Chapter 4
The Kelsen-Hart Debate: Hart's Critique of Kelsen's Legal Monism Reconsidered

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4.1 Introduction

Legal monism is the view that there is only one legal system. Hans Kelsen defended a particularly strong version of that view. Kelsen did not simply hold that there is only one legal system, as a matter of fact. He argued, rather, that it is impossible for a legal science to recognize the existence of more than one legal system. Legal-scientific cognition, as a form of normative cognition, must assume, according to Kelsen, that no two valid legal norms conflict, ie, that there are no two legal norms that make incompatible demands on the behavior of one and the same agent. And the absence or at least the resolvability of such conflict between legal norms can be assured, Kelsen argued, only if all legal norms that exist are understood as belonging to one and the same legal system. Legal pluralism, in other words, is deemed to be juristically inconceivable (Kelsen 1934: 111–125, 1920: 107–111, 1952: 404, 424–428).

This exceptionally strong version of legal monism has found few followers (Somek 2007, 2012). It seems to have been unanimously rejected by the leading Anglo-American analytical legal positivists, in the wake of Hart's highly influential critique of the Pure Theory of Law (Hart 1983).[1] Contemporary constitutional theory generally endorses this rejection and has turned thoroughly pluralist

[1] Hart's arguments have been developed in more detail by Joseph Raz. See Raz (1970: 95–109) and Raz (2009a: 127–129). Hart's and Raz's arguments against Kelsen's theory of legal system are fairly similar. This paper, therefore, focuses on Hart's initial development of the critique. For a discussion of Raz's version of the critique, see Vinx (2007: 184–194).

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(MacCormick 1993: 8–9; Barber 2010: 145–171).[2] Legal monism, or so it would appear, is clearly the least convincing aspect of Kelsen's theory of legal system.[3]

This paper offers a qualified defense of Kelsen's legal monism against Hart's critique. I concede that Hart managed to establish the falsity of Kelsen's strong monism (Hart 1983: 324—332; Barber 2010: 148–156).[4] But this concession, I argue, does not settle the fate of legal monism in all its possible forms. A Kelsenian, as Hart himself pointed out (Hart 1983: 309), might withdraw to a weaker form of monism: even if monism is not a necessary assumption of all legal-scientific cognition, it might still be true, as a matter of fact, that all the law that currently exists belongs to one and the same legal system. It is this form of legal monism that I want to show to be defensible.

Hart, and other legal pluralists following his lead, would not deny, of course, that it is possible for the whole world to come to be governed by one and only one legal system. This would be a world, according to the Hartian, with only one practice of recognition, carried by one globally integrated system of courts. But Hart forcefully argues, in *The Concept of Law*, that this is not the world we live in. As a matter of fact, there are several practices of recognition, each with its own judicial institutions and ultimate standards of legal validity (Hart 1961: 208–231). According to Hart, monism is not even a remotely plausible description of global legal order as it currently exists.

Despite the alleged descriptive inadequacy of monism, Kelsen, in his numerous works on international law, succeeded in giving a fairly detailed and plausible description of existing global legal order as a monist order.[5] If that description can be shown to be coherent and reasonably true to the facts, monism cannot, *pace* Hart, be brushed off as descriptively inadequate. Rather, it must be regarded—alongside legal pluralism—as one available account of current global legal order. And if monism, as applied to current global legal order, is descriptively viable, we are entitled to ask why a legal-pluralist description of the sort offered by Hart and his followers should be preferred to a monist description. We are also entitled to ask whether Kelsen's monist theory of legal system, though not defensible on the ground of the logical conditions for legal cognition, may not be more defensible than is usually assumed.

Hart's answer to this challenge was to claim that Kelsen's monist description of international legal order is based on a mistaken criterion of the identity of legal systems. Kelsen holds to the view, according to Hart, that all legal norms that are

[2] MacCormick subsequently modified his rejection of Kelsen's monism and argued that the European legal order might be understood as a form of "monism under international law." See MacCormick (1999, 113–121). The view that is advocated here is close to MacCormick's later position.

[3] See for instance Culver and Giudice (2010, 38) who argue—though they sympathize with Kelsen's view that international law is real law—that Hart's criticism of Kelsen's monism is "decisive." This assessment is upheld in Giudice (2013, 161–164).

[4] I have tried to explain why I do not hold Kelsen's strong monism to be defensible in Vinx (2011).

[5] For a comprehensive account of Kelsen's theory of international law see von Bernstorff (2010). A recent defense of the continuing relevance of Kelsen's approach to the theory of international law is given in Kammerhofer (2014).

related to one and the same basic norm by what Hart calls a "relationship of validating purport" form part of the same legal system (Hart 1983: 317–321). It is this criterion of identity, in Hart's view, that allows Kelsen to offer a monist account of global legal order, because it appears to imply that international law validates national law. But according to Hart, it is wrong to claim that all laws related to the same basic norm by a relationship of validating purport must form part of the same legal system. Hence, monism is unsustainable even in its weaker form.[6]

Hart is right to argue that the criterion of the identity of legal systems that he attributes to Kelsen must be insufficient. However, the attribution of the criterion to Kelsen is false. I also argue that, rightly understood, Kelsen's monism can accommodate the observations that Hart takes to establish the falsity of weak monism. Consequently, it is not as clear as Hart makes it out to be that the world is not governed by a monist system. The question why we should prefer a Hartian, legal-pluralist account of global legal order to a weak form of Kelsenian monism therefore persists. An answer to this question, however, cannot be given on purely theoretical grounds, by appeal to considerations of descriptive accuracy or logical coherence. In a somewhat modified form, I will thus uphold Kelsen's view that the choice between monism and pluralism (portrayed by Kelsen as a choice between different monisms) depends on questions of value (Kelsen 1934: 116–117, 1920: 314–320, 1952: 444–447).

4.2 The Identity of Legal Systems and the Relationship of Validating Purport

Weak monism, to repeat, does not claim that all laws belong to one and the same legal system by logical necessity. What it claims is that it is possible (and plausible) to interpret the existing international legal order in a monist way. In his influential article, *Kelsen's Doctrine of the Unity of Law*, Hart rejected Kelsen's monism in its weak variant as based on an inadequate account of what it means for two (or more) legal norms to belong to the same legal system (Hart 1983: 311–321).

Hart's argument rests on the attribution to Kelsen of the following principle, which we can call the "principle of validating purport:"

> **[PVP]** *If two norms are related by a relationship of validating purport, they both belong to the same legal system.*

A relationship of validating purport, according to Hart, exists between two legal norms whenever one of the two purports or claims to validate the other (Hart 1983: 317–321). Hart's attribution to Kelsen of the principle of validating purport is based on passages in Kelsen's work that offer an analysis of the relationship of international and national law. To sustain his interpretation of Kelsen's monism, Hart cites

[6] Ronald Dworkin's mild critique of Hart's attack on Kelsen conceded this key point to Hart. See Dworkin (1968).

the following passage describing the "principle of effectiveness" from Max Knight's translation the second edition of Kelsen's *Pure Theory of Law*:

> A norm of general international law authorises an individual or a group of individuals on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm thus legitimises this coercive order for the territory of its actual effectiveness as a valid legal order and the community constituted by this coercive order as a "state" in the sense of international law (Kelsen 1960: 215 (cited in Hart 1983: 318)).

Kelsen's point here, as portrayed by Hart, is that there is a norm of customary international law, the principle of effectiveness, that determines the conditions under which the political rule of a person or group of persons counts as legitimate under international law, with the consequence that the rules enacted by that person or group of persons will then have to be recognized as valid law. The condition in question is simply that the coercive order established by that person or group of persons must enjoy actual effectiveness in some territory (Kelsen 1952: 414–415). Through the principle of effectiveness, international law, then, purports to validate national law. And, given the principle of validating purport, this is sufficient, according to Hart's Kelsen, to establish that national laws are validated by international law and that national and international law therefore form parts of one and the same legal system. In Hart's reading of Kelsen, this alleged appeal to the relationship of validating purport is Kelsen's only argument for the view that national and international law form parts of one integrated legal system. If the principle of validating purport can be shown to be false, Kelsen's monism must consequently fail.

To establish that the principle of validating purport is false, Hart introduces a hypothetical example, which is supposed to make it evident that the principle of validating purport can at best be a necessary, but clearly not a sufficient, condition for the membership in the same legal system of the norms that it connects.

> Suppose the British Parliament […] passes an Act (the Soviet Laws Validity Act, 1970) which purports to validate the law of the Soviet Union by providing that the laws currently effective in Soviet territory, including those relating to the competence of legislative and judicial authorities, shall be valid (Hart 1983: 319).

If the British Parliament passes the act, British law will purport to validate Soviet law. However, it would obviously be false to argue that the Soviet legal system has thereby become part of British law. Hence, the existence of a relationship of validating purport between the Soviet Laws Validity Act and the laws of the Soviet Union is insufficient to make Soviet law part of the British legal system. If a relationship of validating purport is insufficient to ensure that the laws that it relates belong to the same legal system in this case, Hart concludes, the principle of validating purport must be false. It follows that the principle of effectiveness, which purports to validate national law, is insufficient to establish the unity of international and national law.

Hart also offers a diagnosis of what he takes to be Kelsen's "central mistake" (Hart 1983: 318). The reason why it makes no sense to claim that the Soviet Laws Validity Act validates Soviet law is that "the courts and other law-enforcing agencies in Soviet territory do not, save in certain special circumstances, recognize the

operations of the British […] legislature as criteria for identifying the laws that they are to enforce" (Hart 1983: 319). A little earlier in his paper, Hart asks the reader to imagine that the "Vice-Chancellor of Oxford University dispatched to me a document purporting to order me to write a paper on Kelsen's Doctrine of the Unity of Law" (Hart 1983: 312). As Hart points out, it wouldn't follow from this fact, and the fact that he, Hart, did indeed write a paper on Kelsen's doctrine of the unity of law that, in so doing, he obeyed the Vice-Chancellor of Oxford University or that he recognized the Vice-Chancellor's authority to order him to write papers on a certain topic. Hence, we cannot infer from the fact that the Vice-Chancellor purported to order Hart to do something he in fact ended up doing that the Vice-Chancellor had any authority in the matter over Hart.

Similarly, we cannot infer from the fact that the principle of effectiveness purports to validate national law that the validity of national law in fact depends on the principle of effectiveness. Whether that is the case or not must depend, in Hart's view, on whether the legal officials in the coercive order established by national authorities recognize their laws to have been validated by international law. If they do not, the fact that international law purports to validate national law will not suffice to establish that the validity of national law depends on international law.[7]

In accepting the principle of validating purport, Hart argues, Kelsen focused too narrowly on the content of laws purporting to validate others and failed to pay sufficient attention to the circumstances that attend the enactment of such norms, to whether they are recognized as authoritative and by whom. As a result, Kelsen lost sight of the distinction between a norm that merely purports to validate another norm and one that does in fact validate another norm. The pure theory, Hart argues, lacks the resources to draw this crucial distinction. This establishes the superiority, in Hart's view, of a theory of legal system built on the idea of a practice of recognition. A norm validates another norm, in that view, if is recognized to do so, by the relevant legal officials, and does not merely purport to do so (Hart 1983: 312–313, 335–336).

What are we to make of this criticism of the pure theory? At first glance, it is unlikely that Kelsen would have failed to see the distinction between a norm purporting to validate and a norm that really validates, or to appreciate its importance. After all, Kelsen put heavy emphasis on the distinction between objective and subjective legal meaning,[8] and he famously denied that the fact that the Captain of Köpenick managed, for some time, to order people around gave him real legal authority (Kelsen 1934: 9–10). He would therefore surely have rejected the idea that the Vice-Chancellor of Oxford can put himself in a genuine position of normative authority over Hart merely by purporting to give orders to Hart. It is, therefore, *prima facie* implausible to attribute to Kelsen anything like the principle of validating

[7] Needless to say, Hart argues on the basis of his theory of the rule of recognition. See Hart (1961: 97–107).

[8] I have tried to argue elsewhere that the distinction is crucial to Kelsen's conception of legality. See Vinx (2007: 78–100). Kelsen's most interesting and sustained discussion of the issue is Kelsen (1914).

purport, as formulated by Hart, because the principle involves a rather too obvious confusion of subjective and objective legal meaning.

More to the point, Hart's attribution of the principle of validating purport to Kelsen abstracts from the fact that, for the Kelsenian legal scientist, any description of relationships of validation presupposes the prior choice of and commitment to one of several possible variants of legal monism. As is well known, Kelsen argued that there are two different ways, in the framework of a monist theory of law, to conceive of the relationship between national and international law: national monism and international monism. In the first view, the legal scientist assumes a national basic norm and treats international law as valid only to the extent that it has been (indirectly) validated by that national basic norm. It is only in the second version of monism that the legal scientist, by appeal to the principle of effectiveness, comes to endorse international law's claim to validate national law.[9] Both of these options, according to Kelsen, are equally compatible with all available empirical data for which a theory of legal system for the contemporary world would have to account. Both are therefore descriptively possible choices for the construction of a theory of legal system. Hart himself was aware of Kelsen's "choice-hypothesis," but he argued that it had no bearing on his argument against Kelsen's doctrine of the unity of law (Hart 1983: 311–312). In this Hart was quite clearly mistaken.

The availability of two different monist perspectives implies that Kelsen was not committed to the principle of validating purport. To illustrate the point, let us take another look at the example of the Soviet Laws Validity Act. Hart's reasoning here starts out from the claim that the purported validation of Soviet law by the Soviet Laws Validity Act is not really what validates Soviet law (at least if we discount the marginal scenario of the use of Soviet law in British courts). This claim must surely be true, and I do not wish to dispute it. But Hart appears to assume that it follows from the fact that the Soviet Laws Validity Act does not validate Soviet law that British law and Soviet law cannot form part of one and the same legal system. This second step is an obvious a *non-sequitur*. A Kelsenian legal monist can argue, after all, taking the point of view of international monism, that both British and Soviet law form parts of one global legal system, because they are both validated by the principle of effectiveness. This does not commit the Kelsenian to the view that there is a relationship of validation between British and Soviet law (or *vice versa*). He is therefore as free as a pluralist to deny that the Soviet Laws Validity Act validates Soviet law.

It would also be possible, of course, for the Kelsenian legal scientist to adopt a national monist perspective that might be either Soviet or British. In the first case, he would of course deny, as Hart wants him to, that Soviet law is validated by the Soviet Laws Validity Act, because he will hold that Soviet law, validated by the basic norm of the Soviet legal system, or law recognized by Soviet law, is all the law there is. In the second case, he will make the same claim about British law. Perhaps he will then treat the Soviet Laws Validity Act as validating Soviet law within the

[9] On Kelsen's 'choice hypothesis' see ibid., 113–122, Kelsen (1920: 102–320, 1952: 401–447), von Bernstorff (2010: 104–107), and Langford and Bryan (2012).

British legal system. But the claim that the validity of Soviet law within the British legal system might come to depend on a British statute is, as Hart would have to admit, quite obviously true.

The upshot of this discussion is that Kelsen's monist approach can accommodate Hart's example of the Soviet Laws Validity Act as well as other, similar examples that have been put forward in the literature, as I have shown elsewhere (Vinx 2007: 184–194). Hart was right about one thing: If the British Parliament decided to enact a statute validating Soviet law, it would fail to make the validity of Soviet law depend on that British statute. But this is a claim the Kelsenian monist can acknowledge without the slightest embarrassment and without having to abandon monism. Hart's example, I conclude, proves nothing against (weak) monism.

Hart's use of the example of the Soviet Laws Validity Act goes wrong for the reason that it disregards an important element of Kelsen's theory of legal system: the theory of legal hierarchy first developed by Kelsen's pupil Adolf Merkl (Kelsen 1934: 55–75; Merkl 1931). The theory of legal hierarchy claims, in a nutshell, that the norms that belong to one and the same legal system form a hierarchy of authorization in which higher-level norms determine the conditions for the valid enactment of lower-level norms. It follows from the theory of legal hierarchy that a relationship of validation can exist only between a superior and an inferior norm, but not between two norms that are on the same level of legal hierarchy, or between an inferior and a superior norm.

Every construction of legal system makes assumptions about the structure of legal hierarchy, in that it assigns all valid norms to one or another level of hierarchy. These assignments, as we have just seen, will allow us to distinguish, on a perfectly principled basis, between authentic and spurious relationships of validating purport. The Soviet Laws Validity Act, for instance, could not be an authentic validation of Soviet law, in an international monist construction, because British law and Soviet law are, in that construction, situated on the same level of legal hierarchy. It could not be an authentic validation of Soviet law in a national monist Soviet perspective, because that perspective derives all valid law from the basic norm of the Soviet legal system.

It should now be clear that Kelsen is not committed to Hart's principle of validating purport. Whether some relationship of validating purport will have to be regarded as an objective relationship of validation, in the context of legal-scientific description, will depend on which of the different available monist perspectives is chosen by the Kelsenian legal scientist. And these choices impose restrictions on the authenticity of relationships of validation that go beyond the mere existence of a relationship of validating purport, as Hart defines it. Hence, those choices can always be taken in such a way as to accommodate the intuitions about authentic and inauthentic validation that underpin Hart's examples.

Let us now move to a discussion of the principle of effectiveness, and the relation of national to international law. Hart, as we have seen above, challenges Kelsen's claim that international law can be understood to validate national law by arguing that Kelsen's claim is based on nothing more than the principle of validating purport. Because that principle is false, Hart concludes that Kelsen's monism must be

rejected as well. For Hart, the practices of recognition in the national context are what determine the nature of the relationship of national and international law, at least in the absence of an international practice of recognition. National practices of recognition, however, typically do not recognize any dependence of the validity of national law on international law.

This attack fails due to Hart's misattribution of the principle of validating purport to Kelsen. The point can be spelled out both from a national monist and from an international monist perspective.

To start with national monism, the mere fact that international law purports to validate national law does not by itself force the Kelsenian legal theorist to accept that international law validates national law. If the legal officials of some nation, and perhaps the population at large, do not recognize that their law is validated by the principle of effectiveness, they will, presumably, come to embrace a jurisprudential perspective akin to national monism. A Kelsenian legal theorist who thinks that a lack of recognition of international law's claim to validate national law on the part of national officials and citizens undermines international law's claim can of course do the same. A monist, then, can go along with Hart's view that the claim that international law validates national law is deeply implausible, and yet hold on to monism, if he is willing to pay the price of embracing national monism.

The fact that Kelsen is not committed to the principle of validating purport also helps defend the viability of international monism. The international monist construction of legal order does not simply claim that national law must form part of a global legal order because the principle of effectiveness purports to validate national law. Rather, it makes the claim that we can conceive of national and international law as forming a hierarchical structure that gives superiority to international law. This claim, *pace* Hart, is not based on an appeal to the principle of effectiveness alone.

Hart's presentation of Kelsen's doctrine of the unity of law fails to take proper account of Kelsen's oft-repeated view that the existence of a legal system—or, rather, the defensibility of a certain construction of legal system—depends on constraints of effectiveness. It makes no legal-scientific sense, according to Kelsen, to postulate the existence of a certain legal system unless the behaviour that it purports to govern exhibits sufficient conformity with the norms of the system (Kelsen 1920: 94–101, 1952: 412–414). International monism, then, will have to meet constraints of effectiveness to qualify as a viable description of legal order.

It would make no sense to postulate the existence of a global legal order that subordinates national to international law if there weren't a system of states that regularly interact with each other, and that tend to do so in recognition of a number of principles—such as the principle that national law cannot derogate from international legal duties—that can plausibly be seen to imply a superiority of international law to national law. It is therefore wrong for Hart to assume that international monism depends on nothing but a relationship of validating purport between the principle of effectiveness and national law. The question, rather, is whether the system of public international law can, under an international-monist interpretation, account for enough state behaviour to make international monism descriptively plausible. Hart has not established that this is not the case.

4.3 The Basic Norm and the Identity of Legal Systems

Kelsen's conception of the identity of legal systems is open, according to Hart, to a second, seemingly decisive objection that has not been discussed thus far. In rebutting Hart's attribution to Kelsen of the principle of validating purport, I relied heavily on the possibility of a choice between different monist perspectives on the relation between national and international law. As is well known, Kelsen consistently argued that the choice between these different perspectives—national and international monism—is not determined, given the current state of development of international law, by objectively ascertainable empirical facts. Both national and international monism, in Kelsen's view, fit the relevant facts well enough to constitute plausible interpretations of global legal order as it currently exists. Legal science, therefore, cannot tell us how to choose between them. The choice, ultimately, must be grounded on one's ideological preferences (Kelsen 1934: 116–117, 1920: 314–320, 1952: 444–447).

This view has an important implication with respect to our aim to distinguish between mere purported validation and real validation. Whether a relationship of validating purport will amount to a real relationship of validation will depend, in some cases, on what form of monism we choose. According to international monism, for instance, the principle of effectiveness does not merely purport to validate norms of national law. It does validate norms of national law. In national monism, by contrast, its validating purport will not be recognized as truly validating. But if the choice between national and international monism is not determinable by legal science, then legal science cannot determine, or so it seems, whether the principle of effectiveness merely purports to validate national law or whether it actually does so. It seems that Kelsenian legal science does not provide us with any way to ascertain the objective legal meaning of the principle of effectiveness. As a result, the question of the identity of legal systems will also remain indeterminate: There is no legal-scientific way to decide whether, say, British law forms part of a global legal system or whether it should be regarded as a self-standing legal system that, from its own point of view, includes all other valid law within it.

One might argue, of course, that a good theory of the identity of legal systems ought to allow us to answer questions like these. Hart's second main criticism of the pure theory's conception of the identity of legal systems takes Kelsen to task for failing to make his theory live up to this criterion of adequacy. This charge is typically framed as a complaint about the emptiness of reference to the basic norm as a criterion of a norm's membership in a legal system (Hart 1983: 338–339; Raz 1970: 100–105). According to Kelsen, as Hart understands him, legal systems are to be individuated by recourse to a basic norm. Two norms belong to the same legal system if and only if they can both be traced back to one and the same basic norm. If, by contrast, two norms are validated by different basic norms, they belong to two separate legal systems. Hart argues, however, that it is sometimes possible to trace back norms to one and the same basic norm, through relationships of validating purport, that do not, in fact, belong to the same legal system:

> The basic norm of the American constitution is (roughly) that the constitution is valid; but unless we have some independent criterion of what it is for laws to belong to one system we cannot trace the validity of laws back to the constitution and thence to its basic norm; we can only trace relationships of validating purport, and these, as we have seen, cut across different legal systems (Hart 1983: 339).

The independent criterion Hart alludes to here is of course a rule of recognition—in this case the set of criteria, whatever they are, that are in fact used by American courts to determine whether a purported law belongs to the American legal system. Once we can rely on a rule of recognition to determine whether some law belongs to the American legal system or not, the appeal to a basic norm validating the American constitution turns out to be superfluous. It makes no contribution to identifying the valid rules of American law.[10] If, on the other hand, we refrain from invoking the rule of recognition as an independent criterion, we are forced to rely on relationships of validating purport. We have to adopt the view, in other words, that two norms belong to the same legal system if there is a basic norm that purports to validate them both. Such an approach, however, must surely go wrong. It would not allow a Soviet court, Hart assumes, to deny that the validity of Soviet laws depends on the British Soviet Laws Validity Act. Hart thinks that the only reasonable course for a legal theorist is to embrace the first horn of this dilemma. Kelsenians should admit that traceability to the basic norm is an empty criterion of the identity of legal system, and accept the theory of the rule of recognition instead.

A Kelsenian might be tempted to give a rather flippant reply to all of this. The question whether some legal norm belongs to this or to that legal system obviously will not ever bother a legal monist. A legal monist is already committed to the view, for good reasons or bad, that there is only one legal system, and that all legal norms that there are belong to it. It thus makes little sense to assume that Kelsen's theory of the basic norm was meant to answer the question of identity, as Hart understands it, ie, that it was meant to provide us with a criterion for deciding whether some legal norm belongs to this or rather to that of several existing legal systems, as though that were an open question. To think that this is an open question is to assume the truth of legal pluralism, which is to beg the question against the monist.

To make this answer a little less flippant, we can re-emphasize a point already made in the discussion of Hart's first criticism. There is a valid concern as to whether monism can provide us with a plausible account of the structure of the one legal system that it holds to exist. Hart is right to argue that it would speak against monism if monism were unable to cast aside and treat as spurious at least some relationships of validating purport. The validity of Soviet law would not have come to depend on British law if Parliament had enacted the Soviet Laws Validity Act. But as we have seen, there is no reason to suppose that a monist view cannot give enough structure to the legal system to avoid such conclusions. A Kelsenian national monist will of course deny that the British Soviet Laws Validity Act validates Soviet law. And a Kelsenian international monist will hardly have a difficult time to come up with an

[10] For Hart's general development of this attack on the rule of recognition see Hart (1961: 107–110).

explanation that relies on norms of international law for why the British Parliament did not have the authority to validate or invalidate Soviet law. According to his view, both British and Soviet law are validated by international law, but not by each other.

To be sure, Kelsenian legal science still does not resolve the choice between national and international monism. In that sense, it fails to give a perfectly determinate answer to the question of the identity of legal system. But is this a shortcoming of the pure theory? Kelsen may well be have been right to argue that the facts and/or examples that Hart considers to be determinative of the question of the identity of legal systems are, in fact, incapable of providing an unambiguous determination of that question. The fact, for instance, that the Soviet Laws Validity Act would not have come to be the validating ground of Soviet law if it had been enacted does not show that monism is false, and it does not help us to choose one version of monism over the other.

4.4 Monism and the Conflict of Laws

There is one final Hartian objection to monism that we have to consider. I conceded at the outset that Kelsen is wrong to claim that all valid legal norms must necessarily belong to one and the same legal system. I do not deny that one can coherently picture a world, from a Hartian external point of view (Hart 1961: 86–88), which contains several legal systems that are not connected in such a way as to provide any basis for a monist construction of global legal order. A pluralist description of global legal order might, given certain circumstances, even turn out to be the only plausible one. It would make no sense, for instance, for a legal historian to argue that the legal system of the Roman Empire and of the Chinese Empire formed parts of one global legal system. But it would make no sense either for the historian to choose the perspective of one of the two and then to deny that the other was a genuine legal system, containing valid norms. Any plausible description of the legal state of the world in late antiquity the legal historian might come up with will have to be pluralist.

In recognition of this point, I have done nothing more than to try to clear the way for the defense of a weaker form of monism, one that merely holds that monism is a plausible and perhaps attractive interpretation of current global legal order. What characterizes the current historical situation is that it has become possible, while taking a Kelsenian normative point of view, as opposed to a Hartian external or a sociological point of view, to interpret all law that now exists on the globe as belonging to one system. But this possibility is historically contingent on a certain degree of global legal interconnection. It is not implied by the conditions of the possibility of legal cognition.

As Hart rightly points out, Kelsen's monism, even in this modified form, is still committed to a "weaker version of the 'no conflict' theory" (Hart 1983: 332). A monist interpretation of global legal order, according to Kelsen, will have to show that there are no legally irresolvable conflicts between national and international

law. If an apparent conflict between two norms that are both to be regarded as legally valid were not amenable to a legal solution, through the application of some legal rule or principle that gives priority to one over the other, the two norms in question would, in Kelsen's view, have to be regarded as belonging to separate systems of legal authority, neither of which can claim recognized superiority over the other. In other words, Kelsen would, in describing the relation of the two norms, be forced back into the external point of view and would have to embrace some form of legal pluralism.

Because international monism holds international law to be hierarchically superior to national law, and to authorize the enactment of national law, Kelsen would seem to be committed to the claim that purported national laws that conflict with international law ought to be regarded as invalid. The problem with this view, of course, is that national legislatures often enact laws that appear to conflict with norms of international law, but that are not therefore treated as lacking legal validity. The most natural explanation of this fact, it would appear, is that conformity with norms of international law is not typically a condition of the validity of national statutes. These conditions, rather, depend on a national legal system's own practice of recognition. Such a practice may or may not take account of international law, but, even if it does, international law's standing as a condition of the validity of national laws will itself depend on the national practice of recognition. The national practice of recognition is an ultimate standard of validity that turns the national legal order into an independent legal system.

To deal with this challenge, Kelsen attempts to show that, from a monist perspective, there are no real conflicts between national and international law, ie, that all such conflicts can be shown to be merely apparent (Kelsen 1934: 117–119). Kelsen's main strategy for achieving this goal is to assimilate apparent conflicts between national and international law to apparent conflicts between a constitution and statutes that violate constitutional norms (Kelsen 1929). A statute that apparently conflicts with a national constitutional provision will, unless it fails to pass the threshold of absolute nullity, enjoy legal validity. That the statute is unconstitutional means either that it can be invalidated on grounds of unconstitutionality by a constitutional court or—if the political system does not provide for that possibility—that the organs that enacted the statute can be held liable for violating the constitution, even while the statute itself continues to enjoy validity. As Kelsen points out, there is no conflict between the constitutional norm that allows for the invalidation of the unconstitutional law or for the punishment of its enactors, and the demands, whatever they may be, of the unconstitutional statute.

Similarly for the relationship of national to international law: That a national law fails to conform to a provision of international law that the state is under a duty to observe need not entail that it is not valid, even from a monist and internationalist point of view. The legal significance of the international norm, rather, consists in the fact that its violation makes the violating state liable to a sanction under international law that may be applied by the injured state. Once again, there is no conflict between the national and the international norm. Imagine that two countries A and B enter into a treaty in which A undertakes to grant political rights to the members

of a minority. Assume as well that the legislature of A proceeds to enact a national statute depriving members of that minority of its political rights. The treaty-based international norm, in Kelsen's reconstruction, determines no more than that A is now liable to a sanction, and this liability does not conflict with the demands that the national statute, which determines that members of the minority are not to enjoy political rights, makes on its respective addressees.

This defense of the weak no-conflicts thesis raises a host of interesting and complicated questions, and I cannot discuss all of them here. I will focus, rather, on Hart's main criticism that is quoted below:

> This argument is ingenious, but […] it does not, in fact, banish conflict between international and municipal law; it merely locates such conflict at a different point and shows it to be a conflict not between rules requiring and prohibiting the same action (the treaty and the statute) but between rules prohibiting and permitting the same action, ie the enactment of a statute. It is a conflict of this latter form that arises when a state enacts a statute in violation of its treaty obligations, if its enactment is an offence according to international law, but is not so according to municipal law. There are certainly many systems of municipal law, among them the English, according to which it is not an offence to enact or to procure the enactment of any statute, and so this is permitted. It is logically impossible to conform […] both to the permissive rule of municipal law permitting the enactment of any statute and the rule of international law relating to treaties which […] prohibits such an enactment and makes it an offence or a delict (Hart 1983: 334).

Hart argues here that Kelsen's "ingenious argument" does no more than to eliminate the possibility that one and the same act may turn out to be legally mandated by one law, so that its non-performance is the condition for the application of a sanction, and be legally prohibited by another, so that its performance is the condition for the application of a sanction. However, Kelsen's elimination of the possibility of this first kind of conflict, according to Hart, does not rule out the possibility of another, second kind of conflict between national and international norms. The British principle of parliamentary sovereignty permits the enactment of laws with any content, even with a content that constitutes an international delict. As a result, an act of legislation that is permitted under British law, and thus not a condition for the application of a sanction in British law, may turn out to be impermissible under international law, being a condition for the application of an international sanction.

Of course, this second kind of conflict is in one respect less serious than the first: it does not make it impossible for the British Parliament to exercise its power in such a way as not to violate either British or international law. But it does bar Parliament, assuming it wants to avoid breaking international law, from making full use of the permission to legislate granted by the British constitution. Or put differently: One and the same act may still turn out to be legally permissible and legally impermissible at the same time, depending on whether we evaluate it from a national or an international perspective, and that must surely be regarded as sufficient proof of the possibility of conflict between British and international law.

Note, however, that Hart's description of the legal situation seems to presuppose the truth of legal pluralism. Hart, in claiming that one and the same act may turn out to be both legally permissible and impermissible, clearly assumes that British law and international law are independent legal systems with their own ultimate and

potentially conflicting criteria of validity. But the internationalist monist view, needless to say, must be that international law and British law are both to be interpreted as parts of one and the same legal system, in which British law is a mere subordinate part of an international system of law. And it is not at all clear whether, in that interpretive context, the principle of parliamentary sovereignty ought to be understood as permitting the enactment of statutes that conflict with international law.

Hart, in the passage just cited, appears to understand permission as the absence of prohibition. Under British law, as Hart points out, "it is not an offence to enact or procure the enactment of any statute." Let us assume, moreover, that it is not possible, under the British constitution, to introduce a law that would make it an offence to do so. From the perspective of international monism this plainly does not entail that it is not an offence for the British parliament to enact or to procure the enactment of any statute. For an enactment not to be an offence, it would of course have to conform to all law that forms part of the legal system, including—from the point of view of international monism—international law. Hence, all that is implied by Hart's observations about the British Constitution is that the prohibition to enact some law, if there is any, cannot be grounded in British law.

Kelsen need not concede that the enactment of a national statute that violates an international treaty is legally permissible. In fact, Kelsen explicitly argues that such an enactment would be an illegal act and, as such, subject to a sanction, notwithstanding the fact that the statute in question may acquire legal standing, as a result of the fact that the system of international law does not provide well-developed guarantees of legality, such as an international legal mechanism to invalidate national statutes that violate international law (Kelsen 1934: 118). From an international-monist perspective, then, it is legally impermissible for the British legislator to enact a law that violates an international treaty. Hence, Hart is simply wrong to claim that the monist must admit that, in the scenario outlined by Hart, one and the same act may turn out to be both permissible and impermissible. That description will only apply to the scenario if we have already adopted a pluralist perspective that treats British law as a separate legal system with its own ultimate standards of validity. However, in doing that, we rather obviously beg the question against the monist.

Hartians are likely to reply that Kelsen fails to take seriously enough the fact that British courts are committed to treating the principle of parliamentary sovereignty as an ultimate standard of validity. It is often held that this supposed fact (as well as analogous supposed facts about the courts of other nations) alone suffices to establish the falsity of Kelsen's international monism.[11]

[11] See, for example, Kumm (2012: 42):

> If the highest court of a legal order insists on applying the law of the more encompassing legal order only under conditions defined by its legal order and the decisions of that court are generally taken as authoritative by other officials of that legal order, then the relationship between the legal orders is pluralist as a matter of fact.

Kumm goes on to argue the relationship should not be pluralist as a matter of right. But I think he concedes the descriptive point too readily. His own cosmopolitan ambitions would be better

The principle of parliamentary sovereignty, however, can be re-interpreted within the monist framework. According to Dicey's classical formulation, to say that Parliament enjoys legislative sovereignty under the British constitution means that British courts will treat all laws enacted by Parliament as valid, which of course implies that they will not enforce constraints of international law against the British legislator.[12]

Kelsen's international monism, however, is clearly compatible with the non-enforcement of international legal constraints in national courts. It does not deny that norms of international law that bind states will often or even typically not be enforceable in national courts. From an international monist perspective, however, this does not settle the question of the legal permissibility of national acts of legislation that violate international law, because the violation of the international norm makes a state liable to an international sanction, to be carried out by the injured state.

As far as I can see, nothing rules out the possibility of a national judge who both upholds the principle of parliamentary sovereignty and adopts international monism as his theory of legal system. Such a judge would hold that the national principle of parliamentary sovereignty bars him from enforcing international constraints on national legislation, but he would nevertheless agree that his state is under a legal obligation not to legislate in ways that violate international law, and he would concede that a state injured by such an enactment on the part of his own state has a legal right to impose sanctions. He may even agree that the laws of his country are validated by the principle of effectiveness. There is nothing at all inconsistent in such a view.

Hence, we cannot interpret the bare fact that national courts, in some states, refuse to enforce international legal constraints as a falsification of legal monism. Or to put the point slightly differently: The fact that a British judge will regard the principle of parliamentary sovereignty as the ultimate standard for the identification of the legal norms that he is tasked to enforce in his own court does not imply that he must regard parliamentary sovereignty as an ultimate standard of legal validity that turns British law into an independent legal system separate from international law. Empirical facts about legal practice, insofar as they are indisputable, are again less determinative than Hart assumed.

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served by taking the view that the facts he talks about here do not establish that there is no unified global legal order as a matter of fact.

[12] See Dicey (1982: 87):

> The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament.

4.5 Kelsen, Hart, and the Argument from Moral Consequences

The rebuttals of Hart's critique of Kelsen that were offered here leave us with a further question that our dialectical moves on behalf of Kelsen have only made more pressing: Why monism? Let us assume that Hart's specific attacks on Kelsen's weak monism can be parried. Perhaps it is true that Hart implicitly assumes the truth of pluralism and that his arguments thus beg the question against weak monism. Perhaps it is true that the kinds of facts that Hart invokes to establish the falsity of monism fail to lend sufficient support to his rejection of Kelsen's doctrine of the unity of law, for the reason that they can be accommodated by that doctrine. This still leaves a simple and powerful final question in the hands of the Hartian. Why adopt a monist interpretation of global legal order?

What I have argued throughout is that Hart's attempts to establish the descriptive inadequacy of weak monism fail. If such attempts fail, and if it is possible—as Kelsen himself demonstrated—to offer a rich and nuanced description of contemporary global legal order on a monist basis, we are entitled to assume that weak monism is at least a descriptive possibility and that Kelsen's normativist theory of legal system might, *pace* Hart, turn out to be viable. But this is not to say, I concede, that legal pluralism is false. To prove that legal pluralism is false, one would have to defend Kelsen's strong monism, which I did not set out to do, because I am not convinced that this would be a promising endeavor. It is certainly as possible to give a nuanced and rich description of contemporary global legal order on a legal-pluralist basis as it is to give a monist description. In describing contemporary global legal order, then, we appear to have a real choice, as far as descriptive adequacy is concerned, between a Kelsenian monist view and a pluralist account stemming from Hart's theory of legal system.

If both weak monism and legal pluralism are descriptively viable as accounts of contemporary global legal order, then the choice between the two descriptions must, it seems, come to depend on normative factors. Even Hart himself supported the idea, in one of his moods, that the choice of an adequate legal theory might come to depend, within the restrictions set by a requirement of descriptive adequacy, on a theory's practical consequences and thus on our practical interests (Hart 1958: 615–621).

Admittedly, this way of addressing the choice between monism and pluralism conflicts with the purity of the pure theory of law, as it is normally understood, and I certainly would not want to claim that mine is the only plausible way to take Kelsen's ideas on international law forward. But to safeguard the purity of the pure theory, we would either have to defend strong monism, or choose purity over monism and become Kelsenian legal pluralists (Kammerhofer 2009, 2011: 230–240). I am inclined to reject both of these options: The first because I am not convinced that strong monism is defensible, and the second because I would nevertheless like to uphold monism, if it is descriptively viable, for what I suspect may be good normative reasons. At the point where Kelsen's commitment to a value-neutral legal

science and his commitment to monism come to pull apart, I prefer to stick to monism and to work out what I take to be its implicit moral content (Vinx 2007).

This approach is open to the charge that one must not make the choice between two different conceptions of law depend on the moral consequences of that choice. Julie Dickson, who has developed this charge most forcefully, claims that to choose a conception of law over another for its beneficial moral consequences must amount to "wishful thinking" and "utopian scheming" (Dickson 2001: 83–102).[13] Dickson argues that the choice for some conception of law can have morally beneficial consequences only if that conception is independently true. Moreover, even if choosing a false conception of law could have morally beneficial consequences, we would, in choosing that conception for its morally beneficial consequences, impair the accuracy of our theoretical understanding of what the law is.

I am perfectly happy to concede that we should not advocate the adoption of a conception of law, on the ground that it has beneficial moral consequences, if that conception can be shown to be descriptively inadequate, ie, if it can be shown to fail to make sense of intuitions or observations that an accurate account of legal system would have to accommodate. Kelsen's monist theory would have to be rejected, even if its adoption had morally beneficial consequences, if it was true that it cannot distinguish between mere relationships of validating purport and genuine relationships of validation. The thrust of my argument, however, has been that Kelsen's monist theory is not descriptively inadequate, or at least that Hartians have so far failed to show that it is. And if considerations of descriptive adequacy do not suffice to distinguish between two conceptions of law or legal system, then it is hard to see how we could make a cognitive mistake, or be accused of wishful thinking, in choosing between them on moral grounds.

Note that Kelsen himself adopted an argument from beneficial moral consequences in advocating the cosmopolitan version of legal monism. According to Kelsen, both national monism and international monism are descriptively adequate: All incontestable facts that a theory of the structure of legal order would have to explain can, in Kelsen's view, be accommodated by either perspective. The choice between the two perspectives must consequently come to depend on one's assessment of the moral consequences of the choice. The problem with the national monist approach, as Kelsen sees it, is that it cannot conceive of different states as equal members of a legal community of nations. The idea of a legal community of nations that enjoy equal standing under international law, irrespective of their size and *de facto* power, however, is described by Kelsen as "an eminently ethical idea and one of the few genuinely valuable and uncontested constituents of modern cultural consciousness" (Kelsen 1920: 204).

Kelsen is concerned that adoption of a national monist perspective is going to have the consequence of impeding the further institutional development of public international law, and in particular of the introduction of a compulsory system of international adjudication, which Kelsen regards to be highly desirable from a moral

[13] Dickson's argument is phrased as a critique of Schauer (1996). See also Schauer's reply to Dickson in Schauer (2005).

point of view. Adoption of the international monist perspective, on the other hand, is likely to favor such a development. After all, if we already agree that there is an objectively valid system of public international law that authorizes national law and to which nation states are already subject, there seems to be no good reason to oppose the introduction of institutions that can efficiently adjudicate and enforce the norms of that system (Kelsen 1942, 1944).

Kelsen's own argument from beneficial moral consequences, to be sure, assumes the truth of what I have called strong monism. It assumes, in other words, that legal pluralism can be rejected on *a priori* grounds of incoherence. Because monism, in either its national or its international form, is, in Kelsen's view, the only logically coherent description of legal order, we can choose only between the two forms of legal monism. Once this is granted, the choice for national monism can be portrayed as a flat denial of international law, ie, of a law that coordinates states that enjoy equal legal status, for the reason that national monism cannot recognize any law that is not validated by, and thus subordinated to, the basic norm of one's own national legal system. International monism is thus made to appear as the only description of legal order that a civilized and progressive person could wish to embrace (Kelsen 1920: 151–204).

I concede that the argument offered here does not allow us to employ this gambit against a Hartian approach. The defense of weak monism offered here does not entail, to repeat, that Hartian legal pluralism can be rejected on *a priori* grounds, or that it is descriptively less adequate than a Kelsenian theory of legal system. A Hartian legal pluralism remains on the menu of available descriptions of legal order. Hart, in contrast to the authors whom Kelsen accuses of embracing national monism, is not committed to a denial of the possibility of the co-existence of national and international legal systems. And though Hart refused to recognize public international law as a paradigm-case of legality, his theory clearly leaves open the possibility that public international law might develop into a full-fledged legal system, and possibly even into one that comes to subordinate and incorporate national legal orders, so as to create a monist global legal order (Hart 1961: 213–237).

A second charge against my suggestion that the choice between a Hartian legal pluralist and a weak monist approach to the description of international legal order ought to be made on moral grounds, then, is that the differences between a weak monist and a Hartian description of international legal order do not run deep enough to make that choice very consequential, as regards its moral consequences. This criticism seems to me to understate the differences between a Hartian and a weak monist perspective.

To begin with, the two views arrive at fundamentally different assessments of the status of the current system of international law. Hart, in the last chapter of *The Concept of Law*, suggested that existing public international law does not amount to a full-fledged legal system, as it lacks a sufficiently developed and unified practice of recognition (Hart 1961: 232–237). The weak monist assessment, by contrast, denies that the system of international law fails to attain the full quality of law. As long as it is possible to construct all law as part of international legal order, and to show that the construction meets a constraint of effectiveness, the assumption that

there is a full-fledged system of international law is as tenable, from a Kelsenian point of view, as any other systemic hypothesis (Kelsen 1952: 18–89).

These diverging assessments, in turn, are tied to different views about the relation between law and its institutions. Put crudely, for Hart and his followers, law follows institutionalization. If it is the essential function of law to offer authoritative dispute resolution, Hartians argue, legal systems must be normative systems the norms of which are authoritatively applied by judicial institutions. The practices of recognition of these authoritative institutions must determine what norms belong to a legal system (Hart 1961: 147–154; Raz 1990: 123–148). Kelsen, in marked contrast to Hart, frequently suggests that the development of law can and sometimes does jump ahead of institutionalization, because a coherent and sufficiently descriptive systemic hypothesis may be applicable even in the absence of centralized adjudication and enforcement.[14] Kelsen is quite willing, hence, to acknowledge the systemic and legal quality of "primitive" normative orders that do not possess judicial institutions with compulsory jurisdiction over all questions that might arise under the relevant rules (Kelsen 1944: 3–4, 1952: 13–17). However, Kelsen, of course, does not thereby intend to deny the importance of institutionalization for the efficient functioning of legal order.

The morally salient consequences of adopting a Kelsenian international monist perspective, even if only in its weak form, over a Hartian approach turn out to be very similar to the consequences that Kelsen expected from a choice of international monism over national monism. Once we adopt the weak monist perspective, as opposed to a Hartian approach, jurisprudential questions that Kelsen refers to as "legal-technical" questions—questions, that is, about how to make the international legal system function as efficiently as possible—will naturally take center stage. If our theoretical choice already recognizes the existence of an objectively valid system of public international law that stands above national legal systems and authorizes them, then we are committed, Kelsen suggests, to create the institutions that would make that system function well.[15] In particular, we are committed, Kelsen thinks, to the creation of impartial institutions of adjudication that can offer a "guarantee of legality" other than self-help, ie, other than the unilateral use of coercive

[14] To be more precise, a normative system is a legal system, according to Kelsen, if it successfully claims a monopoly of legitimate force, ie, if the behavior of the purported subjects of the law is sufficiently in line with the principle that the use of coercive force is legitimate only in response to a prior delict or violation of the law. For instance, Kelsen claims, with respect to international law, that:

> international law is true law if the coercive acts of states […] are, in principle, permitted only as a reaction against a delict, and accordingly the employment of force to any other end is forbidden; in other words, if the coercive act undertaken as a reaction against a delict can be interpreted as a reaction of the international legal community (Kelsen 1952: 18).

This condition could be fulfilled, Kelsen holds, in the absence of centralized adjudication and enforcement of a system's norms, because injured parties (or their allies) could apply sanctions for delicts committed against them by way of (legally authorized) self-help.

[15] Kelsen's line of argument here is strictly analogous to his argument for the introduction of constitutional adjudication in a domestic context. See Kelsen (1929).

force on the part of a state that claims that its rights under international law have been violated (Kelsen 1944; von Bernstorff 2010: 191–220). Adopting the international monist perspective, then, is likely to favor our willingness to institutionally strengthen the system of public international law.

There might be objections that this line of reasoning presupposes a normative standard of the proper functioning of legal order and that it is wrongheaded to attribute such a standard to Kelsen, who often adopted the posture of a hard-nosed demystifier of our understanding of law. But the fact is that Kelsen, at times, rather unambiguously commits himself to such a normative standard, namely to the ideal of legal peace.[16] This commitment is made most explicit in Kelsen's assertion that the essential function of a legal order is to secure peace, by submitting all use of coercive force to constraints of legality (Kelsen 1944: 3, 1952: 17–18). This view is tied to Kelsen's account of the structure of legal norms (as authorizations of the application of sanctions) and to his claim that public international law is complete, in the sense that it provides legal grounds for resolving any possible conflict between states (Vinx 2011). A condition of full legal peace exists where coercive force is used only in response to a prior delict and after an impartial judicial decision. The attraction of international monism, to Kelsen, is that it promises, in contrast to national monism or legal pluralism, to help subject the use of force on the part of states to comprehensive and effective legal regulation and impartial judicial arbitration that Kelsen hopes will pacify international relations (Vinx 2007: 176–207).

In pointing out that Kelsen was committed to the ideal of legal peace, I do not mean to imply that Kelsen embraced international monism over pluralism for the reason that he thought it would serve that ideal. For Kelsen, the adoption of one or another form of monism, as I have emphasized already, is required on *a priori* grounds, in virtue of a demand for the normative consistency of all law that Kelsen considered to be a theoretical and not a practical postulate (Kelsen 1920: 107–111). From that perspective, the fact that the adoption of the international form of monism can be expected to have morally beneficial consequences is a mere by-product, though undoubtedly to Kelsen a highly welcome one, of the only theoretically defensible understanding of the nature of legal order.

My point is that the commitment to the ideal of legal peace must take on a heightened significance for those who think that Kelsen's *a priori* case for monism is unconvincing but who are nevertheless attracted to monism, and in particular to international monism. It might be argued that it is perfectly possible to adopt an international monist perspective on global legal order without thereby expressing a normative commitment to the ideal of legal peace, like the anarchist law professor who adopts an internal point of view to explain to his students what the law is without thereby endorsing its normative claims. But what would be the point of doing that if an institution-centred and pluralist description of legal order is equally available? If a descriptively accurate account of what the law is need not rely on a monist perspective, then why adopt it over a pluralist description that equally serves any purely expository interest? This question will be especially pressing if the adoption

[16] On the importance of the idea of peace for Kelsen's theory of legal system see Notermans (2015).

of monism has morally salient consequences that differ from the consequences of the adoption of the Hartian alternative.

That this is indeed the case appears obvious. For Hart, and authors working in the Hartian tradition, the existence of law is a matter of moral indifference. Whether more law or more unified law—in the international sphere or elsewhere—is better, we are told, depends on whether that law is going to be used as an instrument for good or bad (Raz 2009b). The further strengthening of the system of public international law, from a Hartian perspective, cannot be desirable *per se*. And because public international law, according to Hart, is not as yet a full-fledged legal system, we cannot, on Hartian grounds, argue from the existence of an international legal system to a commitment to make it work. The Hartian perspective, then, like the national monist perspective, is much less conducive than international monism to the goal of the realization of international legal peace. The choice between a weak form of international monism and legal pluralism, I conclude, must depend on one's estimation of the moral value of an international rule of law.

4.6 Why Not Pluralism?

Let me finish by making some tentative suggestions concerning the normative reasons that might come to bear on a choice between monism and pluralism, assuming that both are descriptively viable. Of course, it is by no means obvious that weak monism will prevail over a pluralist theory of legal system once we accept that the choice between the two approaches must depend on moral consequences. In what follows, I do not offer a comprehensive discussion of the question. Rather, I suggest that some common arguments for the moral attractiveness of legal pluralism might be misconceived.

Legal pluralists frequently talk as though monism was inseparably connected to the monolithic and homogenizing political form of state sovereignty.[17] But this portrayal of monism is a clear misrepresentation of Kelsen's monism. If deployed against Kelsen's monism, it is question-begging in much the same way as Hart's descriptive objections. Of course, if we adopt a legal-pluralist point of view that ties the identity of a legal system to an institutionalized practice of recognition, then the development of monism is imaginable only as a consequence of prior political centralization. In order to rely on the theory of the rule of recognition to determine the identity of a legal system, we must know beforehand whose recognition is to count

[17] See for instance Neil Walker (2012: 18–19) who describes monism as "a tendency towards a new manifestation of closure and a new reduction to unity; towards the old familiar of everything deemed constitutional being contained—'constituted' indeed—within the one hierarchically layered legal and political system." Such talk assumes, without offering much in the way of argument, that legal unity must be tied to the kind of political unity we associate with the modern state. It also assumes that all forms of unity and closure are equally bad. Kelsen's willingness to challenge such assumptions strikes me as more progressive and more intellectually enterprising than contemporary legal or constitutional pluralism.

as constitutive of the rule of recognition in question. And we can only know whose recognition counts if we already have an understanding of the boundaries of the political institutions of the legal systems we investigate. Given a legal-pluralist perspective, the call for monism must, then, appear to be a call for a kind of imperialism. Monism must be the arbitrary claim that one of the many institutionalized normative systems or practices of recognition, and thus one particular polity, should lord it over the others.

Kelsen's monism, however, claims that there can be global legal unity without much in the way of political centralization. The only institution necessary for the efficient functioning of the order of public international law, Kelsen argued, is an international court with compulsory jurisdiction over all disputes under international law (Kelsen 1942, 1944). If Kelsen's conception of legality describes a real possibility, a global legal system need not resemble the dreaded world state.[18] And because Kelsen's monism, as I have argued, may well turn out to be descriptively adequate, the normative worry that monism must resemble sovereignty may well turn out to be ungrounded.

My second suggestion is that legal pluralism implicitly disavows the goal of making political conflict between states amenable to legal resolution. In a monist interpretation of global legal order, as Kelsen points out, there are no political conflicts that do not have a legal solution (Kelsen 1931: 184–185). From a monist point of view, all political conflicts between states are in principle open to be settled through the use of legal procedures. The idea here is not, however, that political conflicts are to be made to disappear, perhaps through a prior homogenizing exercise of political violence of the sort that would be needed to found a world state, before legal arbitration begins. Rather, the idea is that they are to take on a different form, one that, hopefully, is going to be more peaceful than purely political conflict, while being open for political difference within legal unity.

Whether hope for such a civilizing power of international law can still be shared today is of course a doubtful question. Kelsen himself may have thought that the danger of the employment of law as a means of oppression and hegemony is less to be feared in the framework of public international law—at least if it comes to be supported by the binding adjudicative settlement of all international disputes—than in the framework of a sovereign nation state that has a legislator who is unhampered by formal constitutional constraints. This stance, in retrospect, may strike us as politically naïve. But it is important to remain aware of the fact that the legal pluralist alternative does little more than to consign the settlement of inter-systemic conflict to the sphere of power politics.

Legal pluralists like to sing the praises of the progressive attitudes that proponents of different systemic perspectives are allegedly going to exhibit to one another as soon as they have come to recognize the inescapable plurality of legal systems. Tolerance, understanding, and mutual respect are regularly portrayed as likely consequences of an adoption of the legal-pluralist mindset (Krisch 2012; Barber 2010: 170–171).

[18] We are perhaps too afraid of this at any rate. See Scheuerman (2011: 149–168).

Pluralism's bottom line, however, must surely be that inter-systemic conflicts have no legal resolution. To demand that the proponents of different systemic perspectives must therefore be nice and respectful to one another, instead of insisting that their perspective must prevail, is all fine and well. But there is no more intimate connection, either logically or psychologically, between the recognition of the relativity of all legal evaluation and such a tolerant attitude of mutual respect than there is between the recognition of relativity and the unreasoned conviction that one's own perspective must, to the greatest extent possible, be imposed on others. The belief in the relativism of legal evaluation does not entail a belief in the duty of tolerance or mutual respect. It might, with equal consistency, lead to the belief that there is no reason why your view should prevail rather than mine. The consequence of an adoption of legal pluralism, as a result, might well lead to a stance that is pragmatically indistinguishable from national monism.

One might reply here—with Carl Schmitt—that we cannot turn political conflicts into conflicts amenable to legal resolution simply by pretending that there is a global legal order. The proper answer to this challenge is that Schmitt was wrong about the limits of legality. Political conflicts do become amenable to legal resolution if the pretence that they are is successful, and the pretence can be successful if enough of us (statesmen, lawyers, academics, journalists, and citizens) think that there are good moral reasons to settle international conflicts through legal procedure rather than through pure politics. If that latter belief is true, then our pretence will be harmless. It will be nothing but the practical expression of our valid moral commitment to the ideal that political conflicts ought to be resolved, wherever possible, through a properly designed legal procedure and not through the unilateral use of force.

Kelsen came rather close to making the same point when he argued that the choice between the two monist perspectives—national and international—depends on ideological conviction. And his personal estimation of the value of the international rule of law, as already pointed out, was highly positive (Kelsen 1920: 314–320). I hope to have provided some reasons for thinking that it would be useful to make the moral reasons for that normative stance, as well as their jurisprudential significance, more explicit than Kelsen himself felt it necessary to do. At any rate, pluralism should not be regarded as the only account of the structure of global legal order that is descriptively viable or that has normative attractions. Kelsen's monism deserves another look.

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