



2013

# Reconciling Positivism and Realism: Kelsen and Habermas on Democracy and Human Rights

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## Author Manuscript

This is a pre-publication author manuscript of the final, published article.

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## Recommended Citation

Ingram, David. Reconciling Positivism and Realism: Kelsen and Habermas on Democracy and Human Rights. *Philosophy & Social Criticism*, , , 2013. Retrieved from Loyola eCommons, Philosophy: Faculty Publications and Other Works,

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## Reconciling Positivism and Realism: Kelsen and Habermas on Democracy and Human Rights<sup>1</sup>

[Revised 4/26/13]

**Abstract:** It is well known that Hans Kelsen and Jürgen Habermas invoke realist arguments drawn from social science in defending an international, democratic human rights regime against Carl Schmitt's attack on the rule of law. However, despite embracing the realist spirit of Kelsen's legal positivism, Habermas criticizes Kelsen for neglecting to connect the rule of law with a concept of procedural justice (Part I). I argue, to the contrary (Part II), that Kelsen does connect these terms, albeit in a manner that may be best described as functional, rather than conceptual. Indeed, whereas Habermas tends to emphasize a conceptual connection between law and morality, and has even been tempted by natural law arguments in developing his theory of jurisprudence (Part IV), Kelsen is more receptive to arguments drawn from legal and political realism. Yet Habermas is hardly oblivious to these arguments, as can be seen from his recent acknowledgment that human rights that secure subsistence and development depend on "global domestic policy" for their full enjoyment. This acknowledgment, I submit, brings Habermas's legal philosophy closer to Kelsen's monistic view that a supranational human rights regime must regulate political as well as purely legal matters (Part III). Given this stronger analogy between domestic and global institutions of governance, I argue (Part IV) that a global human rights regime must also incorporate features of constitutional review. Conceding this point, however, raises further questions about the insulation of international law from so-called extra-legal (political) influences. I conclude that not only do multicultural differences in understanding human rights (conflicts between legal paradigms) generate political problems for international courts but so do competing subsystems of international law.

**Key Words:** Habermas, Kelsen, Schmitt, law, democracy, human rights, positivism, realism, legitimacy, judicial review.

### I. Habermas Versus and Kelsen?

In a remarkable passage, Habermas pays tribute to a founding figure in modern legal positivism.

Hans Kelsen is best known for his legal theory. But he is equally important as a political philosopher and intellectual of the social sciences. During the Weimar period he was one of the few prominent academics who were engaged in the defense of liberal democracy. In a famous controversy with Carl Schmitt, Kelsen was an early advocate of the idea of a Constitutional Court. Even in advance of the foundation of the United Nations, Kelsen developed the design for a cosmopolitan model of compulsory jurisdiction . . . As much as I admire the fervent spirit of the interventions of the democratic law professor and legal pacifist, so much also can I appreciate Kelsen's philosophical motivation for developing a theory of legal positivism. I agree with his

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arguments against classical natural right theories, in particular against the Platonist idea of a normative order that is found in nature rather than invented by the will of human beings.<sup>2</sup>

Habermas's tribute to Kelsen is noteworthy for being one of the very few places where he discusses Kelsen's positive contributions to legal philosophy at any length. Indeed, most of his scattered references to Kelsen in writings leading up to and including *Faktizität und Geltung* (1992), were largely critical in tone, underscoring the normative deficits of and inconsistencies in Kelsen's legal positivism. That changed once Habermas shifted his attention to international law and human rights. Here he enlists the support of Kelsen as an ally against a common nemesis, Carl Schmitt, whose attacks on liberal democracy, constitutional courts, international law, and human rights continue to draw support from both Left and Right. In keeping with Habermas's change of heart, we will here examine how Habermas further develops Kelsen's "scientific" analysis of democracy, international governance, and human rights in advancing Christian Wolff's vision of a *civitas maxima*. Conversely, we will examine how Habermas's embrace of Kelsenian legal monism forces him to confront the political nature of constituting and applying international law in all of its humanitarian dimensions.

Kelsen and Habermas counter Schmitt's realist assault on the rule of law with realist arguments of their own drawn from arch-idealist Kant, for whom the only solution to a state of war is the rule of law, fully instituted in liberal democracy at the level of state law and in a cosmopolitan human rights regime at the level of international law. Although they reject what they regard as residual natural law reasoning in Kant's theory,<sup>3</sup> they endorse Kant's formal distinction between law and morality.<sup>4</sup> As we know, this distinction, and the correlative rejection of natural law reasoning, came under attack in the wake of the Nuremberg Tribunal. Hence the question: what alternative to natural law reasoning do they offer in grounding the subsequent human rights regime?<sup>5</sup>

According to Habermas, Kelsen's brand of legal positivism has little to offer. He accuses Kelsen of "sharing with his opponents a genetic account of normative validity."<sup>6</sup> Because "the source of norms explains the kind of validity that is claimed for them" and the ultimate source is nothing other than the "will of the legislator," viz., his original "decision to establish and enforce them," the ultimate source for the binding power of norms would appear to be nothing more than "a threat of sanctions." Habermas himself alludes to a more genuine source of normative validity when he observes that Kelsen rules out "the cognitive authority of some enabling 'procedure' or 'process' . . . [whose] intrinsic features . . . rather than the more or less arbitrary choice of the lawmaker," qualifies the result's having a "presumption of validity, or the reasonable expectation of intersubjective recognition" based on "rational acceptability."<sup>7</sup> Connected to Kelsen's putative exclusion of any cognitive procedural validation of law is Habermas's additional concern that "[i]n Kelsen's analysis the moral content of individual rights expressly lost its referent, namely the free will (or 'power to rule') of a person, who from the moral point of view, *deserves* to be protected in her private autonomy."<sup>8</sup>

Kelsen is here alleged to believe that a dictator's command is as binding as a law authorized by a fair democratic procedure. This allegation, I submit, is true only if we focus, as Habermas does, on Kelsen's theory of law in its pure form, abstracted from his legal sociology. Kelsen orients his pure theory of law around a *normative* understanding of legality that reflects the austere assumptions of a *jurist* who is

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tasked with distinguishing laws from other types of norms. In explaining the special way law obligates, a jurist must assume that law comprises a hierarchical system of valid authorizations anchored by a constitution.<sup>9</sup> The validity of the first constitution, not having been authorized by a prior law, must be presupposed as having been authorized by a basic norm (*Grundnorm*).<sup>10</sup> This norm appears to endow any constitution – however despotic - with binding force so long as it meets a threshold of effective recognition (see note 11).

Habermas, by contrast, orients his legal theory around a normative understanding of legality that reflects the robust moral expectations of a *legal subject* inhabiting a modern society who is tasked with finding good reasons why he or she should voluntarily submit to the law. From this normative perspective, the procedure by which the constitution is generated must satisfy minimal democratic requirements. Here we encounter an additional layer of validating reasons that pertain exclusively to the dynamic creation of law.

This all-too simple juxtaposition must be qualified, for both philosophers regard static and dynamic aspects of law as referring to two inseparable (if analytically distinct) dimensions of legal validity. Both concede that, from the static perspective of a jurist tasked with identifying law, a legal act is validated only if it is constitutional. By the same token, they concede that, from the dynamic perspective of a legal subject tasked with submitting to law, a legal act is validated only if the manner of its generation gives rise to an expectation that said law is prudentially and morally reasonable enough to motivate a legal subject's voluntary compliance.<sup>11</sup> Noting that the moral reasons that motivate people to abide by the law vary within and between societies, Kelsen shares Habermas's opinion that the moral expectations inclining legal subjects inhabiting modern societies to comply with the law principally refer to democratic procedures of lawmaking.

It may well be that this understanding of the relationship between morality, law, and democracy, which incidentally very few critics have sufficiently appreciated in Kelsen's writings,<sup>12</sup> reaches beyond the purely descriptive status that Kelsen himself accords his scientific legal philosophy.<sup>13</sup> However, if we take seriously his functional definition of law as a tool for securing peaceful cooperation as well as his theory of legal evolution, it becomes clear that the totality of his legal theory strongly inclines toward a positive moral assessment of liberal democracy and cosmopolitan law as twin pillars of a fully realized rule of law.

## II. Kelsen and Habermas on Democracy

Habermas and Kelsen develop their theories of democracy in the shadow of Schmitt's attacks on liberalism as a sterile ideology of rational, consensual discussion, the parliamentary institutionalization of which allegedly evinces all the anti-democratic evils of majoritarian class-based tyranny.<sup>14</sup> They accordingly reject the assumption of an undivided sovereign will that informs Schmitt's notion of democracy as incompatible with modern social differentiation and value pluralism, insisting instead that a democratic will can at best assume the form of a non-hegemonic compromise constituted by open and inclusive deliberation among free and equals.

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This deliberative model of democracy is famously developed by Habermas as an extension of his discourse theory of normative validity. Like Kelsen, Habermas grounds legal validity in a basic norm. Unlike Kelsen's *Grundnorm*, Habermas's principle of discourse (D) designates a norm that informs only those modern legal systems whose members are permitted the freedom to pursue individual aims. (D) reflects this accent on modern subjective freedom in its emphasis on individual consent as a criterion of validation: "just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse."<sup>15</sup> More precisely, Habermas adduces (D) from the requirements of a "post-conventional" ethos of individual accountability. This ethos requires that persons coordinate their actions by offering to defend the reasonableness and reliability of their commitments to each other beyond asserting a desire to pursue personal ends. In so doing they claim (tacitly if not expressly) that the facts and norms around which they orient their behavior reflect beliefs whose truth (or rightness) can be justified to others.

Justification of such claims (*Geltungsansprüche*) here has both a vertical (hierarchical) and horizontal (symmetrical) structure. The substantive arguments persons present to each other must be capable of being made at ascending levels of generality and depth. Most importantly, within a postconventional moral setting persons will typically suppose some higher normative principles (such as human rights) in justifying the permissibility or necessity of their actions. A principle of universalizability (U) thus functions as a kind of foundational basic norm, which follows "abductively," Habermas believes, from other assumptions regarding rational discourse and communicative interaction.<sup>16</sup>

Superficially, Habermas's appeal to one of these assumptions, the principle of discourse (D) noted above, looks suspiciously like the social contractarian principle of self-authorized obligation:

With the loss of the religious promise of salvation . . . 'validity' now signifies that moral norms could win the agreement of all concerned [as being] in the equal interest of all. This agreement expresses . . . the freedom of legislating subjects who understand themselves as the authors of those norms to which they subject themselves as addressees.<sup>17</sup>

However, what distinguishes (D) from its social contractarian counterpart is the fact that:

[P]rocedural characteristics of the process of argumentation . . . bear the burden of explaining why results achieved in a procedurally correct manner enjoy the presumption of validity. For example, the presuppositions of rational discourse demand that all relevant contributions have their say and that the unforced force of the better argument alone determines the 'yes' and 'no' responses of the participants . . . *In communicative action, the moral point of view is imposed on our minds [and] is not at our disposal* (my stress).<sup>18</sup>

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In light of modern value pluralism, the only neutral (universally shared) moral principle people can rely on for settling disputes and reaching agreement must be “some intrinsic feature of the practice of deliberation” itself - Habermas’s principle (D). But an agreement reached according to this principle “cannot be understood as a contract (*Vereinbarung*) which is rationally motivated from the egocentric perspective of each individual”<sup>19</sup> For (D) refers to a conception of procedural justice that captures not only the equality and autonomy of speakers but also their empathetic solidarity (or friendship) toward each other.<sup>20</sup> (D) therefore requires that speakers alter their interests and perspectives to reasonably accommodate the interests and perspectives of consociates.

According to Habermas, because “moral insight is based on the weak force of epistemic reasons and does not itself constitute a rational motive as in the case of pragmatic reasons,” the “weak motivating force of morality in many areas needs to be compensated by coercive law.”<sup>21</sup> Indeed, (D) itself is neutral between the kinds of norms – moral, ethical, and legal – to which it might apply. When applied to moral discourses, it assumes the role of a principle of argumentation (U) that requires a *strong cognitive* orientation toward reaching universal consensus. When applied to ethical discourses, (D) loses this strong cognitive orientation in recognition of the fact that values and other desired ends are intersubjectively valid only for a specific group or community. As we shall see, contrary to Habermas’s depiction of him as a value skeptic, Kelsen himself generally interprets ethical life as evincing just this kind of weak cognitivism.<sup>22</sup>

When applied to law rather than to moral or ethical deliberation, (D) loses its status as a principle of argumentation. Linked to the modern legal form of “subjective” (or permissive) rights, it becomes a principle of democratic *legitimation* (PD) which asserts: “Only those [freedom-granting] statutes may claim legitimacy that can meet with the assent of all citizens in a discourse process of legislation that in turn has been legally constituted.”<sup>23</sup> (PD) thus presupposes a system of basic rights: a legal code specifying, in addition to subjective rights (freedom from non-interference), rights to membership and legal due process. Giving determinate meaning and prescriptive force to this abstract legal code requires legislation, and (pursuant to PD) democratic participatory rights. Finally, securing the “fair value” of these rights requires social rights to education, health, and welfare.<sup>24</sup>

Constitutions entrench these rights as well as the legislative, judicial, and executive institutions that apply them according to institution-specific democratic procedures. Following Habermas, we detect a kind of Kelsenian monism in the way that the constitution authorizes all law (even customary or common law), as well as in the way that “communicative power” authorizes state power generally. On one hand, validation descends from from (D) through (PD), the system of basic rights, the constitution, and the various levels of law creation and application. On the other hand, a uni-directional constitutional flow of political power is set in motion from the “periphery,” located in the informally organized public sphere, and directed toward the formally organized legal system, or “center” (as Bernhard Peters puts it). Thus, public opinion remains the supreme authority for setting the legislative agenda.<sup>25</sup> Social concerns originating in the periphery are suitably reformulated as policies and modified on the basis of negotiated compromises by the center. However, to comply with the stringent procedural justice embedded in (D), compromises that balance competing interests should only be negotiated after good-faith attempts at reaching consensus on generalizable interests have failed. Habermas accordingly

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rejects the skeptical presumption that competing interests cannot be transformed into harmonious or shared interests. This presumption would permit the imposition of “pseudo-compromises” that enable the majority to impose its will unilaterally without considering the minority’s interests.<sup>26</sup> By contrast, (D) requires “an equal opportunity for pressure, that is, an equal opportunity to influence one another during the actual bargaining, so that all the affected interests can come into play and have equal chances of prevailing.”<sup>27</sup>

Finally, Habermas warns that this impression of a Kelsenian *Stufenbau* (or hierarchical authorization of subordinate acts) within a legitimate circulation of legal power should not obscure the genuine circular (or reflexive) nature of the legal system. Not only do official decision-makers unavoidably reformulate the concerns and arguments drawn from public deliberation, but judges and administrators reformulate and develop the laws that limit their individual actions. Far from being a mechanical process of application that rigidly preserves legal contents without addition, such decision-making, Habermas and Kelsen recognize, is unavoidably interpretative.<sup>28</sup>

Habermas’s philosophical reconstruction of the conceptual linkage of law, democracy, and justice finds no parallel in Kelsen’s writings. But a parallel does exist when we turn to the functional linkages between democracy and modernity elaborated in their respective sociological treatments of law. Drawing from Weber’s account of modern law, Habermas and Kelsen regard liberal democracy as a logical correlate to cultural “rationalization.” The legal constitution of the individual as a subject of rights emerges as an adaptive response to cultural changes that accompany revolutionary socio-economic transformations. The stratification and ideological fragmentation of capitalist societies premised on this notion of the legal subject in turn threatens the legitimacy of the legal order in a way that calls forth democratic institutions that protect minorities and vulnerable economic classes while encouraging discursive will-formation through compromise.<sup>29</sup> In a remarkable passage that could have been penned by Habermas, Kelsen writes: “Here precisely resides a decisive advantage of democracy and its majoritarian principle, that it nonetheless secures by means of the simplest organization a certain political integration of a society legally regulated by a state (*Staatsgesellschaft*) . . . That the ‘will of the state’ created juristically is supposedly the ‘will of the people’ is thus itself a fiction – albeit a fiction closest to reality –*so long as the procedure for creating the will is democratically organized* [my stress].”<sup>30</sup> It should be added that, although Habermas and Kelsen reject proletarian democracy as a regression to premodern *Gemeinschaft*, they regard social welfare as an *inevitable* compromise required by the egalitarian solidarity underwriting democratic citizenship.<sup>31</sup>

Habermas<sup>32</sup> and Kelsen<sup>33</sup> thus defend liberal democracy as the most optimal regime for integrating polities premised on modern, rationally enlightened, cultural expectations. As a manifestation of cultural modernity, legal evolution obeys the same logic of functional differentiation and formal integration typical of other institutional spheres. Just as universalistic morality extrudes empirical and religious grounds in its systemic hierarchy of norms, so law extrudes partisan moral grounds in its specialized hierarchy of judicial, executive, and legislative procedures. Yet both Habermas and Kelsen insist that, despite their functioning as coercive techniques for achieving non-moral social and political ends, these procedures retain a residual link to post-conventional ideas of moral justice.<sup>34</sup> As we shall see, Kelsen no less than Habermas insists that modern legal orders can be stabilized only by

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institutionalizing toleration, individual rights, and solidaristic deliberation as a way of negotiating reasonable compromises.

To be sure, unlike Kelsen, Habermas is less convinced that democracy is functional for stabilizing modern class societies. One need only recall his notorious indictment of capitalism - for privileging the functional imperative of bureaucratically administered economic growth over the moral imperative of democratic deliberation – to appreciate how far more problematic his understanding of modern democracy under late global capitalism is than Kelsen's. Habermas's understanding of modern democracy, informed as it is by a dialectical opposition between different processes of cognitive learning (scientific-technical versus moral-practical) and social integration/reproduction (systemic-functional versus communicative-lifeworld-embedded), situates law at the crossroads of both sides of this opposition.

As one might expect, Habermas's distinction between law as a medium of administrative power and law as a normative institution underscores the dialectical connection between these aspects. As always, the normative aspect – here reflected in a constitutional system of rights – grounds the administrative aspect, which regulates a civil society of strategic actors governed by private law. In his Tanner Lectures (1986) Habermas especially emphasized the crucial link between modern normative legal institutions and early modern natural law theory. According to Habermas, in order for law to be conceived as an "autonomous" system of *norms* distinct from the power-backed commands of a ruler it must have the force of *unconditional morality*. Kelsen's demarcation of the legal from the moral in terms of the coercive form of law alone<sup>35</sup> – the central thesis of Kelsen's static account of law – fails, Habermas notes, because the concept of *valid* coercion that distinguishes legal coercion from coercion *simpliciter* must be conceived as emanating from a source that transcends the factual threat of sanction. The motivation to obey the law out of respect for its intrinsic goodness would require grounding the authority of law in the sacral realm of absolute ends. Contrary to Kelsen's evolutionary account of law out of tribal custom, Habermas insists that tribal societies that resolve internal conflicts through magical oracles, trials of endurance, ritual combat, self-defense, vendetta retribution, or non-binding peaceful arbitration, have yet to evolve any distinctly *normative* conception of law, because they have not infused their pre-conventional morality with an understanding of divine ends that transcend immediate interests. In order to become a medium of normatively sanctioned coercion, law needed to be infused with an evolutionarily more advanced morality that judges actions by their intentions and not solely by their consequences and that places cosmic justice and the highest good above the immediate satisfaction of interests.<sup>36</sup> Compelled by an internal logic of rationalization, such conventional moral-legal systems, eventually evolved (Habermas speculates) into post-conventional, natural law-founded, legal orders.

From this perspective, Habermas claims, positivists like Kelsen fail to appreciate the extent to which morality is not simply exported into law by positive fiat but constitutes law's very normativity. In modern conceptions of the rule of law, this normativity encompasses a basic respect for the dignity of the individual legal subject as an autonomous agent.<sup>37</sup> Conceptions of legal due process in Anglo-American law emerging as early as the seventeenth century already embody an argumentative procedure that evinces this respect. Civil and political rights likewise constitute the procedure of democratic legislation from within (*viz.*, conceptually) and not merely as adventitious moral contents



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that just happen to be legally posited by a first legislator.<sup>38</sup> Despite this internal connection between law and morality, which liberal natural law theory conceptualizes in its foundational understanding of human rights, basic moral rights (including “intrinsically valuable” liberal rights to life, property, freedom of movement, etc.) are not external limits upon democratic procedure, as liberal natural law theory would have it; they are rather its enabling conditions.<sup>39</sup> Every subsequent legal act “reflexively” expands the inclusiveness, equality and freedom vouchsafed by this foundational right, so that we may speak of the constitution as a learning project whose binding force (justice) actually increases over time.<sup>40</sup>

Although we might concede Habermas’s point that Kelsen under-appreciates the *conceptual* link between post-conventional morality and constitutional law,<sup>41</sup> it would be wrong to conclude that Kelsen overlooks the *functional* conjunction of these terms within modern democracy. Kelsen observes that legal institutions become democratic in response to modern social complexity and that basic rights and minority protections are *intrinsic* qualities of modern democracy. Furthermore, like Habermas, he notes that modern democracies are dynamic learning processes that reflexively realize their emancipatory potential:

If we define democracy as a political method by which the social order is created and applied by those subject to the order, so that political freedom, in the sense of self-determination, is secured, then democracy necessarily, always and everywhere, serves this ideal of political freedom. And if we include in our definition the idea that the social order, created in the way just indicated, in order to be democratic, must guarantee certain intellectual freedoms, such as freedom of conscience, freedom of press, etc., then democracy necessarily, always and everywhere, serves the ideal of intellectual freedom<sup>42</sup> . . . *Modern democracy cannot be separated from political liberalism.* Its principle is that the government must not interfere with certain spheres of interest of the individual, which are to be protected by law as fundamental human rights or freedoms. It is by the respect of these rights that minorities are safeguarded against arbitrary rule by majorities (my stress).<sup>43</sup>

At the center of Kelsen’s conception of modern democracy is “political liberalism,” or the idea of basic human rights that cannot be infringed upon by the majority. The most important of these rights are civil rights, such as freedom of speech, of press, of conscience, and of association, that serve the “ideal of intellectual freedom.” Intellectual freedom includes freedom from domination as well as positive self-determination. Without the protection of dissenting voices, the discussions necessary for generating an autonomous, unified political will would be incapable of integrating groups of widely opposed interests and ideologies. Indeed, with Schmitt no doubt in the back of his mind, Kelsen maintains that citizens of a liberal democracy are procedurally committed to relating to each other as friends bound by mutual cooperation and benefit.

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The principle of majority, the greatest possible approximation to the idea of freedom in political reality, presupposes as an essential condition the principle of equality . . . that all individuals are of equal political value and that everyone has the same claim to freedom.<sup>44</sup> . . . *The personality whose desire for freedom is modified by his feeling of equality recognizes himself in the other.* He represents the altruistic type, for he does not experience the other as an enemy but is inclined to see in his fellowman his friend<sup>45</sup> Because the permanent tension between majority and minority, government and opposition, results in the dialectical process so characteristic of the democratic formation of the will of the state, one rightly may say: *democracy is discussion* (my stress).

The coincidence of Kelsen's idea of democracy and Habermas's is amply borne out by their common emphasis on the role of discussion. Despite Kelsen's concession to the "disenchanted" scientific spirit of the modern age, which promotes skepticism regarding all dogmatic ideologies and an awareness of the relativity of value orientations, his reference to discussion as a medium of mutual recognition and solidarity holds open the possibility that skepticism can give way to knowledge, or at least to a reasonable understanding of what is good and right sufficient to transform antagonistic ends into a common political will. Such a will need not (and typically does not) express a consensus on the rationales or interests that ought to be served. Consequently, Kelsen adds that

the content of [democratic] legal order may be a compromise. Because [democracy] guarantees internal peace, it is preferred by the peace-loving, non-aggressive type. . . . [T]he respect for science corresponds perfectly to that kind of person which we have described as specifically democratic. *In the great dilemma of volition and cognition, between the wish to dominate the world and that to understand it, the pendulum swings more in the direction of cognition than volition . . . because with this type of character the will to power, the intensity of ego experience, is relatively reduced and self-criticism relatively strengthened* (my stress).<sup>46</sup>

The above citation strongly suggests that Kelsen and Habermas share remarkably similar views about how democratic procedural justice advances a rational learning process in which mutual (self-) criticism leads to moderation and accommodation of differences. Thanks to the mutual enlightenment of one's own and others' interests vouchsafed by deliberative democracy, citizens have a right to expect that the law will respect, if not advance, each of their interests equally.<sup>47</sup>

### III. Habermas and Kelsen on International Law and Human Rights

Habermas's failure to acknowledge the proximity of Kelsen's thinking to his own reflections on democracy and law is not repeated in his writings on international law. Indeed Kelsen himself anticipates the relevance of democratic theory to international law:

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*The democratic type (of government) has a definite inclination towards an ideal of pacificism, the autocratic, towards one of imperialism. . . . The aim of [a] war [may be the] final establishment of peace through a world organization which bears all the marks of democracy: a community of states having equal rights under a mutually agreed tribunal for the settlement of disputes, if possible a world court, as a first step to the evolution towards a world state; a notion which is not only of no political value to an autocratic and imperialistic outlook, but which, owing to the dreary leveling and weakening of national differences involved, implies, in effect, the downfall of culture (my stress).<sup>48</sup>*

To paraphrase Kelsen, if liberal democracy within a local jurisdiction has proven to be essential for guaranteeing peace among free and equal citizens, its global extension through a world-wide organization may be presumed to be likewise essential for guaranteeing peace among free and equal states. Indeed, Hobbesian realism teaches that states are assured of their sovereign independence only when a higher sovereign protects them from aggression.<sup>49</sup> The worry that a world state will destroy the sovereignty of its subordinate members is therefore as groundless as the worry that lawful order is inimical to individual freedom. Far from destroying national cultural differences, a world state provides the cosmopolitan shelter of human rights and toleration that enables such individual differences to flourish.

Kelsen's defense of cosmopolitan legal order also reflects a realistic (Hobbesian) assessment of the limits of morality in securing human rights. These limits were cited by Schmitt as a reason for rejecting human rights *in toto*: "When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but rather a war wherein a particular state seeks to usurp a universal concept in its struggle against its enemy."<sup>50</sup> Schmitt's challenge to cosmopolitans, however, goes beyond demonstrating the emptiness of human rights moralizing. It denies the very possibility of meaningful human rights law as something distinct from the lawful rights recognized by nation states.

Kelsen's definition of the state as a system of legal norms (the identity thesis) and his argument that territorially overlapping systems of law logically imply a higher, overarching system of law from which they derive their authority (the monism thesis) lays the foundation for a response to Schmitt's challenge. Kelsen's articulation of this response in *Das Problem der Soveränität (1920)* demolishes the state/law dualism prevalent among jurists at the time, to wit: that the state embodies a political identity and will independent of its legal constitution. For Kelsen, on the contrary, the rights of a state conceived as a geographically and temporally bounded legal person interacting with other such persons must be conferred upon it by an authority other than itself: international law.<sup>51</sup>

The fact that a state does not exist until it has been legally recognized by other states only shows that, from the standpoint of these other states, it cannot be regarded as legally self-authorizing.<sup>52</sup> However, each state regards itself as legally self-authorizing (sovereign). Hence the question returns in a slightly different form: Why can't a state claim its rights in defiance of international recognition?

Kelsen's demonstrates the absurdity of such a notion by attacking the idea of legal pluralism that resides at its center. Because a legal system is presumed to be absolutely sovereign over its jurisdiction in all

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matters that affect it, internal as well as external,<sup>53</sup> only one truly sovereign (self-authorizing) legal system can exist. But which system? Does the system of international law delegate rights to state organs or do these organs delegate rights to international law, in the manner of a social contract? The conventional answer affirms the second alternative. But this alternative is improperly stated. If state law were absolutely sovereign, the state would not be legally bound by international treaties. In that case a system of international law would be impossible.<sup>54</sup> But a state of nature composed of multiple states would also be impossible. Because each state would interpret the legality of any action affecting it from the standpoint of its own system, the legality of any action affecting multiple states would not be decidable.<sup>55</sup> In order to avoid this result, each state must deny the sovereignty of all other states and regard its own law as globally supreme. Although Kelsen concedes the coherence of this kind of legal monism,<sup>56</sup> he notes that it would logically entail an imperialistic power politics at odds with the rule of law (PS: 317ff); for the destruction of an objective legal order would unleash a solipsistic will to power *incompatible with normativity as such*.<sup>57</sup>

Having demonstrated the logical absurdity of a global order composed of multiple sovereign states, Kelsen observes that only a single world state can guarantee the rights of subordinate legal regimes and their legal subjects.<sup>58</sup> Indeed, social evolution consists in nothing but the humanistic overcoming of subjectivism in all its forms. If normativity is what distinguishes the objective rule of law from the subjective rule of violence, then it is not exaggerating to say that law first appears with the advent of the *Rechtsstaat* and comes to full fruition in a *civitas maxima*. Advocating on behalf of a legal order he originally sought only to describe, Kelsen concludes his treatise on the problem of sovereignty with the admonition that “all political striving must be put to the infinite task of realizing such a world state as a world organization.”<sup>59</sup>

Defending “a [global] monistic constitutional political order” almost a century after these words were penned,<sup>60</sup> Habermas observes that “[t]he classical meaning of sovereignty has already shifted in a direction anticipated by Hans Kelsen. Today the sovereign state is supposed to function as a fallible agent of the world community; under the threat of sanctions, it performs the role of guaranteeing human rights in the form of basic legal rights to all citizens equally within its national borders.”<sup>61</sup> Habermas could have called this world community that lawfully compels governments to respect the human rights of persons within their jurisdiction a world state but for the fact that its capacity to threaten sanctions is limited to certain rights violations and depends on the willingness of governments to offer up their sanction of last resort: military intervention. The precedent for this model of a primitive world state is thoroughly Kelsenian.

In his first detailed proposal for transforming the League of Nations into a Permanent League of the Maintenance of Peace, *Peace Through Law* (1944), Kelsen conceives this primitive world state as a non-voluntary league of nations whose members’ rights and duties have already been authorized by an even more primitive form of international law, the ancient custom of respecting treaties (*pacta sunt servanda*). In primitive legal systems this custom is enforced through the principle of self-help; in the absence of international courts and enforcement mechanisms aggrieved states must take it upon themselves to sanction delicts through war. Because neither the League nor the UN Charter (1945) provided proxies for these mechanisms, Kelsen again enlisted the support of a *bellum justum* doctrine to

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remedy this shortfall, a position that placed him at odds with the Briand-Kellog Pact (1928) and the Charter, both of which permit only defensive warfare.<sup>62</sup> Conceding the danger and illegality of such a doctrine, he advocated strenuously on behalf of a more impartial application of the war sanction that would require the creation of an international tribunal.<sup>63</sup> Because the Moscow Declaration (1943) had insisted on the (equal) sovereignty of states, Kelsen proposed only the creation of international courts coupled with the compulsory adjudication of all inter-state and state-individual disputes as the centerpiece of his proposal.<sup>64</sup> According to Kelsen's proposal, the international court would have jurisdiction over all disputes *including political disputes* and decisions would be made by majority principle, thereby overcoming the chief weakness of the Council of the League of Nations, in which binding decisions had to be unanimous.<sup>65</sup>

Habermas's own proposals for a global constitution go well beyond Kelsen's vision of an international regime headed by international courts, albeit in a direction Kelsen himself anticipated. The democratic principles underlying his theory of legal legitimation have pushed Habermas to advocate changing the UN General Assembly into a legislative body. The unresolved tension between republican and liberal tendencies in his thought over the last two decades – which explains his vacillation over the institutional design of world governance – stem, in part, from the multiple functions he ascribes to international law. In the mid-nineties he defended a more state-centric, republican design in response to the economic realities of globalization.<sup>66</sup> In the years following he proposed a less radical, more liberal conception that focused the centralized energies of global governance on pacification and human rights enforcement.<sup>67</sup> This period witnessed a skeptical turn in Habermas's thinking regarding the direct democratic legitimation of global governance. He was convinced that the solidarity requisite for legitimating global economic redistribution would be difficult to achieve beyond national and regional levels.<sup>68</sup> The realities of multicultural and economic conflict instead led him to settle upon a tripartite model of international law delegating centralized peacekeeping and humanitarian functions to international courts and a more democratically structured Security Council. Today, his renewal of the more ambitious democratic project – under the banner of Kelsenian monism – still retains important elements of this tripartite scheme.

Departing from a realistic assessment of national and international affairs, Habermas prefaces a recent statement of his project by noting that

[n]ation states have in fact lost a considerable portion of their controlling and steering abilities in the functional domains in which they were in a position to make more or less independent decisions until the most recent major phase of globalization (during the final quarter of the twentieth century). This holds for all of the classical functions of the state, from safeguarding peace and physical security to guaranteeing freedom, the rule of law, and democratic legitimation. Since the demise of embedded capitalism and the associated shift in the relation between politics and the economy in favor of globalized markets, the state has also been affected, perhaps most deeply of all, in its role as an intervention state that is liable for the social security of its citizens.<sup>69</sup>

Rejecting state-centered responses to global insecurities in favor of international legal remedies, Habermas proposes a “three-level system” of global governance wherein statehood, democratic

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legitimation, constitutional governance, and civic solidarity are carefully distinguished. As noted above, Habermas does not deny the importance of states as sanctioning agents within this system: “whereas the political constitution. . . can also extend across national borders, the substance of the state – the decision-making and administrative power of a hierarchically organized authority enjoying a monopoly of violence – is ultimately dependent on a state infrastructure.”<sup>70</sup> There is an additional sense in which this system authorizes states to negotiate matters touching on global distributive justice. At the highest *supranational* level of global governance, a *hierarchical* organization would be “specialized in securing peace and implementing human rights [but] . . . would not have to shoulder the immense burden of a global domestic policy designed to overcome the extreme disparities in wealth within the stratified world society, reverse ecological imbalances, and avert collective threats, on the one hand, while endeavoring to promote an intercultural discourse on, and recognition of, the equal rights of the major civilizations, on the other.”<sup>71</sup> Because there is no “*institutional framework* for legislative competencies and corresponding processes of political will formation” (CIL, 446) in dealing with these problems in a way that could directly satisfy democratic demands for legal legitimation, such problems would instead be treated in *heterarchically* structured “*transnational* negotiation systems” uniting governmental actors (powerful, regionally extensive states, such as the United States, China, and Russia, as well as regional governing bodies, such as the EU) and non-governmental entities. Non-governmental bodies would include entities that address specifically political issues, such as NGOs and global economic multilaterals (the World Trade Organization, the World Bank, the International Monetary Fund, etc.) as well as entities that address technical coordination problems concerning international health, energy, telecommunications, and so on.<sup>72</sup> Owing to the dearth of democratic institutions of legislation at this level, states with elected representative bodies would retain a vital legitimating role at the bottom rung of global governance.

From a Kelsenian perspective, this model leaves several questions unanswered. As Rainer Schmalz-Bruns and others have observed, delegating responsibility for negotiating treaties on trade, greenhouse emissions, and other matters of global domestic policy to persons representing the interests of states and their corporate clients creates a legitimation gap.<sup>73</sup> Even if these negotiators indirectly represent the interests of their own fellow citizens, whose livelihood depends on the governments and businesses that provide them with services and jobs, they do not represent the interests of foreigners, much less the interests of humanity – especially the poorest two-thirds of the world’s population who have a greater stake in reducing poverty and greenhouse emissions. Although the distribution of benefits and burdens regarding global development and environmental security raises sensitive political questions that must be negotiated, the reigning imbalances in power between rich and poor nations, and between powerful and weak clienteles, hardly inspires confidence that the terms agreed upon will fairly advance the interests of humanity, let alone the most vulnerable portion of it.

The legitimation gap becomes even wider if, following the Universal Declaration of Human Rights and other United Nations’ proposals, we include rights to subsistence, environmental security, and development among the basic human rights whose severe and widespread lack of enjoyment amounts to a human rights violation. If Habermas was once unclear about whether these rights deserved protection at the highest supranational level, his recent pronouncements on the matter suggest that he

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no longer is. Having linked the concept of human rights with the concept of a dignified human life in which human development and environmental security are guaranteed, he can no longer convincingly argue that supranational human rights protection and transnational global domestic policy are neatly separable.

Habermas must now endorse something closer to Kelsen's world state once matters of global domestic policy are acknowledged as impacting the basic rights of a world citizenry. That means that political negotiations over global domestic policy must be democratically institutionalized and regulated at the supranational level as well. For, "only in a world state would the global political order be founded upon the will of its citizens. Only within such a framework could the democratic opinion- and will-formation of the citizens be organized both in a *monistic* way, as proceeding from the unity of world citizenry, and *effectively*, and hence have binding force for the implementation of decisions and laws."<sup>74</sup>

However, in light of the fact that the international arena is currently organized around states whose governments ought to advance the interests of their own citizens, Habermas recommends a more realistic vision of global governance that would allow for the equal representation of a world citizenry *and* a nationally identified citizenry. Any "thought experiment" regarding the possibility of constituting a world state out of a "second state of nature" composed of legitimately recognized nation states must serve three major ends. First, the contradiction between the normative orientations of cosmopolitan and national citizens "must be defused in a monistic constitutional world order." Second, this monistic construction should not implement a world republic that would violate "the loyalty of citizens to their respective nations." Finally, "consideration of the distinctive national character of states . . . must not, in turn, weaken the effectiveness and the binding implementation of the supra- and transnational decisions."<sup>75</sup>

Habermas proposes the following institutional design for implementing these ends:

"A General Assembly, composed of representatives of cosmopolitan citizens, on the one side, and delegates from the democratically elected parliaments of member states, on the other (or alternatively, of one chamber for the representatives of the cosmopolitan citizens and one for the representatives of states) would initially convene as a Constituent Assembly and subsequently assume a permanent form – within the established framework of a functionally specialized world organization – as a World Parliament, although its legislative function would be confined to the interpretation and elaboration of the Charter."<sup>76</sup>

A Habermasian World Parliament would address "principles of transnational justice from which a global domestic politics should take its orientation" (ibid) in order to secure the "equal value" of political and civil rights as well as to ensure performance of "duties that citizens of privileged nations have towards the citizens of disadvantaged nations, where both are considered *in their role as cosmopolitan citizens*."<sup>77</sup> However, the divided loyalties of representatives in a unicameral parliament – or the multicultural divisions present in a bicameral parliament - would probably *not* permit "philosophical discussions of justice,"<sup>78</sup> or discussions of justice that theoretically bracket national cultural differences and the potential, discursively testable, overlap and/or convergence between them.

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The democratic deficit plaguing Habermas's tripartite scheme would be solved through electing representatives who would be sensitive to global public opinion. Yet despite the fact that Habermas asserts that supranational governance “would be *more judicial than political*,” with courts and executive bodies taking a leading role in interpreting and applying humanitarian law, it is significant that he changes course in midstream and designates the General Assembly as elaborating “the meaning of human rights” in its legislation – an elaboration that is essentially political and not judicial. Although legitimation of such legislation in the first instance might be secured through the direct election of representatives, legitimation of judicial and executive decisions would be indirect, passing through global public opinion. Habermas suggests that the legitimation of executive decisions be enhanced through the “veto rights of the General Assembly against resolutions of the (reformed) Security Council, on the one hand, and rights of appeal of parties subject to Security Council sanctions before an International Criminal Court equipped with corresponding authority, on the other.”<sup>79</sup> Finally, Habermas believes that the legitimation deficit plaguing transnational negotiations could also be reduced by submitted them to supranational regulation. Given the irreducibly political nature of such negotiations, which unavoidably advance national as well as cosmopolitan interests and cultural perspectives, legitimation will mainly be indirect (contingent on the approval of global public opinion) rather than direct (contingent on the approval of legislatures and judges).

Power politics would no longer have the last word within the normative framework of the international community. The balancing of interests would take place in the transnational negotiation system under the proviso of compliance with the parameters of justice subject to continual adjustment in the General Assembly. From a normative point of view, the power-driven process of compromise formation can also be understood as an application of the principles of transnational justice negotiated at the supranational level. *However, “application” should not be understood in the judicial sense of an interpretation of law. For the principles of justice are formulated at such a high level of abstraction that the scope for discretion they leave open would have to be made good at the political level (my stress).*<sup>80</sup>

In sum, Habermas proposes to strengthen the democratic legitimation deficit of the current world order by increasing centralized regulation on behalf of the often neglected domestic interests of world citizens without sacrificing the domestic interests of national constituencies. This combination of realism and cosmopolitan idealism finds a precedent in Kelsen’s thinking as well. In his discussion of the UN Charter and the UN Declaration of Human Rights, Kelsen urges legal recognition of individuals as cosmopolitan subjects of international law. Such recognition would require granting individuals rights to bring claims against other individuals and states before international courts. Yet neither the United Nations Charter nor the Universal Declaration of Human Rights defines human rights as actionable claim rights; for although Article 8 of the Declaration states that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law,” no international tribunal is suggested for adjudicating such claims. The European Convention for the Protection of Human Rights fares somewhat better by allowing individuals to file complaints to



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the European Commission for Human Rights – but not to the European Court of Human Rights – and even then it requires that they must first prove that they have exhausted all domestic legal remedies.

Delegating states as the sole subjects of international law leaves the enforcement of human rights on very precarious ground, for as Kelsen observes, “[a]gainst a state violating its obligations, the enforcement of human rights will be undertaken when such action serves the state(s) taking enforcement action.”<sup>81</sup> Departing from his earlier defense of *bellum justum* he adds: “[e]ven if enforcement action should be undertaken it is likely to pose as much a threat to human rights as a promise, for the enforcement measures open to states are of a collective character; as such, they may prove to be as injurious to human rights as the actions of a government in response to which they are taken. Indeed, the most characteristic, and the most important, of these measures – war – has surely proven in this century to be most destructive of human rights.”<sup>82</sup>

Kelsen concedes that this latter defect in the enforcement of human rights would still exist in a cosmopolitan regime in which individuals were subjects of international law. However, at least the politicized nature of enforcement “would be largely obviated, at least in principle, if the law constituting individuals the subjects of international rights at the same time constituted individuals the subjects of international duties, duties corresponding to the rights in question.”<sup>83</sup> But to presuppose a situation where enforcement of individual duties doesn’t follow in the aftermath of a successful war but involves policing interventions analogous to municipal law “is not to presuppose the transformation of international law but the disappearance of this law through the replacement of the present system of states by a world state.”<sup>84</sup>

Today we can now describe peace-keeping and human rights enforcement as “policing actions” that have shed some but certainly not all elements of “just war.” Human rights have increasingly ceased to be moral aspirations subject to moralizing interventions. Although the arguments in support of intervention “feed off the outrage of the humiliated at the violation of their dignity” (as Habermas puts it) they cannot be compelling when delivered outside the framework of international legal institutions. Far from being vague moral aspirations that provide blank checks for self-aggrandizing intervention, human rights are (again citing Habermas) “designed to be *spelled out in concrete terms* through democratic legislation, to be *specified* from case to case adjudication, and to be *enforced* in cases of violation. Thus human rights circumscribe precisely that (and only that part) of morality which can be translated into the medium of coercive law;”<sup>85</sup> viz., their “epistemic status is *beyond state control*.”<sup>86</sup>

To summarize: Habermas today develops his formulation of global governance in a decidedly Kelsenian (monistic) direction. Whereas earlier formulations sharply distinguished a transnational regime oriented exclusively to negotiating politically sensitive issues of global domestic policy from a supranational regime oriented exclusively to guaranteeing security and protecting against gross human rights violations, his current formulation integrates all three levels of global governance around *integral* human rights enforcement. Unlike in earlier writings, where he grounded civil and political rights directly in democratic procedure, grounded classical economic liberties and property rights in the legal form, and subordinated social, economic, and cultural rights to contingent enabling conditions for achieving the

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“fair value” (as Rawls would have it) of these other rights,<sup>87</sup> he now insists that all three categories of right are “indivisible” or equally necessary (complementary) for realizing *human dignity*.<sup>88</sup>

Although the UN General Assembly has specified these different categories of human rights in various covenants and their institutionalization has been furthered through the establishment of procedures granting individual petition, periodic compliance reports, and adjudication in international courts, war crimes tribunals, and the International Criminal Court, rights to subsistence, environmental security, and human development remain largely unprotected. Indeed, enforcement of rights against genocide and other atrocities remains hostage to the strategic calculations of geopolitical *Realpolitik*. To this extent Habermas concedes Schmitt's point that the current “program of human rights consists in its imperialistic abuse.”<sup>89</sup> It is tempting, of course, to mitigate this abuse by limiting the list of human rights to be protected by supranational intervention to just those whose violation is most easily quantified and most easily ascribed to definite state actors. It was this temptation that led Habermas to his original separation of politicized and non-politicized levels of global governance (and that led Rawls to endorse a culturally neutral schedule of human rights as a threshold for non-intervention). This kind of trimming strikes at the very universal foundation of human rights, the integral dignity of the individual. The importance of guaranteeing all categories of human rights equally as a necessary step toward honoring this dignity brings to the fore a universal moral monism whose logical correlate is a fully developed *civitas maxima*.<sup>90</sup>

Taking legal monism this far would require rethinking the role of international courts in a way that neither Habermas nor Kelsen envisages. Human rights courts would no longer be conceived exclusively as criminal tribunals for prosecuting crimes against humanity. They would also be conceived as fora where individuals could sue governments, global economic multilaterals, and other entities for violating (or inadequately securing) their rights to subsistence, environmental security, and human development. But conceiving international courts this way suggests a stronger analogy between global and domestic models of governance and the peculiar problems of democratic legitimation that attend them. In particular, the ever-present worry that vulnerable persons of all categories – not just the poor but immigrants, aboriginal peoples, ethnic minorities, women, children, and ostracized castes – will remain marginalized in transnational negotiations and other forums where human rights are debated, defined, and applied suggests that a system of higher courts for appealing decisions *and* reviewing legislation may also be necessary. But as in the domestic case a perennial question arises: if judicial review is problematic from the standpoint of democratic legislation in general, is it not more so when conducted at the level of supranational democratic governance?

### **Conclusion: Constitutional Courts in the Shadow of Legal Realism**

Habermas and Kelsen defend judicial review not only in dealing with appeals and inconsistent rulings but also in reviewing the constitutionality of legislative and executive resolutions. Constitutional review, they argue, is not opposed to democracy when properly limited to guarding the institutions, rights, rules, and discursive processes (formal and informal) that make up democratic procedure. But because such review addresses matters of justice normally taken up by the legislature (e.g., the impact of electoral map-drawing on minority representation) and because annulment of a statute typically

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accompanies a reinterpretation of constitutional language, constitutional review makes (legislates) as well as applies the law. It is this impression - that electorally unaccountable courts are legislating from the bench – that generates the legitimation problem.

Constitutional review abrogates the relatively strict separation of powers that Habermas, in particular, feels must be respected in order to retain the democratic legitimation of laws. The Austrian Constitution of 1920 that Kelsen helped design mitigated this democratic deficit in its provision for the election of constitutional judges by the House and Senate. At the same time, it rendered more visible the political nature of review. But executive appointment of judges with legislative approval is also political, and reducing political pressures on the judiciary through life appointments or term limits without opportunity for future political advancement does not eliminate the impact of politics on judicial decision-making. For this reason, Kelsen and Habermas contemplate review of pending legislation by a constitutional advisory committee, initiated, perhaps, by a special prosecutor or a legislative minority. Combined with delayed enforcement of judicial annulments, these provisions mitigate the intrusive nature of constitutional review.<sup>91</sup>

Because Kelsen and Habermas defend the rights of individuals and states to appeal to international courts based on an analogy with the state model of constitutional law, it would seem that they should endorse constitutional courts at the supranational level for the above reasons. Is this realistic?

To answer this question it behooves us to revisit their response to Schmitt's rejection of constitutional courts. Schmitt's rejection of constitutional courts hinges on the theoretical assumption that abstract review violates the logic of judicial application, according to which courts apply a general norm to a particular "fact situation." Schmitt argued that constitutional review "makes comparisons among general norms, but does not subsume one norm under another or apply one to another."<sup>92</sup> In Schmitt's reading, judicial review appears to be either an imaginary exercise of philosophical interpretation without application to the factual world (and hence irrelevant to resolving real political disputes) or a disguised act of political legislation. Schmitt accordingly recommended that the supreme executive (e.g., the President, exercising dictatorial powers under Article 48 of the Weimar Constitution), and not the judiciary, be entrusted with "guarding" the constitution against the threat of parliamentary politicization and anarchy by dissolving parliament or suspending the constitution.

Kelsen rejects the idea that the supreme executive is better positioned to guard the constitution than the judiciary. To quote Kelsen on this score: "Since precisely in the most important cases of constitutional violation the parliament and the executive branch (*Regierung*) are the disputing parties, to decide the dispute it makes sense to call upon a third authority that stands apart from this conflict and is not itself involved in any way in the exercise of power."<sup>93</sup> Habermas, of course, agrees with Kelsen,<sup>94</sup> but defending the supremacy of the judiciary because it is less political than the supreme executive and the legislature depends on showing that judicial review involves applying the law and not merely reinventing it.

Kelsen responds to this concern by noting that "the fact situation that is to be subsumed under the constitutional norm in decisions about the constitutionality of a legal statute is not the norm . . . but the

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production of the norm.”<sup>95</sup> Following Habermas’s paraphrase, Kelsen here argues that it is not the *political content* of the statute that is in question in abstract review, but the factual *act* by which it was made. The legislative act must not only be undertaken by a body that has been specifically authorized as competent to act in this way by the constitution, but the act must respect constitutional rights, which as Habermas argues, are constitutive of the very procedure of democratic lawmaking. Habermas and Kelsen thus reject Schmitt’s contention that judges on constitutional courts legislate from the bench. Their function is to guard a legal procedure that ensures respect for the rights of minorities.

That said, there is no disputing that constitutional courts undertake acts of interpretation that extend and deepen the meaning of the constitution.<sup>96</sup> It might therefore be asked why this creative dimension of interpretation is not itself a political act of legislation. Habermas responds to this concern (following Ronald Dworkin’s narrative conception of law) by insisting that the discretion exercised by constitutional judges in interpreting the constitution is constrained by other, largely non-political normative principles that inform a tradition of legal reasoning. Presumably it is this more substantive layer of normativity that prevents constitutional interpretation from descending into the void of political casuistry.

But Habermas doubts whether a positivist jurisprudence of the sort he imputes to H.L.A. Hart – and by extension, to Kelsen – avoids such extra-legal reasoning:

“The priority of legal certainty [over rightness] is evident in the positivist treatment of “hard cases.” In these cases, the hermeneutical problem becomes especially clear: how can the appropriateness of unavoidably selective decisions be justified? Positivism plays down this problem, analyzing its effects as symptoms of unavoidable vagueness in ordinary language. . . . Insofar as existing norms do not suffice for an exact specification of cases, judges must decide according to their own discretion. Judge’s fill out their discretionary leeway with extralegal preferences and orient their decisions, if necessary, by moral standards no longer covered by the authority of law.”<sup>97</sup>

At stake in this discussion is whether constitutional law embodies a substantive morality (or historicized natural law) in the tradition of legal reasoning that has determined the long course of its concrete application. If it does not, then its general provisions would require supplementation from extra-legal sources, such as the judge’s personal morality and political ideology, in order to signify meaningfully.

Kelsen concedes that “the content of an individual norm can never be determined completely by a general norm” so that “there is always a certain degree of discretionary power left to the organ bound to apply the general norm,” which is to say that “a certain degree of arbitrariness is inevitably involved in the application of the law which is also a creation of the law.”<sup>98</sup> Kelsen thus concludes, in keeping with O. W. Holmes Jr. and other realists, that “absolute legal security is an illusion, and it is just to maintain this illusion in the law-seeking public that traditional jurisprudence denies the possibility of different interpretations, which are from a legal point of view equally correct, and insists on the dogma that there is only one correct interpretation ascertainable by legal science.”<sup>99</sup> For Kelsen, the difference between applying the law and creating the law is thus a matter of degree, with judges having less discretion for creative interpretation than legislators.<sup>100</sup>

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The above account is subject to several qualifications. First, although Kelsen accepts the realist critique of formalist (or deterministic) conceptions of legal certainty, he rejects the view that the law is unknown until the judge decides its application to a particular case.<sup>101</sup> Even in hard cases a judge's discretion is limited by the law. Second, one can affirm that there are no gaps in the law and yet allow that judges sometimes legislate. Such "retroactive laws" (precedents) are the natural products of constitutional review.<sup>102</sup>

Whatever else one might say about Kelsen's jurisprudential philosophy, it is clear (*pace* Habermas) that it does not privilege legal certainty over rightness. At most, it can be charged with allowing for more than one right decision. This concession, of course, runs afoul of Habermas's Dworkinian view of law as a coherent system of general moral principles and concrete rules that ideally determines precisely one right decision for any given case.

Whether Habermas's or Kelsen's model of jurisprudence is to be preferred as a more realistic model for domestic (let alone international) law is a question to which I shall return shortly. It suffices to note for our present purposes, that Habermas himself harbors a few Kelsenian doubts about Dworkin's model of jurisprudence.

Dworkin's principle of hermeneutical charity requires that the historical body of law be conceived as ideally coherent. Only from this perspective can we say that a legal system "gives for each case exactly one right (i.e., appropriate) answer."<sup>103</sup> For Habermas, this "absolutist ideal of a closed theory" not only resembles metaphysical, natural law reasoning but is not entirely plausible, empirically or practically.<sup>104</sup> In his opinion, the "counterfactual" presupposition of "an ideal coherent system" has heuristic value "only as long as a certain amount of 'existing reason' in the universe of existing law meets it halfway. According to this presupposition, then, reason must already be at work – in however fragmentary a manner – in the political legislation of constitutional democracies."<sup>105</sup> In other words, the degree to which law possesses integrity at any given moment is a function of the shared reasons that legislators bring to bear in defending it. But legislators as well as judges are divided on the substantive background theories of justice – Habermas mentions liberal and welfare paradigms – by means of which they defend and interpret the entire body of law "as a coherent narrative."

Each of these paradigms helps mitigate the problem of indeterminacy by predefining the meaning of certain general types of application situations in accordance with a fixed ranking of competing normative principles. For instance, in American law questions regarding the scope of individual civil liberties and questions regarding equal protection of minorities are framed in opposing ways, one limiting the regulatory power of the state, the other extending it. In many situations calling for legal regulation (e.g., hate speech) it is far from clear which of these paradigms claims priority. Applying them in tandem is ruled out by the fact that each retains its internal narrative integrity by excluding the other.<sup>106</sup>

The ideological rigidity characteristic of legal paradigms, Habermas remarks, provides "sufficient incentive for a *proceduralist understanding of law* to distinguish a level at which reflexive legal paradigms can open up *for one another* and *prove themselves* against a variety of competing interpretations mobilized for the case at hand."<sup>107</sup> A proceduralist (discourse theoretic) paradigm of

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adjudication should thus determine which contexts call for a given paradigm and which call for hermeneutically fusing multiple paradigms in a novel synthesis.

Yet even with this reflexive turn in the judiciary, there is no reason to believe that judges must interpret legislation as if it embodied a single conception of justice. In order to avoid imposing a single conception ideologically, judges must mediate liberal and welfare paradigms by being attentive to the most extensive information available. For Habermas, this will require converting their courts into quasi-political fora, in which (to paraphrase Klaus Günther) all relevant perspectives that bear on the interpretation of disputed facts are represented. The outcome of deliberation, with judges mediating multiple legal paradigms and multiple perspectives (and, at higher levels doing so in communication with fellow judges, jurists, and the various “publics” impacted by the decision), is far from certain – so much so that it stretches credulity to think that those involved will presume that the decision reached is the only right one that could have been decided. Hence, Habermas himself concludes that what remains of our “certainty” that legal decisions are right is the expectation that “in procedures issuing judicial decisions only relevant reasons will be decisive, and not arbitrary ones.”<sup>108</sup>

Kelsen seems to endorse a similar proceduralist jurisprudence: judges facing hard decisions will be reluctant to read any single theory of justice into the law. Kelsenian judges serving on constitutional courts will therefore do what Habermas says judges generally ought to do, which is mediate adversarial contests between competing justice paradigms wherein all affected have equal standing to argue and appeal.<sup>109</sup>

Given that judges must interpret the constitution principally as setting forth the procedural conditions of liberal democracy and not as specifying a single conception of justice, they will be reluctant to nullify statutes unless it is necessary to protect basic rights. This position – which in American jurisprudence is associated with the view espoused by John Hart Ely – receives a ringing endorsement from Habermas in the following passage, in which Habermas highlights the dangers of jurisprudential idealism.

Ely is justified in taking a skeptical view of a paternalistic understanding of constitutional jurisdiction.<sup>110</sup> . . . [I]t is the exceptionalistic description of political practice – how it really ought to be – that suggests the necessity of a pedagogical guardian or regent. . . the exceptionalist image of what politics should be is suggested by . . . [ethically] virtuous citizens . . . oriented to the common good. . . [D]iscourse theory insists, by contrast, on the fact that democratic will formation does not draw its legitimating force from the prior convergence of settled ethical convictions . . . [but from] procedures that secure fair bargaining conditions.<sup>111</sup>

The jurisprudential idealism Habermas warns against imposes an exceptionally high standard of what counts as a constitutionally acceptable democratic process. Such idealism is almost always accompanied by an understanding of what counts as a constitutionally acceptable level of background justice. By denying that a constitution prescribes a singular paradigm of social justice, Habermas also refutes a

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jurisprudence guided by an expectation that hard cases have only one right answer. Indeed, such an expectation encourages precisely the kind of natural law reasoning that both he and Kelsen oppose to democratic proceduralism.

Kelsen's jurisprudential philosophy, which rejects judicial activism inspired by belief in the one true justice, appears more attractive when we turn to international law. Here one must agree with Rawls that national cultural differences do not currently permit an unequivocal endorsement of the liberal democratic understanding of human rights that Habermas believes is conceptually required by the rule of law. Put simply, Kelsen's less conceptual understanding of the linkage between modern law and liberal democracy is better suited to the current state of legal pluralism that reigns in the international arena, in which different legal systems occupy different stages – and different pathways - of modernization. Indeed, the problem of pluralism at this level is both cultural and institutional, shaped as it has been by highly specific challenges of systemic complexity and historical development.

Consideration of such legal diversity might induce skepticism about the possibility of realizing the monistic utopia of a *civitas maxima*. Legal realists and critical legal scholars have long highlighted the multiplicity of reasons validating international treaties (factual consent of sovereign states versus conformity to norms). Today's skeptics focus additionally on conflicting legal practices. Competing systems of law – trade law, environmental law, human rights law, security law, etc. - describe the same event under incompatible legal descriptions. As Martti Koskeniemi points out, each system of law is further sub-divided into competing internal paradigms; we may speak of a minimalist approach to human rights (of the sort put forward by Rawlsian pragmatists) or a maximalist approach (of the sort defended by Habermas); and we may speak of conservative and progressive variants of each of these, as well as culturally differentiated sub-variants representing, for example, American and Chinese practices.<sup>112</sup>

The fragmentation of international law into legal sub-specialties, each with its own ideological centers and peripheries (which are again traversed by competing schools, national practices, etc.) explains why international courts are wary of intervening in legal disputes involving competing areas of law. Even when intervening in disputes that center on a single legal vocabulary, such as human rights, courts are loath to enter into philosophical or cultural debates about interpretation. At most, they condemn as violations only those criminal actions on which there is broad agreement: slavery, torture, ethnic cleansing, genocide, and so on. In many cases, such as the decision by the UN high commissioner on refugees to forcibly repatriate refugees to war-torn areas, the line separating legal violation from legal enforcement is vague, which just goes to show how much more politicized human rights enforcement is in comparison to humanitarian assistance. Political is the decision to repatriate for the sake of guaranteeing all parties (refugees as well as their hosts) a right to security, even when repatriating into an unstable domestic situation threatens this very right; equally political is the decision to intervene in stopping gross human rights violations when doing so jeopardizes the dissemination of assistance necessary for procuring subsistence to third parties.<sup>113</sup>

Fragmentation of international law clearly threatens legal monism. But the image of centralized legal hierarchy commonly associated with that monism is misleading. Given the logical gap between higher-

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order norms and their lower-order applications, any constitutionalization of international law will perforce permit flexibility in the choice of which legal systems are best suited for addressing legal problems. It will have to recognize that the choice of system is itself largely political. And when a situation clearly falls under the jurisdiction of human rights, it will have to recognize that the concrete application of such rights will be institutionally and politically conditioned. Practically speaking, the development of human rights will be from the ground up – dispersed among many institutions – rather from the top-down.

The same might be said for the institutionalization of constitutional review. The reasons that compel instituting constitutional review in a separate court, namely, that doing so facilitates philosophical examination of human rights impartially, also compel institutionalizing such review in legislative and executive bodies.<sup>114</sup> Although these institutions lack the greater political autonomy of a separate court, they are better equipped as sensors of injustice and discontent, and can respond to concrete cases of conflict more readily, in terms of which even abstract review must ultimately have recourse for testing its arguments. Ultimately, a global public sphere will also share in this review. It goes without saying that global social movements representing cosmopolitan concerns should have the right to initiate formal review at the level of the highest court.

This realism in the flexibility of human rights application may still not counter all objections to monism. One might still object that there remains an inextricable tension between human rights and domestic rights. Even a stalwart monist like Habermas concedes that the juridification of human rights at the international level works at cross purposes to their juridification at lower levels of regional and state governance. Trade-offs between multicultural flexibility and centralized juridification are thus to be expected. Given current political realities, that means sacrificing centralized juridification. But without juridification, we find ourselves once again staring at the Schmittian abyss.<sup>115</sup> From here, the only way back to the rule of law is to hope for a mediation of cultural worldviews and legal systems at varying levels of institutionalized deliberation, facilitated by precisely the very philosophical dialog that Habermas finds so problematic at the level of global parliamentary legislation.



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<sup>1</sup> The author thanks George Mazur, who greatly helped in navigating the subtleties of Kelsen's legal theory.

2 Habermas, 2012: 1.

3

Kelsen, 1946: 445; Habermas, 1996: 101.

4

Id.: 108-9.

5 Id.: 106; Kelsen, 1934/67: 64.

6 Habermas, 2012: 1.

7 Id.: 2.

8 Habermas, 1996: 86,

9

Kelsen tells us that the static aspect of law concerns law "only in its completed form and in a state of rest" as a system of norms. It concerns the essence of law as a normative system distinct from other normative social systems in its attachment of "a criminal or civil sanction" to norm violations. By contrast, the dynamic aspect of law concerns the creation of law; it "furnishes an answer only to the question whether and why a certain norm belongs to a system of valid legal norms, forms part of a certain legal order" (Kelsen, 1946: 39, 122. Key to understanding the dynamic aspect of law "in its movement" is the fact that law "regulates its own creation" through legally authorized acts of legislation and adjudication (Kelsen, 1957: 245).

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Kelsen, 1934/67:199-205. Kelsen himself later questioned whether the *Grundnorm* is, strictly speaking a norm at all, as opposed to a fiction deployed by jurists when they understand law as objectively binding (at 204).

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Abandoning the *Grundnorm* comports better with Kelsen's dynamic understanding of law as a reflexive procedure. See Brunkhorst, 2009: 219-39 and Bernstorff, 2010: 270-71.

11

"In the normative syllogism leading to the foundation of the validity of a legal order, the major premise is the ought-sentence which states the basic norm: 'One ought to behave according to the actually established and effective constitution'; the minor premise is the is-sentence which states the facts: 'The constitution is actually established and effective'; and the conclusion is the ought-sentence: "One ought to behave according to the legal order, that is, the legal order is valid" (Kelsen, 1934/67: 212).

12 Many critics of Kelsen repeat Habermas's (in my opinion, mistaken) criticism that "Kelsen's type of legal formalism is not sufficiently dynamic to ensure that the imperatives of administrative power remain accountable to the democratic will" (McCormick, 1997: 737). Others (Kalyvas, 2006: 584-86) argue that Kelsen traces the legitimacy of the constitution to "the contingent act of a first legislator," despite the fact he and Habermas both conceive modern constitutional law as a reflexive learning process that draws its full legitimacy from in-built normative expectations. Also see Gumplová, 2011: 17.

13

In arguing that Kelsen's early essay, "Rechtstaat und Staatsrecht" (1913), 'tries to . . . read autocratic legal systems as anticipations of a legal order that more fully realizes the ideal of the rule of law' wherein legal coercion is morally justified – Lars Vinx (Vinx, 2007: 56, 212) comes close to interpreting Kelsen as a natural law theorist. Vinx's interpretation of Kelsen would better apply to Habermas's reconstructive approach to law, which, as I argue in Part II, has at times ascribed a kind of moral teleology at work in legal evolution.

14

Schmitt, 1923/1988: 3-6. In *Strukturwandel der Öffentlichkeit* (1962) Habermas accepts much of Schmitt's indictment of mass democracy.

15 Habermas, 1996: 107.

16 Habermas, 2012: 17.

17 Id.: 13.

18 Id.: 14-15.

19 Id.: 17.

20 Id.: 8-9, 12.

21 Id.: 13.

22 Id.: 4-7.

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23 Habermas, 1996: 110.

24 Id.: 123.

25 Id.: 150, 170, 182.

26 Habermas, 1975: 112.

27 Habermas, 1996: 167.

28 Id.: 182.

29

Citing Weber's discussion of modernity and state, Kelsen observes that "the abolition of a professional bureaucracy (*Berufsbeamtentums*), no less than the rejection of parliamentarianism, is simply a negation (*Aufhebung*) of the division of labor and therewith of that progressive development, that cultural differentiation within political life" (Kelsen, 1920b: 24).

30 Id.: 28.

31

After criticizing the Marxist idea of a radical workers democracy Kelsen makes the following comment: "Doubtless the ideal of the greatest economic equality is a democratic ideal. And therefore social democracy is a perfect (*vollkommene*) democracy" (id.: 35).

32 Habermas, 1996: 139-46.

33 Kelsen, 1957: 31-38, 244-56.

34 Kelsen, 1920b: 26.

35 Habermas, 1988: 263.

36 Id.: 264-67.

37 Id.: 274.

38 Id.: 268-79.

39 Habermas, 2001a: 770-71; 776-80.

40 Id.: 774-76.

41

Kelsen's legal theory, Habermas claims, converges with the legal systems theory developed by Niklas Luhman and his epigones (Habermas, 1988: 263; 1996: 86), thereby offering no resistance to the "colonization of the lifeworld" (Habermas, 1975: 40-50; 71-92; 1987: 356-73). Notwithstanding this objection, Habermas concedes that "autochthonously functioning" subsystems depend on democratic input for their optimal coordination and

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functioning (1996: 350-52). What Habermas adds to Kelsen's functionalist defense of democracy is his grounding of modernization in a distinctly normative theory of communicative action (1987: 142-43; 341-42; 359-60).

42 Kelsen, 1955: 4.

43 Id.: 28.

44 Id.: 25.

45 Id.: 26.

46 Id.: 28.

47

Habermas and Kelsen assess the cognitive advantages of deliberative democracy somewhat differently. For Habermas, democracy generates an ideal expectation that laws and official decisions are (or could be) singularly just and correct. For Kelsen, by contrast, “[o]nly if it is not possible to decide in an absolute way what is right and what is wrong is it advisable to discuss the issue and, after discussion, to submit it to a compromise” (Id.: 39). I discuss the implication of this disagreement in Part IV.

48 Kelsen, 1933/73: 106-07.

49

Kelsen, 1944b: 207-08; 1934/67: 34.

50

Schmitt, 1932/1996: 54 [translation altered by author, cited in Habermas, 1998: 11.

51 Kelsen, 1920a: 9-53.

52

Kelsen's monism, in both its domestic and international applications, has come under attack by pluralists such as F. Rigaux (1998), H.L.A. Hart (1983: 309-42), and Joseph Raz (1979: 122-45). Raz, for instance, raises two main counter-examples to the thesis: the presence of distinct customary and statutory sources (basic norms) of law within the same legal system and, in the case of former colonies being granted independence, the authorization of a new state constitutional order (basic norm) by another state constitutional order, in which both orders (basic norms) are considered distinct yet equally authoritative. As Vinx notes (2007: 184), for Kelsen, the first counter-example is not compelling because any legal system will designate a higher (constitutional) authority as a common source specifying how conflicts between customary and statutory law are to be resolved (usually in favor of the

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latter). The second counter-example fails because it can be interpreted in two ways that comport with Kelsenian monism: if a former colony sees itself as breaking with the mother country in a revolutionary manner, it will not regard its constitution as standing in a relationship of continuity with the constitution of the mother country, in which case its constitution will be seen as grounding an entirely separate order. If it does not see itself as breaking with the mother country (as perhaps exists in the case of British Commonwealth countries today), then by definition it recognizes its order as in some sense co-extensive with the basic norm of the mother country (some British Commonwealth countries may recognize the British monarch as the titular if symbolic authority behind their law).

53 *Kelsen, 1920a*: 45.

54 *Id.*: 196.

55 *Id.*: 206.

56 *Id.*: 120; 134.

57 *Id.*: 315; 317. The trajectory from Schmittian subjectivism to Kelsenian objectivism laid out here defines the career of the founder of the realist school of international relations, Hans Morgenthau. See Morgenthau, 1948; Jütersonke, 2010; and Koskenneimi, 2002.

58 *Id.*: 319.

59 *Id.*: 320.

60 Habermas, 2008: 449.

61 *Id.*: 453.

62 Kelsen, 1952/1966: 16-87; 1944a: 18; Landauer, 2003.

63 Kelsen, 1944a: 12.

64 *Id.*: 12-15; 19-23.

65 *Id.*: 23-32, 43, 50.

66 Habermas, 1998: 187.

67 Habermas, 2006: 128-38.

68 *Id.*: 79, 139, 177,

69 Habermas, 2008: 444.

70 *Id.*: 445.

71 *Id.*

72 *Id.*: 446.

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Schmalz-Bruns, 2007: 269-93; and Scheuerman, 2008: 133-51.

74 Habermas, 2008: 448.

75 Id.: 449.

76 Id.

<sup>77</sup> Id.: 449-50.

78 Id.

79 Id.: 451.

80 Id.: 452.

81 *Kelsen, 1952/1966*: 241.

82 Id.

83 Id.: 242.

84 Id.

85 Habermas, 2010: 470.

86 Id.: 469.

87 Habermas, 2001b: 125.

<sup>88</sup> Habermas, 2010, 468-9. Habermas's use of human dignity here – as an inventive source for human rights that grows out of and unifies the “plethora of human experiences of what it means to get humiliated and be deeply hurt” (467-8) – finds earlier mention in *Between Facts and Norms* (Habermas, 1996: 426) without, however, designating the evolving complementarity of rights (Ingram, 2010, 171)

89 Id.: 477.

90 Id.: 478. Although Habermas accepts a monistic understanding of the complementarity of moral elements underlying the concept of human dignity and, therewith, of human rights (see n. 88), he rejects a monistic understanding of human rights as having a common *moral foundation* in, for example, a “right to justification” of the sort proposed by Rainer Forst (Forst, 2012). Such a monism of morality and law, Habermas argues, neglects the essentially *juridical form* of human rights as specifying, first and foremost, “subjective rights,” or *permissions to act without need of justification* that can be *enforced* against government and non-government agents. Moral rights, by contrast, derive directly from moral *duties*, so that, properly speaking, the moral right to justification follows from a prior moral duty to justify one's actions to others (Habermas, 2012: 296-98). By conceiving human rights as permissions to act without interference, Habermas commits himself to interpreting human rights violations as violations of reciprocal *negative* duties to desist from causing harm, specifically by

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interfering with the agency of others. Human rights to subsistence, by contrast, have traditionally been understood as entailing reciprocal *positive* duties to aid others in need. This distinction (typically exemplified in the difference between civil and social rights), however, is hardly decisive; for Habermas, like many others, observes that fulfilling negative duties generally requires that agents do more than refrain from interfering with others. Legal agents, especially, must actively *protect* against rights violations as well as *aid* those whose rights have been violated. Finally, besides showing how negative duties imply positive duties, Habermas argues that “violations” of human rights to subsistence, human development, and environmental integrity *are* violations of *negative* duties insofar as legal and economic institutions effectively harm the poor by denying them free access to resources necessary for a minimally decent human life (Ingram, 2010: 170-89).

91 Kelsen, 1942: 183-200.

92

Schmitt, 1931: 42.

93 Kelsen, 1931: 609.

94 Id.

95

Kelsen, 1931 : 590.

96 Habermas, 1996: 243.

97 Habermas, 1996:202-03.

98 Kelsen, 1955: 78.

99 Id.: 79.

100 Kelsen, 1946: 130, 144.

101 Id.: 150.

102 Id.: 145, 150.

103 Habermas, 1996: 232. “Referring to my critique of Gadamer, Dworkin characterizes his critical hermeneutical procedure as a ‘constructive interpretation’ that makes the rationality of the interpretative process explicit *by reference to a paradigm or purpose* . . . By following such a procedure of constructive interpretation, each judge should be able in principle to reach *an ideally valid decision in each case by undergirding her justification with a ‘theory,’* thereby compensating for the supposed ‘indeterminacy of law.’ This theory of law is supposed to rationally reconstruct the given legal order in such a way that that existing law can be justified on the basis of an ordered set of principles and thereby displayed as a more or less exemplary embodiment of valid law in general” (id.: 211 – my stress).

104 Id.: 219,227,233.

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105 Id.: 232.

106 Id.: 221.

107 Id.: 221-22.

108 Id.: 220, 224, 232.

109

For Kelsen, the “most radical way to satisfy legal-political interests (*rechtspolitische Interesse*) following the [constitutional court’s] setting aside of unconstitutional laws and decrees (*nach Beseitigung rechtswidrige Akte*)” is to require that the constitutional court institute a procedure of constitutional review (*Verfahren der Prüfung der Rechtmässigkeit*) “pursuant to an appeal made by or on behalf of any private party (*auf jedermanns Antrag*)” (Kelsen, 1928/1968): 1857. In addition to allowing an “*acto popularis*” of this sort, it is of the greatest importance, to permit a “qualified minority within parliament” to challenge parliamentary resolutions that may be deemed unconstitutional – “all the more so, as constitutional courts in parliamentary democracy must necessarily serve to protect minorities” (Id.: 1859). This stipulation regarding constitutional procedures complements Kelsen’s insistence that parliamentary procedure guarantee representation of electoral minorities. Finally, Kelsen shares Habermas’s discursive understanding of judicial decision making as a public process of joint deliberation:

The principle of publicity and oral argument (*Mündlichkeit*) is generally to be recommended for courtroom procedure in cases involving constitutional review, although it chiefly deals with pure questions of law . . . . The public interest concerning the affairs of the constitutional court is so weighty that in principle oral argumentation before the court might be necessary to fully guarantee the publicity of the proceedings. Indeed it might be necessary to guarantee the publicity of judicial deliberation and judgment by considering extending said deliberation to include an assembly of lectures and hearings (*Gerichtskollegium*) (Id.:1860).

110 Habermas, 1996:266.

111 Id.: 278-79.

112 Koskenneimi, 2009: 7-19.

113 M. Barnett, 2010.

114

Kelsen’s understanding of the continuity (*Stufenbau*) linking legislation and application undermines notions of institutional supremacy and separation and also disperses democratic accountability in a way consonant with Habermas’s tri-level monism (Kelsen, 1920b: 19-26). See. Brunkorst, 2009: 232, and Zurn, 2007.



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115 Koskenneimi, 1990: 4-32. Fischer-Lescano & Teubner, 2004:

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