expectations within our national society, and another set ... for everything that happens beyond the frontiers of our national society'.[8]

Vattel appears to have articulated two fairly different framings of the character of international legal order. Some recent scholarship on Vattel has tried to account for the Janus-faced character of his writings. For Richard Tuck, Vattel belongs full-square in a liberal tradition which, on the one hand, emphasises the autonomy of all political agents, including states, but which, on the other, took as its paradigmatic case of the political agent 'the belligerent

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[1] H. Lauterpacht, 'The Grotian Tradition in International Law', *British Year Book of International Law* 23 (1946), 27.

[2] A. Hurrell, 'Vattel: Pluralism and its Limits', in: *Classical Theories of International Relations*, ed. I. Clark, I. B. Neumann (Basingstoke, 1996), 239.

[3] Hurrell, 'Vattel', 233.

[4] E. Vattel, *The Law of Nations, Or, the Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, ed. B. Kapossy, R. Whatmore (Indianapolis, 2008), 73.

[5] Lauterpacht, 'The Grotian Tradition in International Law', 28, fn. 3.

[6] H. Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933), 7.

[7] A. Linklater, *Men and Citizens in the Theory of International Relations*, 2nd edn (Basingstoke, 1990), 87, 90.

[8] P. Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge, 2002), 418.

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post-Renaissance state', so that the respect for autonomy ended up being severely curtailed.[9] Following Reinhart Koselleck's suggestive remarks, Dan Edelstein argues that Vattel, having established an internally consistent and bounded system of rules intended to describe an international morality, had to argue that on occasions when those rules did not apply international conduct was unconstrained by moral considerations. The amplification of the moral limitations on war 'entailed an inversely proportional damnation of those who disrespected the law of nations'.[10] This article also attempts to account for the discrepant nature of Vattel's work on international order, but it does so by examining his notion of state personality. Why did Vattel arrive at the notion that each state has a personality? What kind of persons are states? What are their rights and duties? Answering these questions, I maintain, takes us some way to understanding Vattel's work.

The argument begins by setting out briefly two rival perspectives on the character of human freedom, voluntarism and intellectualism, which impacted on the respective worldviews of Samuel Pufendorf and Christian Wolff, on both of whose shoulders Vattel was precariously perched. Vattel adopted the notion of the 'moral personality' of the state from Pufendorf, but embedded this conception in a narrative of the purposes of human life, taken from Wolff, which was fundamentally at odds with Pufendorf's *Weltanschauung*. The resulting vision of international law and order was not rendered inconsistent on the basis of its combination of these opposing perspectives, but it goes some way to explaining the tension in his thinking that should be evident from the interpretations mentioned above.

The contest of the faculties

During the high Middle Ages, a debate raged concerning the priority of the two 'spiritual' faculties of mind: intellect and will. It was by virtue of possessing these faculties that human beings were thought capable of free or moral action; but then the question arose as to which of these faculties 'formally' secured the agent's freedom. The answer given depended on what the respondent considered to be constitutive of freedom. For *intellectualists*, true freedom entailed acting in accordance with the dictates of reason; one could not be regarded as free if one were acting irrationally. These writers argued that freedom was secured by the intellect, for this was the faculty that apprehended and processed the dictates of reason. For *voluntarists*, freedom had to involve choice; one was not free unless one could choose to act irrationally. Such choice was the province of the will.

Most prominent among intellectualists was St. Thomas Aquinas (1225–1274), while the two greatest medieval voluntarists were John Duns Scotus (1265–1308) and William of Ockham (1288–1348). Aquinas regarded the intellect as the 'nobler' faculty. The will, he maintained, is an appetitive faculty, and thus its end is to cease willing by attaining the sought-after object – which, put another way, means that its end is to extinguish itself. The intellect, on the other hand, does not seek to put an end to itself, and for this reason it is nobler.[11] Duns Scotus was the first philosopher after Aquinas to argue the opposite. For Scotus, the will can affirm or repudiate whatever confronts it; it can 'transcend everything', and it is by virtue of this that we appear to have been created in God's image. Without the will, we would be 'intellectual beasts', certainly not God-like.[12] For William of Ockham, too, it is the will that allows humans to live within the sphere of permissions that God's law has left us.[13]

Between the fourteenth and sixteenth centuries, the controversy died down considerably. During the Renaissance, the recovery of Graeco-Roman ideas about fate and *fortuna*, coupled with later Protestant notions of predestination, meant that writings about human freedom in this period were concerned with whether human beings could be said to be free at all, rather than the priority of intellect and will in securing liberty.[14] When discussion about intellect and will resurfaced in the second scholastic in late sixteenth century Spain, theorists were concerned rather to reconcile intellectualism and voluntarism than assign priority to one faculty over the other.[15] But as the stimulus of Greek philosophy again began to give way in the seventeenth century, the debate was stirred up anew.

Samuel von Pufendorf

In his highly influential work *On the Laws of Nature and of Nations* (1672), Samuel von Pufendorf (1632–1694) elaborated on the roles played in determining moral action by the human cognitive faculties of intellect, or 'understanding', and will.[16] The 'initiative for any voluntary action, without exception, proceeds from man's understanding'.[17] The intellect, that is, apprehends objects, considers the nature of the objects apprehended, and passes judgement on the best course of action. Nonetheless, 'when all the requisites of action are given' (when the intellect has shown to the will what may be done), the will may freely 'select one or more among a number of given objectives and reject the rest, or if but one objective is given, to accept and do it or not'.[18] Reason itself cannot determine the acts of the will of a rational agent, for if a human being possesses no faculty by which he may determine his own actions independently of the intellect, then he can bear no moral responsibility for his actions: 'the chief affection of the will ... is that it is not restricted intrinsically to a definite, fixed, and invariable mode of acting ... And this must be maintained all the more firmly because upon its removal the morality of all human actions is at once destroyed'.[19] Pufendorf thus espoused a mitigated voluntarism, according to which it was the will's 'indifference' to the exercise of its own actions that ultimately secured human liberty.[20]

This faculty psychology feeds into Pufendorf's conception of the powers of the state. His book opens with a treatment of the discipline of natural jurisprudence as a science. The natural sciences dealt with material substances, and Pufendorf argued that entities to which moral laws applied could be 'conceived analogously to substances'. These entities he called 'moral

[9] R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 1999), 195.

[10] D. Edelstein, 'War and Terror: The Law of Nations from Grotius to the French Revolution', *French Historical Studies*, 31 (2008), 238. See also R. Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, MA, 1988), 46–7.

[11] H. Arendt, *The Life of the Mind*, 2 vols. (New York, 1978), ii, 113–25.

[12] J. Duns Scotus, *Philosophical Writings*, ed. A. Wolter (Indianapolis, 1987), 54–5.

[13] A. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge, 1997), 50–68.

[14] A. Poppi, 'Fate, Fortune, Providence and Human Freedom', in: *The Cambridge History of Renaissance Philosophy*, ed. C. B. Schmitt, Q. Skinner (Cambridge, 1988).

[15] A. J. Freddoso, 'Suarez on Metaphysical Inquiry, Efficient Causality, and Divine Action', in: F. Suárez, *On Creation, Conservation, and Concurrence: Metaphysical Disputations 20, 21, and 22*, ed. A. J. Freddoso (South Bend, IL, 2002); W. M. F. Stone, 'The Scope and Limits of Moral Deliberation: *Ratio Recta*, Natural Law, and Conscience in Francisco Suárez', in: *Imagination in the Later Middle Ages and Early Modern Times*, ed. L. Nauta, D. Pätzold (Leuven, 2004).

[16] This section on Pufendorf and moral personality draws on the author's forthcoming article 'Pufendorf's Theory of Facultative Sovereignty: On the Constitution of the Soul of the State', which readers are advised to consult in order to fill in the detail about what I can present here only sketchily.

[17] S. Pufendorf, *De Jure Naturae et Gentium Libri Octo*, ed. C. H. Oldfather, W. A. Oldfather, 2 vols. (Oxford, 1934), ii, 38.

[18] Pufendorf, *De Jure Naturae*, ii, 53.

[19] Pufendorf, *De Jure Naturae*, ii, 54.

[20] Pufendorf, *De Jure Naturae*, ii, 53.