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A Morally Enlightened Positivism? Kelsen and Habermas on the Democratic Roots of Validity in Municipal and International Law¹

David Ingram

Abstract: A commonplace misconception identifies Kelsen as a one-dimensional legal positivist and Habermas as a one-dimensional legal moralist. I argue, on the contrary, that both theorists defend a complex normative conception of democratic proceduralism that straddles the positivism/naturalism divide. I then show how their extension of this conception to international law commits them to a monistic human rights regime. I conclude that their realistic acknowledgment of the fragmented nature of legal paradigms and regimes entails a complementary qualification of their monism. Part 1 situates Kelsen and Habermas's proceduralism between natural law reasoning and formal positivism in opposition to Schmitt's political-theological defense of decisionism. Part 2 compares the different methods by which Kelsen and Habermas defend democratic proceduralism. Part 3 shows how they extend this conception to international law in defending a monistic human rights regime. Part 4 discusses their respective views about the decisive role played by courts and constitutional review in this regime, and critically examines their proceduralist understanding of constitutional review. Part 5 concludes with an assessment of the limits and possibilities of constitutionalizing humanitarian law in international law in the face of persistent legal pluralization.

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

1.0 Habermas and Kelsen: Two Neo-Kantian Positivists Confronting Schmittian Decisionism

Renowned are the many writings in which Habermas excoriates positivism in general and legal positivism in particular. So the following tribute to a founding figure in modern legal positivism requires some parsing.

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.

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

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 arguments against classical natural right theories, in particular against the Platonist idea of a normative order that is founded in nature rather than invented by the will of human beings. (Habermas, 2012a, 1)

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.

To situate our comparison of these thinkers it might be useful recall Schmitt's argument against liberal democracy and human rights. Schmitt argued that law is an empty vessel that derives its entire force from the sovereign will of a person, group, nation, or other extra-legal source of power. This "might makes right" argument seemed especially plausible to Schmitt in light of his Hobbesian analysis of the impotence of the rule of law in modern liberal democracies. In liberal democracy riven by unresolvable ideological conflicts between parties who view the world through the bipolar lens of "friend and foe," the indecisiveness of legislative will inclines toward a permanent constitutional crisis. In such a state of national emergency – which Schmitt imputed to the Weimar regime – only a chief executive who has the supreme power to "decide the exception" can rise above the law, suspend part or all of the constitution, and restore through martial[?] decree the political order and unity without which legal order itself is meaningless (Schmitt, 1996, 46; 1985, 5-35). For Schmitt, this "commissarial dictatorship" is legitimated by the presumption of a political will, personified in the nation state, whose identity and membership is defined solely by a majority that exists in its own right, independent of, and therefore sovereign over, the law. Schmitt also argued, like Hobbes and Hegel before him, that beyond the plurality of national wills there can be no sovereign, for each nation possesses an identity and will that is also irreducibly unique. The impossibility of assimilating nations to a single humanity, possessing its own universal will and sovereign power to decide, renders talk of international law and human rights utterly meaningless, except as an ideological rationale covering up acts of aggression that are undertaken exclusively to advance national interests (Schmitt, 1988, 11-17; 1987, 73-89).

Kelsen and Habermas counter Schmitt's realist assault on the rule of law with realist arguments of their own. Departing from the same Hobbesian premises as Schmitt, they acknowledge the weakness of moral

motivations and the inadequacy of abstract ideals in resolving modern conflicts between self-interested individuals who subscribe to opposing conceptions of justice and human goodness. But like Kant, they insist that the only solution to a state of war wherein persons are disposed to seek unlimited power over others 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.²

Kelsen and Habermas argue that such “idealism” appears eminently more suitable to realizing the psychological aspirations underlying Hobbes’s political realism than Schmitt’s political-theological postulation of a homogeneous, metaphysical source of national sovereignty that exists above the law. While the Kantian project promises a realistic framework for achieving peace and freedom, the Schmittian project portends imperial warfare and totalitarian genocide in the service of ideology. In the wake of so many horrors that have been committed in the name of national security conducted under the banner of absolute sovereignty, it is no wonder that Habermas looks to Kelsen’s monistic theory of law as the pre-eminent exemplar of Kant’s project for the twenty-first century.

Kant’s argument in defense of an international legal order as a pre-requisite for the secure enjoyment of any rights whatsoever (and therewith, as a pre-requisite for morality as such) is often described as a variant of natural law reasoning from moral premises. Habermas and Kelsen subscribe to this judgment as well, albeit in a qualified way (Kelsen, 1946, 445; Habermas, 1996, 101).³ The status of Kantian legal

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In *Zum Ewigen Frieden* (1795), Kant departed from Hobbes’s hypothetical state of nature, which Hobbes famously characterized as “a war of all against all,” in arguing – along thoroughly realist lines – that even a “race of devils” would find it in their mutual self-interest to establish a lawful republic in which their individual rights would be protected. Continuing this realist argument further, Kant observed that republican governments protect the freedom of their citizens by enabling them to channel their acquisitive urges through mutually beneficial economic competition. The appetite for commerce, in turn, inclines republican nations to seek peaceful relations among themselves. By promoting general freedom and happiness, liberal democracy cultivates the peaceful *moeurs douces* observed by Montesquieu. As Kelsen remarks, “the democratic type [of foreign policy] has a definite inclination towards pacificism, the autocratic, towards one of imperialism” (Kelsen, 1933/73, 106) [?]. Indeed, according to Michael Doyle, since 1800 no liberal democracies have warred against one another, although powerful democracies have engaged in imperialist ventures against weaker governments with less secure liberal democratic credentials). Kant culminates his realist vision by defending a cosmopolitan legal order as the ultimate guarantor of peace and basic rights. However, against Hobbes’s narrow realism, Kant (Kelsen and Habermas concurring) insists that the social contractarian idea underpinning his theory of law cannot be adduced from the empirical psychology of strategically calculating egoists but requires a prior normative foundation, (Doyle, 1997, 277-84. [page #?]).

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In defense of Kant’s legal positivist credentials, Ingeborg Maus (2009, 53) notes that Kant’s use of “moralisch” in the opening passages of the *Metaphysik der Sitten* designates all “Gesetze der Freiheit” in opposition to deterministic laws of nature. Kant subdivides morality into ethics (natural morality) and law, Contrary to a

theory is important for both thinkers given their rejection of what Habermas, in the passage cited above, refers to as the Platonism underlying natural law reasoning. For them, law is a human technique (to use Kelsen's terminology) that can be used for many ends besides those conformable to morality, and even laws that originate from just procedures or are supported by moral reasons need not, upon further reflection, be morally justified. But given the important role that natural law reasoning has played in the human rights movement and in the social contractarian defense of liberal democracy, denying the importance of moral justice as a basic requirement for legal validity and legal duty seems antagonistic to their support for a global *civitas maximas* based on democracy and human rights. Leaving aside their own questionable understandings of natural law theory⁴ - depending on what we mean by the term, Kelsen and Habermas might be characterized as natural law theorists of a sort⁵ - it is difficult to understand their rejection of this theory when we recall positivism's poor reputation in the aftermath of the Second World War.

Former positivists such as Gustav Radbruch embraced natural law reasoning as providing the only legal rationale for prosecuting officials of the former Third Reich for humanitarian crimes committed in the course of carrying out legally authorized duties (Radbruch, 1946).⁶ Justice Robert L. Jackson's opening

natural law theorist such as Locke, Kant insists that the moral right to possession (first occupancy) is superseded by the legal right to acquire and own property: "Original acquisition can only be provisional - Conclusive acquisition takes place only in the civil condition" (Kant, 1996, 52).. According to Maus, Kant's concept of "morality" occupies a neutral status between law and ethics not unlike Habermas's own discourse principle (D). Can you specify your sources in a manner more consistent with Springer's citation apparatus?

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John Finnis criticizes Kelsen's view that natural law theorists "from church fathers down to Kant" derive the entire validity and content of positive law from morality and therefore enter into a contradiction when they derive the authority to make law from natural law (Kelsen, 1946, 412-13, 416). Finnis rightly notes that this description does not apply to Aquinas's natural law theory, which allows law makers discretion to make laws for all sorts of useful ends, so long as they stay within the broad framework of morally just procedure. (Finnis, 2011, 26-29) This view is consonant with Habermas's proceduralist (and otherwise positivist) account of legal validity, which I argue is not (pace Habermas) fundamentally different from Kelsen's own.

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See n. 4. Indeed, in *Between Facts and Norms*, Habermas expressly rejects an argument he developed in "Law and Morality" (1988) that, in natural law fashion, assimilates the discourse principle (D), which according to Habermas founds the democratic legitimacy of law, to the Kantian moral principle of universalizability (U). (Habermas, 1996, 108-9)

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statement at the Nuremberg Tribunal contending that such crimes were already implicitly, if not expressly, forbidden by international treaty and custom, did not seem particularly compelling on positivist grounds. Indeed, some of these treaties and customs appear to endorse natural law reasoning. The Martens Clause inserted into the preamble to the 1899 Hague Convention governing Regulations on the Laws and Customs of War on Land, for example, appeals to the “laws of humanity” and the “requirements of the public conscience” as compelling and peremptory grounds of international law possessing the status of *jus cogens*. So, in the wake of positivism’s massive failure to provide an obvious legal ground for resisting and prosecuting evil acts that were committed in the name of obeying orders commanded by legally authorized superiors, it fell to natural law theory to rebut Schmitt’s “might makes right” sanctioning of such commands in its metaphysical appeal to natural rights.

Leaving aside the familiar theoretical counterarguments Kelsen and Habermas marshal against natural law theorizing,⁷ it must be conceded that whatever approach they propose in its stead should provide a substitute grounding for cosmopolitan human rights law. Kelsen’s defense of a “monistic” conception of law under the supreme aegis of a centralized, hierarchical system of international law takes a necessary step in this direction, while his and Habermas’s arguments for liberal democracy invoke a procedural, rather than directly moral, justification for equal rights (including the equal rights of states under international law). This procedural positivist manner of grounding human rights potentially counters one Schmittian objection that natural law, with its appeal to moral intuitions of a vague and uncertain nature, fails to address: the alleged abstractness, indeterminacy, and political contentiousness of human rights. Once we show that basic rights are procedurally embedded in modern law and democracy, we can then account for their legitimacy and concreteness through their own reflexive application.

But a problem still remains. According to Habermas, Kelsen’s positivism is incompatible with a proceduralist defense of human rights and, in fact, unintentionally converges with Schmitt’s decisionism.

H.L.A. Hart (1959) criticized the German Courts’ post-war deployment of the principle of humanitarianism involving cases where Nazi informants were convicted for following statutes that were (in the opinion of one court) “contrary to the sound conscience and sense of justice of all decent human beings.”

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Natural law reasoning allegedly runs afoul of scientific reason in deriving an “ought” from an “is” while its “derivation” of law from unchanging morality ostensibly limits or violates positive law’s essential instrumental flexibility and alterability (Kelsen, 1934/67, 64-69, 219; Habermas, 1996, 106). As Kelsen notes, without the law/morality distinction civil disobedience makes no sense (69).

He accuses Kelsen of “sharing with his opponents a genetic account of normative validity” (Habermas, 2012a, 1). 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.”

There is some truth to this claim. Kelsen distinguishes moral norms, which take the form of an unconditional duty (or a conditional duty backed by the immediate sanction of conscience), from legal norms, which are backed by the socially organized threat of depriving someone (not necessarily the lawbreaker) of possessions (“life, health, freedom, or property”) against that person’s will (Kelsen, 1957, 233,35). They are conditional duties that take a hypothetical form: If a person X commits delict A, s/he should suffer punishment P. Importantly, in contrast to Hobbes and Austin, Kelsen insists that laws are not reducible to personal commands backed by threats, since on this reading the highwayman’s command “[You should] hand me your money or I’ll injure you” is subjectively (psychologically) indistinguishable from a similar command issued by a monarch. But threat of sanction in this sense amounts to the factual prediction that harm will be done unless conditions are met, and the meeting of the condition is understood as a prudential – viz., subjective – obligation contingent on the factual existence of a preference to avoid said harm. The highwayman’s command “obligates” subjectively, contingent on the psychological fact, which may not obtain, of a preference to avoid harm, but not objectively, based on a norm. Coercion alone does not obligate compliance with the command - might does not make right; at best it physically compels compliance, and the fact that the addressee “should” obey it means only that s/he would be acting against his/her own interest not to, if her interest is to avoid harm. By contrast, the same command issued by a monarch should be obeyed for the additional reason that the threat of coercion has the meaning of law. What makes it a law is not the fact that it is commanded and backed by threat of sanction (which cannot generate a normative obligation, permission, or authorization to punish) but the fact that the command asserts an obligation, i.e., embodies a norm.

Habermas himself alludes to a more genuine source of legal validity, namely, “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” (Habermas, 2012a, 2). Connected to this observation 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” (Habermas, 1996, 86).

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 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. This *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

8 86.

social systems in its attachment of “a criminal or civil sanction” to norm violations (Kelsen, 1946, 39, 122). 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*).

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).

As formulated above, the basic norm appears to endow any constitution – however despotic - with binding force so long as it meets a threshold of effective recognition. But as we shall see, meeting this latter threshold in modern societies may require that a constitution be democratic rather than despotic.

This becomes apparent when we turn to Habermas's legal theory. In contrast to Kelsen's juridical standpoint, Habermas, orients his thinking around the more robust moral expectations of *legal subjects* inhabiting a modern society who are tasked with finding good reasons why they 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. According to Kelsen, the dynamic aspect of law "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, 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)

Despite their different points of departure – the universal essence of law as a valid form of coercion versus the capacity of a democratic form of legislation to uniquely motivate voluntary compliance with the law - 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. Both further 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. 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.

Because these dynamic expectations determine not only the normative legitimacy but also the effectiveness (or positive legality) of a constitution, one might doubt whether Kelsen's basic norm is needed to explain our obligation to obey valid law. Again, to recall Kelsen on this point,

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).

By 1952, after decades of defending his doctrine of the *Grundnorm*, Kelsen 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, 119-20). By the time he wrote the second edition of the *Pure Theory of Law* (1960) he again reversed course, distinguishing the basic norm, as a pure cognitive presupposition, from any constitution or other positive act of will (Kelsen, 1934/67, 204n72). Doing so perhaps saved him from the objection that Habermas levels at him, that despite his insistence on subordinating will to norm, he had in fact subordinated norm to will, thereby falling prey to decisionism. But if I am not mistaken, Kelsen's momentary abandonment of normative transcendentalism brought him closer to Habermas's own position, which despite its appeal to transcendental argumentation in grounding a discourse principle (D), is not a foundational theory of moral or legal rights and duties. We may agree with Jochen von Bernstorff that abandoning the *Grundnorm*, with all its foundational and hierarchical aspects, comports better with Kelsen's understanding of law as a reflexive (circular) procedure not dissimilar from Habermas's own. (von Bernstorff, 2010, 270) And we may then further agree with Hauke Brunkhorst that "we should read Kelsen's theory no longer primarily as a scientific theory of pure legal doctrine, but as a practically oriented theory that anticipates the global revolution of the 20th Century" (Brunkhorst, 2009, 232).

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,⁸ reaches beyond the purely descriptive status that Kelsen himself accords his scientific legal philosophy.⁹ However, if we take

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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 Gümplová (2011, 17).

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Lars Vinx, for example, asserts that "Kelsen's position, is in some important respects, not positivist because it affirms, rather than denies, a necessary connection between legality and legitimacy" (Vinx, 2007, 214-15). In arguing that Kelsen 'tries to . . . read autocratic legal systems as anticipations of a legal order that more fully realizes the ideal of the rule of law' (212) – what Vinx elsewhere refers to as a "utopia of legality" (73-4) – Vinx in fact comes close to interpreting Kelsen as a natural law theorist. In Vinx's opinion, to presuppose a basic norm "is to postulate that exercises of coercive force that take place under the authorization of that basic norm are, in some sense and to some extent, morally justified" so that "without this assumption, Kelsenian normative legal science would be pointless" (56). As Neil Duxbury (2007) notes, the main textual evidence Vinx offers to support this revisionist interpretation of Kelsen's theory (which he concedes flies in the face of Kelsen's own

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.

2.0 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 (Schmitt, 1923/1988, 3-6).¹⁰ They accordingly reject the assumption of an undivided sovereign will that informs

self-understanding as a legal scientist) is a passage from Kelsen's early "Rechtsstaat und Staatsrecht," where Kelsen writes, "Die Rechtsstaatsidee aber ist noch nicht überwunden, ihre allseitige rechtslogische Entwicklung bleibt aufgabe der Zukunft" (The "idea of the rule-of-law state . . . is not yet vanquished (überwunden); its comprehensive legal-logical development remains the task of the future" (Kelsen, 1913/2010, 155). Duxbury correctly notes that whatever this statement might have meant prior to Kelsen's mature development of the pure theory of law in 1920, the meaning Vinx attributes to it stands in stark contrast, not only to Kelsen's vision of legal science as purely descriptive and value free but also Kelsen's belief that majoritarian governments may be lawfully replaced by autocratic governments - - objections to his interpretation that Vinx himself notes (Vinx, 2007, 56, 131, 217). In fact, Vinx's interpretation of Kelsen would better apply to Habermas's reconstructive approach to law, which sees a kind of normative (even moral) teleology at work in legal evolution (see below), one that enables him to establish a conceptual co-originality between rights and democracy, while at the same time acknowledging that this necessary link remains implicit and undeveloped (or anticipated) in the pre-liberal, pre-democratic *Rechtsstaat*. I suggest that a better way to defend Kelsen's support for a 'utopia of legality' is by appealing to Kelsen's sociology of law and especially his Weberian account of social evolution (modernization). According to this reading, liberal democracy is the legal form that best accords with the peace-seeking motivations and moral expectations of modern, rationalized (scientifically enlightened) societies. Of course, this argument - which matches normatively imbued, legal ideal types (autocracy v. democracy) with social, ethico-political *Weltanschauungen* - also relies on purely descriptive premises, which is to say that its "defense" of liberal democracy is premised on the latter's empirical (adaptive) efficiency in response to integration problems peculiar to modern social complexity. I think a similar kind of reading can be extended to Kelsen's earlier "ethico-politico" preference for a *civitas maxima* anchored in a world state; for here, too, evolutionary changes in international relations leading to the universal aspiration for equality and independence among all nations flies in the face of the older, Westphalian regime of unrestricted state sovereignty.

In *Strukturwandel der Öffentlichkeit* (1962) Habermas accepted much of Schmitt's indictment of mass democracy as well as Schmitt's concern about the tendency of liberal ideology to "suppress" politicized conflict behind the veneer of a transcendent rational harmony of interests or, conversely, behind the veneer of an

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.

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" (Habermas, 1996, 107). 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 post-conventional moral setting, persons will typically suppose some higher normative principles (such as human rights) in justifying the permissibility or necessity of their actions. A moral principle of universalizability (U) thus

atomization of private interests. (Habermas, 1962/89, 81, 205) In this respect he followed in the footsteps of earlier critical theorists. Despite Schmitt's disdain for Marxism, whose corporatist conceptions of representation he thought were corrosive of any unified state, some of his most famous students were Marxists who shared his critique of the modern state. Franz Neumann and Walter Benjamin both came under Schmitt's spell. Otto Kirchheimer, who along with these thinkers would later associate himself with the Frankfurt School, argued in his dissertation (written under Schmitt's direction) that parliamentary democracies instituted on a capitalist base inevitably lack legitimacy. In his opinion, the sphere of private law allows capitalist enterprises to contest the sovereignty of the state in asserting their own partial interests in the form of statutory protections. The solution to this problem, Kirchheimer argued, was the abolition of an autonomous sphere of private law immune from democratic regulation by the state. Thirty odd years later Kirchheimer's Schmittian diagnosis of capitalist democracy would resurface in Habermas's *Strukturwandel*, which documented the decline of a liberal public sphere grounded in rational, open debate in the face of propagandistic class democracy. Habermas's later masterpiece, *Legitimation Crisis* (1973), continued to frame this diagnosis in terms of a vaguely Schmittian conception of legitimacy, understood as a process of democratic will formation whose legal results reflect a unitary consensus on common interests, as distinct from a strategic compromise that balances plural interests according to their relative degree of political power. This notion of legitimacy – which Habermas has since considerably qualified – was presented in a way that opposed the separation of powers, the private law/public law distinction, the grounding of legal policy in class compromise, and other liberal principles.

functions as a kind of foundational basic norm, which follows “abductively,” Habermas believes, from other assumptions regarding rational discourse and communicative interaction (Habermas, 2012a, 17).

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 (Habermas, 2012a, 13).

Stated thus without further qualification, the argument contained in this passage appears to succumb to Kelsen’s following objection:

The doctrine of the basic norm is not a doctrine of recognition as is sometimes erroneously understood. 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. The difference between it and the theory of the basic norm of a positive legal order, as taught by the *Pure Theory of Law*, is evident” (Kelsen, 1934/67, 218n83).

Kelsen here reiterates his familiar logical point that an “ought” cannot be derived from an “is.” The fact that people all want something and therefore agree to it, as in the fiction of the social contract, does not mean that they ought to want 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 would have to be presupposed, such as “the individual ought to do only what he wants (agrees) to do.” This “basic norm”, however, is entirely incompatible with any system of positive law. Self-obligation (self-determination, self-legislation, self-authorization) are metaphysical conceptions that traditionally define conceptions of divine sovereignty, but which are logically incoherent and, in any case, conflate volition with normativity (cognition).

Does Habermas’s principle (D) commit the is/ought fallacy Kelsen describes? A closer reading of Habermas suggests that it does not.

[P]rocedural characteristics of the process of argumentation itself must ultimately 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 (Habermas, 2012a, 14). . . . Instead of an objective world presupposed to exist independently of us, what is not in our power to accept or reject here is the moral point of view. In communicative action, the moral point of view is imposed on our minds. It is not the social world as such that is not at our disposal but the structure and procedure of a process of argumentation which facilitates both the production and discovery of the norms of a properly regulated existence (Habermas, 15).

In light of modern value pluralism, the only neutral (universally shared) normative 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” (Habermas, 2012a, 17). 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 (Habermas, 2012a, 8, 9, 12); viz., their willingness to alter their interests and perspectives to reasonably accommodate the interests and perspectives of consociates.

More precisely, (D) requires

(a) that nobody who could make a relevant contribution may be excluded, (b) that all participants are afforded an equal opportunity to make contributions, (c) that the participants must mean what they say, and only truthful utterances are admissible, and (d) that communication must be freed from external and internal compulsion so that ‘yes’/‘no’ stances the participants adopt on criticizable validity claims are motivated solely by the rational force of better reasons (Habermas, 2012a, 19).

The defense of (a)-(d) as intrinsic features of (D) appeals to a “transcendental argument” which shows that the “*argumentative* duties and rights” implied in (a)-(d) - - duties and rights that are not moral duties and rights, but enabling rules that are “constitutive for the game of argumentation” – cannot be denied by participants in discourse without entering into a “performative contradiction” (Habermas, 2012a, 1). Thus we have, as in Kelsen, the transcendental-logical defense of a basic norm (D) underlying validity – a defense that appeals to a vertical, non-circular, conception of validity.

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” (Habermas, 2012a, 13). 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 (Habermas, 2012a, 4-7).

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” (Habermas, 1996, 110). (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 (Habermas, 1996, 123).

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 (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” (). Thus, public opinion remains the supreme authority for setting the legislative agenda (Habermas, 1996, 150, 170, 182). 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 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 (Habermas, 1975, 112). 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” (Habermas, 1996, 167).

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 insists, is unavoidably interpretative (Habermas, 1996, 182).

As I noted above (and as I shall argue below) Kelsen's own understanding of the reflexive creation of law as a process involving judges and administrators departs from the image of a *Stufenbau* to the point of rendering otiose any practical presumption of a *Grundnorm*. That said, 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." For Kelsen and Habermas, bureaucratic administration and parliamentary systems of political representation – no less than the constitution of the individual as a legal holder of rights – emerge as adaptive responses to cultural changes that accompany revolutionary socio-economic transformations. Citing Weber against Marxists and Schmittian romantics, Kelsen warns 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). No doubt Marxists and their reactionary counterparts are right to worry that the stratification and ideological fragmentation of capitalist societies premised on the rational notion of a modern legal subject threatens to undermine the legitimacy of the legal order. But Kelsen maintains that social and political integration based on shared moral principles can be advanced by means of democratic institutions that protect minorities and vulnerable economic classes while encouraging discursive will-formation through compromise. 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*" (Kelsen, 1920b, 28, my stress).

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.¹¹

Habermas and Kelsen thus defend liberal democracy as the most optimal regime for integrating polities premised on modern, rationally enlightened, cultural expectations (Habermas, 1996, 139-46; Kelsen, 1957, 31-38, 244-56). 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 (Kelsen, 1920b, 26). As we shall see, Kelsen no less than Habermas insists that modern legal orders can be stabilized only by institutionalizing toleration, individual rights, and solidaristic deliberation as a way of negotiating reasonable compromises.

To be sure, 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, 1987, 356-73). 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 (1988), Habermas especially emphasized the crucial link between modern normative legal institutions and early modern natural law theory. 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 – 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 (Habermas, 1988, 263). The motivation to obey the law out of respect for its intrinsic goodness would require grounding the authority of law in the sacred 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

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” (Kelsen, 1920b, 35).

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 (Habermas, 1988, 264-67). 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 (Habermas, 1988, 274). 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 that just happen to be legally posited by a first legislator (Habermas, 1988, 268-79) 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 (Habermas, 2001a, 770-71, 776-80). 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 (Habermas, 2001a, 774-76).

Although we might concede Habermas’s point that Kelsen under-appreciates the *conceptual* link between post-conventional morality and constitutional law,¹² it would be wrong to conclude that Kelsen

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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 functioning (Habermas, 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 (Habermas, 1987, 142-43; 341-42; 359-60).

overlooks the *functional* conjunction of these terms within modern democracy. Kelsen observes that legal institutions become democratic in response to modern social complexity; furthermore he agrees with Habermas that basic rights and minority protections are *intrinsic* qualities of modern democracy. Finally, 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 (Kelsen, 1955, 4).

Later, in the same work, Kelsen continues:

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, my stress).

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.

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 . . . *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. 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 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,¹³ 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* (Kelsen, 1955, 28, my stress).

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.

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" (Kelsen, 1955, 39). I discuss the implication of this disagreement in Part 4.

3.0 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:

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 (Kelsen, 1933/73, 106-07, my stress).

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 (Kelsen, 1944b, 207-08; Kelsen, 1934/67, 34). 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" (Schmitt, 1932/1996, 54). 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 Souveränität (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. By doing so, it further demolishes the idea of legal pluralism, or the idea that states constitute themselves as independently self-contained and sovereign loci of legal authority. 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 (Kelsen, 1920a, 9-53).

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.¹⁴ 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 matters that affect it, internal as well as external (Kelsen, 1920a, 45), 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 (or treaty ratification)? 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 (Kelsen, 1920a, 196). 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 (Kelsen, 1920a, 206). 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 (Kelsen, 1920a, 129, 134), he notes that it would logically entail an imperialistic power politics at odds with the rule of

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Kelsen's monism, in both its domestic and international applications, has come under attack by pluralists such as F. Rigaux, H.L.A. Hart, and Joseph Raz (Rigaux, 1998; Hart, 1983, 309-42; 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, 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 latter) (Vinx, 2007, 184). 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).

law (Kelsen, 1920a, 317ff); for the destruction of an objective legal order would unleash a solipsistic will to power *incompatible with normativity as such* (Kelsen, 1920a, 315, 317).¹⁵

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 (Kelsen, 1920a, 319). 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 with the creation of 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” (Kelsen, 1920a, 320).

Defending “a [global] monistic constitutional political order” almost a century after these words were penned, Habermas observes that “[t]he classical meaning of sovereignty has already shifted in a direction anticipated by Hans Kelsen (Habermas, 2008a, 449). 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” (Habermas, 2008a, 453). 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 remedy this shortfall, a position that placed him at odds with the Kellogg-Briand Pact (1928) and the Charter, both of which permit only defensive warfare (Kelsen, 1952/1966, 16-87; Kelsen, 1944a, 18; Landauer, 2003). 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

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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 (Morgenthau, 1948; Jütersonke, 2010; Koskenneimi, 2002).

international tribunal (Kelsen, 1944a, 12). 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 (Kelsen, 1944a, 12-15, 19-23). 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 (Kelsen, 1944a, 23-32, 43, 50).

Like Kelsen, Habermas views human rights courts as the centerpiece of any currently feasible global legal regime. That said, his 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 (Habermas, 1998, 187). 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 (Habermas, 2006, 128-38). 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 (Habermas, 2006, 79, 139, 177). 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 (Habermas, 2008a, 444).

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 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” (Habermas, 2008a, 445). 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” (Habermas, 2008a, 445). Because there is no “*institutional framework* for legislative competencies and corresponding processes of political will formation” (Habermas, 2008a, 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 (Habermas, 2008a, 446). 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 (Schmalz-Bruns, 2007, 269-93; Scheuerman, 2008, 133-51). 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 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" (Habermas, 2008a, 448).

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 (Habermas, 2008a, 449)."

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 (Habermas, 2008a, 449).

A Habermasian World Parliament would address "principles of transnational justice from which a global domestic politics should take its orientation" (Habermas, 2008a, 449) 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*" (Habermas, 2008a, 449-50). 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” (ibid), or discussions of justice that theoretically bracket national cultural differences and the potential, discursively testable, overlap and/or convergence between them.

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 (UNSC), 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” (Habermas, 2008a, 451). Indeed, as of 2009, thanks to the unprecedented judicial review and reversal of Security Council sanctions, as well as pressure from lobbying groups in the wake of *Kadi I*, *Kadi II*, and similar cases, reform of the UNSC had partly met Habermas’s stipulation, albeit by non-judicial means, through the creation of an ombudsperson to address individual challenges to the UNSC’s 1267 sanction’s regime.¹⁶

Finally, Habermas believes that the legitimation deficit plaguing transnational negotiations could also be reduced by submitted them to supranational regulation. Given the 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* (Habermas, 2008a, 452, my stress).

¹⁶ UNSC Resolution 1904 (adopted 1 December 2009 and most recently extended by Resolution 2161 in 2014). For further discussion of the *Kadi* case and recent changes in oversight of the UNSC sanctions regime, see Ingram (2014).

I will return to the highlighted part of this passage at the conclusion of this essay insofar as it suggests a qualification of and departure from the monist world order Habermas and Kelsen ideally endorse. It suffices to note in summation that 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 the European Commission for Human Rights – but not directly 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" (Kelsen, 1952/1966, 241). 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 (Kelsen, 1952/1966, 241).

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" (Kelsen, 1952/1966, 242). 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" (Kelsen, 1952/1966, 242).

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," as evidenced by the murderous trade embargo that was imposed on Iraq during the 1990s (Gordon, 2010). Human rights still remain moral aspirations subject to selective politicized enforcement. Although the arguments in support of human rights

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” (Habermas, 2010, 470); viz., their “epistemic status is *beyond state control*” (Habermas, 2010, 469)

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 “fair value” (as Rawls would have it) of these other rights (Habermas, 2001b, 125), he now insists that all three categories of right are “indivisible” or equally necessary (complementary) for realizing *human dignity* (Habermas, 2010, 468-9).¹⁷

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” (Habermas, 2010, 477). 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

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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” (Habermas, 2010, 467-8) – finds earlier mention in *Between Facts and Norms* (Habermas, 1996, 426) without, however, designating the evolving complementarity of rights (Ingram, 2010, 171).

necessary step toward honoring this dignity brings to the fore a universal moral monism whose logical correlate is a fully developed *civitas maxima* (Habermas, 2010, 478).¹⁸

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. The European Court of Justice's recent decision (18 July 2013) to uphold the European General Court's earlier removal of Yassin Abdullah Kadi from a UNSC-imposed sanctions list targeting suspected terrorists (*Kadi I* and *Kadi II*), shows that the courts have asserted their prerogative to subject UNSC decisions to substantive and procedural review.

The ECJ's decision is ambiguous: Does it reflect a regional rebellion against an international legal order or a move to bind an international executive body to international norms of legal due process and human rights? Interpreting the ECJ's decision in this latter sense suggests a stronger analogy between global and domestic models of governance and the peculiar problems of constitutional hierarchy that attend all governmental regimes. 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*

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Although Habermas accepts a monistic understanding of the complementarity of moral elements underlying the concept of human dignity and, therewith, of human rights (see n17), 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, 2012b, 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 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).

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?

4.0 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 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 the democratic deficit attendant on having Platonic philosopher kings legislate from the bench 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 (Kelsen, 1942, 183-200; Ingram, 2014).

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 these same 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" (Schmitt, 1931, 42). 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” (Kelsen, 1931, 609). Habermas, of course, agrees with Kelsen, but defending the supremacy of the judiciary because it is less political than the supreme executive and the legislature depends, once again, on the dubious assumption that judicial review, like any ordinary act of adjudication, involves applying the law and not creating it. Habermas’s occasional tendency to construe adjudication as a technical form of applying rather than creating law not only runs afoul of common law jurisprudence (judge-made law) but it occludes the way in which constitutional courts unavoidably develop the law by providing novel justifications and interpretations not expressly contemplated in legislative debates and subcommittee hearings (Zurn, 2007, 243-52).

In his response to Schmitt, Kelsen likewise falls back on the idea that judicial review, no less than ordinary adjudication, is a species of law application, albeit with a difference: “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 production of the norm” (Kelsen, 1931, 590). 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 under review must not only be undertaken by a body that has been specifically authorized as competent to act in this way by the constitution (the legislature), 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, mainly by nullifying statutes that threaten to undermine them.

That said, there is no disputing that constitutional courts do not stop at nullifying statutes but undertake acts of interpretation that extend and deepen the meaning of the constitution (Habermas, 1996, 243). 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 (1986) 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. To quote Habermas at length on this subject:

When Dworkin speaks of arguments of principle justifying judicial decisions externally, in most cases he has legal principles in mind in any case, that is standards that result from the application of the discourse principle to the legal code. The system of rights and constitutional principles are certainly indebted to practical reason, but they are due in the first instance to the special shape this reason assumes in the principle of democracy (Habermas, 1996, 206). . . This explains why landmark decisions and important precedents usually admit reasons of extralegal origin, hence pragmatic, ethical, and moral reasons, into legal discourse (Habermas, 1996, 207). . . Rules and principles both serve as arguments in the justification of decisions, though each has a different status in the logic of argumentation. Rules always contain an "if" clause, specifying the typical situational features that constitute the features of application, whereas principles either appear with an unspecified validity claim or are restricted in their applicability only by general conditions that require interpretation (Habermas, 1996, 208). . . From Dworkin's perspective, positivists are forced to reach decisionistic conclusions only because they start with a *one-dimensional* conception of law as a system of rules without principles (Habermas, 1996, 209). . . 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 (Habermas, 1996, 211).

Presumably it is the more substantive layer of principled reasoning noted above that prevents constitutional interpretation from descending into the void of political casuistry. However, Habermas doubts whether a positivist jurisprudence restricted to rule application of the sort he imputes to H.L.A. Hart – and by extension to Kelsen – can avoid 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. Judges 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 (Habermas, 1996, 202-03).

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 a path upon which its concrete application must follow. If it does not, then, as legal realists argued, 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.¹⁹

¹⁹ For Habermas's confrontation with legal realism and critical legal scholarship (CLS), see Ingram (2002).

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” (Kelsen 1955, 78). Kelsen thus concludes, in keeping with Justice Oliver Wendell 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” (Kelsen, 1955, 79). 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 (Kelsen, 1946, 130, 144).

As we have seen, this reflexivity (circularity) in the way law is validated, interpreted, and created belies the hierarchical image of a self-contained legal system grounded in a basic norm. The infusion of indeterminacy in the meaning of law generated by its reflexive application is nonetheless 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 (Kelsen, 1946, 150). 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 (Kelsen, 1946, 145, 150).

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. To begin with, it is impossible to conceive a system of law that retains its ideal unity, identity, and determinate meaning throughout historical acts of reconstructive interpretation.

In criticism of Dworkin’s version of the coherence theory, it has been objected that a rational reconstruction of past decisions requires their revision from case to case, which would amount to a retroactive interpretation of existing law. . . . [T]he element of surprise in each new case now seems to draw theory itself into the vortex of history. The problem is obvious: the political legislator must adaptively react to historical processes, even though the law exists to erect walls of stable expectations against the pressure of historical variation (Habermas, 1996, 219).

Added to this problem is the practical difficulty of conceiving such a coherent system of law in its relationship to the political and social system. The full range of arguments that enter into judicial decisions include the very same pragmatic, ethical, and moral arguments that enter into legislation, albeit within the context of “discourses” of applying – rather than of justifying – norms (Habermas, 1996, 230). But pragmatic and ethical arguments are not straightforwardly true or right but probable or value-maximizing relative to some taken-for-granted purpose, value, or good (Habermas, 1996, 232).

In sum, 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.” For Habermas, this “absolutist ideal of a closed theory” not only resembles metaphysical, natural law reasoning but is not entirely plausible, empirically or practically (Habermas, 1996, 219, 227, 233). 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” (Habermas, 1996, 232). 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 (Habermas, 1996, 221).

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” (Habermas, 1996, 221-22). A proceduralist (discourse theoretic) paradigm of 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” (Habermas, 1996, 220, 224, 232).

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.

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 (*Verfahrung 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” (Kelsen, 1928/1968, 1859). This stipulation regarding constitutional procedures complements Kelsen’s insistence that parliamentary procedure guarantee representation of electoral minorities. Finally, Kelsen shares Habermas’s discourse theoretic 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*) (Kelsen, 1928/1968, 1860).

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, where Habermas highlights the dangers of jurisprudential idealism.

Ely is justified in taking a skeptical view of a paternalistic understanding of constitutional jurisdiction (Habermas, 1996, 266) [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 (Habermas, 278-79).

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 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.

5.0 International Courts: A Test Case for Legal Monism

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 Koskenneimi 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 (Koskenneimi, 2009, 7-19).

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. Citing numerous cases in which international courts were forced to choose between competing legal perspectives from which to interpret a conflict, Koskenneimi notes that the shift from the old power politics of state sovereignty to the new rule of law has not led to a corresponding constitutional

privileging of human rights over power politics (Koskenneimi, 2009, 2007).²⁰ If anything, it has obscured the politics of “forum shopping” and global influence peddling behind the façade of institutional expertise, as if law were the “technical production of pre-determined decisions by some anonymous logic” (Koskenneimi, 2009, 29).

Koskenneimi places hope in the redefinition and democratization of functional legal regimes (“giving voice to those not represented in the regime’s institutions”). However, he remains dubious about whether instituting a legal hierarchy of the sort proposed by human rights monists such as Kelsen and Habermas would circumvent elitism or politicization. Unfortunately, there are no simple, unproblematic recipes for implementing global constitutional review. Instituting this function within the legislature or executive administration threatens politicization; instituting it within the judiciary threatens politicization *and* elitism.

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

²⁰ For example, in opposition to the Israeli government’s insistence that building the Palestine Wall flowed from its right to defend against terrorist attacks, the International Court of Justice’s Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) interpreted this act as a violation of Palestinian’s right to self-determination as well as a violation of their human rights to liberty of movement (as specified under Article 12 of the International Covenant on Civil and Political Rights [ICCPR]) and to work, to health, to education, and to an adequate standard of living (as specified by the International Covenant on Economic, Social, and Cultural Rights). In the *Al Jeddah* case (2005), by contrast, the High Court of Justice of Britain appealed to the law of security in denying relief under the British Human Rights Act of 1998 to the plaintiff – a dual Iraqi-British citizen, who had been detained for ten months without charge. In another case, *Legality of the Threat or Use of Nuclear Weapons* (1996), the ICJ observed that both the law of armed conflict and the ICCPR applied equally to the strategic use of nuclear weapons. In deciding that the law of armed conflict was more directly relevant to the use of nuclear weapons (applying the principle of *lex specialis*), it favored a narrow interpretation of ICCPR Article 6’s clause concerning the “arbitrary deprivation of life.” Critics of this interpretation argued that the ICJ had made an error in its judgment about which legal regime was more relevant to the “arbitrary deprivation of life” inasmuch as nuclear weapons are weapons of mass destruction that technically have no strategic military use. Finally, the case involving the environmental impact of the MOX Plant nuclear facility at Sellafield, UK illustrates how different legal institutions, each with its own jurisdiction, frame the issue of impact from their own perspective. Is the issue to be decided by the Arbitral Tribunal responsible for adjudicating matters that pertain to the United Nations Convention on the Law of the Sea (UNCLOS), the tribunal established by the Convention on the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), or the European Court of Justice (ECJ) under the European Community and Eurotom Treaties? As the Arbitral Tribunal for UNCLOS observed, even if the other two tribunals applied rights and obligations that were similar or identical to those of UNCLOS, they would do so relative to their own peculiar context, objective, purpose, case law, and historical experience (Koskenneimi, 2007, 7).

cleansing, genocide, and so on. In many cases, such as the US-backed sanctions regime against Iraq (Gordon, 2010) or the decision by the UN High Commissioner on Refugees to forcibly repatriate refugees to war-torn areas in central Africa, 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 (Barnett, 2010).

Fragmentation of international law clearly threatens legal monism. But the utopian image of a centralized legal hierarchy commonly associated with Kelsenian and Habermasian monism is misleading.²¹ Given the logical gap between higher-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. However, it will also 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 institutionalizing constitutional review in the legislation, adjudication, and execution of international law. 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 (Ingram, 2014).²² Although these latter 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. 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 object that there remains an inextricable tension between human rights and domestic rights.

²¹ ‘Monism’ can mean either the *constitutional* incorporation of international law into domestic law (as in the case of the Netherlands or South Africa) in contradistinction to its selective domestic inclusion by way of treaty ratification (as in dualist systems such as the United States); or it can mean the centralization (constitutionalization) of an international legal order analogous to the state-centered organization of domestic law – the meaning intended here.

As noted above, Kelsen's understanding of the reflexive 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 institutionalization of international law under aegis of a centralized (monistic) human rights regime (Kelsen, 1920b, 19-26; Brunkorst, 2009, 232; Zurn, 2007).

Even stalwart monists like Kelsen and Habermas concede 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 postponing centralized juridification. But without this further step toward constitutionalizing international law, we find ourselves once again staring at the Schmittian abyss (Koskenneimi, 1990, 4-32; Fischer-Lescano and Teubner, 2004).

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