

Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought

*David Dyzenhaus**

Eyal Benvenisti has sought to provide an optimistic account of international law through reconceptualizing the idea of sovereignty as a kind of trusteeship for humanity. He thus sketches a welcome antidote to trends in recent work in public law including public international law that claim that international law is no more than a cloak for economic and political interests, so that all that matters is which powerful actor gets to decide. In this Article, I approach his position through a discussion of the debate in Weimar about sovereignty between Carl Schmitt, Hans Kelsen and Hermann Heller. I try to show that Heller's almost unknown legal theory might be helpful to Benvenisti's position. Heller shared with Schmitt the idea that sovereignty had to have a central role in legal theory and that its role includes a place for a final legal decision. Indeed, much more than Schmitt, Heller regarded all accounts of sovereignty as inherently political. However, in a manner closer to the spirit of Kelsen's enterprise than to Schmitt's, he wished to emphasize that the ultimate decider — the sovereign decision unit of the political order of liberal democracy — is entirely legally constituted. Moreover, Heller argued that fundamental principles of legality condition the exercise of a sovereign power in a way that explains the specific legitimacy of legality and which might supply the link between sovereignty and ideas such as trusteeship and humanity.

* Professor of Law and Philosophy, University of Toronto. I thank the participants in the conference Sovereignty as Trusteeship for Humanity, in particular my commentator Roy Kreitner, for discussion and the student editors for their many very perceptive suggestions for revision.

INTRODUCTION

In liberal democracies today, sovereignty in the sense of national sovereignty is often perceived as being under threat, or at least “in transition,” as power devolves from nation states to international bodies. Some scholars conclude that we are living in a “post-sovereign order,” though perhaps “disorder” would be more accurate, as the loss of control by individual states to bodies which do not have the characteristics of states — for example, a monopoly on the legitimate use of violence — leads to the fragmentation of political power.¹ This threat to national sovereignty is at the same time considered one to a rather different idea of sovereignty, popular sovereignty — the sovereignty of the people — as important decisions seem increasingly to be made by institutions outside of a country’s political system.

However, these processes need not be perceived as threats. “Fragmentation,” a kind of Hobbesian worry about anarchy in international affairs, in the eyes of one scholar may amount to a “pluralism” to be celebrated in the eyes of another. And just as liberals argue that there is no loss to the sovereignty of the people when a country entrenches a bill of rights, thus subjecting the decisions of the legislature to constitutional review by judges, so they can argue that an international constitution is emerging and that the subjection of states to the norms of that constitution enhances democracy. One can even combine the pluralist position with the constitutionalist position by arguing that the era of Westphalian sovereignty of individual states has been replaced by a kind of constitutional pluralism in which all states are bound together in a federal structure in which there is no sovereign or overarching state.²

The idea that there might be this kind of overarching legal order is often part of an optimistic outlook on the prospects for law’s role in helping to serve the interests of all individuals in being treated justly and in a way that respects their human rights; in serving, we might say, their humanity. It informs Eyal Benvenisti’s *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*.³ Benvenisti argues that it is morally required that we reconceive sovereignty in such a way that states are understood to have obligations to strangers beyond their borders and also are required “to

1 See SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT (Hent Kalmo & Quentin Skinner eds., 2010); SOVEREIGNTY IN TRANSITION (Neil Walker ed., 2003).

2 See JEAN COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM (2012).

3 Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295 (2013).

take foreigners' interests seriously into account even absent specific treaty obligations."⁴ He recognizes that this argument might seem "utopian." But he hopes to convince his readers that the idea of sovereigns as trustees of humanity "already manifests itself in certain doctrines of international law and in specific judicial decisions."⁵

Benvenisti has suggested that an inquiry into this idea should proceed by asking three questions: The threshold question: can the idea of sovereignty be reconciled with obligations to others? Then, if it can, what are the reasons for trying to effect the reconciliation? Finally, what are these obligations and how are they to be operationalized? The first is the threshold question because there is, of course, no point to asking the second question if the answer to the first is that in practice there can be no reconciliation.⁶ Benvenisti's answer to that question hinges on showing that there are already examples in international legal practice of sovereign states being made answerable to obligations to others, to non-nationals outside their borders. In turn, his answer to the second question is that this kind of practice is morally required, and to the third that states have to take foreigners' interests seriously into account even absent specific treaty obligations when the states make decisions that affect such interests. And he takes the metaphor of trusteeship to be the most apt way of understanding these other-regarding obligations of sovereigns and "humanity" as the most apt characterization of the nature of the obligations.

However, one could just as well claim that the practical examples show that states are no longer sovereign at the same time as supposing that some moral loss has been incurred, in which case the burden would fall on the second question. If, for example, one's conception of sovereignty requires that the sovereign be free of any legal or moral limits on its freedom of action, one would think that the examples are of actions by non-sovereign bodies, at most of erstwhile sovereigns. And if, as suggested, one thinks that it is morally important that sovereigns retain such freedom of action, one would also think that the loss of sovereign status is a moral problem.

There is, in my view, an important point to be made here both in regard to current debates about sovereignty and more generally. It is that any conception of sovereignty is in part a normative construction; hence, there can be no appeal to brute facts about practice to demonstrate that practice is reconcilable with the idea of sovereignty. Arguments in this domain, as elsewhere in the human sciences, are always complex mixes of normative and factual claims,

4 *Id.* at 297.

5 *Id.*

6 Eyal Benvenisti, *The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks*, 16 THEORETICAL INQUIRIES L. 535 (2015).

and reconciliation for one paradigm of sovereignty might be the abdication of sovereignty for another. I shall explore the thought that the moral and the factual inquiries have to be fused in this way, so that there is no purely empirical threshold question, through a discussion of an older debate about sovereignty, the public law debate in Weimar.⁷

While the context for this debate was obviously different from that in which Benvenisti writes, the kinds of social pressures to which it responded were not. These pressures included the economic stranglehold imposed on Germany by the Allied powers after the First World War, foreign control over important aspects of domestic policy, and an increasingly globalized economy. Moreover, a large proportion of the population, including the elites, was not committed to the liberal democratic Weimar Constitution. Political and legal institutions were thus vulnerable to capture by groups from the right or the left that had no principled stake in maintaining them and capture had led to the internal fragmentation of the state.

At this time, legal scholars on the right regarded the Weimar Constitution as itself a threat to sovereignty, given that it diluted the power of the prewar sovereign — the Kaiser — by introducing some of the checks and balances of democratic constitutionalism. Their concern about sovereignty was, however, much more radical than that of contemporary opponents of judicial review, for example, Jeremy Waldron,⁸ who claim that such review undermines parliamentary supremacy and thus the authority of the representatives of the people. These rightwing Weimar scholars, notably Carl Schmitt, opposed what they regarded as the pluralistic, party political system of parliamentary democracy, as they thought that that system, like the judicial system, was prey to capture by special interest groups and thus contributed to the problem of fragmentation. On their view, popular sovereignty is national sovereignty, with national sovereignty understood as the sovereignty of a substantively homogeneous people, a power which is outside of legal order and which cannot be constrained by the legal limits that liberals and democrats desire to impose on an authentic sovereign power capable of making the kinds of decisions necessary to solve the fundamental conflicts of a society.

Schmitt's position gave rise to one of the three leading paradigms of sovereignty in Weimar. He set out his conception of sovereignty in a customarily

7 My account below draws heavily on my earlier work, especially DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* (1997).

8 See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006).

succinct and enigmatic way: “Sovereign is he who decides on the exception.”⁹ This formulation becomes clearer when paired with Schmitt’s claim that the primary distinction of “the political” is the distinction between friend and enemy.¹⁰ It follows, he supposes, that the political sovereign is the person who is able to make that distinction, is indeed revealed in the making of that distinction, and that he decides both that there is an exception and how best to respond to it. Schmitt thought that liberal democratic institutions with their commitment to the legal regulation of political power, that is, to the rule of law or the *Rechtsstaat*, are incapable of making the distinction, hence, incapable of being sovereign, hence, cannot be the guardian of the constitution. And he took this flaw to be expressed in Article 48 of the Weimar Constitution¹¹ since that section recognized the need for the presidential exercise of sovereign authority on existential questions, though it sought in a liberal-legalist fashion to set limits to an exercise of executive discretion that cannot in fact be legally circumscribed.

Hans Kelsen provided the second, legal positivist paradigm, one which opposed the classical idea that each state is sovereign in that it is subject to no externally imposed law. Indeed, Kelsen concludes his major work on sovereignty by advocating the radical suppression of the concept of sovereignty in legal thought if, as he thought desirable, states were to conceive of each other as equal actors within an international legal system.¹² According to Kelsen, a legal system is a hierarchy of norms, where the validity of each norm is traceable to a higher-order norm, until one reaches the *Grundnorm* or basic norm of the system. Such an order is free of contradictions since any apparent contradiction between two norms will be resolved by a higher-order norm, which gives an official the power to make a binding decision. The validity of the basic or constitutional norm cannot, however, be traced to any other norm and, Kelsen asserts, its validity has therefore to be assumed. Sovereignty is thus not a kind of freedom from law, as in the classical conception, since it is a legally constituted property, pertaining to the identity of a particular legal system. Thus Kelsen does not provide a paradigm for understanding

9 CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., MIT Press 1985) (1922) [hereinafter SCHMITT, *POLITICAL THEOLOGY*].

10 CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. of Chicago Press 1996) (1972) [hereinafter SCHMITT, *THE CONCEPT OF THE POLITICAL*].

11 VERF BAY art. 48.

12 HANS KELSEN, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS: BEITRAG ZU EINER REINEN RECHTSLEHRE* [THE PROBLEM OF SOVEREIGNTY AND THE THEORY OF INTERNATIONAL LAW: CONTRIBUTION TO A PURE THEORY OF LAW] 320 (1920).

sovereignty so much as a paradigm for understanding legal order in a way that does not regard sovereignty as an organizing concept for legal theory.

Schmitt and Kelsen remain important figures in the contemporary debate about sovereignty and, as I shall show below, their paradigms provide a useful perspective on the idea of sovereignty as a trusteeship for humanity. Schmitt sounds a productive, skeptical note about the idea of humanity (and by extension trusteeship) as a justification for state action, as he thinks that such justifications serve as ideological camouflage for power politics. Kelsen, in contrast, invites us to conceive sovereignty on its own terms, that is, legally. On that conception, sovereignty becomes an instrument for whatever ideological purposes those who occupy sovereign office choose. Such a conception permits one, Kelsen supposes, to distinguish clearly questions of what *is* from questions of what *ought* to be, the realm of legal science from the realm of ideology or of moral inquiry. And it is precisely such a distinction that Benvenisti relies on when he sets out his threshold empirical question to clear the way for asking his normative or moral question.

I shall also introduce a third paradigm — the almost completely forgotten legal theory of Hermann Heller, who died in 1933 aged forty-two.¹³ Heller, as we shall see, shared with Schmitt the idea that sovereignty had to have a central role in legal theory and that its role includes a place for a final legal decision. Indeed, much more than Schmitt, who liked to claim that he was a dispassionate, scientific diagnostician of politics and law, Heller regarded all accounts of sovereignty as inherently political. However, in a manner closer to the spirit of Kelsen's enterprise than to Schmitt's, he wished to emphasize that the ultimate decider — the sovereign decision unit of the political order of liberal democracy — is entirely legally constituted. Finally, the claim that all accounts of sovereignty are inherently political is not, for Heller, a claim that reduces sovereignty to the play of power politics. As he emphasized, normative argument is an eliminable part of legal and political theory, so that it is in Heller that we get the fusion of the factual and the normative of the sort I suggested Benvenisti needs.

Part I introduces the problem all three thinkers tried to resolve: how is it that the sovereign is both the highest authority and yet subject to law (Section I.A.)? It then indicates how Schmitt and Heller both resorted to Hobbes, though in very different ways, to respond to the paradox of sovereignty

13 His principal work is HERMANN HELLER, *DIE SOUVERÄNITÄT: EIN BEITRAG ZUR THEORIE DES STAATS- UND VÖLKERRECHTS* [SOVEREIGNTY: A CONTRIBUTION TOWARDS A THEORY OF THE LAW OF THE STATE AND OF INTERNATIONAL LAW], in 2 *GESAMMELTE SCHRIFTEN* [COLLECTED WORKS] 31, 127 (Christoph Müller ed., 1992) [hereinafter HELLER, *DIE SOUVERÄNITÄT*].

(Section I.B.). Lastly, it sets out the outlines of Heller's resolution of the paradox (Section I.C.). Part II begins the process of filling in that resolution by explaining how within the nation-state Heller thought that a particular democratic bond is forged between sovereign and those subject to his power in that the sovereign rules through law. Part III explains the role of normative principles in his theory in the construction of the bond between ruler and ruled and explores the implications of the theory for the relationship between sovereign and subject, where "subject" does not necessarily mean "citizen" since it includes all subject to sovereign power. Part IV takes the argument back to Benvenisti's central idea in order to show why both Schmitt's and Kelsen's paradigms illuminate some of its problematic aspects while Heller's paradigm might be able to take the idea forward, albeit on a rather different path. The last Part provides a brief conclusion.

I. THE PARADOX OF SOVEREIGNTY

A. The Paradox

In the nineteenth century, leading theorists of public law were much preoccupied with what we may think of as the paradox of sovereignty: if the sovereign is the highest authority, and hence not answerable to any other authority, how can the sovereign be subject to law? In Germany, this reasoning is most famously to be found in the attempt to explain the relationship of power and law in Georg Jellinek's "two-sided" theory of state.¹⁴ Jellinek belonged to the school of "statutory positivism" that built a theory of law around the idea of the primacy of statute law made by a legally unlimited and thus sovereign state. Statutory positivists argued that the state ruled comprehensively through primary legislation, faithfully implemented by the administration, with judicial review for constitutionality of statutes prohibited, and review for the legality of official action under the law confined to seeing whether the officials had kept within the letter of the law. The legal order was thus understood as a "closed positive system of laws deriving from a sovereign source (the state)."¹⁵

On this theory, it is impossible to explain international law, since the idea of the state as having unlimited power entails that there can be no law outside of the state to which the state is bound. But similarly the state is not bound by its own law. Since Georg Jellinek took as a given that the state is bound by its

14 See Georg JELLINEK, ALLGEMEINE STAATSLAHRE [GENERAL THEORY OF STATE] (1905).

15 See PETER C. CALDWELL, POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY & PRACTICE OF WEIMAR CONSTITUTIONALISM 34 (1997).

own law, he found himself confronting the paradox.¹⁶ The two-sided theory responds to the paradox by taking the state to have two modes of being. It presents itself, on the one hand, as a matter of social facts about power, but on the other, as a legal person. In its social side, there are constraints on the state's power — the constraints set by the needs the state has to satisfy and by the other locations of social power in the society. In its legal side, the state may legislate as it pleases, but it is to be understood as legally constituted — as a system of legal norms.

The theory faced several problems. At a conceptual level, it does not so much respond to the paradox as evade the question of the relationship between law and power. For it consigns questions about the elements in the relationship to distinct fields of inquiry, on the one hand, social theory and political science, on the other, legal theory understood in a very particular way, as confined to the study not only of positive legal norms but also only those norms that are established by statute. In addition, the theory assumed that the *de facto* power of the state was also *de jure* or legitimate. But its methodological restriction on keeping its modes of analysis distinct meant that it barred itself from inquiry into the question of how *de facto* power might become *de jure*.

Kelsen and Schmitt each developed one side of the theory to the exclusion of the other. In both cases the results bore little resemblance to the original, most notably in the one small but significant feature their theories had in common — the fusion of the *de facto* state with the *de jure* state. However, in Kelsen legitimacy becomes a property of legality, more accurately, of the validity of positive law, whilst in Schmitt legality is reduced to legitimacy, with legitimacy conceived as the property of a particular kind of power, one that stands outside of legal order.

Heller, in contrast, took Jellinek seriously, in particular the idea that facticity — what is — has a normative force; in Jellinek's phrase: "the normative force of the factual."¹⁷ Heller approved of this idea to the extent that it conveys correctly that tradition often has a hold on us that we do not fully bring to consciousness. But he insisted that the idea of the normative force of the factual has to be supplemented by the idea of the "normalizing force of the normative."¹⁸ And in order for the normative ideas to become normal, for prescriptive ideas to become part of practice, they have to strive for legitimacy.

16 *Id.* at 42-44.

17 HERMANN HELLER, STAATSLHRE [THEORY OF STATE], in 3 GESAMMELTE SCHRIFTEN, *supra* note 13, at 181, 181, 379 [hereinafter HELLER, STAATSLHRE].

18 *Id.* at 179-81.

Thus for Heller there is a gap between the *de facto* and the *de jure* dimensions of the state. In exploring this gap, Heller again took his cue from Jellinek, as he emphasized two aspects of the *Rechtsstaat*: on the one hand, the law-constitutive character of power — legal order secures and even increases the resources of the powerful; on the other, the power-constitutive aspect of law.¹⁹ What connects these two aspects, establishing a dialectical relationship between law and power, is ethics, more precisely what Heller called “ethical fundamental principles” of law.²⁰ These principles provide a basis for a juridical assumption that legal order should be conceived as a dialectical unity of law, power, and ethics. That assumption in turn leads to a duty on the part of legal officials to attempt to close the gap between the *de facto* and the *de jure* in the direction of the *de jure*. The officials are under a duty to make law as it in fact is live up to what we might think of as law’s inherent, ethical aspirations — the aspiration to be a *Rechtsstaat*.

In order to transcend Jellinek’s binary reasoning, Heller reaches back beyond the nineteenth century through Spinoza via Hobbes to Bodin to confront the paradox of sovereignty. Indeed, the paradox of sovereignty was classically formulated by Thomas Hobbes in *Leviathan*. Hobbes’s formulation is important to any discussion of Heller and Schmitt on sovereignty because they both took Hobbes’s political theory to be a major, though rather different source of inspiration for their own. Kelsen, in contrast, did not consider Hobbes a significant point of reference.

B. Hobbes in Schmitt and Heller

In *Leviathan*, Hobbes is commonly taken to have responded to the paradox of sovereignty by pointing out that to suppose that the sovereign is subject to civil law leads one into an infinite regression of always looking for a further sovereign as ultimate decider; hence, one should conclude that the sovereign is not subject to law.²¹ However, we need to note that Hobbes prefaces this claim by saying that “[i]t is true, that Sovereigns are all subject to the Lawes of Nature; because such laws be Divine, and cannot by any

19 *Id.* at 354-55.

20 HERMANN HELLER, *Bemerkungen zur Staats- und Rechtstheoretischen Problematic der Gegenwart* [Observations on the Problem of Contemporary Theory of State and of Law], in 2 GESAMMELTE SCHRIFTEN, *supra* note 13, at 249, 275 [hereinafter HELLER, *Bemerkungen*].

21 THOMAS HOBBS, *LEVIATHAN* 224 (Richard Tuck ed., Cambridge Univ. Press 1997) (1651).

man, or Common-wealth be abrogated.”²² The prefatory remark opens up the possibility that the sovereign is subject to law, not to the civil law he has himself made, but to the laws of nature. This is just one of the many points in Hobbes’s political and legal theory where he introduces an element that makes his account of law more complex, given his reputation as the founder of an absolutist, authoritarian conception of sovereignty. In addition, when Hobbes explains why the sovereign is legally unlimited by civil law, his point is that he who has ultimate lawmaking authority can always choose to free himself from subjection to law by enacting a new law. But since that choice has to be properly or legally enacted, it would seem that until that point, the sovereign is subject both to particular laws and the rules that apply to the making of particular laws.²³ Finally, Hobbes argues that the sovereign is an artificial not a natural person and that characteristic of his personality are several “rights of sovereignty,”²⁴ such that any attempt by the sovereign to give away one of these rights should be regarded as void. Here a constitutive element of sovereignty turns into something regulative, as it seems that even if the sovereign were to enact his decision in accordance with the relevant rules for making law, that enactment should be treated by legal officials (including judges) and legal subjects as void.²⁵

One can seek to deflate this and other similar remarks by pointing out that Hobbes insisted that the sovereign’s subjection to the laws of nature made him answerable only to God for his transgressions, not to any earthly institution or human individual, and that being bound by law at one’s pleasure is not in fact to be bound. In his 1922 book on sovereignty, Schmitt adopted a view of Hobbes consistent with this deflationary strategy, as he found in Hobbes the source of his own decisionist understanding of law, in which all that matters is the answer to the question, “Who will ultimately decide?”²⁶

Schmitt’s definition of sovereign was at that time ambiguous between the claim that the one who as a matter of fact decides on the state of exception is sovereign and the claim that the sovereign, by virtue of his position as sovereign, is the one who gets to decide on the state of exception. On the first claim, we can never know who is sovereign in advance of a state of exception; on the second, we do know in advance who the sovereign is, only the content of his decision is unknown. This ambiguity plays itself out in Schmitt’s discussion of

22 *Id.*

23 *Id.* at 184.

24 *Id.* ch. 16.

25 *Id.* at 127.

26 SCHMITT, *POLITICAL THEOLOGY*, *supra* note 9, at 33-35.

the role of decision. Is he who makes decisions in fact the sovereign authority, or is a decision valid only when made by the sovereign?

There is a polemical point to the ambiguity. I understand Schmitt's argument as one that seeks to show that the ambiguity is located not in his own argument but within liberal political and legal philosophy. Liberalism recognizes that the sovereign, because he decides on the state of exception or emergency, stands above the normally valid legal order. But liberalism tries to limit the exception by legally defining the jurisdiction of the sovereign: the conditions both for declaring a state of exception and for resolving it. Kelsen stands out for Schmitt as the logical culmination of the liberal tradition in his determination to resolve the ambiguity by eliminating the exception, and with it the idea of sovereignty, from any independent role in legal order.²⁷

Schmitt took liberals to want to reduce as far as possible the necessity of politics by establishing the supremacy of impersonal law. His claim, by contrast, was that all legal orders are based on a political decision and not on a norm. It is therefore the nature of decision that has to be comprehended if one is to understand the concepts of law and of order, which are the two different, even antithetical, components of "legal order." Once one sees the foundational role of decision, one will also see that, in the state of the exception, while law (*Recht*) retreats the state stays.²⁸ It is the further liberal equation of state and positive law — the state is exhausted in official activity by virtue of positive law — which leads to the liberal claim that the state of exception is a state of lawlessness. For Schmitt, because the state remains whilst law retreats, the state of exception is still in a juristic sense an order.²⁹

Schmitt also argued that the concept of decision is closely bound up with the concept of personality. He wanted to reinstate a personalized Hobbesian decisionism against Locke's attempt to show that authority is the authority of law. For law itself cannot answer the crucial question: "Who will decide?" With Hobbes, Schmitt said that "[a]uthority and not truth makes law." And he took Hobbes to have claimed correctly that authority cannot be reduced to legal authority — to authority that is exhaustively constituted by law. State sovereignty is not something that can be subsumed in an abstractly valid legal order, but is always something concrete: a subordination of subjects to the power of a particular person or persons.³⁰

27 *Id.* at 14.

28 *Id.* at 12.

29 *Id.* at 12-13.

30 *Id.* at 43-45.

C. A Sketch of a Resolution

What, then, is the concrete resolution of the paradox of sovereignty? According to Schmitt, the answer lies in seeing that “all fruitful concepts of modern theories of state are secularized theological concepts.”³¹ His aim is to expose the politics of theories of law against what he regarded as the depoliticizing or neutralizing trend of the Enlightenment. He also supposed that it is a sociological fact about modernity that claims to authority have to be democratic in the sense that such claims can appeal only to what strikes people — the people — as right. And to strike the people as right, such claims have to be existential in nature — they must aspire to constitute the concrete unity of the people.

Further, there is a political-theological element to such claims. Once we see that what is at stake in law is political decisions about different kinds of order, we will also see that it is our political-theological commitments that fundamentally divide us from each other. Political theology tells us that a set of commitments has an existential worth for those who hold them, a worth that transcends rational discussion. Sociology tells us that these commitments are the only justificatory basis available to us. The commitments, in sum, are constitutive of collective identity: they transcend the here and now and pose an absolute challenge to any rival set. Any decision for a particular type of order is thus an absolutist, dictatorial one, something which liberalism hopes both to avoid and disguise.³²

Hence, Schmitt had an apocalyptic understanding of law and politics. He offered no legal answer to the paradox of sovereignty, since, on his account, the solution will take place in the realm of the political. More particularly, the resolution of fundamental problems of law is in the state of exception, which means by way of the sovereign acts that spring from a genuine political decision. And the struggle for sovereignty, the struggle to be the one who decides, is won not in the reasoned debates of parliamentary politics, but in the battle of the politics of identity.

Heller, in contrast, wanted to preserve what he took to be two intimately related elements of Bodin’s and Hobbes’s thought. The first is their commitment to the idea that whatever one’s ultimate conception of legal authority, one must find some immanent and rational justification. The second is the idea that the sovereign is subject to some higher authority and his laws are therefore to be seen merely as the positivization of such authority.³³ As we shall see, Heller

31 *Id.* at 49.

32 *Id.* at 55-84.

33 HELLER, *DIE SOUVERÄNITÄT*, *supra* note 13, at 34-38.

argues that the practice of the democratic *Rechtsstaat* makes an immanent legal rationality constitutive of the state, so that the sovereign is legally bound to fundamental legal principles.

On Heller's view, the elements of Hobbes's thought outlined above have to be taken seriously: the role of the laws of nature and the idea of sovereign subjection to them; the fact that the sovereign rules thought positive law; and that the person of the state is an artificial not a natural person.³⁴ As I shall now show, Heller builds his conception of sovereignty on the basis of these elements. Moreover, he argues that one cannot have a conception of sovereignty appropriate for a democratic political order unless these elements are made into the building blocks of one's legal theory. It follows from this argument that Schmitt does not so much provide an alternative paradigm of sovereignty in Weimar as a critique of sovereignty, one which strips it of its legal elements by reducing it to the name for superior *de facto* power.

II. THE DEMOCRATIZATION OF REASON

For Heller, the state is the organization equipped to make final and effective decisions on any matter that requires a resolution for the maintenance of social cooperation between all the inhabitants of the territory. In order to fulfil this role, the organization must be superior to any other, that is, sovereign.³⁵ But, in his view, state power can never be a mere projection of will from the powerful to those subject to them, from ruler to the ruled. The state organization consists of relations between the different groups whose activities constitute it, since it has to be brought into being and maintained in existence by the deliberate activity of individuals. These individuals include both the most and the least powerful among those subject to the state. Political power is never power over the state, since by definition it is power won and exercised within the state organization.³⁶ Heller thus said that even the most autocratic kind of ruler will find that not all power can be united in his person. He will have to exercise that power through the state, which means sharing it with his bureaucracy and all his other organs of rule. And he will also have to count on the willing support of a certain number of organizations and groups if he is to secure the obedience that makes his rule viable.³⁷

34 *Id.* at 36-37, 95-98.

35 HELLER, STAATSLEHRE, *supra* note 17, at 358.

36 *Id.* at 351.

37 *Id.* at 339-49.

Heller also maintained that law is the means any ruler must adopt in order to publicly manifest his will. Since the autocratic ruler will, among other things, promulgate laws, it might seem that Heller could not withhold the title of *Rechtsstaat*, the state bound by the rule of law, from an autocratic state. Nevertheless, he poured scorn on Kelsen's claim that every state is a *Rechtsstaat*,³⁸ because for Heller the *Rechtsstaat* is a very particular form of legal and normative order, distinguished from absolutist forms of state in that it exhibits a division of powers between legislature, executive, and judiciary that equips the bond between ruler and ruled with legal sanctions.³⁹

It is these sanctions that operationalize what Heller called the "polemical principle" of democracy, or of the sovereignty of the people. The principle is that power in a democracy should go from bottom to top — all power resides in the people. The democratic *Rechtsstaat* institutionalizes that principle by requiring that the law be made by elected representatives, whose accountability to the people is legally ensured. That same law must be implemented and interpreted by officials and judges who are similarly accountable to the law.⁴⁰ The principle is polemical in the sense that it is intended to provide a basis for a stance amidst political conflicts. It opposes directly the autocratic principle that seeks to unite all power in the hands of the ruler and it points to the inevitable and sometimes very large gap in any *Rechtsstaat* between ideal and reality. Once institutionalized, it requires a constant attempt to narrow the gap under the impulse of interpretations of the principle.

The precise juridical distinction between democracy and autocracy is that in autocracy the sovereign representatives are juristically unbound, whilst in the state of the sovereignty of the people there exists a magisterial representation that is without exception legally bound. In such a situation, rulers must be able to justify their actions by referring to some legal warrant. And that is the beginning of what one might think of as political, even democratic, accountability.

It makes sense to see this as the beginning of democratic accountability for two connected reasons. First, the subjection of rulers to the law is part of the historical development that includes the establishment of representative

38 See, e.g., HANS KELSEN, VOM WESEN UND WERT DER DEMOKRATIE [ON THE NATURE AND VALUE OF DEMOCRACY] 252-53 (1981); HERMANN HELLER, *Der Begriff des Gesetzes in der Reichsverfassung* [The Concept of Statute in the Constitution of the Reich], in 2 GESAMMELTE SCHRIFTEN, *supra* note 13, at 203.

39 HERMANN HELLER, *Politische Demokratie und Soziale Homogenität* [Political Democracy and Social Homogeneity], in 2 GESAMMELTE SCHRIFTEN, *supra* note 13, at 421, 426 [hereinafter HELLER, *Politische Demokratie*]; see also HELLER, STAATSLHRE, *supra* note 17, at 359-61.

40 HELLER, STAATSLHRE, *supra* note 17, at 360-61.

assemblies with some role to play in legislation. Second, once the idea is dislodged that the authority of rulers and their law is divine, rulers must find some other mode of justification, hence, the search for an immanent and rational justification for political authority. Even if, as in Hobbes, the rational justification is one for absolutist rule, what is important is its appeal to the reason of its audience. Such an appeal sets in motion a process that makes it difficult to resist what we might think of as the democratization of reason.⁴¹

This process is not just a matter of formally extending the franchise until it is universally held. The idea that political power must appeal to the reason of each individual is founded in some conception of the equality of each individual reasoner. And this foundation leads to social division rather than cooperation in the face of large discrepancies in social and substantive equality. If the process of the democratization of reason is to avoid self-destruction, it must turn the formal *Rechtsstaat* of liberalism into the substantive or social *Rechtsstaat*. This is a state that strives to attain a degree of social homogeneity, that is, of rough social equality, for all the citizens of a particular state.⁴²

Thus far I have sketched two different aspects of the democratization of reason detected by Heller. The first culminates in universal franchise. The second requires attention to social inequality as an impediment to what can be taken as the rationale for the process of democratization — the vision of the citizen as author of his or her social and political order. These two aspects are given expression in the legal order of the *Rechtsstaat* in a way that provides much of the basis for Heller's claim about the legitimacy of legal order. However, these two aspects, whilst necessary conditions of legitimacy, are not sufficient. What has to be added is the legal quality of *rechtsstaatlich* rule, the specific legitimacy of legality. In this regard, we have to take into account Heller's argument that the legitimacy of legality cannot be reduced to the certainty delivered by the rule of positive law, since underpinning positive law is not simply, as Kelsen once put it, the "Gorgon head of power,"⁴³ but the fundamental principles of law.

41 *Id.* at 108-09.

42 HELLER, *Politische Demokratie*, *supra* note 39.

43 Hans Kelsen, *Remarks*, 3 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER [PROCEEDINGS OF THE ASSOCIATION OF GERMAN PUBLIC LAW TEACHERS] 54, 54-55 (1927).

III. THE LEGAL CONSTITUTION OF SOVEREIGNTY

Heller's definition of sovereignty is cumbersome, especially in contrast to Schmitt's one line quoted above⁴⁴:

The sovereign is thus the one who has decided on the normal situation in accordance with the written or the unwritten constitution, and because he willingly maintains its validity, he is able permanently to make further decisions. And only the one who decides in a constitutional manner about the normal situation is able also to decide juridically about the exceptional situation, even if he decides *contra legem*. Only he can be said plausibly to have the final decision on whether or not his law must yield to the necessities of the moment. If one were to accept that there are two independent decision making units, one deciding about the exceptional the other about the normal situation, so one would have to accept that there are two sovereigns in the same state.⁴⁵

However, I shall now argue that its elements make sense within a theory that accords a central and politically significant place to sovereignty, but which insists that sovereignty is entirely legally constituted. Sovereignty is then both a political and a legal concept. The political aspect is in a sense Schmittean, whilst the legal aspect is in a sense Kelsenian. That the two are aspects of the same phenomenon makes Heller's contribution to our understanding of sovereignty both distinctive and valuable.

Heller distinguishes between logical and ethical fundamental principles of law. His view seems to be that the logical principles are essential to the form of law, whilst the ethical principles give law both its value and its substance.⁴⁶ The logical are the "constitutive principles of the pure legal form."⁴⁷ They are universal conditions of legal knowledge, in that they will play a role wherever there is law, in the same way as grammar is to be found wherever there is speech.⁴⁸ For example, the principle of equality before the law, whether of states in the international order, or of individuals in the state order, is in one sense a logical fundamental principle of law, since in order for there to be law that governs both you and me, we have to accord each other formal reciprocal recognition as bearers of rights and duties. But to give content to the idea of equality, one has to positivize an understanding

44 See text accompanying *supra* note 9.

45 HELLER, *DIE SOUVERÄNITÄT*, *supra* note 13, at 127 (translated by the author).

46 HELLER, *STAATSLEHRE*, *supra* note 17, at 369.

47 *Id.* at 69-71.

48 *Id.* at 69-71.

of substantive ethical fundamental principles of law.⁴⁹ Thus, while logical fundamental principles are formal, in the sense that all law must observe them, it is the ethical fundamental principles which the positive law must seek to express. The substantive *Rechtsstaat* — the substance of the rule of law — is derived from these ethical fundamental principles, by contrast with the formal *Rechtsstaat*, which will be in place wherever there is the commitment to government in accordance with law.

Heller found the indispensability of the ethical fundamental principles to be acknowledged by the legislator in that he will refer to such principles in two ways, either substantively, in their actual formulation, or formally. An example of substantive formulation is the second part of the Weimar Constitution in its catalogue of fundamental rights. An example of formal reference is when the legislator, without formulating the content of the law, refers to illegality, public morals, reasonableness, good faith and so on. Here the legislator gives the judge full authority to concretize the fundamental principles of law legitimated by the society into norms of decision.⁵⁰ In addition, these norms have to be relied on even when there is no explicit reference to them, just because the law is never wholly contained in the text of the positive law. Heller offered the classic example of equality before the law, whose content is largely determined by changing social understandings of the scope of equality.⁵¹

It is their very lack of determinate content that permits ethical fundamental principles of law to stabilize a constitution. They provide the doorway through which positively valued social reality makes its way into the normativity of the state.⁵² The ethical aims of legal order are then expressed in the ethical fundamental principles of law. They are suprapositive in the sense of being beyond positive law. But they are not supracultural. They are principles that express the values embedded in the cultural practices that the *Rechtsstaat* institutionalizes. They are given content in the positive law by the process of democratic reason and reason is the criterion by which that content is elaborated and evaluated. There have to be moments of authoritative interpretation, debate stoppers where an exercise of political power is what ends the debate.⁵³ But each interpretation is authoritative only within the institutional structure of the democratic *Rechtsstaat*.

49 *Id.* at 154-57.

50 *Id.* at 370.

51 *Id.* at 370-01.

52 *Id.* at 371.

53 *See, e.g.,* HELLER, DIE SOUVERÄNITÄT, *supra* note 13, at 201-02.

What, then, are these principles? On Heller's view, this question is wrongly posed if it is meant to elicit a list of timeless ethical principles. The principles are those values that the culture regards as constitutional values, as the legal foundation of social cooperation. As such, they make up the stock of values that is the substantive constitution in the narrow sense. If there is a written constitution, it will try, insofar as is possible, to formulate the values of the substantive constitution in one document — a formal constitution. And this document may try to rank the values by putting some on a list of basic rights out of the reach of simple parliamentary majorities.⁵⁴ However, Heller also emphasizes that not all ethical fundamental principles of law are entirely relative with regard to time and place. They aspire to universality and the positive law can violate them.⁵⁵

According to Heller, legal theory has to make sense of the idea of sovereignty just because the fundamental principles of law cannot be concretized in the absence of a decision unit capable of making effective decisions for all the inhabitants of a particular area. But for him the paradox of sovereignty — that the sovereign is both bound by and free of the law — is resolved by disambiguating “law” in the formulation, so that we see that the sovereign is free of positive law, but only in a very specific sense. He is free of positive law only in that he may use legal means to change the law, and, even more importantly, he is never free of fundamental principles of law. Heller thus retrieves for twentieth century legal thought all three of the central ideas of Hobbes's legal theory.

According to Heller, the paradox of sovereignty arises only insofar as the main task of sovereign power is to concretize the fundamental principles of law and not to guarantee the positive law; hence, a decision against the positive law might be the right one if the positive law contradicts fundamental principles.⁵⁶ But, unlike Schmitt and Kelsen who wanted to dissolve the paradox, Heller wished to maintain it because the tension of which it is the manifestation is part of the structure of the *Rechtsstaat*. For whilst it is a mark of sovereignty that the sovereign can decide against the positive law, it is equally a mark that sovereign decision is always the decision of a legal, artificial person, that is, the third main idea in Hobbes's legal theory.

54 HELLER, STAATSLEHRE, *supra* note 17, at 385-95.

55 HELLER, DIE SOUVERÄNITÄT, *supra* note 13, at 70. Moreover, Heller says that at least some of the ethical fundamental principles are universal, a priori and historically unchanging, although he leaves open the sense in which they can be said to be. See HELLER, STAATSLEHRE, *supra* note 17, at 334.

56 HELLER, DIE SOUVERÄNITÄT, *supra* note 13, at 185.

Thus Heller argued in respect of Article 48 of the Weimar Constitution⁵⁷ that the discretionary powers granted to the President to respond to an emergency had to be understood as conditional on the parliament's power to confirm or strike down his measures, as well as on the electorate's power exercised through plebiscite.⁵⁸ On his view, and against Schmitt's, in a *Rechtsstaat* with its separation of powers, one cannot localize sovereignty in any particular state representative. But against Kelsen, he held that sovereignty is still something that transcends the positive law in that the state can decide to act legally against the law for the sake of law.⁵⁹ Sovereignty, in short, resides not in any particular organ of the state but in the organization of the state as a whole; and it cannot be reduced to an expression of the positive legal order.

In this analysis of Article 48, one can see all the elements at work in his definition above:

1. We find out who the sovereign is by seeing who in the normal situation makes decisions that both comply with and maintain the constitution.
2. That person is also the sovereign who responds to emergencies, which includes making decisions to act against the positive law (*contra legem*).
3. Even if decisions have to be taken against the positive law, they have to be in proper legal or juridical (*juristisch*) form.
4. There can only be one sovereign person in a state.

The last element — there can only be one sovereign person in a state — is particularly significant in appreciating why Schmitt does not so much offer a paradigm for understanding sovereignty as a paradigm for getting rid of sovereignty, because his thought in its hostility to legality is perforce hostile to any quintessentially legal construct. As noted above, Schmitt is sometimes ambiguous about this issue. Recall, for example, his claim that in a state of exception law recedes but the state in a juristic sense remains, which suggests that sovereignty is located both in the person of the state and in the natural

57 VERF BAY art. 48.

58 Heller's most elaborate analysis is to be found not in his academic writings but in his argument to the *Staatsgerichtshof* about the legal validity of the *Preußenschlag*, the federal government's coup against the Prussian government in 1932, under the pretext of Article 48. See PREUSSEN CONTRA REICH VOR DEM STAATSGERICHTSHOF: STENOGRAMMBERICHT DER VERHANDLUNGEN VOR DEM STAATSGERICHTSHOF IN LEIPZIG VOM 10. BIS. 14 UND VOM 17. OKTOBER 1932 [PRUSSIA V. REICH BEFORE THE STATE COURT: STENOGRAPHIC REPORT OF THE TRIAL BEFORE THE STATE COURT IN LEIPZIG FROM THE 10TH TO THE 14TH OF OCTOBER AND THE 17TH OF OCTOBER 1932] (1976). Schmitt both advised the federal cabinet throughout this process and appeared against Heller in the case. See David Dyzenhaus, *Legal Theory in the Collapse of Weimar: Contemporary Lessons?*, 91 AM. POL. SCI. REV. 121 (1997).

59 HELLER, DIE SOUVERÄNITÄT, *supra* note 13, at 127-31.

person who actually decides. However, as we have seen, for him the state is ultimately located in the natural person who is able to make the friend/enemy distinction in a way that appeals to a substantively homogeneous collectivity.

The idea of homogeneity here has nothing to do with Heller's egalitarian idea of social homogeneity and everything to do with nationalistic ideas of authenticity. There is an unbroken line of thought running from Schmitt's 1922 claim that law recedes in the state of exception, through to his suggestion in 1932 that the concept of the *Rechtsstaat* is a mere piece of rhetoric and his endorsement of the saying that "*Recht aber soll verzüglich heißen, was ich und meine Gevattern preisen*," a line from Goethe that Schmitt takes to mean that *Recht* amounts to nothing more than what me and my buddies happen to value.⁶⁰ And there is a direct line from this claim to the refrain of Nazi-era legal theory that the *Führer's* will is the source of all law.

Heller was well aware of this point. He argued in 1926 that a counterrevolution against the idea of rational legality would have to reach back beyond the absolutist period to seek a justification on the basis of a personalized deity. But this harkening back would be a revolution against Hobbes, since Hobbes, with others of his time, had replaced the idea of a personal god with the idea of human nature or reason. Such a reaction is against the Enlightenment and it can justify no stopping point for whatever forces it unleashes and whose driving vision it endows, whatever its content, with the romance of an aesthetics that is in awe of any absolute power.⁶¹ And it is in this thought, said Heller in 1928, that one can find the true kernel of Schmitt's claim that the specific political distinction is the distinction between friend and enemy. Schmitt, in making the friend/enemy distinction the fundamental distinction of politics, sought to do away with the internal politics of a state.⁶²

According to Heller, Kelsen and Schmitt are the flip sides of the same coin, as they both seek a kind of transcendental certainty. Kelsen's response eschews metaphysics and ethics, finding its transcendental foundation in a scientific starting point that hopes for the certainty that such a starting point seems able to deliver. But the security and certainty it delivers is entirely illusory, since its product is a "ghostly unreality of a theory of state without a state and a theory of law without law."⁶³ It must end in the final disillusionment of Schmitt's romantic theory, one that sets itself against all attempts to find

60 CARL SCHMITT, *LEGALITÄT UND LEGITIMITÄT* [LEGALITY AND LEGITIMACY] 19 (1988).

61 HERMANN HELLER, *Die politischen ideenkreise der gegenwart* [*Contemporary Political Ways of Thought*], in 1 *GESAMMELTE SCHRIFTEN*, *supra* note 13, at 267, 287-89.

62 HELLER, *Politische Demokratie*, *supra* note 39, at 425.

63 HELLER, *Bemerkungen*, *supra* note 20, at 252.

a rational basis for authority, opting instead for the romance of potential war of one homogeneous unit against all rivals, so that security and certainty can be created out of a normative void.⁶⁴ I shall now turn to exploring the implications of each paradigm for Benvenisti's idea of sovereignty as a trusteeship for humanity.

IV. THE SOVEREIGN AS TRUSTEE

Recall my point from the beginning that Benvenisti cannot help himself to examples from practice in order to support his claim that his idea is already in fact instantiated as a prelude to arguing that sovereigns *should* be subject to other-regarding obligations. My reason was that arguments in this domain, as elsewhere in the human sciences, are always complex mixes of normative and factual claims, and reconciliation for one paradigm of sovereignty might be the abdication of sovereignty for another. I also suggested that Benvenisti's distinction between the factual, threshold question and the normative question relies on the Kelsenian paradigm in which questions of what *is* can be clearly distinguished from what *ought* to be.

Schmitt's critique of liberalism is helpful in understanding my point. While he often portrayed liberalism as politically impotent, unable to guard against its enemies because it lacks any real substance, at other times he seemed to regard liberal ideology as an effective cloak over a particularly vicious kind of power politics. Liberals, he argued, like to fight their battles in the name of universal ideals, associated with the idea of humanity. This idea, he said, "is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat."⁶⁵

This "highly political" use of "a non-political term," Schmitt claimed, leads to viciousness because war waged in the name of humanity must deny what the friend/enemy distinction does not — the humanity of the enemy, their specific human "quality."⁶⁶ But Schmitt's objection goes deeper than the denial of other-regarding obligations of the sovereign in international law. For him, it is important to preserve the idea of the sovereign as absolute, i.e., unconstrained by law or by any sort of obligations, domestically as well as

64 *Id.* at 264-65.

65 SCHMITT, THE CONCEPT OF THE POLITICAL, *supra* note 10, at 54.

66 *Id.* at 54-55; see also Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113 (2005).

internationally. Indeed, his argument about why it is a mistake to think of the sovereign as subject to international law is entailed in his argument that in the domestic setting the sovereign is unconstrained by law.⁶⁷

Schmitt thought that a similar kind of critique applied to Kelsen. Despite his claim that the concept of sovereignty should be radically suppressed, Kelsen did not deny the idea of sovereignty any role. If the norms of the international system and of a domestic system seem to conflict, one will have, he argued, to make a choice in favor of one or the other in order to avoid contradiction. One has, in other words, to be a monist when it comes to the relationship between domestic and international law. Either one considers only those international norms valid that have been explicitly incorporated into domestic law, or one understands all national legal systems as authorized by the basic norm of international law, in which case conflicts between the two have to be resolved in favor of the international system.⁶⁸

Kelsen's claim that there is a choice here is rather strange. First, he clearly thought that the choice for international law was politically consequential and that the choice should be for the international system. Second, he argued that the very claim to sovereign equality presupposes an overarching legal order that accords each state equal legal standing. So there does seem to be a substantive concern that drives the Pure Theory. And while Schmitt generally argued that Kelsen's legal theory is the exemplar of the void at the heart of liberal legalism, he also claimed that Kelsen's desire to make international law into a hierarchy of authorizing norms that would make unauthorized acts of force criminal had the result of denying the equal moral status of friend and enemy.⁶⁹ In this way, Kelsen's legal theory can be seen as concealing, or at least serving as camouflage for, a substantive political agenda.

It is important to see that Schmitt's claims about liberal legalism are not in tension with each other. Indeed, one does not have to be a Schmittian to make the historical case for the claim that in international law and relations the idea of humanitarian trusteeship did in fact serve the economic interests of the imperial powers.⁷⁰ That case fits snugly with a normative critique of liberalism as presupposing an atomized conception of the individual — the

67 See Lars Vinx, *Carl Schmitt and the Analogy Between Constitutional and International Law: Are Constitutional and International Law Inherently Political?*, 2 GLOBAL CONSTITUTIONALISM 91 (2013).

68 See LARS VINX, HANS KELSEN'S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY 182-83 (2007).

69 CARL SCHMITT, *The Turn to the Discriminating Concept of War*, in SCHMITT, WRITINGS ON WAR 30 (2011).

70 See Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 THEORETICAL INQUIRIES L. 447 (2015).

rational maximizer of self-interest — in place of a thicker conception of the common values that could give individuals in a political order a more valuable sense of identity.

This case poses a serious challenge to Benvenisti and others who wish to resurrect the idea of sovereignty as trusteeship for humanity.⁷¹ It suggests that the idea is too laden with bad history to make it worth resurrecting. But Schmitt's point goes further because it is conceptual. It is that the bad history is no accident. Liberalism is driven by a political logic that requires it to claim that the other-regarding obligations of the state are requirements of some abstract idea, whether of humanity, as in Benvenisti, or as derivations of some ideologically neutral idea, as in Kelsen's *Pure Theory of Law*. That abstraction is supposed to permit the theorist to demarcate the domain of inquiry so that questions can be asked in one domain in an ideologically or value-neutral way. For example, Benvenisti's threshold question — Are sovereigns in fact already subject to other-regarding obligations? — allows him in his view to proceed to answer the normative question: Should they be so subject? According to Schmitt, however, the answer to both questions comes too easily because it has already been smuggled into the conception of sovereignty that informs inquiry into the first question.

A response to this powerful challenge should start by accepting, with Heller, that all arguments on this terrain are at bottom political. There is no value-free description of the facts of the matter, as is illustrated in that the claim that examples show that sovereigns in fact have other-regarding obligations can be answered by the counterclaim that the better conclusion is that we are living in some post-sovereign order, more likely disorder. But that all the arguments are at bottom political does not mean either that argument itself or appeals to practice are futile. It is just that theoretical inquiry has to be understood pragmatically, as responsive to experience but always with the aim of working out the normative commitments in the practices that make up that experience, so that the practices can be productively reformed.

Heller's legal theory is helpful here. He wrote only a few pages on international law, but in them he insisted against Kelsen on the factual and normative priority of the law of the sovereign state over that of the international

71 See Evan Criddle, *Three Grotian Theories of Humanitarian Intervention*, 16 THEORETICAL INQUIRIES L. 473 (2015); Evan Fox-Decent & Ian Dahlman, *Sovereignty as Trusteeship and Indigenous Peoples*, 16 THEORETICAL INQUIRIES IN L. 507 (2015). See also Evan Fox-Decent's pioneering book, EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (2011).

order.⁷² Heller pointed out that any theory of international law has to take into account that in the last instance, for the most part a state's legal decisions will, at least for subjects of that state, trump international law. However, while siding in this regard with Schmitt against Kelsen, Heller insisted, as we saw, that the sovereign is a legally constituted entity, even though he can decide against the positive law.⁷³ Unlike Kelsen, Heller did not think that the independent lawmaking capacity of the sovereign state was subsumed into the hierarchy of international legal norms of a *civitas maxima*. The tension within domestic law that arises when a sovereign decision is made against law has to be preserved in an account of the relationship between the domestic and the international legal order.⁷⁴

It is not all that clear how much Kelsen disagreed. Writing in 1941, in the same journal in which Benvenisti's essay on trusteeship would appear, Kelsen argued that a community had to meet three conditions before it could achieve the legal status of statehood: it had to be "constituted by a coercive, relatively centralized legal order"; it had to be "effective for a given territory"; and it must not be subject to the "legal control of another community, equally qualified as a state."⁷⁵ Kelsen hastened to add that the third condition is not incompatible with the state being "under the legal control of an international community, in so far as it belongs to a union of states which has an international character, such as the League of Nations."⁷⁶ And, as we have seen, his actual view on this third condition is that equal qualification as a state is not possible in the absence of the international legal order.

This Kelsenian view is an important element in Benvenisti's argument, though in it the idea that the international legal order distributes space over which states are sovereign is reconceptualized so that what is redistributed is "responsibilities for promoting the rights of *all* human beings."⁷⁷ I think

72 HELLER, *DIE SOUVERÄNITÄT*, *supra* note 13, at 141-84. For an account of international law by his former assistant which owes much to Heller, see GERHART NIEMEYER, *LAW WITHOUT FORCE: THE FUNCTION OF POLITICS IN INTERNATIONAL LAW* (2001).

73 HELLER, *DIE SOUVERÄNITÄT*, *supra* note 13, at 88-89. Caldwell takes these remarks to indicate Heller's endorsement of Schmitt in a wholesale fashion. See CALDWELL, *supra* note 15, at 128-29, 236 n.53. But Heller's endorsement is only of the thought that ultimately a sovereign entity can decide against positive law, and Heller follows that endorsement with a biting critique of Schmitt's general legal and political theory.

74 HELLER, *DIE SOUVERÄNITÄT*, *supra* note 13, at 141-84.

75 Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 *AM. J. INT'L L.* 605, 606-08 (1941).

76 *Id.* at 608.

77 Benvenisti, *supra* note 3, at 308 (emphasis added).

that a more modest proposal, reformulated in line with Heller's paradigm of sovereignty, might better secure the aims of Benvenisti's argument.

In Heller's paradigm, there is something like a principle of humanity. But that principle is not about what justifies a state in intervening either in the lives of individuals beyond its borders or in the internal affairs of other states. Rather it is about the obligations that attend any exercise of sovereign power that affects important individual interests. A claim to exercise sovereign power is a claim to authority over the person affected by the exercise. It is a claim that the exercise is justified and justification in the modern era is justification to the individual affected by the exercise.⁷⁸

Heller's legal theory lays the groundwork for showing how ideas from the early modern era to do with the public law form — the form given by fundamental principles of law — help to understand the way in which the exercise of public power through law conditions that exercise so that the exercise is legitimated. An alternative path, the one suggested by the idea of sovereignty as trusteeship for humanity, is to have recourse to another source of such ideas in that same era — private law ideas analogous to trusteeship in Roman law invoked by many early modern scholars.⁷⁹

The common thread is that the sovereign, the ultimate legal authority, does not have dominium or absolute rights over his power, but rather exercises that power on behalf of another — “the people” — who are subject to that power. But it is unclear how the rules of a private law regime can be turned into principles of legality appropriate for conditioning the exercise of public power, not least because of the inherent libertarianism of such regimes.⁸⁰

I have therefore suggested elsewhere that in Anglo-American legal theory we should rather take our cue from Lon L. Fuller's well-known argument that there are eight principles of legality that together make up an “inner morality of law.”⁸¹ Fuller said of this morality that it is better understood in terms of a morality of aspiration than a morality of duty and hence that its “primary

78 Cf. BERNARD WILLIAMS, *Realism and Moralism*, in *IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT 1* (2005). According to Williams, a sovereign has to be able to satisfy “the Basic Legitimation Demand” if it is to show that it wields authority rather than sheer coercive power over those subject to its rule. In order to meet that demand, William argues, the state “has to be able to offer a justification of its power to each subject.” See *id.* at 4.

79 For an exploration of these alternatives, see Benjamin Straumann, *Early Modern Sovereignty and Its Limits*, 16 *THEORETICAL INQUIRIES L.* 423 (2015) (opting for the private law path, but countenancing the possibility of the public law one).

80 As I argue in David Dyzenhaus, *Liberty and Legal Form*, in *PRIVATE LAW AND THE RULE OF LAW* (Lisa Austin & Dennis Klimchuk eds., forthcoming 2015).

81 LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

appeal must be to a sense of trusteeship and to the pride of a craftsman.⁸² The appeal here, note, is to a “sense” of trusteeship and not to the private law regime of trusteeship. Moreover, it is an appeal not to rules from which one can deduce answers but to an aspirational framework, one that conditions how we approach the legal questions at stake without providing determinate answers.

This kind of framework is utterly familiar to lawyers. It is the framework that has been developed in the administrative law regimes of common law countries in which judges have crafted principles to ensure that those who are vulnerable to the exercise of official power are entitled to a hearing at which their interests will be seriously considered, and which might require that any decision be backed by reasons that manifest such consideration. In addition, such judges have progressively extended the scope of such protections, including within it individuals who were previously considered “other” in that the state had no obligations to them — noncitizens, prisoners, and those outside national borders but still subject to state power. Indeed, just this kind of framework explicitly informs much of Benvenisti’s analysis of actual examples.⁸³

My claim is not that Heller himself thought that sovereigns are or should be subject to other-regarding obligations. Rather, it is that his paradigm of sovereignty entails that those who are in fact subject to acts of sovereign power are thereby placed in a normative relationship with the sovereign that imposes an onus of justification on the sovereign to them, that is, a justification that is attentive to their interests. The obligation here is a political and particular one. By “political,” I mean that the obligation is not informed by some abstract moral ideal, for example, humanity. Rather, it comes about because the sovereign in claiming to act as a sovereign — as someone who wields authority and not merely superior power — accepts that there is a relationship of reciprocity with the individual or individuals subject to his power. And by “particular,” I mean that the obligation is not to humanity as such, but the obligation of a particular sovereign to particular individuals.

Of course, this is vague, both as to institutional detail and because it says little about the content of the actual decisions other than that they must be part of a justificatory practice. But the point is to leave much of the detail to be filled in within particular contexts by the actual actors. This is not to say that we can do without determinate answers. And here there is in fact common ground between Schmitt, Kelsen, and Heller about the need for an institution that is capable of making a final decision. Even if this institution is not “the source of authority,” as A.D. Lindsay said in a brilliant but little known essay

82 *Id.* at 43.

83 Benvenisti, *supra* note 3.

on sovereignty, “but the instrument of an authority that is not its own, it is still an indispensable instrument. Without such an instrument there could be no government.”⁸⁴ In a nutshell, Kelsen differed from Schmitt in that he saw no incompatibility between this need and the requirement that the decision be in accordance with legality, while Heller differed from Kelsen in that he regarded that requirement as including an orientation towards fundamental principles of legality. But Heller also differed from Kelsen, and in this respect sided with Schmitt, in supposing that ultimately the legal questions had to be resolved by an institution capable of making an effective decision, which in practice meant an institution within the nation-state. However, this emphasis on the priority of the local over the international is conditioned by the orientation within the local to the values that inform what we might think of a general rule of law project. This is a project of seeking to understand and to give effect to the values that underpin what I termed earlier the specific legitimacy of legality. In this project, learning is a two-way street — the possibility has to be kept open that international law can learn from domestic law when a domestic institution decides in a way that advances the *ius* of the project against the *lex* of an international institution.⁸⁵

CONCLUSION

At the end of his work on sovereignty, Heller returned to the paradox of sovereignty in order to evaluate its implications for the individual legal subject, the citizen.⁸⁶ He emphasized that the modern condition is one in which we have to make decisions in a deeply uncertain secularized world, where ethical certainty exists only in highly personal religious spheres. The only other source of certainty is that which law offers by providing a regular, predictable framework for common life. To have that certainty, we have to subject ourselves to the state, to the sovereign organization that is both constituted by law and that makes law possible, because it is law that makes a common life possible. In subjecting ourselves, we should keep in mind that all the organization does is positivize ethical prescriptions. It cannot pronounce on them finally, and so it is not the ultimate ethical authority and might even act in such a way that it violates the very ethical presuppositions

84 A.D. Lindsay, *Sovereignty*, 24 PROCEEDINGS ARISTOTELIAN SOC’Y 235, 240 (1923-1924).

85 For example, Heller’s account of the relationship between sovereign states and the international legal order makes room for the decision in Case C-402/05 P, P. Kadi v. Council and Comm’n [2008] E.C.R I 6351.

86 HELLER, DIE SOUVERÄNITÄT, *supra* note 13, at 201-02.

of its own existence. This would also amount to a violation of legality, since such prescriptions are also legal.

In many respects, these sentiments resonate with those to be found in the work of other Weimar-era social democrats or left liberals, who were committed to the success of Germany's first experiment in democratic constitutionalism. Most notably in the context of this discussion of sovereignty, the sentiments resonate with themes in Kelsen's work, in particular his account of the way in which a principle of legality plays a role in sustaining a commitment to democracy in an age in which citizens have to negotiate the torment of heteronomy. This is the tension that arises out of the fact that the individual who rightly knows that he is sovereign when it comes to judging the good has to find reasons to submit to the sovereign decisions of the collectivity, even when these decisions conflict with the individual's strongly held views about what is right. The stance recommended by such thinkers asked the citizen to recognize both the primacy he should give to his own judgments and that in a secular era those judgments have to be viewed as relative to the individual, with the consequence that the collective understanding of the common good must trump the individual's. Such an ethical stance will lead to a valuation of positive law, in particular to rule by the statutes enacted by a democratic parliament that are general in form and that apply for the most part prospectively, so that legal subjects may guide their conduct by the law.⁸⁷

However, what distinguishes Heller from Kelsen is that Heller provides an argument that is barred to Kelsen by the value-freedom of the Pure Theory, one that seeks to show that the positive legal form is substantively valuable. The point of the democratic institutional structure of the *Rechtsstaat* is to make it possible for the values of social and political order to be positivized in a way that makes the powerful accountable to the subjects of their laws. Morality, in the sense of the values that the collectivity can legitimately require we live by, is just the set of values that are concretized through the positive law.

The subjects of the law become its authors, first, due to the fact that it is their representatives that enact legislation; hence the enhanced legal force of statutes. But their authorship does not end there, since authorship continues through an appropriate process of concretization of the legislation.⁸⁸ What makes that process appropriate is that the interpreters of the law must regard themselves as participating in a process of legislation which instantiates fundamental ethical principles of law. Most abstractly, these are the principles

87 See Kelsen, *supra* note 38; Kelsen, *supra* note 43. For a cogent argument that Kelsen himself went much further than is generally thought towards providing an account of law nested in a theory of democracy, see VINX, *supra* note 68.

88 HELLER, STAATSLHRE, *supra* note 17, at 371-72.

that promise both freedom and equality to all citizens. The ultimate check on delivery of such promises can be nothing other than the individual legal conscience — the individual citizen’s sense of whether the law is living up to its promise. However, before that limit case is reached, the case in which the individual feels compelled to deny the state’s claim to be an authority over him, legal officials, including judges, have to understand that they are under a duty to concretize the law in ways that respects law’s promise.

In Heller’s account, the perspectives of the legal theorist, the legal official (including the judge), and the legal subject are inextricably linked. The task of the theorist is to bring to the surface the normative commitments that officials live up to when they make best sense of their practice, and which have to do with making sense of that practice to those whose lives it governs. When such sense cannot be made, criticism is not merely on the basis that the officials are failing to live up to their moral obligations. For the fundamental commitment of legal practice is to a structured process of justification of authority to those whose normative situation is affected by its directives.

Writing in 1968, the distinguished social theorist Wolfgang Schluchter concluded a book on Heller by saying that contemporary political and social theory should not decline Heller’s legacy. Heller’s account of progress from a skeptical, pragmatic perspective meant, Schluchter said, that hardly any other theorist had set out as clearly as Heller did the predicament that results from the necessity to make political decisions from a stance of internal uncertainty, whilst barring any retreat to a past world or to a future salvation, and without engaging in crude simplifications or one-sided treatments of important problems.⁸⁹

If one surveys contemporary philosophy of law and legal theory in the English-speaking world today, Schluchter’s observations have, in my opinion, even greater force. On the one hand, in philosophy of law, the dominance of legal positivism in many quarters means that we once again are faced with the “ghostly unreality of a theory of state without a state and a theory of law without law,”⁹⁰ as legal positivist philosophers deliberately construct a theory that has as little contact with legal practice and problems as possible. On the other hand, in legal theory that does attend to problems and practice, in particular in constitutional theory, there is not only a turn to Schmittian

89 WOLFGANG SCHLUCHTER, *ENTSCHEIDUNG FÜR DEN SOZIALEN RECHTSSTAAT: HERMANN HELLER UND DIE STAATSTHEORETISCHE DISKUSSION IN DER WEIMARER REPUBLIK* [DECISION FOR THE SOCIAL, RULE OF LAW STATE: HERMANN HELLER AND THE DEBATE ABOUT THEORY OF STATE IN THE WEIMAR REPUBLIC] 290 (1983).

90 HELLER, *Bemerkungen*, *supra* note 20, at 252.

accounts either in an allegedly scientific, diagnostic mode,⁹¹ or in a mode of giving ultimate value to an existentially conceived politics of authenticity,⁹² or as a way of debunking international law by showing how it is an elaborate disguise for national self-interest,⁹³ but also a turn to Schmitt himself as the direct source of inspiration.

Benvenisti's endeavor to provide a more optimistic account of international law through reconceptualizing the idea of sovereignty as a kind of trusteeship for humanity is a welcome antidote to these trends. It provokes simultaneous inquiry into legal theory, legal practice and the history of international law ideas. In my view, Benvenisti and others who are at the forefront of trying in this way to understand and to make more humane the puzzling world in which we live today could well learn from the approach of some of the foremost thinkers of the twentieth century to quite similar puzzles, albeit in the very different context of late Weimar. Moreover, attention to their ideas might also help to illuminate the more productive resources available in the increasingly arid and internecine debates in contemporary Anglo-American legal theory. My account of the debate in Weimar about how to understand sovereignty is of some assistance, I hope, in that endeavor.

91 See MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* (2010).

92 See PAUL KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2012).

93 See JACK L. GOLDSMITH & ERIC S. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).