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Kelsen's Legal Logic of International Pluralism

Ronnie Hjorth

Professor of Political Science, Swedish Defence University, Stockholm
ronnie.hjorth@fhs.se

Abstract
This paper presents a Kelsenian perspective on international pluralism showing that international pluralism is not necessarily the logical consequence of sovereignty but bestowed upon states by international law through the principle of equality. The paper argues that this leads to an improved concept of international pluralism as more than a by-product of sovereignty logic. Flowing from Kelsenian legal logic, international pluralism and legal cosmopolitanism share the same origin in the *Grundnorm*. Hence, this perspective on international relations appeases the perceived conflict between international pluralism and cosmopolitanism. Moreover, the paper suggests that the approach provides a different framework for analyzing international norms and practices, their normative relationship and evolution.

Keywords
Hans Kelsen, International Pluralism, Legal Cosmopolitanism, International Relations Theory, International Law

Kelsens Rechtslogik des internationalen Pluralismus

Zusammenfassung
Dieser Beitrag ist eine Kelsen'sche Perspektive des internationalen Pluralismus. Das Argument ist zweierlei: dass der internationale Pluralismus nicht notwendigerweise die logische Folge der Souveränität ist, sondern den Staaten durch das internationale Recht aufgrund des Gleichheitsgrundsatzes verliehen wird; und zweitens, dass dies zu einem verbesserten Konzept des internationalen Pluralismus führt, welches mehr ist als ein Nebenprodukt der Souveränitätslogik. Ausgehend von der Kelsen'sche Rechtslogik haben internationaler Pluralismus und rechtlicher Kosmopolitismus denselben Ursprung: in der Grundnorm. Dieser Kelsen'sche Blick auf die internationalen Beziehungen entschärft den Konflikt zwischen internationalem Pluralismus und Kosmopolitismus. Darüber hinaus bietet dieser spezifische Ansatz einen anderen Rahmen für die Analyse internationaler Normen und Praktiken, ihrer normativen Beziehungen und ihrer Entwicklung.

Schlüsselwörter
Hans Kelsen, Internationaler Pluralismus, Rechtlicher Kosmopolitismus, Theorie der Internationalen Beziehungen, Völkerrecht

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1. Introduction[1]

This paper explores the curious connection between Hans Kelsen's legal logic and international pluralism. The central contention is that Kelsen offers a unique and fruitful perspective for rethinking international relations – a perspective that transcends most of modern international theory. The paper explores a possible path ahead – a *Kelsenian approach* – a path Kelsen did not take, and perhaps, would not take. Hence, this is not primarily a contribution to the puzzles of legal philosophy that his writings respond to or invite. Yet, it retains as much as possible of Kelsen's thinking, developing three important elements of his thought.

First, the key to understanding Kelsen's importance for the study of international relations has to do with his refusal to let sovereignty decide the space and rationale of the state. This contention liberates international theory from the "Westphalian straightjacket" (Buzan/Little 2001, 25) and "sovereigntism" (Vinx 2007, 176) so typical of modern international thought. Second, while Kelsen's legal logic is a closed system of its own it is possible to deduce from it a broader account of international relations. This involves looking beyond his legal philosophy while retaining the direction he envisaged. Third, Kelsen's work accommodates a rationalist approach to law, a political commitment to liberalism, as well as a certain realist perspective (Schuett 2021). Like many analytical lawyers, he was a realist of a kind: Why develop a legal theory if human societies can flourish without law. In some ways, Kelsen's position is perhaps not that different from the position of his famous disciple, Hans J. Morgenthau. Kelsen was not blind to the politics of power but he did not allow power politics to colonise his theory of state and law and he resisted the urge to treat states as the equivalents of persons. This way Kelsen moved beyond classical realism towards a general theory of law and state.

The central claim of the paper is that Kelsen's treatment of both international pluralism and cosmopolitanism, deriving from legal logic, opens up a different theoretical terrain for international relations. From the vantage point of a legal state conception, Kelsen theorised state pluralism as legal pluralism and from his legal logic derived legal cosmopolitanism. Such an approach contrasts markedly with the inclination common among modern international theorists to ground both international law and state pluralism in sovereignty and non-legal conceptions of the state. The paper argues that a Kelsenian approach appeases the perceived conflict between international pluralism and cosmopolitanism precisely because of the legal state conception and therefore does not reiterate the tension.

This paper is mainly conceptual and descriptive, sketching out the contours of Kelsenian international theory. Initially, the paper reviews Kelsen's standpoint in the debate about sovereign equality during the 1940s, marking out the contours and main elements of a Kelsenian approach to international relations. The second section reviews Kelsen's legal logic to the extent necessary for the exploration of a Kelsenian perspective on international relations. The third section treats Kelsen's three-circle theory (*Drei-Kreise-Theorie)* as a descriptive account of international relations. Furthermore, the section explores Kelsen's separation of the efficacy of international law from the politics of power. The fourth section develops the relation between legal logic, legal cosmopolitanism, and international pluralism. The final section concludes.

2. Kelsen on Sovereign Equality

All his life Kelsen combined sophisticated theoretical research with practical engagement. In the mid-1940s, he sought to influence the discussions prior to the signing of the UN Charter being critical of the principle of sovereign equality. The fact that the principle remains shows that Kelsen largely failed to influence the outcome, but his intervention in the debate is a good illustration of his unique account of international relations. The background is the debate on equality of states that started at the 1899 and 1907 Hague Conferences accounted for at the time by F.C. Hicks's (1907, 538) contention that "the conferences enacted rules of conduct designed to be followed not only by the signatory states but by the whole world." The debate attracted much scholarly interest and displayed "a rich source of jurisprudence" (Simpson 2003, 134). Hence, there are several accounts of it in the literature (Hicks 1907; Dickinson 1920; Baker 1923; Kooijmans 1964; Simpson 2003; Hjorth 2014). The topic continued to be central at Versailles and in the process leading up to the San Francisco Conference when the principle of sovereign equality finally settled.

In short, the debate involved two main schools of jurisprudence. On the one hand, scholars in favour of a naturalist principle of equal rights of states; on the other hand, the advocates of the principle of equality before the law basing their arguments on versions of analytical jurisprudence and viewing naturalism a "discarded philosophy" (Hicks, 1907, 532). There was also a political realist argument involved: that a principle of equal rights based on natural rights would not have real effect, that it would not protect smaller states from Great Power intervention because it would not account for real differences in power, resources and influence

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on world politics (Simpson, 2003, 132-147). The most influential conception was that of equality before the law later transformed to sovereign equality. Accordingly, Simpson (2003, 38) concludes that sovereign equality can be reduced to two propositions: That only states enjoy sovereign equality and that the principle "operates exclusively in the juridical sphere". Equality before the law does not prohibit unequal voting power or unequal representation in particular cases, such as the privileged position of the permanent members of the UN Security Council.

Kelsen criticised sovereign equality in a 1944 article in *Yale Law Review*. There were two major arguments. First, that the principle of sovereign equality is meaningless in practice, and second, that it rests on a flawed account of the connection between sovereignty and international law. As for the first argument, Kelsen claims the following:

> "Equality is the principle that under the same conditions States have the same duties and the same rights. This is, however, an empty and insignificant formula because it is applicable even in case of radical inequalities." (Kelsen 1944, 209)

This is the voice of Kelsen the realist looking at international law in the context of international politics. This is the kind of argument offered by realists that the principle of equality of states has no practical importance and is just another word for sovereignty. Accordingly, Morgenthau (1967, 302-304) claims that equality of states is a "synonym" to sovereignty and Hedley Bull (1977, 36-37) writes that equality is a "corollary" to sovereignty. This was however not Kelsen's standpoint.

The other argument is more interesting – this is the voice of Kelsen the theorist. Here, Kelsen presents an alternative to the political realist argument. For Kelsen the principle of sovereignty and the principle of equality are both legal principles. Hence, sovereignty in his view is not a political element outside of law, it is "the legal authority of the States under the authority of international law" and "limitable and limited only by international law" (Kelsen 1944, 208). Like all rules of international law, sovereignty is valid only in accordance with the appropriate sources of law. Thus, sovereignty of states and equality of states are norms on the same level, and consequently, one cannot derive equality from sovereignty (Kelsen 1944, 210). This understanding of sovereignty and equality remained consistent in Kelsen's writing throughout his life, from a very influential treatise on sovereignty and international law written in 1920 when he was a young scholar in Vienna to his later writings of international law as an instrument of peace when a retired professor of political science at Berkeley. The outlook is fundamental to the Kelsenian approach to international relations sketched out below.

3. Kelsen's Legal Logic

Kelsen's legal and political theory emerged from the rich debate in *Staatslehre* in the late 19th century and early 20th century. A major topic of the debate concerned state-law dualism, i.e., to what extent it is theoretically motivated to separate between law and state. In short, state dualists rejected the legal theories of state presented by major scholars, notably Paul Laband and C.F. von Gerber while adopting instead some other kind of state conception, such as biological, theological, organic, psychological or sociological (Dyzenhaus 1997; Kelsen 1922). The theories of law and state had a dual philosophical basis in the Hegelian position that the fulfilment of human freedom is only possible within the state and in Kant's individualist cosmopolitan law (Koskenniemi 2002, 183). Naturally, this debate included as a major issue the nature and existence of international law, and the question whether or not a binding objective international law is possible. Jochen von Bernstorff (2010) describes this as an attempt to bring together a subjective will of states with an objective account of their relations. He concludes that the "two antagonistic positions were not really synthesized in this way; rather, they were incorporated into the theoretical approaches as an unresolved tension" (Bernstorff 2010, 42-43).

Accordingly, the influential Georg Jellinek, with whom Kelsen studied in Heidelberg during his post-doc years, took a middle way viewing the state as involving both a legal and a psychologic element. Jellinek (1914, 370) placed politics and law in one system according to which the state's obligations to law is a result of "self-binding" (*Selbstverpflichtung*). He also included a further psychological element: that the factual has normative power (Jellinek 1914, 342). The idea is that the understanding of the law as valid makes it valid, hence motivating the acts of legal subjects (Koskenniemi 2002, 200). Initially, Kelsen criticised this position, but from the 1930s and onwards he too developed a multidimensional perspective of law and its functions in the field of international law (Bernstorff 2010, 49-50). In the 1940s, he even stated that there is "a considerable connection" (Kelsen 1941, 52-53) between sociological and normative jurisprudence claiming that the former is concerned with the efficacy of law whereas the latter is concerned with law's validity. This distinction, developed below, is relevant for conceiving of a Kelsenian perspective on international relations.

However, the main theoretical course pursued by Kelsen and other members of the so-called Vienna School of Jurisprudence was to establish a purely juristic

concept of the state – the thesis of the identity of law and state – and to develop law as a science of norms and not a science of explanation (*Normwissenschaft* vs. *Kausalwissenschaft*) rejecting methodological syncretism. This involved the rejection of the popular conception of the state as a person – a notion central to Hobbes and much of modern international theory (Skinner 1999; Wendt 2004). Kelsen even treated this as mystic and unscientific; hence his conviction to "demystify" and "deontologise" the state (Somek 2006). A law, Kelsen concludes, is a "depsychologized command" through the concept of the norm and not accepting the "superfluous and dangerous fiction of the 'will' of the legislator or the state" (Kelsen 1941, 57).

Kelsen's main achievement of Jurisprudence is the pure theory of law presented in his *Reine Rechtslehre* first published in 1934. The work presents jurisprudence as "the science of law" – a science of "*ought*-propositions" (Kelsen 1941, 44). This is not the place to describe the pure theory in detail, but two central aspects have to be related if only briefly, the notion of legal hierarchy and the primacy of international law over national law. First, Kelsen presented his logic of norms as a theory of a norm hierarchy (*Stufenbaulehre*) according to which a valid legal norm receives its validity from another valid norm of a higher order. This conception, originally developed by Adolf Julius Merkl, places legal norms into a dynamic and changing system. The theory establishes a special type of relation through "the chain of delegation" by which new norms are determined by a superior norm and "chain of derogation" by with norms in conflict with superior norms are annulled (Gragl 2018, 71). The validity of a legal norm can then only derive from another valid legal norm and so on in a unified hierarchical system of norms. The legal monism, which Kelsen defended, prescribes that norms derive their validity ultimately from a basic norm, the *Grundnorm*. In *Reine Rechtlehre* the *Grundnorm* is presented as a hypothetical norm – an *as if* assumption. The idea is that unless one believes the *Grundnorm* to be valid, the rest of the chain of validity cannot be valid. Moreover, being a superior norm, it hinders the infinite regress of the norm hierarchy in which only the *Grundnorm* is presupposed. Finally, the *Grundnorm* makes the legal system a "closed system" and as such, it relates to other systems (Gragl 2018, 76-78; Koskenniemi 2002, 241).

Second, the primacy of international over national law was a central theme not only of Kelsen but also of other members of the Vienna School, notably Alfred Verdross and Josef Kunz. To begin with, it is important to recognise when dealing with the primacy of international law that the theory is about norm-logic and that it is not a theory of social and historical facts or of empirical causality. In other words, knowledge about how something is historically constructed is not proof of either a logical or a normative relation. While the Vienna School defended the primacy of international law thesis, Kelsen himself, presented this as a "choice-hypothesis" (Bernstorff 2010, 104). Accordingly, in 1940 Kelsen describes a choice between the primacy of "national" or international law as logically either "dualistic", meaning that these are two separate forms of law, or "monistic", meaning that it is just one system of law. Kelsen argues that even in order to accept legal dualism there would have to be some norm regulating the relationship between legal systems; hence, legal monism is necessary (Kelsen 1941, 67):

> "Since the national legal orders find the reason for their validity in the international legal order, which at the same time defines their spheres of validity, the international legal order must be superior to each national order. Thus it forms, together with them, one uniform universal legal system." (Kelsen 1941, 70)

By contrast, the position hold by diverse influential authors such as H.L.A. Hart and Morgenthau is that there is, for empirical reasons, nothing to mediate between different legal systems but merely conventions of diplomacy, power and morality. Real binding law among nations can only originate from a world state or a world empire. As for the idea of a world state Kelsen concluded in *Peace through Law* (1944), that while the principle of sovereign equality in the UN charter changed the prospects of a world state evolving, international legal norms are not, as such, dependent on institutional structures such as a world state. Thus, a binding system of international law is possible even without a world state. Kelsen's approach to the matter "presupposed merely the real existence of a single international legal norm as the nucleus of an evolving order" (Bernstorff 2010, 110-111). Furthermore, this implies that even if there is no central authority such as a world state to rely on, law can still be effective and include both reprisals and coercion against wrongdoers.

Finally, while Kelsen's legal theory is widely recognised as ground-breaking, his political theory, mainly presented in the form of two long essays on democracy (Kelsen 1929; Kelsen 1955), is not so well known. The fact that Kelsen viewed the pure theory as a science of law implies that it is consistent with a variety of systems of government. However, Lars Vinx (2007) suggests that there is after all a connection between Kelsen's legal theory and his political works promoting liberal democracy. Vinx claims that behind Kelsen's defence of the identity of law and state is "the normative aim to subject the state's power, as far as possible, to legal restraints that will protect subjects of the law from arbitrary exercises of official power" (2007, 22). Respect for the rule of law at least in a formalistic

sense is no doubt central to Kelsen, but it does not follow that the pure theory is limited to liberalism. The whole of Kelsen's work shares a credo but there is no reason to presuppose that it forms an integrated system of thought. In this paper, I take the view that the narrow formalistic approach to law is one reason why Kelsen's legal logic provides such an interesting account of international pluralism.

4. The Three-Circle Theory

Most international theories account for two different levels of political association, the state and the society of states (Jackson, 2000). The state is regarded the primary institution in several respects: casually, in the sense that states construct international society among themselves (Wight 1978, 105); morally because states sustain primary values or are moral ends (Hume 1952, 266; Walzer 1980); normatively, because states decide what the international law is, if there is international law at all (Austin 1954; Hart 1994). These contentions in one way or another perpetuate the view that sovereignty is the fundamental norm of international relations and that the sovereignty principle in international law flows from a non-legal concept of the state.

Approaching international theory from a Kelsenian perspective means entering a different terrain. Initially, I follow Paul Gragl's (2018) suggestion and take Kelsen's three-circle theory (*Drei-Kreise-Theorie*) as a descriptive point of departure. The three-circle theory, originally developed to describe the relations of a federation, visualises three circles, two of which are parallel and on the same level: the law of the member states of the federation (*Gliedstaaten*) and the law of the federation (*Oberstaat*). There is no hierarchy between these two circles. Hence, there is no delegation of the law of the state from the law of the federation or vice versa. A third circle, the common constitution (*Gesamtverfassung*) encompasses the two circles on a level above. The law of the state and the law of the federation are both delegated from the common constitution. The theory illustrates that the sovereignty of the federation does not determine the standing of the separate units within it or that the separate units decide the rules of the federation; furthermore, the theory shows that the common constitution is not the same as sovereignty (Kelsen 1925, 199-200).

As a descriptive theory of international relations, the three-circle theory illustrates how Kelsen sought to overcome the idea of international relations as based on the will of sovereign states as well as the image of the state person. In the place of sovereignty, Kelsen puts the norm of equality in relation to international law. Accordingly, Bernstorff (2010, 65-66) concludes that "we are dealing here with the notion that two legal subjects can be described as equal only in relation to a higher normative order that subordinated them both". Gragl (2018, 120) models international legal relations based on the three-circle theory. According to his description, general international law takes the place of the common constitution. He defends the practical realism of the model arguing that the outlook does not strain against widely held conceptions of international law (Gragl 2018, 120, 188).

From an international relations perspective is seems as if the three-circle conception completely ignores the role of politics and of power. For example, Bull (1977, 131-132) concludes that the effectiveness of international law depends on states' preparedness to use power. In short, Bull argues that an effective system of international law necessitates the balance of power and that contingent violation of international law is necessary in order to uphold the balance (Hjorth 2007). A Kelsenian approach take a difference stance on this matter beginning with the distinction between the validity and the efficacy of law, an issue relating to Kelsen's dependence and disagreement with Jellinek. As mentioned above, Jellinek combines a legal state conception with an element of will in the shaping of law so that the state's legal obligations result from the act of self-binding (*Selbstverpflichtung*). Furthermore, he defends the assumption that the factual has normative force because people believe the norms to be valid. I label these two contentions (J1) and (J2):

(J1) States' legal obligations result from acts of self-binding (Jellinek 1914, 370).
(J2) The factual has normative power because people believe this to be so (Jellinek 1914, 342).

Both these contentions apply to Jellinek's concept of international law, reformulated as (J1') and (J2'):

(J1') States obligate themselves to follow international law (Jellinek 1914, 376).
(J2') States follow international custom believing these rules to be obligatory (Jellinek 1914, 376).

It is evident that Kelsen's theory differs from Jellinek's on these points. To begin with, Kelsen does not share Jellinek's (1914, 376) contention that international law is merely a law of coordination; this would imply renouncing the primacy of international law and much else. Furthermore, the proposition (J1') is incompatible with Kelsen's work since it is based on the will of the state and because the primacy of international law contradicts the idea of self-obligation. Hence, the argument that international legal norms in practice will have to be adopted one way or the other by states implying (J1´) as an instance of validity is rejected by

Kelsen. The whole point of the pure theory of law and the Vienna School is that we are dealing with normative concepts and not with causality; international legal rules are valid because of the chain of validity and not because government decide to adopt them as such. Moreover, Kelsen rejected the conception of sovereignty as the highest and unconstrained authority. He argued that since states are interdependent, sovereignty does not rest with the states; hence, sovereignty derives from the system of law (Bernstorff 2010, 64-65).

While the Kelsenian approach rejects (J1´) it is another matter with the standpoint (J2´), that the factual has normative force. As is pointed out by Matthias Klatt (2019), this is perhaps not relevant for the validity of law but it is important for understanding the efficacy of law. When dealing with the efficacy of international law, we may assume that if enough states abide by the norms acting upon the contention that those factual norms indeed have normative force this will *ceteris paribus* be the case; hence (J2´) is relevant. Moreover, Kelsen makes clear that the efficacy of the law is conditional of law's validity; unless there is efficacy of the law legal rules are not valid (Kelsen 1941, 50-51). This does of course not mean that validity flows from efficacy. The point is that unless the parties obey the rules it is not really a functional legal system. For this reason, he was adamant that international law to be effective has to be binding and, if necessary, employ coercive instruments such as reprisals and even war. Accordingly, Kelsen found evidence of reprisals in the customary law of nations (Bernstorff 2010, 89).

Since proposition (J2') entirely ignores the element of power when dealing with the efficacy it differs from Bull's view of the relation between law's efficacy and power relations. The Kelsenian perspective does not accept such compromise as an integral part of a theory or conception of state and law. It seems that from a Kelsenian viewpoint it is better to accept international law as primitive law and at the same time strive to develop international law and international society in a way that would make clear what kind reprisals are legal and what are not. Nevertheless, it is evident that even if Kelsen conceived of international law as an instrument of peace, he did not rule out the use of force or believed that international law could function without enforcement mechanisms. The deeper realism of the Kelsenian approach is that logically or conceptually the functions of international law stand in no relation to power, but that the development of law – even international law – is a way to manage power. Kelsen's insistence that reprisals and war are sometimes necessary to make international law effective is by no means a warrant for giving privilege to the politics of power.

5. Legal Cosmopolitanism and International Pluralism

This final section claims that a Kelsenian approach to international relations solves two different theoretical puzzles: first, that modern international theory typically views international pluralism as secondary and as a by-product of sovereignty, and second, that the approach appeases the perceived conflict between international pluralism and cosmopolitanism. Both puzzles have to do with the way international theory pictures international relations from the point of view of sovereignty, treating international law as an instrument for the protection of sovereignty, for putting up a fence in the wilderness, filling up a void. A Kelsenian perspective is not only a different one, it leads on to entirely different connotations of both cosmopolitanism and pluralism as well as their relation.

While pluralism is broadly regarded as a political ideal there is among political theorists often the contention that pluralism can only flourish within the bounded community – "behind the walls of the city" (Arendt 2005, 170). Hence, the pluralist ideal however defined remains with the state. From the point of view of sovereignty, international pluralism becomes more of an instrument to encounter the perceived problems or negative consequences of the fact that plurality is the natural condition among states. Perhaps pluralism then does more to limit plurality than to embrace difference. For example, Carl Schmitt treats international pluralism ("the pluriverse") as a means to preserve sovereignty within realm of the state (Schmitt 2003); the English School concept of pluralism is about the protection of state autonomy and political independence (Bull 1977); Rawls' concept of pluralism reduces plurality to "reasonable pluralism" (Rawls 1999). These conceptions of pluralism are of course different in many ways yet they share the view that plurality among states has to be limited in conformity with some pluralist model.

Accepting, as Kelsenians do, the identity of law and state, the pure theory of law, and the primacy of international law, international pluralism is different; the founding principle is not sovereignty but equality describing how states stand side by side:

> "The idea is quite generally held, that all states form a community in which they stand side by side on a footing of equality, is possible only on the assumption that above the states, or above national legal orders, there is a legal order that makes them equal by defining their mutual spheres of validity." (Kelsen 1941, 68)

This, of course, is a formal account of state pluralism. Legal logic does not portray international pluralism in a substantial sense or as a political ideal. The fact

that pluralism involves economic, political or moral challenges is another matter. Nevertheless, the Kelsenian approach is a starting point for rethinking the possible value or content of international pluralism without the limitations of the sovereigntist approach. Turning now to cosmopolitanism, Kelsen did not teach that legal cosmopolitanism requires a world state since the validity of the law is uncoupled from sovereignty. Instead, the primacy of international law in a monistic system logically leads on to legal cosmopolitanism – one legal system for the entire globe. Legal cosmopolitanism in Kelsen's view is also detached from morality and hence not a version of moral cosmopolitanism. Unlike many international lawyers including prominent members of the Vienna School, Kelsen strongly rejected the connection between law and morality. According to Bernstorff (2010, 253) there were two main reasons behind Kelsen's standpoint. First, that he was a moral relativist in the sense that he did not conceive of a clear concept of international justice or that universal values are possible. Second, that he was concerned that concepts of justice and morality may easily serve ideological purposes. Instead, he seemed to accept the realist position that value conflicts and diverging interests is the condition of world politics. This is an example of Kelsen's realism, but perhaps also a connection with more pessimistic émigré scholars of his generation such as Ernst Cassirer, Leo Strauss and Hannah Arendt. Hence, unlike Morgenthau (1946), Kelsen did not approach the tension between power and political morality. It is possible that the development of normative political philosophy after Kelsen's times would have made a difference to his progressive mind. Nevertheless, there are reasons to retain Kelsen's scepticism focusing instead on how his conception of the state and international law possibly interacts with various accounts of international morality (Hjorth 2011).

To begin with, the Kelsenian approach adds a dynamic dimension to international law, which is a major difference compared to the sovereigntist perspective. For example, when reading modern international theory through a Hobbesian lens, sovereignty stops motion; consequently, there is, for the time being, a closing of the political space. Hence, Hobbesian legacy portrays international law as a bundle of temporary norms "profitable for the time they last" and preserved only by the reliance on the discretion of the stronger Prince (Hobbes 1909, 181[122], 107[69]). Such a conception places international law in the hands of the states and order becomes a way to preserve the present order. By contrast, Kelsen presents a legal theory according to which the hierarchy of norms is not static, but dynamic and based on the chain of validity; this is not the static perspective of Hobbes but rather the dynamic perspective of Kant.

An advantage of the Kelsenian approach is that there is, in theory, no conflict between pluralism and cosmopolitanism since both flow from legal logic. The perceived conflict has been much in focus in recent years involving hard-to-solve tensions between cosmopolitanism and versions of communitarianism, such as nationalism. Accordingly, leading liberal theorists have searched for ways to find a middle way (Rawls 1999; Beitz 1999; Tan, 2004). The, problem, it seems, is urgent only as long as one views states to be cultural, social or ethnic units. Legal logic does not rely on any particular ideological conviction; it merely insists that states are legal entities. Adding legal cosmopolitanism does not challenge legal logic but is a part of it. This way the Kelsenian approach present an entirely different anatomy of international relations. This does of course not solve all possible conflicts but presents a different framework. The Kelsenian approach replaces the conception of a system of sovereign states with an equally plausible conception of international relations. It may be argued that this approach involves too many assumptions and too little of observable facts. The value of the approach, however, is that it enables us to rethink and possibly unleash some of the mental barriers that has limited IR-discourse and it does so not from a moral perspective but on the foundation of a legal theory. Kelsen clearly perceived of modernity in the making – as an unfilled promise – yet he maintained, as a legal scholar and expert, that his theory was not utopian or merely suggestive, something to ponder over, but a genuine and working legal theory. Further exploration of this is due; three issues may be illustrative as a beginning.

First, scholars have suggested a version of legal pluralism, constitutional pluralism, as a middle way between legal monism and legal dualism to advance the European Union. A political advantage of this perspective seems to be to avoid two uncomfortable options: either to accept that particular nations dominate the law of the union or that the body of EU law subordinates national legal systems to it. In Kelsen's terminology, this clearly resembles the choice hypothesis and perhaps the unwillingness among European nations to make the choice. Neil MacCormick (1993) insists that constitutional pluralism is not a plurality of different legal systems but a genuinely pluralist constitution. The idea is further developed by Klemen Jaklic (2014, 21) claiming that constitutional pluralism is not hierarchical but heterarchical. From a Kelsenian point of view, legal monism is of course to be preferred to legal pluralism but the matter is complicated particularly when dealing with international law (Kammerhofer 2009). However, Gragl (2018, 48) notes that a certain version of legal pluralism, "pluralism under international law posits a single legal system, i.e. international law, with domestic legal orders, including the European Union, as subsets contained with

it" would probably have been acceptable for both Kelsen and Hart. It is easy to visualise this system in line with the three-circle theory so that the laws of the member states and the laws of the Union represent the two inner circles whereas the common constitution remains. This way a Kelsenian approach accounts not only for international law among states, but also for constitutional relations across borders beyond sovereignty logic.

Second, a challenge for the Kelsenian approach is to handle the interaction of the legal system with non-legal systems, norms and practices. That there is such an interaction is obvious since the content of the law does not change itself but is the result of social and political processes. This involves encountering non-legal concepts of law and norms related to ideology, religion or culture. From a Kelsenian viewpoint, the legal system relates to other systems but is not subsumed under these other systems or compromised by them. Taking Kelsen's legal logic as a starting point for a broader project of social or political theory involves accounting for the critical relation between social facts and norms with law as a mediator (*Vermittler*) between factual claims, cultural norms and comprehensive worldviews (Habermas 1992). If law is a mediator in international relations, it represents what Kratochwil (1989, 211) defines "as a particular style of reasoning with rules". The Kelsenian approach sketched out here liberates international law from substantial claims whatever they are. International law is not the language of moral discourse but a structure of norms and rules within which moral discourse takes place. R.J. Vincent (1978) claimed that international society present such a condition on the foundation of a Western conception of a universal moral order. The Kelsenian approach represents a further step towards post-nationalist and post-sovereigntist norms.

Finally, stretching Kelsen's legal logic leads not only to legal cosmopolitanism but, perhaps, to what Alexander Somek (2006) labels "stateless law". Accordingly, Somek (2007) points to the "fragmentation" of the international system into multi-layered forms of international and transnational relations. Despite including non-state actors into his conception of international law, Kelsen may not have conceived of the prospect of the "withering away of the state" nor the various emerging forms of global governance. Relaxing sovereignty logic, a variety of norms and practices across border are perceivable, goings-on that create expectations or norms at a micro-level that are not necessarily subject to the kind of dichotomising constructions that flow from sovereignty-based logic. Hence, practices wherever they appear lead on to the formation of different kinds of norms, formal or informal, spontaneous or designed. A Kelsenian approach presents a tool for evaluating norm-hierarchies and for interacting with extra-legal conceptions of order. As such, the approach provides a normative foundation for analysing international norms and practices, their normative relationship and evolution. This is not impractical or unworldly but a way to explore, understand and criticise.

6. Conclusions

As a theorist, Kelsen was a modernist, a positivist, a progressivist and a presentist; in politics, he was a democrat and a liberal. Kelsen sought to demystify the state, reacting against political and legal myths as well as the romance of ideology. Uncoupling international law from sovereigntism he moved in the direction of legal cosmopolitanism envisioning international law as an instrument of peace. This paper argues that when reading international relations through a Kelsenian lens one can conclude that state pluralism is not necessarily the logical consequence or by-product of sovereignty but bestowed upon states by international law through the principle of equality. Furthermore, that international pluralism and cosmopolitanism share the same origin in legal logic hence appeasing the perceived conflict between international pluralism and cosmopolitanism. The paper is limited to the anatomy of international relations, involving mainly descriptive and conceptual issues. It leaves out elements such as culture, religion, identity, economy and much else that is important for international relations and which complicates and perhaps obscures the picture. The intention has not been to tone down the importance of these aspects for empirical international relations or when dealing with international ethics, but to show that this does not necessarily determine the way we perceive of the structure of international society.

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Author

Ronnie Hjorth is Professor of Political Science at the Swedish Defence University, Stockholm. He specialises in Political Theory, International Political Theory, and International Ethics.