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David Ingram

Loyola University Chicago, dingram@luc.edu

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The Role of Recognition in Kelsen's Account of Legal Obligation and Political Duty

David Ingram

Loyola University Chicago
dingram@luc.edu

Abstract

Kelsen's critique of absolute sovereignty famously appeals to a basic norm of international recognition. However, in his discussion of legal obligation, generally speaking, he notoriously rejects mutual recognition as having any normative consequence. I argue that this apparent contradiction in Kelsen's estimate regarding the normative force of recognition is resolved in his dynamic account of the democratic generation of law. Democracy is embedded within a modern political ethos that obligates legal subjects to recognize each other along four dimensions: as contractors whose mutually beneficial cooperation measures esteem by fair standards of contribution; as autonomous agents endowed with equal rights; as friends who altruistically care for each others' welfare, and as fallible agents of diverse experiences and worldviews.

Keywords

democracy, obligation, law, recognition, Kelsen, sovereignty

Die Rolle der Anerkennung in Kelsens Darstellung von Rechtspflicht und politischer Pflicht

Zusammenfassung

Kelsens Kritik der absoluten Souveränität beruft sich bekanntlich auf eine Grundnorm internationaler Anerkennung. In seiner Diskussion der Rechtspflicht lehnt er jedoch, allgemein gesagt, offenkundig ab, dass gegenseitige Anerkennung eine normative Bedeutung hat. In diesem Aufsatz argumentiere ich, dass sich dieser scheinbare Widerspruch in Kelsens Ansatz betreffend die normative Kraft der Anerkennung in seinem dynamischen Ansatz der demokratischen Rechtsetzung auflöst. Demokratie ist eingebettet in ein modernes politisches Ethos, das Rechtssubjekte verpflichtet, einander entlang von vier Dimensionen anzuerkennen: als Vertragsschließende, bei deren gegenseitig vorteilhafte Zusammenarbeit sich die Wertschätzung nach fairen Standards des Beitrags bemisst; als gleichberechtigte freie Menschen; als Freunde, die sich selbstlos um das Wohl des anderen sorgen, und als fehlbare Akteure unterschiedlicher Erfahrungen und Weltanschauungen.

Schlüsselwörter

Demokratie, Pflicht, Recht, Anerkennung, Kelsen, Souveränität

The author has declared that no competing interests exist.

1. Introduction

Contemporary debates about the ethics of recognition (Honneth 1996; Taylor 1992; Ingram 2021) would seem to be entirely foreign to Kelsen's legal philosophy. I argue that this impression is mistaken. Although Kelsen denies that law can be founded on ethics, especially one based on voluntary recognition of common interests (as social contractarians would have it), he affirms the opposite when writing about democracy. I contend that Kelsen's reflections on democracy ought to be considered more central to his legal philosophy than they currently are. Kelsen's reference to recognition in this context must in turn be distinguished from his discussion about the importance of recognition in international and domestic law, which refers to his idea of a basic norm.

In his discussion of legal obligation Kelsen notoriously rejects mutual recognition as having any normative consequence. The act of recognizing self and other as sovereign agents enables persons (or nations) to agree on terms of cooperation that are at best *prudentially* – not *normatively* – binding. This kind of social contractarian commitment to law is entirely contingent on the voluntary consent of the contracting parties, and so cannot independently obligate them – each remains obligated only to itself. Kelsen's solution to this Hobbesian dilemma, viz., the impossibility of deriving a normative obligation from a contingent factual act of mutual recognition, postulates the hypothetical assumption of a basic norm (*Grundnorm*) which asserts that agreements ought to be kept. Not mutual recognition of each agent's sovereignty but rather mutual recognition of a coercive norm that limits everyone's sovereignty *according to law* – what H.L.A. Hart would later name “a rule of recognition” – must be presupposed (Hart 1991).

I argue that Kelsen's appeal to the role of recognition in this latter argument at best explains how, from a purely conceptual point of view (the point of view adopted in Kelsen's pure theory of law), legal subjects identify (recognize) a law to which they are objectively bound. The argument, in other words, does not purport to explain why they in fact *feel* bound to it; accordingly, it says nothing about how their intersubjective recognition of others as people like themselves matters in this regard. Kelsen himself notes that mutual recognition of the law's impact on one's interests (to be safe from harm, to gain the support of others, to avoid punishment, etc.) as well as mutual recognition of the law's impact on other persons' interests (to be treated with equal respect and concern, to be treated fairly, etc.) are, like other social-psychological observations about what motivates legal subjects to comply with the law, far removed from a pure theory of law, conceived as a theory of recognition. That said, Kelsen's own dissatisfaction with this latter theory,

which arguably reflects conceptual tensions between its static and dynamic aspects, which roughly correspond to the standpoints of jurist and citizen, respectfully, prompts me to turn to Kelsen's social-psychological observations about the political connection between legal obligation and ethical recognition as a more fertile ground of study.

For our purposes, the most salient of such observations are contained in Kelsen's practical writings on liberal democracy, understood as the most likely system to bring about a peaceful lawful order in a modern, scientifically enlightened era. As he notes, democratic procedures function best when those who apply them do so in a civil manner that tacitly presupposes what might be described as an ethos of mutual recognition. In my opinion, such a combined political-legal account is necessary to conceptualize our modern understanding of legal authority in both its objective and subjective dimensions.

I therefore argue that we must go beyond Kelsen's *static* account of law as a hierarchy of legal authorization culminating in a constitution (the empirical instantiation of a Kelsenian *Grundnorm*) and even beyond his *dynamic* account of law as a self-authorizing procedure underlying its own genesis. We must turn to his political writings on democracy for appreciating the kinds of moral principles modern constitutions must embody if they are to secure the voluntary compliance of minority groups with majority rule. In Kelsen's account, liberal democracy is the political system most capable of securing stable legal functioning under modern conditions of complex societal organization, moral pluralism, scientific enlightenment, and individualism. He insists that, in order to carry out this function well, democracies must cultivate an ethos of civility which encourages citizens to recognize each other as social contractors who voluntarily cooperate for mutual benefit under fair conditions. More precisely, it requires them to recognize each other as autonomous agents endowed with equal rights, as friends who care for each other's welfare, and as bearers of irreducibly diverse, merit-worthy social interests and epistemically valuable socio-cultural worldviews.

2. The Antinomies of Sovereignty and Recognition in Kelsen's Early Legal Theory

Kelsen's early writings on international law provide a convenient entry into our discussion of recognition insofar as it appears at first glance to support the very recognition-based account of legal authority he so strenuously rejected in his pure theory of law. *Das Problem der Souveränität* (1920a) argues against an unqualified notion of national sovereignty by directly

appealing to the logical necessity of international recognition in determining which regimes count as authorized representatives of independent legal orders. In other words, it appears as if contractual agreement among nations alone suffices to authorize the system of treaties that make up international legal order, so that only regimes that are admitted to this order by other regimes in the global compact count as authorized representatives of states. The same goes for a regime's monopoly of violence; its territorial scope also requires international authorization facilitated by the voluntary consent of other regimes.

In order to appreciate why Kelsen thinks this recognition-based (social contractarian) view of international law is incoherent, we need to recall an argument he develops in his *Reine Rechtslehre* (1934):

According to the doctrine of recognition positive law is valid only if it is recognized by the individuals subject to it, which means: if these individuals agree that one ought to behave according to the norms of positive law. This recognition, it is said, actually takes place, and if this cannot be proved, it is assumed, fictitiously, as tacit recognition. The theory of recognition, consciously or unconsciously, presupposes the ideal of individual liberty as self-determination, that is, the norm that the individual ought to do only what he wants to do. This is the basic norm of this theory (Kelsen 1967, 218n83).

Kelsen here states his logical objection to any idea of sovereignty, or pure self-determination, understood as a ground of obligation. The fact that several governments or persons want something, recognize this to be so, and therefore agree to it, as in the fiction of the social contract, does not entail that they are entitled (authorized or permitted) to want (recognize, agree to) it. Will or collective might cannot constitute right. For the social contractarian conception of legal validity to get off the ground, logically speaking, some prior basic norm authorizing or permitting each contractor would have to be presupposed, such as "the individual [government or person] ought to do only what he wants (agrees) to do" (Kelsen 1967, 218n83). This "basic norm", however, is incoherent. Self-obligation (self-determination, self-legislation, self-authorization) are but secular expressions of one and the same conflation of will and norm, inherent in any political theology of sovereignty. Normativity, by contrast, is objective, or non-self-referential.

In his earlier discussion of international law, Kelsen adduces a further objection to the idea that voluntary recognition suffices to ground law. In the international context, the idea presupposes a multiplicity of sovereign governments that recognize each other. However, as Kelsen notes, the idea of sovereignty works at cross

purposes to the idea of multiplicity, thereby rendering superfluous any need for recognition. Indeed, Kelsen argues that the idea of absolute national sovereignty dialectically unfolds an imperialistic logic that culminates in a world state.

Kelsen's argument can be summarized accordingly: Following the social contractarian view of international recognition, legally self-determining and self-authorizing governments are free to enter into treaties – and break them – at will. Leaving aside the inherent fragility of treaties based on pure will and national self-interest, it is clear from the logical incoherence of self-authorization noted above that the lawful status of any agreement implies an authority beyond the contracting parties capable of identifying and deciding that status – in other words, something like a world state, or monistic legal order having its authority grounded in some norm (in a manner to be explained below), but not dependent on recognition from another state.

Of course, governments can refuse to enter into legally binding agreements – they can forswear both a higher law and mutual legal recognition. But it is hard to imagine how this lawless state of nature among nations could avoid the Hobbesian entailment of a single world state. As Kelsen points out, a state of nature composed of multiple sovereign states would be logically incoherent. Because each state would interpret the legality of any action affecting itself and other states from the standpoint of its own legal system, it would have *no choice but to deny the sovereignty of all other states and regard its own law as globally supreme* (Kelsen 1920a, 45, 206).

Although Kelsen concedes the coherence of this kind of legal monism (Kelsen 1920a, 129, 134), he notes that it would logically entail an imperialistic power politics at odds with the rule of law (Kelsen 1920a, 317). For a single state to undertake an unauthorized extension of its legal monopoly of violence over all other states would involve unleashing a solipsistic will to power *incompatible with normativity (rightfulness) as such* (Kelsen 1920a, 315, 317). Although Kelsen admits that a world state established through imperialistic means may become a recognized, peace-keeping legal order of the kind he himself endorses, at the moment of its willful imposition there would be no independently recognized authority to decide its legality.

Kelsen himself hoped that such a world state would emerge through less violent means. Here, ironically, he turns to the very social contractarian language he elsewhere disparages, albeit with a significant twist. International law can arise out of agreements among nations that mutually recognize each other as free and independent. All that is logically required is that they abdicate their sovereignty. They must bend their "wills" to the logic underlying their own rightful claim to independence and concede that the authority binding

their power to enter into binding agreements resides in a basic norm: agreements must be kept (*pacta sunt servanda*) (Kelsen 1989, 216).

3. The Antinomies of Kelsen's Grundnorm: Toward a Retrieval of Recognition as a Basis for Political Duty

Kelsen concluded his treatise on the problem of sovereignty with the admonition that "all *political* striving must be put to the infinite task of realizing [...] a world state as a world organization" (Kelsen 1920a, 320; my emphasis). In his opinion, only a single world state (*civitas maxima*) organized *democratically*¹ can guarantee the rights of subordinate nations and their legal subjects (Kelsen 1920a, 319). The sudden change in tone in Kelsen's text – from conceptual argument to political prescription – brings us back to our political duty as citizens of presumably peace-loving democracies informed by an ethos of mutual recognition. However, the path leading back to political recognition as an ethos mandating the creation of a democratic world state must begin where Kelsen's pure theory of law has taken us thus far: the idea that underlying all legal obligations whatsoever – including those created by agreement, or political recognition – is a *Grundnorm*, or what Hart would later describe as a rule of recognition.

As we shall now see, this idea, at least in Kelsen's justification for it, adds nothing that is not already implicit in the way law is ordinarily conceived by persons in their practical capacity as legal subjects. Furthermore, as a foundational principle, it misrepresents the circular nature of legal authorization as Kelsen himself understands it, thereby obscuring his later acknowledgement that the practical, if not conceptual, boundaries separating political will (and ethical recognition) from legal norm (and rule of recognition) are less sharp than he claims they are.

Kelsen introduces the idea of a basic norm (*Grundnorm*) to capture two conceptual features of law: its status as a norm that possesses obligatory force as distinct from a power-backed command or threat; and its status as a self-contained system distinct from other normative systems, such as those emanating from morality, religion, or self-interest. Let us begin with this last feature of the basic norm: its provision

of a "rule of recognition" for identifying valid law as a distinctive system of norms. Here, the basic norm serves to highlight the hierarchical nature of law, which posits the constitution as the supreme authority for laying out the procedures for deciding what constitutes valid law. In the regressive logic that leads from any action claiming legal status to the actual determination of its legal validity, the basic norm says nothing more than that one "ought to behave according to the actually established and effective constitution" (Kelsen 1967, 212). Kelsen underscores the foundational logic underlying this top-down determination – from a limiting set of abstract constitutional norms to a concrete set of authorized actions – by appeal to a simple syllogism.

"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 1967 [1934], 212).

The other function of the basic norm, which we have already discussed, underscores the fact that laws are not power-based commands or threats, but are norms or actions that have been authorized by the norms specified through the constitution.

"To the question why we ought to obey its [i.e., the historically first constitution's] provision a science of positive law can only answer: the norm that we ought to obey [its] provisions must be presupposed as a *hypothesis* if the coercive order established on its basis and actually obeyed and applied by those whose behavior it regulates is to be considered a *valid* legal order binding on these individuals; *if the relations among these individuals are to be interpreted as legal duties, legal rights, and legal responsibilities, and not as mere power relations; and if it shall be possible to distinguish between what is legally right and legally wrong and especially between legitimate and illegitimate use of force.* This is the basic norm of a positive legal order, the ultimate reason for its validity, seen from the point of view of a science of law" (Kelsen 1957, 262; my emphasis).

Several problems surface when critically examining the kind of validity that Kelsen here assigns to the law and how persons subjectively choose to relate to it. First, as Hart noted (Hart 1991, 230), the idea of a basic norm appears to be unnecessary, or tautologous, since it essentially asserts that one ought to fulfill one's obligations. In the quote above, the basic norm is described by Kelsen as a hypothesis stating a logical

1 "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 [...] of no political value to an autocratic and imperialistic outlook [...]" (Kelsen 1973 [1933], 106-107).

or transcendental condition for the possibility of relating to an action as lawful: If one is to identify an action as lawful one must also be able to identify it as constitutionally valid and further be able to understand the constitution itself as valid and binding.

As we have seen, Kelsen applies this logic to international law. Contrary to Hart's belief that there is no rule of recognition binding international law – that treaties are simply temporary agreements of mutual convenience, dependent on each contracting party's voluntary decision to recognize them as such – Kelsen insists that there is such a rule (basic norm), namely that agreements ought to be kept, or as Kelsen alternatively formulates it: "Coercion of state against state ought to be exercised under the conditions and in a manner that conforms with the [treaty] customs [legally] constituted by the actual behavior of states" (Kelsen 1967, 216).

So formulated, the basic norm in both its international and domestic constitutional formulations succumbs to Hart's objection. Taking the basic norm underlying international law as our example, once one understands that the conditions and customs in question specify that states ought to be coerced whenever they fail to respect their treaty obligations, nothing is gained by adding further that this ought to be done. Nowhere does the basic norm add anything more to the meaning of law than what is already implied by its actual functioning. At best, this tautology (as Hart puts it) serves to remind philosophers that the classical positivist reduction of laws to power-based commands that one finds in Hobbes and Austin is conceptually mistaken.² Nor does this reminder serve to establish Kelsen's other thesis that the binding power of law stems from a superordinate rule of recognition – or international legal constitution – as distinct from an ethically or prudentially motivated act of recognition.

Second, related to Hart's concern that international treaties are prudential agreements rather than legally binding contracts, is the status of the basic norm as a *hypothesis*. As a hypothesis, or conditional norm, the basic norm opens up the possibility that one might simply relate to the law prudentially, as if it were not a norm, but a mere factual constraint. Hart, for example, entertains this possibility when he distinguishes the insider attitude of someone who identifies herself as a legal subject or practitioner of the law from the outsider attitude of someone who identifies herself as a strategic calculator who is concerned only about the beneficial peace-securing effects that follow from her conforming to it or, conversely, the punitive effects that might attend her violating it. Because of its status as a hypothesis, or conditional belief (attitude), the basic norm appears

to be merely contingently related to law. Indeed, legal realists regarded law this way, as if it were nothing more than a relatively predictable punitive power exercised by agents of the state. Conversely, natural law theorists have dismissed the positivist emphasis on law's authority in deference to its moral legitimacy. Citizens sometimes do care more about a law's justice than its authority. Therefore, it all boils down to how one chooses to view the coercive acts of identifiable state agents: as predictable threats (the outsider view), as authorized commands (the juristic insider view), or as just norms (the citizen insider view).

Where does this leave Kelsen's doctrine of the basic norm? By 1952, after decades of defending his doctrine, Kelsen himself expressed doubts about its necessity: "I have abandoned it seeing that a norm (*Sollen*) must be a correlate of a will (*Wollen*). My basic norm is a fictive norm based on a fictive act of volition [...] In the basic norm a fictive act of volition is conceived that actually does not exist" (Kelsen 1952, 119-120). This passage can be understood as perhaps reiterating Hart's point that adopting the normative standpoint of a legal insider is a matter of choice or decision, so that law's obligatory force is not intrinsic to its external identification as a relatively predictable punitive (or instrumentally efficacious) power emanating from agents of the state. Likewise, Kelsen's steadfast insistence that the basic norm is a purely *cognitive* presupposition that has no *prescriptive* force can be understood as reiterating Hart's point that the basic norm only functions to draw attention to law's practical meaning for one who approaches it as a legal insider (a jurist or citizen). However, it could also mean that the process of legal authorization is circular, viz., that constitutions must be interpreted– and, in turn, reciprocally constituted – by the very acts they authorize. As we shall now see, this exposes a conceptual tension between the static and dynamic aspects of Kelsen's pure theory of law that renders implausible the very idea of identifying law through a foundational rule of (constitutional) recognition.

Conceptual problems surface when we examine how the basic norm is supposed to function as a rule of recognition. When viewed from Kelsen's *static* (logical or conceptual) analysis of law, the basic norm tells us that we must look to the constitution as the supreme authority for identifying what actions count as valid law. However, when we turn to Kelsen's analysis of the *dynamic* process of law as a self-contained system of lawmaking, the hierarchical conception of law, as a determination proceeding from foundational premise to application, gives way to a more circular conception. 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

² Even Hitler's commands were not popularly regarded as mere power-backed threats (however criminal they were later judged to be) but were obeyed in accordance with a basic legal norm, the Führerprinzip.

and adjudication (Kelsen 1957, 245). In this firm rejection of the mechanical (deductive or deterministic) account of legal application that was so central to legal formalism, Kelsen here asserts that the authoritative meaning of the constitution, which certainly regulates its own creation through acts of amendment, statutory enactment, judicial interpretation, and executive application, is organically connected to the totality of the acts it has authorized. One must therefore look to these subsidiary, concrete articulations of the constitution in deciding its valid meaning as an authorizing procedure.

If the circularity of law's reflexive genesis is taken as the fulcrum of Kelsen's theory of law, then this suggests another reason for abandoning his doctrine of the *Grundnorm*, with all its misleading foundational and hierarchical aspects (von Bernstorff 2010, 270). It also suggests that the real contribution of Kelsen's theory of law resides in its understanding that the basic human rights and procedures that constitutions entrench, do not simply limit what legislatures, judges, and executive agents can legally do, since these agents also contribute to the enactment of these very same rights and procedures.

To conclude, our critical examination of Kelsen's defense of a basic norm *qua* rule of recognition recommends discarding it as the centerpiece of his legal philosophy. In its place, we should focus on his circular account of lawmaking. Doing so, I submit, brings to the fore an important conceptual relationship between constitutional rights and democracy that has been much obscured in our time: the manner in which individual freedom (rights) and collective self-determination mutually define and constitute each other. Once we no longer "read Kelsen's theory [...] as a scientific theory of pure legal doctrine, but as a practically oriented theory that anticipates the global revolution of the 20th Century," namely, the *conjunction of liberal (social) democracy and international human rights* (Brunkhorst 2009, 232), then the political, recognitive ethos underlying our subjective duty to respect the law emerges as perhaps Kelsen's most important contribution to contemporary legal theory.

4. Liberal Democracy as a Political Procedure for Creating a Legislative Will

Let us pause to recollect the path that has led us to now reconsider Kelsen's theory of legal obligation as a political, and not purely legal, theory. We began by noting that Kelsen appeals to the necessity of political recognition in authorizing the sovereign rights and duties of agents (nations and persons) but dismisses the idea that political recognition as such, at least in its classical formulation as a mutual agreement among already sovereign

subjects, is coherent; for, the contracting parties are only bound to do whatever each of them wants to do. In the case of international law, for example, the very concept of national sovereignty, or unlimited national self-determination, entails a dialectical logic that leads to the effacement of independent sovereign nations. In lieu of political recognition as the ground of legal authority, Kelsen appeals to an entirely different kind of founding recognition: a basic norm that provides a logical rule of recognition for identifying and authorizing legal obligations. However, as we have just seen, such an objective notion of recognition is arguably vacuous and even unnecessary on Kelsen's own account, and for two reasons. First, it adds nothing to our understanding of what it means to be in a legal relationship (which by definition imposes obligations); and second, a choice must be made to subjectively recognize oneself as being in such a relationship, in which the coercive acts of the state are to be regarded as binding (valid), as distinct from merely compulsory.

Finally, the idea of a rule of recognition is misleading insofar as it seems to posit a constitution as a well-defined norm for limiting and authorizing subsequent legal acts. Such a foundational, hierarchical view of law inadequately acknowledges the role subsequent legal acts play in interpreting, defining and delimiting law's own constitutional meaning and authority. In this sense, Kelsen's revealing assertion that the basic norm is a 'fictive' norm that necessarily incorporates a moment of subjective willing suggests that, in the final analysis, Kelsen's own distinction between will and norm, subjective (psychological) and objective (conceptual) grounds of obligation, and political and conceptual modes of recognition breaks down.

Once we accept that a pure theory of legal obligation cannot be self-standing but requires supplementation from political theory, it becomes imperative to ask what kind of political system in our modern age is most likely to secure the psychological motivation most likely to encourage an ethical, as opposed to a purely self-interested (or instrumental) respect for the law. The question is important because only the former kind of respect (of law's justice and goodness) is likely to secure the enduring voluntary compliance of subjects to the law.

As is well known, when it came to rational and effective sources of legal order, Kelsen never concealed his preference for clear, flexible constitutional norms over vague metaphysical notions of national will and identity. Among constitutional regimes, he always upheld liberal democracy as most conducive to achieving that order, at least in a modern, enlightened world. Leaving aside his own commitment to value-free political science, his description of an ideal type of liberal democracy, understood as a distinctive

conjoining of individual liberties and political rights, points us to a set of psychological dispositions, or recognitive ethical expectations, that citizens of such a democracy generally have, if they are to retain faith in the validity, or legitimacy, of the political process that generates their rights and duties.

Kelsen's scattered writings on democracy show his indebtedness to Weber's sociology of law. For Weber, democracy marks the logical political corollary to a modern, rational type of legal order. Such an order endows legal subjects with basic individual rights, which, in turn, express a distinctly modern ethos of individualism that he believed evolved in Northern Europe during the late Middle Ages, specifically in conjunction with the Protestant Reformation. Thanks to secularization and the spread of rational and scientific attitudes toward self, society, and nature, ethical life has split off from public morality and has become a sphere of private moral conscience and, subsequently, of responsibility for the consequences of one's actions as these impact others as well as oneself.

As the supreme coordinating mechanism in an ethically polarized world of free subjects, law must be voluntarily accepted by those whose behavior it constrains. However, not only must they be responsible for respecting the law, but they must also be responsible for making the law. In other words, legal subjects will obey the law responsibly only if they generally find that its coercive effects are conducive toward the satisfaction of their ends; and this means that the binding authority of law – its legitimacy and efficacy – depends on the law advancing the interests and ethical values of the people whose behavior it constrains. This condition is most likely to be obtained only in a democracy wherein the people themselves have taken direct or indirect responsibility for lawmaking.

In common parlance, democracy is simply the principle that the people must be consulted, either through direct plebiscite or indirect election of lawmakers, to ensure that the law reflects the will of the majority. Most important from our (and Kelsen's) perspective (and in contrast to Schmitt's) is that the will of the majority doesn't precede and pre-determine the law, as if there already existed a homogeneous "will of the people." Rather, the will of the majority first comes into existence as a result of a democratic procedure. To cite Kelsen's early essay on democracy:

"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" (Kelsen 1920b, 28; my emphasis).

The key idea expressed in the above passage is that a political will must be created out of an aggregate of conflicting wills through a process of "integration." This understanding of democracy goes against the simple view of democracy as a procedure for weighing and ranking preferences through a counting of votes. If what we mean by democracy is nothing more than the aggregation of preferences, then democracy cannot function as a true decision procedure for lawmaking because a dominant preference – assuming one could emerge that would avoid familiar paradoxes associated with collective choice cycling – would fall short of what we mean by a majority *will*.

In order for democracy to function as a procedure for integrating conflicting preferences into a majority will – not to mention a "people's will" or a popular mandate – it must also facilitate critical public deliberation on the opportunity costs associated with our preferences. This deliberative understanding of democracy is clearly articulated in Kelsen's later essay on democracy: "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*" (Kelsen 1955, 25–26; my emphasis).

Assuming that Kelsen is correct that discussion is necessary for the democratic integration of conflicting preferences into a dominant majority will, we must ask how much integration is needed to constitute such a will. Here, Kelsen rejects the idea that integration entails anything like a consensus on generalizable interests, or a general will. As he puts it, "the content of [democratic] legal order may be a compromise" that balances particular interests (Kelsen 1955, 28). Beyond having one's interests included in a political compromise, which might not always happen in the short term, there remains another kind of political integration that is perhaps most essential to democracy: *political agreement on the approximate fairness of the democratic process sufficient to generate acceptance of the outcome*.

Here, Kelsen reminds us that modern democracy only functions to integrate the minority into the majority so long as it constitutionally entrenches a foundational principle of liberalism:

"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" (Kelsen 1955, 28).

The compliance of minorities with democratic majority rule depends on their being protected from majoritarian tyranny through their secure exercise of basic, constitutionally entrenched rights. However, as we have seen, given that Kelsen's circular account of lawmaking and legal authorization entails that the concrete prescriptive content of rights must be interpreted and legislated by those in power, constitutional norms do not provide an absolute barrier to majoritarian tyranny.

One way to avoid milder forms of tyranny (recalling the connection between political self-determination and deliberation) is to "include in our definition the idea that the social order [...] in order to be democratic, must guarantee certain intellectual freedoms, such as freedom of conscience, freedom of press, etc." (Kelsen 1955, 4). Without the protection of dissenting voices, the discussions necessary for generating an autonomous political will would be incapable of integrating groups of widely opposed interests and ideologies. A more ambitious way to include minority voices in the deliberative process, Kelsen suggests, is to guarantee minority representation in government itself. That said, purely legal remedies along these lines will likely not succeed in fairly incorporating minority opinions into the process of political will formation unless they are accompanied by an ethos of civility that motivates political actors – along several dimensions of mutual recognition – to refrain from imposing their private wills on their fellow compatriots imperialistically.

5. The Politics of Recognition in Kelsen's Account of Democracy

The reluctance of political actors to impose their will tyrannically, I argue, requires that politicians and citizens mutually recognize each other as persons meriting equal moral respect. According to Kelsen, this "feeling for equality" presupposes "that all individuals are of equal political value and that everyone has the same claim to freedom [...] and recognizes himself in the other" (Kelsen 1955, 25-26; my emphasis). One manifestation of this kind of recognition is the respect shown to fellow political interlocutors who enjoy fundamental human rights to speak, associate, and disseminate public opinion. Here the accent is on recognition of each person's *moral* autonomy.

Another manifestation of mutual recognition is on *reciprocity*. In recognizing oneself in the other, one recognizes common interests and ends that can (indeed must) be furthered through cooperation. At the very least, consociates must collaborate in speaking to one another, influencing one another, and shaping opinions that will form part of the wider public discussion regarding justice and welfare, as well as shape policies

impacting the scope of their freedom. This notion of reciprocity – of proposing just and beneficial forms of social cooperation – brings us back to the idea of political society as a social contract. It emphasizes the ethical duty of citizens in a democracy to join in solidarity in the pursuit of securing their common welfare in a just manner. Without civic solidarity, democratic life is ill equipped to withstand legally permitted forms of majoritarian tyranny.

Solidarity may or may not entail a willingness on the part of those so conjoined to make reasonable sacrifices. Citizens are nonetheless called upon to sacrifice some of their freedoms for the common good during national emergencies and they are called upon to sacrifice some of their wealth in guaranteeing that those among them who are worst off can enjoy roughly equal opportunities to exercise political and civil freedom through accessing provisions of health, education, and welfare. Hence, Kelsen notes that the citizen of a democracy "represents the *altruistic* type, for he [sic] does not experience the other as an enemy but is inclined to see in his fellow man his *friend*" (Kelsen 1955, 26; emphasis added). With Schmitt's definition of the political as an antagonism between friend and foe no doubt in the back of his mind, Kelsen here maintains that citizens of a liberal democracy are ethically committed to recognizing each other as friends who care for each other. Just as parents seek to instill confidence in their children so that they can express their individuality, so too citizens of a democracy are willing to make altruistic sacrifices for the sake of enabling each member of society to become fully autonomous agents who confidently express their individual opinions.

Finally, Kelsen observes that citizens of a democracy are predisposed to resolving their differences through peaceful means, through the force of reason, impartial evidence, and critical reflection on their own fallibility and the opportunity costs imposed on others by single-minded pursuit of their own interests.

"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" (Kelsen 1955, 28).

The above citation reaffirms the importance of recognizing what John Rawls in *Political Liberalism* describes as "reasonable pluralism" and the "burdens

of judgement" in conducting oneself with civility in democratic deliberation (Rawls 1993, 58-66; Vinx 2007). Knowledge of the reasonableness of strong differences of opinion in a free society, viz. moral and cognitive/epistemic relativism, counsels that one regard one's interests and deeply held convictions *from the standpoint of others*. Recognizing that others – whose reasonable interests conflict with one's own, and whose identities have been shaped by different comprehensive cultural worldviews than one's own – might not be rationally persuaded to embrace one's own interests and convictions, obligates us to refrain from tyrannically imposing these interests and convictions in the course of our political deliberations and voting conduct.

To conclude, Kelsen's understanding of liberal democracy as a deliberative procedure of lawmaking invokes an ethical conception of mutual recognition as a precondition for the subjectively binding force (legitimacy) of objectively recognized laws. Although Kelsen clearly endorses this ethos, he does so indirectly, by endorsing a corresponding democratic ideal, which he believes is most conducive to securing lawful peace and order in our times. As he describes it, the recognitive expectations of democracy are not chosen or agreed upon so much as given in the enabling conditions for the kind of deliberative democratic practice he highlights. Indeed, these expectations – to recognize fellow deliberative consociates as equal possessors of human rights, as collaborators in a joint venture oriented toward their mutual benefit, as peace-loving critics of their own fallible understanding, and as friends who care about each other and are willing to make sacrifices on their behalf if need be – might well be built into our basic competence as beings who mutually understand and affirm each other, cooperate together, and resolve differences peacefully through critical discussion (Habermas 1987, 1996).

6. Summary

I have argued that Kelsen's legal thought deserves serious consideration in contemporary discussions about the ethics and politics of recognition. Given Kelsen's explicit objection to recognition-based accounts of legal authority, this conclusion might seem surprising. However, my examination of Kelsen's legal thought *broadly construed* has revealed that recognition is key to his defense of liberal democracy, which he singles out as the political system that is most conducive to supporting a stable rule of law in the modern era. Furthermore, I have sought to show that other, non-ethical modalities of recognition – the prudential and the conceptual – figure predominantly in Kelsen's legal philosophy as well.

The conceptual/legal modality that is associated with Kelsen's pure theory of law designates a rule of recognition for recognizing an action as lawful in accordance with a self-contained, hierarchical system of legal norms. I have argued that this kind of conceptual recognition, which bears little, if any, resemblance to ethico-political modalities of *intersubjective* recognition, should not merit the central role in his legal theory that Kelsen sometimes assigned it. Once we accept Kelsen's own misgivings about this purely conceptual idea of recognition, especially in light of his analysis of the circular dynamic informing lawmaking at all levels, we are better off focusing our attention on his discussion of two other, distinctly ethical-political, modalities of recognition.

The first ethico-political modality of recognition we examined is associated with purely prudential accounts of social contractarian justifications for normative authority. It consists of each party recognizing that its interests converge with the interests of other parties, and then agreeing to conditions for mutually satisfying them. As illustrated in Kelsen's early writings on national sovereignty and international law, governments are recognized by other governments as rightfully exercising a monopoly of violence in pursuit of their interests, so long as they do so effectively and within the constraints (territorial and otherwise) agreed upon by the international community. According to prudential social contractarian reasoning, governments recognize these constraints solely out of national self-interest, with each reserving an absolute sovereign "right" to break the agreement should its own strategic calculations so dictate. International peace and cooperation cannot be founded on this kind of fragile agreement, which is inherently vulnerable to violent overthrow by any party that has the power and will to do so. In place of this prudential model of recognition, whose implicit logic inclines toward solipsism and imperialism, Kelsen recommends a second ethical modality of recognition of a kind he associates with a peace-loving democratic federation.

The ethical modality of recognition thus emerges as a democratic corrective (or supplement) to the impasses found in Kelsen's discussion of conceptual and prudential modalities of recognition. For Kelsen, liberal democracy presents a model of political order in which the rights (limited sovereignty) of all parties to the social contract are legally protected. Kelsen adds that the various legal mechanisms by which democracies integrate the dissident wills of minorities into majoritarian legislation succeed in promoting a peaceful rule of law only to the degree that they also embody an ethos of civility. I have argued that this ethos can be understood as an ethics of recognition along four dimensions highlighted by Kelsen: recognition of

fellow citizens as autonomous moral agents, as parties to a scheme of cooperation engaged in a solidaristic and reciprocal sharing of burdens and benefits, as friends whose welfare calls forth duties of care, and as bearers of distinctive cultural identities, social perspectives, and political interests that merit respect when reasonably cultivated in critical discussion.

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Author

David Ingram is Professor of Philosophy at Loyola University Chicago. He has published nine books in the areas of law, human rights, democratic theory, and the critical theory of the Frankfurt School, including *Law* (Continuum/Bloomsbury); *Habermas* (Cornell University); *Rights, Democracy, and Fulfillment in the Era of Identity Politics* (Rowman and Littlefield), and *World Crisis and Underdevelopment* (Cambridge University). His current research interests focus on applying theories of discourse and recognition to ethical and legal issues pertaining to global development, immigration, and gender identity.