

Law, Sovereignty, and Democracy: Hans Kelsen's Critique of Sovereignty

Petra Gümplová

Abstract

This paper analyzes Hans Kelsen's critique of sovereignty. I argue that Kelsen's critique of sovereignty is based on a misleading and obsolete view of sovereignty which translates into his contested notion of the basic norm and hence his "monistic" theory of a legal system and international law. The implausibility of the monistic approach to law is shown not only on the theoretical level but also in the light of recent processes of pluralization and fragmentation of legal systems. The second part of the paper takes up Kelsen's very much neglected theory of constitutional democracy. By focusing on Kelsen's conception of the autonomy and the dynamics of lawmaking I try to show that Kelsen in fact relies on a notion of sovereignty quite different from the one he attempts to eliminate from legal and political theory. I argue that such an alternative notion of sovereignty represents an indispensable feature of constitutional democracy—and also a possible missing link between Kelsen's legal theory and theory of democracy. The article concludes by addressing the question of the relationship between sovereignty and constitutional democracy and the impossibility of the realization of the latter without the former.

Hans Kelsen's critique of sovereignty represents one of the most elaborate attempts to eliminate sovereignty not only from the internal political realm of the state, but also from the external sphere of international relations. If only for this reason, the theory of this unjustly neglected philosopher should be examined today when many thinkers believe that we have finally displaced the concept of sovereignty in legal and political theory as well as in practice and finally entered in the much hailed "post-sovereign" era. Kelsen's theory demonstrates that the endeavor to get rid of sovereignty can never be quite successful, especially when one accepts the basic normative aim of his theory—to help to realize fully the ideal of the rule of law and use it to reinforce the theory of liberal democracy.

It has become a commonplace to say that Kelsen's profound attack on sovereignty is the result of his epistemological project of a strictly scientific legal theory which specifies law as a unique phenomenon purified of empirical, political or moral phenomena. I believe that Kelsen's legal theory is driven rather by the normative goal to politically "depersonalize" law, that is to explain the validity of law without the reference to the action of a person—the sovereign. Kelsen was fully committed not primarily to scientific description of law, but above all to the normative idea of the rule of law as opposed to the rule of men. He was convinced that fulfilling of the ideal of the rule of law can best prevent arbitrary abuses of state power and bring about peace and

freedom in modern society. Law in Kelsen's theory has this unique double normative purpose: it enables peaceful, nonviolent arbitration of conflicts both between individuals and the states,¹ and it preserves individual freedom to the largest extent possible, especially when organized in conformity with principles and institutions of constitutional democracy.²

According to Kelsen, sovereignty represents the fundamental obstruction to the full realization of the rule of law. Kelsen chooses a peculiar way to prove his point and it is precisely his strictly value-neutral, theoretical strategy due to which his work has been misread too often as an obsolete neokantian project that seeks to formulate the "pure" theory of law.³ His strategy is to show that no such concept as sovereignty is necessary for theoretical explanation of the imperative character of law and for locating the ultimate source of validity of legal norms. The main reason for such an unprecedented and wholesale denial of sovereignty which grants Kelsen a solitary place in legal and political theory, remains a normative one—Kelsen believes that the irreducible dualism of law and sovereignty makes room for the uncontrollable exercise of political authority. For Kelsen, sovereignty represents a relic of absolutism and a disguised autocratic claim to power which can justify disrespect for existing positive law. The pure theory of law is designed deliberately to bypass the concept of sovereignty and thus to advance legal and political development toward the formal rule of law which finally displaces subjectivity from political governance and confines arbitrariness of personal authority in a system of objective legal norms.⁴

Critique of the Dualism of Law and Power

The most fundamental problem inherent in the concept of sovereignty is, according to Kelsen, that it operates with an irreconcilable duality of law and power. Kelsen proceeds from the common understanding of sovereignty as the purely political concept referring to the "absolute and unlimited state power" understood as the ultimate source of the validity and compulsoriness

¹ Hans Kelsen, *Law and Peace in International Relations* (Cambridge, MA: Harvard University Press, 1942), 12.

² Hans Kelsen, "Foundations of Democracy," *Ethics*, Vol. LXVI, No. 1. Part II (1955): 18–19. Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Tübingen: J. C. B. Mohr, 1929), 4.

³ An exception in the research on Kelsen represents a recently published book which extensively elaborates on what has also been my intuition about Kelsen's work, namely that it is deeply committed to the ideal of rule of law and constitutional democracy. See Lars Vinx, *Hans Kelsen's Pure Theory of Law. Legality and Legitimacy* (Oxford: Oxford University Press, 2008).

⁴ For emphasizing this as one of the main aims of the pure theory of law see also Henry Janzen, "Kelsen's Theory of Law," *The American Political Science Review* 31:2 (1937): 205.

of legal norms.⁵ It is a familiar conception of sovereignty derived from Hobbes's work in which sovereignty was defined as the supreme authority embodied in one person who has the absolute and unlimited power to make law by his command. Ever since Hobbes it has been assumed that sovereignty represents power in the sense of pure facticity, a sheer force unlimitable by law. Kelsen presupposes this notion of sovereignty derived from Hobbes's conception and assumes that the logic of the concept implies that sovereign power must be characterized by non-derivability, originality, indivisibility, and unity of its source and unlimitedness of its exercise. His aim is to offer a radical response to the ambiguous legacy of this early modern paradigm of sovereignty since it involves no protection against autocratic implications based on sovereignty claims.

Kelsen's argument is that this dualism is theoretically incoherent since the political authority of the state is conceived prior to the law and potentially dangerous since the capacity to act without legal authorization is considered the essential element of statehood. Kelsen sets for himself the task to overcome this dualism by proving that the concept of sovereignty is jurisprudentially inconceivable in the first place. His critique of sovereignty employs two related arguments regarding two traditional expressions of sovereignty. First, there is the critique of the idea of the sovereignty as the ultimate source of law and the introduction of the concept of the basic norm; second, there is the critique of power as the explanation of the coercive character of law and the introduction of the concept of the legal efficacy. Let me summarize both arguments in turn.

To prove that the concept of sovereignty is not necessary for the explanation of legal validity Kelsen comes up with a strictly "normativist" account of the normativity of law. Legal norms are not valid because they are compatible with moral values or because they are commanded by the sovereign. The widely accepted view that sovereignty is the ultimate source of law which is placed somewhere above the law is wrong according to Kelsen. To him it is a naive theory derived from absolutist thought and a typical manifestation of an unacceptable personification of law and the state which continues to plague legal and political theory well into the twentieth century. Kelsen argues that no source of power can be found which would be original, highest and entirely self-sustaining. To have the highest power in the social context

⁵ Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Reinheim: Scientia Aalen, 1960), 3.

means that a person has the authority to act as a superior. However, this authority can only be exercised within the framework of some normative order. Sovereignty understood as the highest power distinct from the legal is a nonsensical notion for Kelsen.⁶

Law does not need a source placed somewhere above it, least in the form of a personal bearer such as the sovereign. Kelsen argues that legal science cannot accept that the source of the validity of legal norms would be such an extralegal phenomenon. Law can only be regarded as valid insofar as it is created in accordance with a definite rule.⁷ In Kelsen's theory, the validity of a legal norm is thus established by procedural appeal to the higher-level norm, whose validity is established by appeal to its higher-level norm and so on, until the highest level of norms is reached—the basic norm, the ultimate norm which cannot be derived from any other superior norm. The basic norm is the postulated ultimate rule, an authorizing norm according to which the norms of this order are established and annulled. Its validity must be simply presupposed, but that is the only solution to the problem of the infinite regress implied in looking for the ultimate source of law.⁸

In Kelsen's theory it is the basic norm that explains the validity of legal norms and is at the core of his vision of pure legal normativity based on the idea that a legal norm can be derived only from another legal norm. With the presupposition of the basic norm, Kelsen can claim that any conception of legal validity derived from the concept of sovereignty as the highest political authority prior to the law is implausible and redundant. Equally misleading is according to Kelsen another common view, namely that sovereignty represents the phenomenon of power back of the law, in other words the coercive violence which sustains the imperative nature of norms. Kelsen argues that the power behind law always refers to the authorized power which is the right or a competence derived from a norm.⁹ It can only be described as the efficacy of the order regulating

⁶ Kelsen, *Das Problem der Souveränität*, 7–9; *Law and Peace*, 68.

⁷ In Kelsen's theory, legal norms are essentially statements about what "ought to" be done. The concept of "ought to" is part of Kelsen's extensively discussed distinction between *Sollen* ("ought to") and *Sein* ("is") inspired by a neokantian methodological distinction derived from Hume's and Kant's theory and is the core of his normativist approach to law. Kelsen uses this distinction for separating the world of legal "normativity" from that of empirical "facticity" which describes law as a matter of a fact or the actual behavior of men. See Hans Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Oxford: Oxford University Press 1992), 22–25.

⁸ For Kelsen, the basic norm is a hypothetical condition of possibility of legal science without which it would not be possible to interpret law as normative. Discussing this ambiguous definition which clearly places the basic norm outside of the positive law is one of the favorite topics in Kelsen's scholarship. See for instance Stanley L. Paulson, "On the Puzzle surrounding Hans Kelsen's Basic Norm", *Ratio Juris* 13, no. 3 (2000): 279–293.

⁹ Kelsen, *Das Problem der Souveränität*, 57; *Law and Peace*, 68–69.

the conduct of individuals. The element of coercion which is essential to law's efficacy consists not in physical compulsion, but in the fact that specific sanctions are provided for in specific cases by the rules which form the legal order. Such a legally authorized violence is not the power in a true sense of the meaning, but a legally defined competence. Violence can by no means sustain the efficacy of legal norms.¹⁰

There is "the force of law" according to Kelsen, but there is nothing mystical or sovereign to it.¹¹ Law is indeed a coercive order which compels to social conduct through the threat of sanctions. But the ultimate *normative* aim of law is the sustenance of peace, in other words the condition in which there is no use of force in relations among individuals. To establish peace, Kelsen argues, law therefore monopolizes the employment of force in the hands of the state rendering thus all uses of coercive force in society not authorized by the law legally impermissible delicts. In Kelsen's view, no legal order can fail to sanction all unauthorized violence since its essential purpose is to assure that people settle their conflicts without the use of force, in conformity with an order valid for all. Insofar as law is the condition of monopoly of force, it is the state of peace. The basic norm, the ultimate source of validity of all legal norms in a system ensures that coercive force is applied in accordance with the norms authorized by it.¹² Force is thus the fundamental and inescapable element of legal normativity because legal order is essentially an order for the promotion of peace. Yet, it has nothing to do with the sovereign power which is for Kelsen a nonsensical notion, jurisprudentially as well as empirically.

Identity Thesis and the Problem of Legal Legitimacy

Kelsen's critique of sovereignty needs to be read as an attempt to overcome the dualism of law and sovereign power which escapes legal authorization. Kelsen rightly observed that this dualism has become the cornerstone of modern political science and jurisprudence. Most thinkers took for granted that the state could not be understood only as a juristic entity, that it is unavoidably both a fact of power that can only be understood politically *and* a normative order

¹⁰ Kelsen, *General Theory of Law & State*, 30; *Das Problem der Souveränität*, 17.

¹¹ The phrase "force of law" alludes to Derrida's essay in which he argued that the origin of the political authority cannot by definition rest on anything but on the act of sovereign violence. Jacques Derrida, "Force of Law. The "Mystical Foundation of Authority", in *Acts of Religion*, edited by Gil Anidjar (New York: Routledge, 2002): 241–242, 272.

¹² Kelsen, *General Theory of Law & State*, 21–22. See also Kelsen, *Law and Peace*, 1, 12.

bound to the rule of law. According to Kelsen, this dual perspective is wrong, theoretically indefensible and dangerous as it makes room for the government without the control by law or ignoring existing law whenever it does not suit the state's interests. He demonstrates that law is an autonomous, self-sustaining normative phenomenon which does not require any extralegal notion for the explanation of its origin, its efficacy, and its operation. There is no outside of law, no mystical sovereign authority which is in a close relationship with law, yet stands above law and is fundamental for its creation and sustenance. Only norms generate norms and the only legitimate power in the society can only be impersonal violence authorized by valid legal norms.

The conceptual solution to the problem of the duality of law and sovereignty offered by Kelsen is the so called "identity thesis" according to which the state cannot be understood as anything else but the legal order itself. Only by conceiving the state as identical with its legal order it is possible to avoid the error of viewing it alternately from two antithetical perspectives—from the perspective of the legal order and from the perspective of the political power irreducible to legal order.¹³ Kelsen argues that the supreme authority of the state is derived from the rules of this order. There is no ultimate power, only the ultimate possibility to determine the legal order which is derived from the basic norm. Once the basic norm is presupposed, legal science can reject the dualist view because the state capable of legally unauthorized action is jurisprudentially inconceivable. This is Kelsen's main argument: if the state is considered to have the power to override constitutional norms on the basis of an appeal to its sovereign authority, then these norms lack legal force. And conversely, governmental actions that violate those norms cannot qualify as legitimate exercises of public power.¹⁴

Kelsen thus rejects all non-legal notions of the state. There is no person behind the legal order, no ethical life or a supreme association, the state is just the system of valid and efficacious positive norms, legal rights and duties attributed to authorized persons. It needs to be highlighted that this is a truly revolutionary concept which places Kelsen well beyond the mainstream analytic jurisprudence and the continental legal positivism preoccupied with the concept of the

¹³ Georg Jellinek, the most influential legal theorist of the German Empire, maintained for instance that the state is unavoidably both the fact of power and the normative order bound to the rule of law. As the legal order, it is dependent for its creation and protection on the state as a fact of power and therefore it cannot commit itself unconditionally to act in accordance with the rule of law. For Jellinek, the state's commitment to normative order can only be a matter of voluntary self-limitation. Georg Jellinek, *Allgemeine Staatslehre* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1960), 367–375.

¹⁴ See Kelsen, *Der soziologische und der juristische Staatsbegriff*, 86–91 See also Vinx, *Kelsen's Pure Theory of Law*, 20.

Rechtsstaat. Kelsen's model of the *Rechtsstaat* is literally the "rule of law state" which not only exercises power in strict accordance with law, but is itself a purely juristic entity, reducible completely to its legal order. Until Kelsen, it was unequivocally assumed that *Rechtsstaat* was a state-centered polity in which the theoretical sovereign may have been the law, but in which the actual sovereign was above the law. Despite being understood as the state in which the exercise of power is constrained by law, the tension between the legal order and the state's political authority was always resolved by most thinkers before Kelsen in favor of the state's superiority to positive law.¹⁵

Many interpreters of Kelsen have expressed doubts whether the identity thesis based on the model of pure legality derived from a hypothetical basic norm can provide with sufficient constraints on the actions of the state and thus sustain the rule of law as a normative political ideal.¹⁶ Given the failures of legality to provide protection from the abuses of power in the 20th century and the role law played in these abuses, the skepticism toward the conception of pure legality to become the sole basis of legitimacy of the political power is justified. The problem lies especially in Kelsen's insistence that the identity thesis is a neutral methodological principle which is not supposed to be committed to any particular conception of the state and infer anything about the scope of its legitimate powers. It follows from the identity thesis that no matter how just or unjust, all states should be respected merely because they are instances of legal order.

Kelsen refused any relationship between legality and justice because he was obsessed with avoiding the view that positive law can be legitimate if it conforms with values external to positive legality. Therefore he introduced the fiction of the basic norm. He may have succeeded in explaining the link between legal normativity and political legitimacy independent of the substantive conception of justice. But he could not avoid entirely the moment of the exercise of the sovereign will prior to the authorization by the positive law and the moment of rupture in legal continuity. In his theory, the hypothetical basic norm is transformed into the system of positive law through the constitutive act of the historically first legislator. To presuppose the basic norm, according to Kelsen, means in practice to accept the factual event of the making of

¹⁵ For an instructive analysis of the development of the concept of the *Rechtsstaat* see Girish N. Bhat "Recovering Historical *Rechtsstaat*," *Review of Central and East European Law* 32 (2007): 69.

¹⁶ See for instance Joseph Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 210–228.

the historically first constitution which confers law-creating power on the act of the first legislators and to which the norms of a given legal order (and all successive legal orders) can be traced back through an unbroken chain of validity. No matter who created it, how and what is its content, this constitution has to be considered as objectively valid and as validating all norms that were created in accordance with it.¹⁷

Norms deriving their legal validity from a contingent fact of the historically first constitution are not the only problem with Kelsen's conception of legality. Kelsen's pursuit of the legalist account of legal validity which requires the refusal of the political and moral justification of legitimacy of law leads to the theory according to which a formal, proceduralist conception of legality is the only basis of the legitimacy of law. But *validity* of law derived from the procedural appeal to a higher-level norm is insufficient to provide the basis of *legitimacy* of law. What the procedural concept of legal validity does not answer is whether law duly made according to authorizing procedures can be reasonably accepted as legitimate by those who are its addressees. Jürgen Habermas has shown in his discourse theory of law and democracy that the legitimacy of the positive law stems not just from its mere legality and that law can be legitimate while at the same time not derived from a superior moral or natural law. According to Habermas, the legitimacy of law as rational acceptability of law can be achieved when the people understand themselves as authors of those laws they are supposed to obey as addressees. The source of the legitimacy of law is in the participation of politically autonomous citizens in the democratic lawmaking process.¹⁸

It seems that Kelsen's identity thesis can work only when based on a normative conception of legality supplied with ethical-political principles which provide more substantive restrictions on the state's actions and thus protect citizens from the abuses of power by legal means. As Lars Vinx has shown in his innovative study of Kelsen, there are ample resources in Kelsen's own work which make a "thicker" normative reading of the identity thesis plausible.¹⁹ The conception of pure legality can be reinterpreted as the conception of a justified legality with the help of Kelsen's unjustly neglected theory of democracy. With its stress on autonomy of the legal-political order that can be achieved by the democratic participation in the lawmaking, on the protection of the individual and minority interests by constitutional guarantees, and on the

¹⁷ Kelsen, *Introduction to the Problems of Legal Theory*, 56–58. Kelsen, *General Theory of Law & State*, 115 - 116.

¹⁸ Jürgen Habermas, *Between Facts and Norms* (Cambridge: MIT Press, 1998), 121.

¹⁹ Vinx, *Kelsen's Pure Theory of Law*, 15–29, 59–67, 101.

impartial administration of law, Kelsen's theory of democracy supplies the missing normative dimension necessary for understanding his "utopia of legality" as a normative political ideal.²⁰

Sovereignty of Law and Monistic Conception of a Legal System

Kelsen's endeavor to reinforce the authority of the rule of law and establish a strictly normativist approach to law must be appreciated as utterly unique. His work represents an isolated attempt to renew the formalist, proceduralist, and pacifist legal discourse in the midst of the hopeless distrust in the rule of law expressed on one hand in the anti-enlightenment critical theory approach to law which denounced law as the utmost expression of the destructive instrumental rationality, and on the other hand in the work of Carl Schmitt who fiercely attacked formalism and normativism of liberal jurisprudence and endorsed the indeterminacy and unlimitedness of a sovereign political decision.²¹

It is the biggest paradox of Kelsen's theory that the project of reinforcing the rule of law did not compel Kelsen to abandon the concept of sovereignty entirely. In fact, Kelsen accepts the idea of sovereignty as meaningful provided that sovereignty is understood as a property of the legal order.²² This unexpected move appears little less surprising when we look closely at how Kelsen characterizes the legal system. In virtue of being derived from an original basic norm not derived from any other higher norm the legal order can be characterized as absolutely highest, independent, exclusive within a territory. It is also unified and gapless since all norms that belong to it depend on one single basic norm. The unity, exclusivity, and independence are consequences of the juridical condition, not the political condition. Hence, sovereignty makes a perfect sense as

²⁰ "Utopia of legality" is Vinx's description of Kelsen's project. He shows convincingly that the legal order portrayed in Kelsen's paradigm of pure legality does not make claim to legitimacy based on the absolute justification of the basic norm, but on behalf of *all* norms that have membership in it. In Kelsen's "utopia of legality", the state's decision have legitimate authority only if they are taken in *full* compliance with all relevant higher order legal norms, including *all* applicable higher-order material norms. The principles and institutions of constitutional democracy substantially enhance the *degree* to which the legality-based claim to legitimacy can be achieved. Vinx, *Kelsen's Pure Theory of Law*, 25, 66–67, 83.

²¹ Kelsen's *Das Problem der Souveränität und die Theorie des Völkerrechts*, the book in which he systematically exposes the critique of sovereignty, was published in 1921, the same year in which Walter Benjamin published his famous essay *Critique of Violence*, a text that praises divine, sovereign violence against the existing corrupt and rotten legal order. This text was highly acclaimed by Carl Schmitt. See Walter Benjamin, "Critique of Violence," in *Selected Writings*, Vol. 1 (Cambridge: The Belknap Press of Harvard University Press, 1997), 236–252.

²² Kelsen, *Das Problem*, 12–14, 36–38.

the feature of law.²³ It is one of the biggest paradoxes of Kelsen's theory that sovereignty, this eminently political concept indicates the independence of law from politics (as well as from justice, morality, religion etc.).

Kelsen thus transforms the theory of sovereignty into the theory of the identity of the legal system derived from the basic norm. The transformation is possible by preserving all important tenets of the early modern paradigm of sovereignty and making them essential attributes of the basic norm—singularity, exclusivity, indivisibility, and absoluteness. Kelsen's critique of sovereignty represented by his identity thesis and the claim that the state can be sovereign only insofar as it is itself identical with a legal order that possesses absolute normative independence thus relies on those features of sovereignty that made Kelsen refuse the power theory of sovereignty. Not only represent these features a historical variant of the concept elaborated for the purpose of defending absolute monarchy; the indivisible, exclusive, unified and hierarchical model of sovereignty is useless for analyzing legal reality in modern society.

The unitary and absolutist model of sovereignty has been made implausible with the advent of constitutionalism and democracy. The claim to the ultimate political authority included in the notion of sovereignty does not compel us to interpret sovereignty in terms of singularity of its source and unlimitedness of its exercise. These features reflect a variant of the theory of the form and the location of the supreme authority elaborated for the purpose of defending the absolute monarchy or the nineteenth century *Rechtsstaat*. However, the core idea of sovereignty is reinterpretable for modern constitutional democracy where sovereignty is dispersed in various state offices and governmental institutions and limited by the rule of law. Instead of reinterpreting sovereignty, Kelsen only shifts from one misleading monocular conception to another. The logic of the old paradigm of sovereignty compels Kelsen to assume a monistic approach to analyzing legal systems the outcome of which is the theory of the identity of the legal system derived from the basic norm. The basic norm, as we have seen, is the postulated ultimate singular rule according to which the norms of a given order are established and annulled. It accounts for the unity of norms belonging to one and the same legal order and hierarchical ordering of norms in a legal system. All norms in a legal system have to be deducible from the same basic norm in an unbroken chain of validity, otherwise the unity and identity of the legal order would be

²³ Kelsen, *Das Problem der Souveränität*, 27, 38–39, 74–75.

compromised. Like Hobbes's sovereign, the basic norm is the ultimate, singular and indivisible source of validity of legal norms.

Kelsen's monistic conception of the legal order extends beyond a particular regime and comprises whole historical continuity of the state from the first constitution. Despite regime changes that occurred in another way than prescribed by the constitution (revolutions or coups d'état), the identity of a legal system is derived from this historically first constitution provided the territory remains by and large the same and legal order efficacious. A victorious revolution or a successful coup d'état do not destroy the identity of the legal order which it changes because they are mere modifications of the old order, not law-creating facts that constitute a new order.²⁴ This is obviously a controversial view. Not only does this view fail to make any normative distinction between different forms of regime changes, but it makes it impossible to see democratic revolution or the independence as a new beginning and the foundation of a new legal-political order.²⁵

Kelsen's vision of the hierarchical unity of norms and especially the singularity and exclusivity of their source is untenable. Joseph Raz pointed out that the claim that two norms are linked together in a chain of validity is insufficient to ensure that they form a part of the same legal system and that it is possible, conversely, for two laws to belong to the same legal system even if there is no common basic norm authorizing the creation of both.²⁶ It is not an unbroken chain of validity leading to one basic norm which determines the membership of a norm in a legal system. As H.L.A. Hart has argued, the membership of a norm in a legal system can only be determined through the practice of identification that characterize the process of applying law, not the procedural appeal to its origin. To answer the question of the identity of a legal order, we must look at facts through which an order is created and applied, especially at courts as primary law-applying institutions. If there are norms applied by the same courts, they form part of the

²⁴ "No jurist doubts, for instance, that it is legally the same Russian State that existed under the tsarist constitution and that now exists under the bolshevist constitution and under the new name of U.S.S.R." Kelsen, *General Theory of Law & State*, 220–221, 368.

²⁵ For the critique of the basic norm from the viewpoint of normative foundations of democracy see Andreas Kalyvas, "The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory," *Philosophy and Social Criticism* 32, no. 5 (2007): 573–599.

²⁶ Joseph Raz, "Kelsen's theory of the Basic Norm," in *The Authority of Law. Essays on Law and Morality* (Oxford: Oxford University Press, 1979), 127–128. H.L.A. Hart, "Kelsen's Doctrine of the Unity of Law," in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 319. See also Joseph Raz, *The Concept of Legal System. An Introduction to the Theory of Legal System* (Oxford: Oxford University Press, 1983), 95–108. For the discussion of this critique of Kelsen's theory see Vinx, *Kelsen's Pure Theory of Law*, 184–194.

same legal system without being necessarily derived from the same basic norm. When looked at from this perspective, the determinate identity of a legal system can exist not by virtue of one basic norm, but only once there is a system of courts such that all and only the norms recognized by these courts form part of the legal system.²⁷

There are numerous instances in contemporary legal reality which contradict Kelsen's vision of the unity and exclusivity of normative systems, emerging especially as a consequence of the process of globalization which has had a great impact on legal pluralization and fragmentation. Nation-state law is now overlain by transnational legal regimes and competes with global judicial authorities which define the reach of their jurisdiction along issue-specific rather than territorial lines, and which create norms through other mechanisms than state-based legislative bodies.²⁸ The norms created by these legal instances become valid norms in national legal orders without being derived from the same basic norm. Where systems overlap, neither is necessarily a part of the ultimate reason for the validity of the other, nor we have to presuppose some common reason for validity external to them both. It thus seems necessary for us to embrace a more diffuse view of law. Exactly as Kelsen moved beyond the idea that all law originates from a single power source like the command of the sovereign, he needs to admit that not all norms of a given legal system originate in one basic norm.

Legal Cosmopolitanism and the Primacy of International Law

Kelsen uses his monistic perspective not just as the basis of his identity thesis, but also to prove the unity of municipal and international law and to support his vision of cosmopolitan legal order. It is the biggest paradox of Kelsen's theory that his idea of sovereignty of the legal order which perpetuates the basic assumptions of the classical sovereignty paradigm is used to buttress the conception of international law, presented by Kelsen as the ultimate end of the critique of sovereignty. As a result, the theory of international law is undermined by the assumptions of the notion that it was supposed to eliminate from legal theory of international relations.

²⁷ Hart, "Kelsen's Doctrine of the Unity of Law," 309–342. Joseph Raz, *The Concept of Legal System. An Introduction to the Theory of Legal System* (Oxford: Oxford University Press, 1983), 95–109.

²⁸ See Andreas Fischer-Lescano, Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law* 25 (Summer 2004): 999–1046.

Kelsen elaborates on the theory of international law extensively in his first major book *Das Problem der Souveränität und die Theorie des Völkerrechts* where he also systematically presents his critique of sovereignty and uses it exactly in the project of reinforcing the authority of international law.

In this book, Kelsen discusses the “dogma of sovereignty”, as he puts it in this context, as the major impediment in the development and the unification of the international law and thus an obstacle to establishing a peaceful world order. According to Kelsen, the claim to the state’s sovereignty is incompatible with the international law and disguises the ideology of imperialism which seeks to advance the power of one state whenever there is a conflict between the state and international law.²⁹ Here, Kelsen proves himself to be a pacifist who firmly believes in international law as an instrument of peaceful arbitration of conflicts between states and who was deeply convinced about the primacy of international law and viability of legal cosmopolitanism. However, he feels compelled again by his scientific commitments to hide his normative motivations in sophisticated theoretical argumentation.

Kelsen comes up with an approach unique in interwar Europe and highly critical of the dominant theories of his time that claimed for the most part the primacy of state law over international law. Insofar as these theories claim the primacy of state law, they necessarily fail, in Kelsen’s view, to confirm the objective existence and obligatory nature of international law.³⁰ Therefore, Kelsen seeks to postulate the theory which would confirm the objectivity of international law and enable to claim its validity independent of such elusive and inadequate phenomena as are the common will of the states or the auto-obligation of the state. Not only make these empirical or psychological facts room for unpredictability of the fulfillment of the state’s commitments, they also cannot provide legal basis for international law’s obligatory force. Most importantly for Kelsen, a new perspective needs to overcome the separation and structural difference of international law and the state law, i.e. the view that they are distinct as to the source and the content. Kelsen thus has two major tasks—to prove that international law is a regular legal coercive order of positive law like the state law, and to demonstrate that both

²⁹ Kelsen, *Das Problem der Souveränität*, 318.

³⁰ Kelsen refers to “dualist” theories of Heinrich Triepel and Georg Jellinek who conceived international law as a product of the convergent wills of the states (Triepel) or the voluntary “auto-obligation” of the state (Jellinek). Both theories presuppose that international law is the part and parcel of the state law because legal obligations of the state can only emanate from the state itself. According to Kelsen, it is difficult for these theories to claim that obligations under international law exist. See Kelsen, *Das Problem der Souveränität*, 134–136, 169–174. See also Janzen, “Kelsen’s Theory of Law,” 213–214.

systems are connected in such a way so that both can claim validity for the same people at the same time.

Kelsen starts with showing that in order to be valid and binding legal order, international law must be understood as a regular coercive system of positive law which regulates human behavior and is derived from its original basic norm like the state law. In the pursuit of this task, he makes a number of interesting points, one of the most salient being that both domestic and international legal systems regulate human behavior—the view that has gained a wide currency recently with the rise of human rights law.³¹ Kelsen's main argument is that international law cannot be entirely separate from national law. If they were separate and independent, derived from two different basic norms, they could not be viewed as simultaneously valid for the same subjects at the same time. Should the state recognize the norms of the international law as a limitation on its competence, it can only mean that both orders are linked together by legal norms. According to Kelsen's conception of the identity of the legal systems discussed above, norms belonging to one legal system must be derived from the same source. Therefore, if international law is to be considered objectively valid and binding for the state, the both need to be derived from the same basic norm and hence regarded as one.

Kelsen supports his thesis with an epistemological argument inspired by neokantian methodology of science according to which norms related to same objects and valid simultaneously in space and time must always be parts of one single normative system.³² Dualist construction of the coexistence of international and national law is untenable because it is impossible to conceive of two independent valid orders from one legal standpoint. Therefore, monistic view is required at least as a matter of methodological consistency.³³ Having determined that law is a unity, the problem of primacy remains to be solved. There are two options available—either subordination of international law to national law or coordination of equal states by the higher order of international law and hence subordination of national law to

³¹ For this point see Kelsen, *Das Problem der Souveränität*, 125. Another, yet contested argument is about the doctrine of the just war which is the outcome of Kelsen's effort to show that international law is a coercive legal order. In his view war plays a role of legal sanction whose application is left up to the discretion of the individual members. See Kelsen, *General Theory of Law & State*, 330–339. For a critique of this approach see for example Danilo Zolo, "Hans Kelsen: International Peace through International Law," *European Journal of International Law* 9:2 (1998): 308.

³² Kelsen adopts epistemological requirements of the Marburg school philosophy of science, especially Hermann Cohen's concern with the utter purity of knowledge. See Zolo, "Hans Kelsen: International Peace through International Law," 306.

³³ Kelsen, *Das Problem der Souveränität*, 120–124. Kelsen, *General Theory of Law & State*, 380.

international law. The decision whether it is the national or international law that has precedence in legal hierarchy is according to Kelsen up to the legal theorist and is a matter of his or her *Weltanschauung*. The pure theory's critique of the dogma of sovereignty does not commit the legal theorist to assume the cosmopolitan perspective.³⁴ Yet, Kelsen's own choice is clear. He opts for the primacy of international law and the result is the picture of one single universal legal order on earth embracing all mankind which includes all states as subordinate legal orders.

To defend his choice of cosmopolitan monism over statist monism, Kelsen focuses on legal-theoretical justification of the basic norm of the international law and on the theory of co-originality of the state and the international law. He shows that the state is determined in its validity by international law in its crucial dimensions. It is the coexistence of the plurality of clearly demarcated territorial jurisdictions which confirms that there is a system of international law determining how the validity of a single national legal order is restricted within its boundaries. The continuity of the efficacy of a national legal order within the same territory in time, despite the unconstitutional changes such as revolutions or coups d'état, demonstrated by the recognition of a modification of the old order by other states, reveals that the international law delimits the temporal sphere of validity of the national legal order as well. According to Kelsen, the existence of the basic norm of the international law is proven precisely through the effectiveness of the international law expressed in territorial integrity and legal continuity of the states.³⁵

Showing that international law is original, exclusive and universal and encompasses all other normative systems and hence all mankind is the ultimate end of Kelsen's theory. It is the most elaborate theory of legal cosmopolitanism so far which suggests that there is one single universal legal order on earth which includes all states as subordinate legal orders. Such an ambitious vision for international law strikingly anticipates contemporary revival of the doctrine of cosmopolitanism and attempts to create international constitutional order. Kelsen's legal cosmopolitanism might be a meaningful moral ideal of a legal order that serves the value of peace, but the narrow monistic conception of the legal system combined with an epistemological argument do not make cosmopolitan monism a plausible normative vision. Kelsen's claim that

³⁴ Kelsen, *Das Problem der Souveränität*, 103.

³⁵ Since international law is customary, the basic norm must be a norm which countenances custom as a norm-creating act: the states ought to behave as they have customarily behaved. *Pacta sunt servanda* is thus the universal basic norm. This norm is behind all norms of international law; and it is *the* basic norm which confers validity on all ensuing legal norms of all legal systems on earth. Kelsen, *General Theory of Law and State*, 369.

the plurality of the states and their equality as jurisdictional spheres is conceivable only if we presuppose a common, objective and valid normative framework, represents a relatively unproblematic argument. What is questionable is Kelsen's monistic vision of a legal order coupled with his epistemological conviction that there is an inherent tendency to hierarchical unity in legal universe. For sure, international law is in some sense superior to the state law, but we does not have to assume the model of hierarchical monism derived from one basic norm to sustain the objective existence and validity of international law.

Moreover, cosmopolitan monism does not appear to be useful for assessing the development of normative systems in the transnational sphere. An example of the fact that the relationship between national and transnational legal orders is not such a clear-cut hierarchy derived from a singular source is the complex legal reality in contemporary Europe. There is now an independent and autonomous European legal order with its own source of validity in place alongside with distinct legal systems of each of the member states which is recognized as valid, directly applicable and binding on them. It is supreme over the member states' law in the relevant spheres of activity and as a result, national legal systems now include norms whose validity may be derived from sources external to the national legal system. Yet the supremacy of the EU's law should not be interpreted as imposing a total supremacy in the hierarchy of legal systems. European law is restricted in the sphere of matters that it is competent to regulate by law, and depends on the institutions of state-law to make its norms effective. It presupposes and recognizes the distinct sources of validity of each legal system.³⁶

The reality of European legal order is clearly not accountable by Kelsen's monistic hierarchical framework and demonstrates that the idea of an overlap of two legal orders with different sources of validity is possible. System theory has convincingly demonstrated that there is a possibility that different legal systems can overlap and interact without necessarily requiring that one is completely subordinate or hierarchically inferior to the other or to some third system.³⁷ We do not need to subscribe to the vision of polycentric legal fragmentation and multidimensional legal pluralism as some contemporary system theory-inspired conceptions suggest, what we do need, however, is the perspective which allows to see different legal systems

³⁶ Neil MacCormick, "The Maastricht-Urteil: Sovereignty Now," *European Law Journal*, Vol. 1, No. 3 (1995): 259–266.

³⁷ Gunther Teubner, Andreas Fischer-Lescano, "Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law* 25 (2004): 999–1046.

as interacting and mutually recognizing one another—partially independent and partially overlapping, not in the relationship of clear-cut all-embracing hierarchy with one criteria of validity at the top. The appropriate analysis is thus pluralistic and interactive rather than monistic and hierarchical. The legal systems of member states and their common legal system of the EU are distinct, but interacting systems of law and hierarchical relationships of validity within criteria of validity proper to distinct systems does not mean the all-purpose superiority of one system over another.³⁸

Sovereignty between Law and Politics

In the concluding chapter I want to consider the reason why Kelsen’s critique of sovereignty leads to the monistic conception of the legal system and whether it is possible to refuse this narrow legalistic notion of sovereignty while at the same time maintaining the purpose of this conception, namely to reinforce the ideal of the rule of law.

The source of Kelsen’s misleading monistic approach is a misconceived notion of sovereignty. Kelsen rightly refuses the power theory of sovereignty and eliminates notions of power and violence from the explanation of legal validity. Recasting the fundamentals of legal theory in terms of the identity thesis and the basic norm represents a progressive move beyond command theory of law, decisionism, natural law tradition, and socio-historical accounts of law towards a positivistic, formal, and proceduralist concept of law—and hence beyond the absolutist notion of sovereignty. However, Kelsen operates with an overly simplistic notion of sovereignty. Sovereignty is taken by Kelsen to be a strictly political notion which refers to an empirical phenomenon of the highest power. As I already pointed out, this idea is derived from Hobbes’s theory in which sovereignty is defined as the supreme authority embodied in one person who has the absolute and unlimited power to make law by his command.

This definition gave rise to common interpretation of sovereignty as the arbitrary exercise of power by someone who himself is not subject to law, although Hobbes, as well as Jean Bodin who first introduced the notion into political theory, meant to describe a new, essentially modern idea of the unity of political supremacy and legal authority, not that sovereignty primarily entails

³⁸ MacCormick calls the relationship the “mutuality of recognition”. It means that each system includes among its criteria of validity not only sources special to the particular system, but also criteria as determined by other systems. MacCormick, “The Maastricht-Urteil: Sovereignty Now,” 264.

arbitrary and unlimited exercise of somebody's will.³⁹ Kelsen is no exception in presupposing the common interpretation derived from Hobbes's conception. Instead of treating this model of sovereignty as a particular historical variant of the concept determined by political institutions and struggles of the era of absolutism, Kelsen assumes this essentialist understanding of sovereignty.

Such a purely political notion of sovereign power interpreted and an unlimited capacity to give legally binding commands has become a commonplace about Hobbes's theory which does not do justice to its full formulation. As Hobbes clearly suggests, the ultimate aim of sovereign political authority is not power for the sake of its mere exercise. The ultimate aim of sovereign power is the prevention of civil war and the establishment of peace and security. Sovereignty is the fundament for building the state that would put an end to devastating struggles that plagued England in the seventeenth century. Therefore Hobbes envisioned a strong, unified and centralized state embodied in a single and indivisible entity—the sovereign person. To justify such a state he pictured the image of the state of nature, supported by the pessimistic theory of human nature, and made this initial situation the basis for the deduction of the principles of the state and sovereignty. It has been taken for granted in Hobbes's scholarship that this hypothetical construction supplies presuppositions for the deduction of the principles of the absolute sovereignty. There is evidence in Hobbes's work, however, which suggests that the picture of the state of nature represents neither a concrete description of the English civil war nor the substantive argument about the human nature, but a rhetorical hyperbole by which Hobbes wanted to convince his readers that only the sovereign state with absolute, indivisible, and unlimited authority can guarantee peace and security.⁴⁰

Hobbes's "absolute sovereign power" thus aims at the establishment of a "common power" (as Hobbes himself puts it) which is imposed above the plurality of different associations and thus makes their peaceful coexistence possible by neutralizing their claims to power. The absolutist state is not the answer to a corrupt human nature but a historical answer to emerging social plurality and potential conflict that comes with it, which at Hobbes's time was the conflict of the claims of religious factions to orthodoxy. These claims could only be challenged by

³⁹ Thomas Hobbes, *Leviathan* (London: Penguin Books, 1985), 220–221, 227, 257, 275, 367.

⁴⁰ See Thomas Hobbes, *Behemoth or the Long Parliament* (Chicago: University of Chicago Press, 1990). Here I rely on an outstanding interpretation of Hobbes's *Behemoth* suggested by Robert P. Kraynak, "Hobbes's *Behemoth* and the Argument for Absolutism," *The American Political Science Review* 76:4 (1982): 837–847.

creating a new political sphere with a supreme and absolute authority which replaced moral and religious ethics with political claims by rational action of the sovereign. *Auctoritas, non veritas facit legem*, in other words in the absolutist state laws are made by authority, not by truth. As Reinhart Koselleck pointed out, the sovereign prince is above the law and at the same time its source, yet this law is no longer substantially tied to social or religious interests but it designates a formal domain of political decision beyond any church, estate, and party.⁴¹

The first lesson to be drawn from the discussion of Kelsen is seemingly simple conclusion, yet by no means evident in political theory, namely that sovereignty is not just the absolute power, in addition characterized by non-derivability, originality, indivisibility, and unity of its source and unlimitedness of its exercise. This model of sovereignty represents a conceptual variant influenced by the struggles of the era of absolutism, inapplicable to the modern constitutional state where sovereignty is a divided and limited condition, dispersed in various government offices and limited by separation of powers, checks and balances and basic rights. The complex structure of the modern state itself renders the indivisible, unitary and unlimited conception of the form and location of sovereign authority implausible.

Indeed, sovereignty has been and remains, as Martin Loughlin has aptly pronounced, a quintessentially political concept.⁴² It is the expression of the public power which is essentially the product of the political relationship. It expresses the distinctively political bond between the groups of people and their government which is able to exercise the “absolute” political power. As Kelsen rightly stressed, this power is official and not personal, conferred by a normative order and invested and exercised through an institutional framework which rests, however, on the foundation of a political relationship.⁴³ Hence, sovereignty is inseparable from the modern state. It emerged as an aspect of its formation and the establishment of an institutionalized form of government which is able to impose itself on society as a “single” power source with the monopoly of power exercise in accordance with the law.⁴⁴

This last aspect also suggests that sovereignty has always been expressed through the medium of law and is inseparable from law. Already in the sixteenth century Jean Bodin stressed

⁴¹ Reinhart Koselleck, *Critique and Crisis. Enlightenment and the Pathogenesis of Modern Society* (Cambridge, Mass.: MIT Press, 1988), 16, 31.

⁴² Martin Loughlin, “Ten Tenets of Sovereignty,” in *Sovereignty in Transition*, ed. Neil Walker (Oxford: Hart Publishing, 2003), 56.

⁴³ *Ibid.*, 56, 67.

⁴⁴ *Ibid.*, 56, 59.

the legislative character of sovereignty.⁴⁵ Sovereignty and law are inextricably linked.⁴⁶ Yet, sovereignty cannot be made the feature of law or a solely legal concept. Sovereignty remains a political concept even though the method by which the claim to sovereignty is expressed is the medium of law. Law is law by virtue of being a political phenomenon. It is a means of political rule. The political authority embodied in the apparatus of the modern state is defined legally as the capacity to make decisions in accordance with higher constitutional rules. Law is an expression of sovereignty, but sovereignty is itself constituted and limited by law. For many thinkers this is what indicates the conceptual paradox and incoherence of sovereignty, namely that sovereignty expresses both the power that enacts law and law that restrains power. Yet, the claim to sovereignty is only seemingly caught in the antinomy between sovereignty that is legally derivative and hence never politically independent and sovereignty that is politically unconstrained and not so truly legal.⁴⁷

The alleged paradox built into the conceptual structure of sovereignty disappears, as Neil Walker suggests, once we understand it as the key to sovereignty and define sovereignty as a dynamic process of mutual constitution and mutual containment of law and politics. Capturing both politics and law, the modern sovereignty is defined by the co-originality and interdependence of binding positive law and political power.⁴⁸ In modern societies, the spheres of the legal and the political are thus inseparable. Politics and law relate so inextricably that all attempts to separate law as a phenomenon *an sich* from its political context is nonsensical. Sovereignty is precisely the concept that expresses the nexus between law and politics and thus can only be situated at the intersection of legal and political theory. When theorized within one discipline only, the concept of sovereignty loses its intelligibility.

The second lesson to be learned from the discussion of Kelsen's critique of sovereignty is that sovereignty cannot be made the feature of law and an exclusively legal concept. Kelsen insisted on the separation of legal and political theory because he was concerned with laying foundations for an independent science of law, perhaps even for the sake of epistemological purity itself, but certainly because he believed that only the scientifically grounded and

⁴⁵ Bodin defined sovereignty as the supremacy in making and unmaking law, binding on all his subjects in general and on each in particular. Jean Bodin, *Six Books of the Commonwealth*, Abridged and translated by M. J. Tooley (Oxford: Basil Blackwell, 1955), 43, 99.

⁴⁶ Loughlin, "Ten Tenets of Sovereignty," 57.

⁴⁷ See Neil Walker, "Late Sovereignty in the European Union," in *Sovereignty in Transition*, ed. Neil Walker (Oxford: Hart Publishing, 2003), 20–21.

⁴⁸ *Ibid.*, 21.

theoretically justified legality is capable of becoming the sole basis of the legitimacy of the political rule and thus the basis of the rule of law as the normative antidote to the sovereign decision which claims legitimacy for its action derived from some extralegal grounds. This step seems justified by the concept of sovereignty he takes as his starting point. When it is replaced by a redefined concept of sovereignty, the move from political to legal concept of sovereignty appears unnecessary.

All the more so, when we take into consideration the normative aims of Kelsen's theory and the fact that Kelsen implicitly links his theory of pure legality with his theory of constitutional democracy. To conclude I will briefly consider how the redefined concept of sovereignty would fit into Kelsen's theory of constitutional democracy.

The concept of democracy plays a prominent role in Kelsen's theory. As Vinx has shown convincingly in his study, the theory of democracy reinforces Kelsen's ideal of the rule of law and supplies his concept of legal legitimacy with a seemingly missing normative dimension in that it strengthens its degree by the introduction of democratic and constitutional mechanisms.⁴⁹ Kelsen's conception of democracy is inspired by Rousseau's vision of a political order in which an individual submits to a unifying general will and yet remains as free as in the state of nature. Unlike Rousseau, however, Kelsen does not believe in the absolute reconciliation of the individual will and the general will. His political theory is based on the idea that there is an irreconcilable opposition between individual freedom and the social (ergo legal-political) order which is compulsive per se. The inherent possibility of conflict between social order that regulates human social conduct through coercive rules and subjective individual will thus inevitably leads to what Kelsen calls "uneasiness of heteronomy".⁵⁰

Kelsen's defense of democracy is based on the claim that democracy preserves individual freedom to the largest extent possible. Democracy, Kelsen argues, is a transformation of natural freedom from an instinct that leads men to the negation of any social order to social or political freedom which he defines as a state in which a man, "while being subject, is subject only to his own but not subject to an alien will."⁵¹ For Kelsen, it means in practice to be subject to a normative order in the establishment of which one participates. Only self-determination by

⁴⁹ See Vinx, *Kelsen's Pure Theory of Law*, 26, 66–67. See also Kelsen, "Foundations of Democracy," *Ethics*, Vol. LXVI, No. 1. Part II (1955): 14–18.

⁵⁰ Kelsen, "Foundations of Democracy," 18.

⁵¹ Kelsen, *Wom Wesen und Wert der Demokratie*, 4.

majority rule can secure the highest degree of political freedom that is possible within society.⁵² Democracy thus preserves natural freedom by allowing subjects of the law to participate in its creation and the determination of the content of general laws. The method of creating social order, that is the method of lawmaking and the organization of legislation, constitutes the difference between democracy and autocratic forms of social order. Democracy prescribes the participatory (autonomous) method of lawmaking, while autocracy is defined in terms of the absolutist (heteronomous) production of legal norms.⁵³

The point is that the core value of Kelsen's theory of democracy is the participation in the process of lawmaking by virtue of which the people can consider themselves the authors of the norms that coercively regulate their behavior. Kelsen's theory operates with the ideal of the autonomous social order based on the normative distinction between autonomy and heteronomy. Autonomy is a state of collective life that reconciles subjective individual freedom with demands of the social order by creating such a legal-political order, in which individuals enjoy political freedom—the freedom to participate in the determination of the content of legal norms. Social order in the creation of which people participate may satisfy the subjective preferences of the largest possible number of the people, but the point is rather, as Vinx rightly stresses, that it offers the possibility to consider them legitimate and identify with them as self-governing autonomous persons. The freedom it offers is thus the freedom to remain a distinct autonomous person with individual moral preferences or conceptions of justice, while allowing to identify with democratically enacted laws even if I don't agree with them on substantive merits.⁵⁴

Kelsen's conception of democracy *qua* autonomy thus relies on the principle of popular sovereignty. For Kelsen, democracy is essentially the government by the people and only government by the people themselves can create an autonomous political order and thus lessen the torment of heteronomy. Kelsen gives the principle of popular sovereignty the meaning of autonomy. Yet it is not Rousseau's conception of autonomy and popular sovereignty operating with the substantive conception of the ultimate, absolute power of the people existing prior to the establishment of democracy and resisting the full transformation into a legal-political order.⁵⁵

⁵² Kelsen, *Wom Wesen und Wert der Demokratie*, 9–10.

⁵³ Kelsen, "Foundations of Democracy," 19; *Wom Wesen und Wert der Demokratie*, 79–81; *General Theory of Law & State*, 284.

⁵⁴ Vinx, *Kelsen's Pure Theory of Law*, 104–119.

⁵⁵ This conception inspired revolutionary doctrine of the constituent power of the people, that is the capacity of the people to determine its own political existence through giving itself a constitution in the extraordinary moment

According to Kelsen, popular sovereignty means essentially taking the legislative decisions through majority vote. Only government on the basis of majority rule can claim legitimacy derived from its origin—it originates in those over whom its authority is exercised.

Democracy, on the other hand, can bear the name of constitutional order distinct from autocracy only insofar as it conforms to the normative ideal of the rule of law. Legislative power must be subject to such conditions of legality that constrain its exercise in a way which ensures that the content of laws is more than “the tyranny of the majority”. In other words, the exercise of legislative power must be in accordance with basic political rights, civil liberties and democratic rights of political participation. These secure a successful transformation of natural freedom as the idea of absence of government into the idea of political freedom as the idea of participation in government.⁵⁶ The political regime which does not respect these fundamental rights cannot be called a well-functioning democracy. Kelsen thus refuses any contradiction between popular sovereignty (as democratic majoritarianism) and constitutionalism and its practice of entrenching rights. Sovereignty in constitutional democracy cannot be seen neither as the purely political notion of the absolutely highest power (whoever holds it) standing above the law, nor as a purely legal category embodied in a hypothetical highest norm, but as the concept of political autonomy. As such it is a concept that is perfectly suitable for capturing the interaction of law and politics, the co-originality and interdependence of binding positive law and legitimate political power. The last lesson to be drawn from this discussion is that getting rid of the political dimension of sovereignty and making sovereignty the feature of law is not a necessary for developing the theory of legality adequate to constitutional democracy.

outside of any legal or institutional forms of preexisting authority. See Emmanuel Sieyès, *Political Writings* (Indianapolis: Hackett Publishing Company, 2003). In the twentieth century, the concept of constituent power was revitalized by Carl Schmitt. See Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2007).

⁵⁶ Kelsen, “Foundations of Democracy,” 27–28.

Bibliography

- Archibugi, Daniele, Held, David, Kohler, Martin (eds.). 1998. *Re-Imagining Political Community: Studies in Cosmopolitan Democracy*. Palo Alto: Stanford University Press.
- Benjamin, Walter. "Critique of Violence." In *Selected Writings*, Vol. 1. 236–252. Cambridge: The Belknap Press of Harvard University Press, 1997.
- Derrida, Jacques. "Force of Law. The "Mystical Foundation of Authority"" In *Acts of Religion*, edited by Gil Anidjar. 230–298. New York: Routledge, 2002.
- Fischer-Lescano, Andreas, Teubner, Gunther. "Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law." *Michigan Journal of International Law* 25 (2004): 999–1046.
- Habermas, Jürgen. *Between Facts and Norms*. Cambridge: MIT Press, 1998.
- Hart, HLA. *Essays in Jurisprudence and Philosophy*. Oxford: Oxford University Press, 1983.
- Held, David. 1995. *Democracy and the Global Order*. Stanford: Stanford University Press.
- Hobbes, Thomas. *Leviathan*. London: Penguin Books, 1985.
- Janzen, Henry. "Kelsen's Theory of Law." *The American Political Science Review* 31:2 (1937): 205–226.
- Jellinek, Georg. *Allgemeine Staatslehre*. Darmstadt: Wissenschaftliche Buchgesellschaft, 1960.
- Kalyvas, Andreas. "The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory." *Philosophy and Social Criticism* 32:5 (2007): 573–599.
- Kelsen, Hans. *Das Problem der Souveränität und die Theorie des Völkerrechts*. Tübingen: Mohr, 1920.
- Kelsen, Hans. *Der soziologische und der juristische Staatsbegriff*. Tübingen: J.C.B. Mohr, 1922.
- Kelsen, Hans. *Vom Wesen und Wert der Demokratie*. Tübingen: J. C. B. Mohr, 1929.
- Kelsen, Hans. "Foundations of Democracy." *Ethics*, Vol. LXVI, No. 1. Part II (1955): 1–101.
- Kelsen, Hans. "On the Basic Norm." *California Law Review* 47:1 (1959): 107–110.
- Kelsen, Hans. *Law and Peace in International Relations*. Cambridge, MA: Harvard University Press, 1942.
- Kelsen, Hans. *General Theory of Law & State*. New Brunswick, N.J.: Transaction Publishers, 2006.
- Kelsen, Hans. *The Pure Theory of Law*. Berkeley: University of California Press, 1970.

Kelsen, Hans. *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*. Translated and edited by Stanley L. Paulson and Bonnie Litschevski Paulson. Oxford: Oxford University Press, 1992.

Loughlin, Martin “Ten Tenets of Sovereignty.” In *Sovereignty in Transition*, edited by Neil Walker, 65. Oxford: Hart Publishing, 2003.

MacCormick, Neil. “The Ethics of Legalism,” *Ratio Juris* 2, no. 2 (1989): 184–193.

MacCormick, Neil. “Beyond the Sovereign State?” *Modern Law Review* 56, no. 1 (1993): 1–18.

MacCormick, Neil. “The Maastricht-Urteil: Sovereignty Now.” *European Law Journal*, Vol. 1, No. 3 (1995): 259–266.

Paulson, Stanley L. “On the Puzzle surrounding Hans Kelsen’s Basic Norm”, *Ratio Juris* 13, no. 3 (2000): 279–293.

Raz, Joseph. *The Concept of Legal System. An Introduction to the Theory of Legal System*. Oxford: Oxford University Press, 1983.

Raz, Joseph. *The Authority of Law. Essays on Law and Morality*. Oxford: Oxford University Press, 1979.

Vinx, Lars. *Hans Kelsen’s Pure Theory of Law. Legality and Legitimacy*. Oxford: Oxford University Press, 2008.

Walker, Neil. “Late Sovereignty in the European Union.” In *Sovereignty in Transition*, edited by Neil Walker, 20–21. Oxford: Hart Publishing, 2003.

Zolo, Danilo. “Hans Kelsen: International Peace through International Law.” *European Journal of International Law* 9:2 (1998): 306–325.