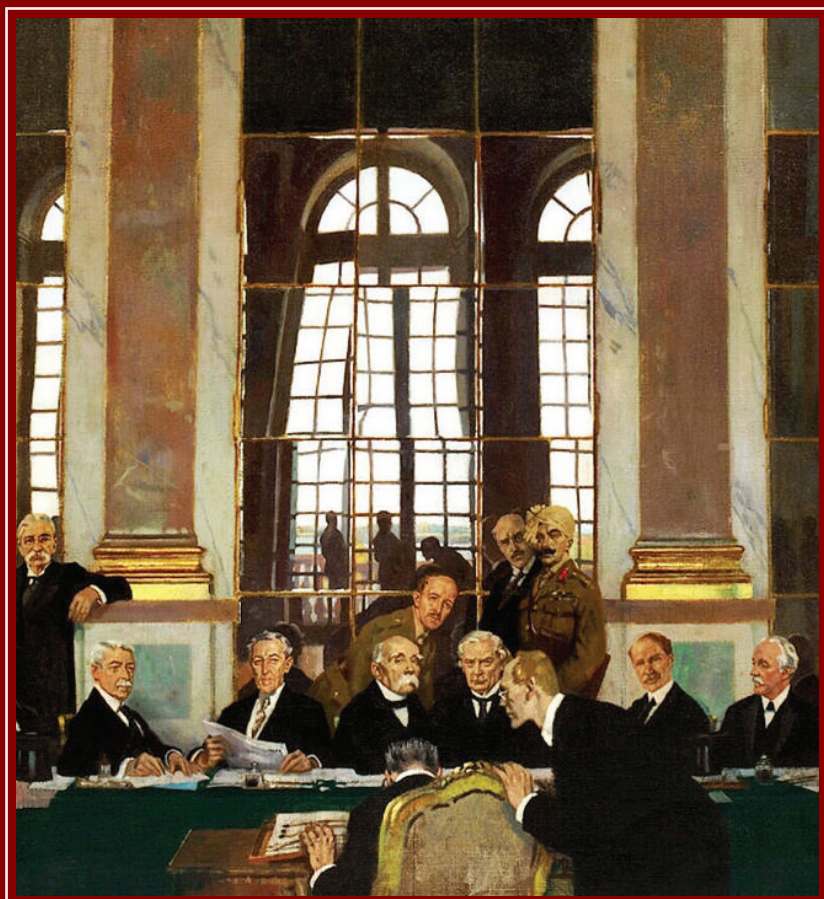


THE HISTORY AND THEORY OF INTERNATIONAL LAW



SOVEREIGNTY

A CONTRIBUTION TO THE THEORY OF
PUBLIC AND INTERNATIONAL LAW

Hermann Heller

Edited and Introduced by David Dyzenhaus

OXFORD

Introduction

The Politics of Sovereignty

Hermann Heller published *Sovereignty: A Contribution to the Theory of Public and International Law* [*Sovereignty*]¹ in 1927 as an intervention in the interwar debate about the nature of sovereignty. In large part it is a response to the most important legal philosopher of the last century, Hans Kelsen, and in particular to his work of 1920, *The Problem of Sovereignty and the Theory of International Law: A Contribution to a Pure Theory of Law*.² It is also in small part a response to one of the most controversial figures in the political and legal thought of the last century, Carl Schmitt and his 1922 book *Political Theology: Four Chapters on the Concept of Sovereignty*.³ Of the three, Heller's book is the least known, in fact virtually unknown.

This debate remains pertinent today, as Martti Koskenniemi observes in saying that if the 'terms of the interwar debate are applied' to contemporary challenges to the jurisdiction of international courts such as the European Court of Justice and the European Court of Human Rights, it is 'possible to see that behind the apparently conceptual problem of the limits of the "political" vis-à-vis the "legal" there is a more pragmatic concern about who should have the final say about foreign policy—and thus occupy the place political theory has been accustomed to calling "sovereignty"'.⁴ This claim is made in Koskenniemi's 'Introduction' to another work of the interwar period, by the foremost international lawyer of the last century, Hersch Lauterpacht's *The Function of Law in the International Community* (1933). Koskenniemi continues: 'Kelsen, Schmitt, and Lauterpacht all had much to say about this, and very little that would have been both new and intelligent has been added to the topic thereafter.'⁵

But what Koskenniemi gives with one hand, he takes away with the other. He immediately suggests that in today's 'pluralist world, there is simply no such 'ultimate place from which authoritative direction could be received for any and all disputes.'⁶ He concludes that we should turn away from abstract theory to questions about the politics of international law and institutions, in which the legalist vision of those like Lauterpacht, who believed that 'international lawyers, in particular international judges, should rule the world', should be understood as a 'political project' in competition with others, each imposing its own set of advantages and disadvantages on participants.⁷ More recently, in a collection on sovereignty, Koskenniemi has said that 'sovereignty' is 'just a word' and that if there is 'historical sense to a notion such as "sovereignty of the law"' it is perhaps 'shorthand for the power of the juristic class.'⁸

Heller does not figure on Koskenniemi's list though he does get a mention in his magisterial book *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*. There he is described as the 'socialist constitutional lawyer who pointed out that 'many of the numerous critiques of sovereignty after the First World War engaged a straw man—no political theorist had ever espoused the absolute conception they attacked. Without a concept of sovereignty in a concretely existing community ..., they continued to move in an abstract conceptual heaven.'⁹ 'Yet', Koskenniemi continues, 'there was force to the argument that the attempt to square the circle of statehood and international law was doomed to fail on logical grounds. Either the State was sovereign –and there was no really binding international order. Or there was a binding international order – in which case no state could truly be sovereign.'¹⁰

Koskenniemi's attribution of a conception of sovereignty to Heller as that which exists in a concrete community seems to put Heller on the sovereignty side of the tension between sovereignty and international law he just sketched. He is not alone in this judgment. In *The Function of Law in the International Community*, Lauterpacht grouped Heller's *Sovereignty* among those works of the time that

argued that the relation of the state to international law is 'based on the voluntary acceptance of legal obligations' and said that, 'in fact', Heller's 'able monograph is a somewhat intolerant denial of international law as a system of law, and an affirmation of the absolute sovereignty of the state.'¹¹ But if that judgment is right, it would have been odd for Heller to have argued that 'no political theorist had ever espoused the absolute conception'.

Heller's book does defend an absolutist conception of sovereignty. But it does so by articulating the complexity of such a conception in a way that explains why so many critics do in fact attack a straw man. Heller sees that conception as both legal and as part of a political project, as Koskenniemi claims one should understand Lauterpacht's own legalist vision. But in exposing the politics of a legal or juridical idea of sovereignty, Heller hoped to address sovereignty so as to clarify the space in which pragmatic decisions had to be made. That clarification would preserve the spirit of legalism in a way denied to Kelsen's legal positivist approach and against Schmitt's attempt to show that the rule of law is a liberal sham.

In doing so, Heller approached the understanding of international law that Lauterpacht set out six years later in *The Function of Law in the International Community* because, despite Lauterpacht's own view of Heller, they shared the goal of injecting substance into Kelsen's Pure Theory of Law precisely to square the circle of sovereignty and international law. The major difference between the two is, as I just suggested, that Heller conceived this project as political as well as legal. But he did so in a way that would have led him to resist Koskenniemi's invitation to turn away from abstract theory to an account immersed in the concrete politics of the moment.

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 sceptical, 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.¹² In this Introduction, I will explain why not only the interwar debate remains relevant today on its own terms, but also why we should pay special attention to Heller's contribution within it, precisely because his argument about the place of sovereignty in the international legal order has the characteristics that Schluchter so nicely describes.

Paradigms of Sovereignty¹³

Heller died in 1933 aged 42 and to this day remains at best an obscure figure in the English-speaking world.¹⁴ Kelsen's status in that same world is assured. But he is little read even by specialists in legal philosophy and his Weimar-era work, most of which remains untranslated, is almost as unknown as Heller's entire corpus.

Kelsen and Heller were both Jews who had grown up in the Austro-Hungarian empire. Both were committed to democracy, parliamentary government, and on the social democratic left. Both were forced out of their positions in Germany in 1933 after the Nazi seizure of power and the enactment of the law which required the elimination of Jews from public positions--The Law for the Restoration of the Professional Civil Service. Heller was at that time a professor in the Frankfurt Law Faculty, where the dismissal of Jewish professors opened the way for the appointment of Ernst Forsthoff, a committed Nazi and a disciple of Schmitt, who as one of Germany's leading public lawyers after the war was instrumental in ensuring Schmitt's lasting influence. Heller's last significant public intervention was his appearance against Schmitt in the *Preussenschlag*. In this case, the Prussian government--the major bastion of social democracy in Germany--contested the seizure of the Prussian state machinery by Schmitt's political masters in the federal government under the pretext

that the political situation in Prussia represented an emergency in terms of Article 48 of the Weimar Constitution.

Kelsen was at that time at the Cologne Law Faculty, where as acting dean he had recruited Schmitt to the Law Faculty the year before. Schmitt alone amongst Kelsen's colleagues refused to sign the Faculty's letter of protest. Heller died in exile in Madrid that year of a heart condition, a relic of his war time service, while Kelsen made his way via Geneva and Prague to the USA. In 1942, he took a visiting position in Political Science at Berkeley which became a full position in 1945. He remained there for the rest of his long career in relative obscurity.

Carl Schmitt, in contrast, has become in our century one of the central figures in political and legal theory despite the fact, or perhaps because of the fact, that his work is a sustained polemic against liberal democracy and the liberal commitment to the rule of law, an intellectual commitment that had significant practical implications. In the early 1930s, he was in the inner circle of the conservative politicians who were determined to turn the clock back on Germany's first experiment with democracy at the same time as they attempted to contain Hitler. He jumped onto the Nazi bandwagon as soon as Hitler had not only bested these politicians, but also ordered the murder of General Schleicher, the politician to whom Schmitt was closest, along with the murder of Hitler's rivals within his own ranks. Schmitt's public reaction to these murders on the 'Night of the Long Knives', and to the enactment of the legislation that retroactively legalized the murders, was an article celebrating this event entitled 'The Führer as the Guardian of our Law'¹⁵--his first major step in ingratiating himself with the Nazis. His involvement with them was sufficient for him to be interned after the war while the Allies considered putting him on trial at Nuremberg. He was not in the event tried, but was prohibited from having an academic position, which did not prevent him from exerting a baleful influence on postwar German public law.¹⁶

Oxford's publication of Heller's *Sovereignty* as well as Kelsen's work on the same topic in the same year is important at a time when Schmitt has become central to Anglo-American political and legal thought to the extent that essays in the mainstream press will occasionally refer to him as providing insight into our current situation.¹⁷ At the same time, there is an explosion of books about sovereignty many of which strike a pessimistic note¹⁸ and in which often Schmitt figures prominently and always more prominently than Kelsen, while references to Heller are extremely rare.¹⁹

The reason for the explosion is that our situation is an eerie echo of the tensions and concerns that came to the fore in Weimar. Sovereignty, in the sense of national sovereignty, is often perceived in liberal democracies today 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 defined territory over which they wield a monopoly of effective law-making power--leads to the fragmentation of political power. 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 made by institutions outside of a country's political system or by elite-dominated institutions within.

Indeed, 'sovereignty' has become a kind of catchword in politics for a stance that may include hostility to some or all of the following: to the role of international organizations and supra-national organizations in making decisions that have a domestic impact, to international law itself, to immigrants and refugees, to a judicial role in upholding constitutionally entrenched rights, to international law, and to elite expertise, most notably in the scientific fields that concern themselves with the environment and climate change. Those who hold this kind of stance seem intent on

eradicating these elements in a bid to restore their countries to a perceived lost 'greatness', predicated on an idea of a political community in which the condition of entry is satisfaction of vague criteria of substantive homogeneity.²⁰

In the 1920s, a similar sense of loss of control was pervasive. People wondered about their place in a world in a time when new countries and national identities were being formed on terms dictated by the victorious nations at the Paris Peace Conference that ended World War I. At the same time, these nations attempted to forge a new international order by entering into the Covenant that led in 1920 to the creation of the League of Nations, an association confined to the victors at its inception,²¹ and of the Permanent Court of International Justice that was attached to the League and which began operation in 1922.

These tensions and concerns were not unique to Weimar Germany. But they had an existential quality there. Germany was a signatory to the Treaty of Versailles which ended the war between herself and the Allied Powers in 1919. However, as the principal vanquished country, she had no choice but to sign an agreement that imposed an economic stranglehold on her as well as foreign control over important aspects of international and domestic policy, and which required her explicitly to accept a humiliating statement of responsibility for the aggression that led to the war.

This national humiliation coincided with the birth of the Weimar Republic, which replaced the pre-war political system of a monarch in whom power was concentrated with a democratic system in which the Constitution assigned power principally to an elected parliament. But commitment to the Constitution did not prevail among either the elites or the masses and that made its political and legal institutions most fragile. Indeed, until 1923 there were several violent attempts by the extreme right and left to overthrow the Republic.

In this context, 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

the checks and balances of democratic, parliamentary government. Their concern about sovereignty was, however, much more radical than that of contemporary figures in the Anglo-American tradition of opposition to judicial review who claim that such review undermines parliamentary supremacy and so the authority of the representatives of the people. For these rightwing Weimar scholars opposed root and branch what they regarded as the too pluralistic, party political system of parliamentary democracy, as they thought that the system, like the judicial system, was prone 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. This is a quintessentially political power located outside of legal order. As such, it cannot be constrained by the legal limits that liberals and democrats desire to impose on an authentic sovereign, one who is capable of making the kinds of decisions necessary to solve the fundamental conflicts of a society.

Their position gave rise to one of the three leading paradigms of sovereignty in Weimar. Schmitt, its leading exponent, set out his conception of sovereignty in 1922 in the opening sentence of one of his two most influential works, *Political Theology*: 'Sovereign is he who decides on the exception.'²² Schmitt's customarily succinct and enigmatic formulation becomes clearer when paired with his claim in an essay of 1927 'The Concept of the Political',²³ which he elaborated in his other most influential work as a book in 1932, that the primary distinction of 'the political' is the distinction between friend and enemy.²⁴ It follows, he supposed, 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 argued 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.

He took this flaw to be manifested in Article 48 of the Weimar Constitution—the emergency powers provision—since that article recognized the need for the presidential exercise of sovereign authority on existential questions, though it also sought in a liberal-legalist fashion to set limits to an exercise of executive discretion that cannot, in his view, be legally circumscribed.

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 legal limits, either internal or external. Indeed, it might be more accurate to say that Kelsen accepted the claim that sovereignty is best understood as the absence of legal limits on ultimate political power, but as a result argued that one has reason to eradicate the idea from theory and practice. Thus, he concluded his 1920 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.²⁵

In work after publication of his book on sovereignty, Kelsen elaborated his ‘Pure Theory’ of law, according to which 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.²⁶ 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 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. Kelsen does not, then, provide a paradigm for understanding 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.

Kelsen is Schmitt’s main foil in *Political Theology* because he understood the Pure Theory of law as the culmination of the attempt by liberalism to impose a legal rationality on political order

that would rid it of the personal exercise of sovereign power which introduces arbitrariness into political life. As he put it, in Kelsen's theory: 'Now the machine runs itself.' But in Schmitt's view, sovereignty will always assert itself in moments when the public law of a legal order cannot provide an answer to a political question, or where the answer provided is considered by those who wield sovereign power to be inadequate to preserving the substantive basis of the political order in which the legal order is nested. At any moment, the sovereign can break free of the torpor of legal life and assert his pre-legal authority, an assertion whose success depend not on its compliance with legality or the rule of law, but on whether it works.²⁷

Heller provides the third paradigm in *Sovereignty*, a book remarkable for its range. He starts by locating his argument in an account of the history of ideas with the founders of the modern conception of sovereignty, in which the principal figure is Bodin (1530-1596), the French jurist and philosopher who crafted the first modern 'absolutist' conception of sovereignty, which has been both highly influential and, according to Heller, badly misinterpreted. Heller proceeds to discuss contemporary theories in light of his account of Bodin, and then seeks to demonstrate the resources that his account provides for an analysis of sovereignty in both nation states and in international law. Along the way, he illustrates his arguments by reference to examples drawn from domestic public law and public international law. He also engages deeply in the methodological disputes of his day, so that the text and especially the footnotes are populated by issues that are often abstruse and figures that are often either obscure or wholly unknown to readers today.²⁸

The trajectory of Heller's argument requires that he vindicates the view that a retrieval of ideas from some of the classics of early modern thought, which are often referred to but hardly read, can throw much needed light on the debates of his time. That light makes worthwhile what he refers to as the end of chapter one as the 'ponderous literature review' he undertakes there. It thus resonates with recent work on early modern classics, including Bodin, Hobbes (whom Heller

esteemed along with Bodin), and Grotius.²⁹ In this Introduction, I hope to return the compliment by indicating how a retrieval of Heller's thought might help to respond to pressing problems that coalesce around the topic of sovereignty today.

In my view, the most striking feature of Heller's work is the promise of what we might think of as his *political*-legal theory. It is political in two respects. First, it is a theory of law that takes seriously the idea that the modern legal state enables a kind of political community, a jural community in which the relationships between ruler and ruled are mediated by law. It is this mediation that makes possible the transformation of might into legal right. Second, it is political in that it is explicit about its defence of this kind of community as politically valuable. In other words, there is no pretence of value neutrality, although Heller claimed that the theory is firmly grounded in the reality of the modern, legal state and that legal theory must account for the sociological conditions in which such a state could come to be considered legitimate by those subject to its power.

In putting forward a theory which seeks to show both the value and the actuality of the modern legal state--of the *Rechtsstaat* or rule-of law state--Heller joined a group of public law theorists of Weimar who were quite optimistic about law's potential for conditioning the exercise of state power in ways that would serve the interests of those subject to that power. As I have indicated, such optimism is in short supply these days. However, pessimism does not reign everywhere.

'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 quasi-federal structure in which there is no sovereign or overarching state.³⁰

Heller would have regarded this combination as naïve, as he rejected a version of this view that he found in Kelsen in which the international legal order is conceived, much like a national legal order, a *civitas maxima* or ‘world state’, and thus as a system of legal rules underpinned by a constitution. But he did not think that such rejection drove him into the arms of those who are profoundly pessimistic about law’s potential, let alone those like Schmitt who celebrated the idea that a sovereign political decision would break through the facade of the liberal rule of law and permit the restoration of the substantively homogeneous basis of a successful nation state.

Heller was always clear about the dangers of Schmitt’s position. However, as we shall see, he shared with Schmitt the idea that sovereignty had to have a central role in legal theory and that the role of sovereignty includes a place for a final legal decision. It might even be more accurate to say that Schmitt shares these ideas with Heller, as there is a plausible case to be made that Schmitt’s legal theory was profoundly influenced by the argument of Heller’s *Sovereignty*, perhaps the best evidence being that he never refers to Heller.³¹ Indeed, while Schmitt liked to claim that he was a dispassionate, scientific diagnostician of politics and law, as I have indicated, Heller regarded all accounts of sovereignty as inherently political.

Given the centrality of Schmitt these days, readers may find it surprising that Heller spends so little time on Schmitt and so much attacking Kelsen. For in *Sovereignty* Schmitt makes only a kind of cameo appearance over the course of a few pages in which Heller says that he should be given ‘great credit’ for having shown that the dominant theory--the rationalist legalism that culminates in Kelsen--cannot get rid of the problem posed for the *Rechtsstaat* by sovereignty, namely, that legal

theory cannot eliminate the moment of personal decision from the legal order.³² But Heller is clear that Schmitt's attempt to bring the decision back into legal theory is part of a wider political agenda, inevitable in the circumstances of Weimar, to replace democracy and its separation of powers with a dictatorship of the Reich President.

Schmitt's argument is based on his understanding of the role of the President in the circumstances of emergency foreseen in Article 48 of the Weimar Constitution. As Heller points out, Schmitt is correct that the role sketched there is, as Schmitt terms it, 'commissarial': The President is subject to constitutional limits and acts under supervision of the Reichstag. But, Schmitt, Heller presciently argues,³³ wishes to elevate the 'commissarial dictatorship' of the President into a 'sovereign dictatorship', one in which the President has the extra-legal right to remake the constitution. He concludes that Schmitt not only analogizes the place of the state of exception or emergency in legal order to the place of miracles in theology, but also wishes to replace legal theory with a 'political theology' in which the President is endowed with magical powers. Schmitt wishes, that is, to substitute for the legal idea of sovereignty a relentlessly political idea, and in doing so distorts Bodin's conception of sovereignty in his bid to find historical support for his claims.³⁴

In contrast to his quick disposal of Schmitt, Heller's critique of Kelsen is persistent, to the extent that he begins *Sovereignty* by stating in his brief Foreword that the Kelsenian method must 'be destroyed at its roots'³⁵ so that the state can be restored to the centre of political and legal theory and Kelsen together with others in the Vienna school of legal positivism—for example, Adolf Merkel and Alfred Verdross—are his constant foils. As Timothy Stanton explains in an astute discussion of the debate between Kelsen and Schmitt in the 1920s, Kelsen was 'by far the better known and more eminent figure in jurisprudence. To take him as one's opponent, as Schmitt did, was by implication to place oneself on his level.'³⁶

This remark applies with equal force to Heller. Moreover, when Stanton lists the sins of which Schmitt accused Kelsen in the 1920s, these are hardly different from the list one could compile of Heller's accusations.³⁷ For example, in an article published the year before *Sovereignty*—“The Crisis of State Theory”³⁸--Heller said that it was his view, ‘without any irony’, that ‘Kelsen’s greatest contribution was to have elaborated logical legal positivism without making any concessions and with great vigour and excellent acuity; and so have driven it to its ultimate absurdity’,³⁹ which was to produce a ‘theory of state without a state’ and a ‘positivism without positivity’.⁴⁰

What does not apply to Heller is Stanton’s further observation, that ‘[d]ifferent purposes were served for Schmitt by the facts that Kelsen was, notwithstanding his eminence, an “outsider”, coming from Prague and owing his intellectual formation to the Austro-Hungarian Empire, and a converted Jew’;⁴¹ for Heller shared Kelsen’s outsider status in each respect (though did not convert to Christianity). Significant in this regard is that in *Sovereignty* Heller twice refers to Bodin as ‘the Huguenot’,⁴² which is inaccurate as later scholarship agrees, but revealing about the stance from which Heller wrote.

In ‘Religion in the Life of Jean Bodin’,⁴³ Marion Kuntz explains that Bodin was during his life ‘accused of being a Jew, a Calvinist, a heretical Catholic, an atheist’. But, she says, he was none of these. Rather, he was a profoundly religious Catholic who argued for religious tolerance (though not tolerance of atheism).⁴⁴ However, Heller’s insistence that Bodin was a Huguenot, while mistaken, is not gratuitous in a work of political and legal theory. As a thoroughly assimilated Jew in an anti-Semitic milieu, his project was to make sense of the modern legal state and its institutions as providing the conditions for religious and other kinds of pluralism. He took inspiration from Bodin because of what he regarded as Bodin’s fundamental insight that the absolutism of the modern legal state with its monopoly on legitimate violence—to use Weber’s term--and its unity of effective decision-making in its legal institutions is a precondition of a pluralistic, tolerant polity.

The claim that absolutism is necessary for toleration will seem at best paradoxical, more likely utterly mistaken, in an era in which individuals are thought to have inalienable rights, including freedom of religion, expression, association, and conscience, that limit the authority of the state. Indeed, Rainer Forst has recently argued that Bodin's political writings on sovereignty give rise only to a 'permission conception' of toleration, one in which an absolute sovereign who has an independence from the political and religious conflicts of the day has the ability to prescribe religious tolerance and should do so, but for purely prudential reasons--to avoid conflict among his subjects. The sovereign's absolute nature, that is, permits him to withdraw permission at any time it seems to him expedient.⁴⁵

In contrast, in Bodin's later work--the *Heptaplomeres* which is 'a dialogue between men of seven different religious faiths or philosophic persuasions'⁴⁶—Forst says that Bodin sets out a 'respect conception' of 'mutual toleration' in which individuals respect each other as moral persons without endorsing their moral views.⁴⁷ But because Bodin never elevates the respect conception to the political level, he remains, Forst argues, 'captive to the permission conception as what was politically possible and necessary at the time'.⁴⁸

On Heller's interpretation, the respect conception is already present in Bodin's political conception of the modern, legal state just because sovereignty is conceived legally. His view is that Bodin is the first modern thinker to conceive of sovereignty as what leading scholars in the English-speaking world writing at the same time as Heller described as 'sovereignty in the legal sense'.⁴⁹ As Heller interprets Bodin, sovereignty in this sense presupposes a relationship between state institutions and the legal subject such that the sovereign's positive or enacted law will have regard for the interests of those subject to the sovereign's power.

The difference, then, between Schmitt and Heller is as follows. Schmitt was determined to show that positivistic legal formalism would be ruptured by an extra-legal, political substance--the

sovereign who made the distinction between friend and enemy and established the substantive homogeneity of the people. In contrast, Heller was determined to emphasise the juridical substance of legality and the legal nature of sovereignty that would permit a heterogeneous ‘people’ to flourish on terms of freedom and social equality or ‘social homogeneity’, a term he coined in a direct riposte to Schmitt’s publication, just after *Sovereignty*, of his essay ‘The Concept of the Political’.⁵⁰

As Heller himself explains, Kelsen’s theory of the modern, legal state was not only the leading theory of its time, but also was the logical and fully worked out culmination of the dominant strand in legal theory that wished to explain sovereignty as a matter of law. Further, despite the fact that he was writing *Sovereignty* at a time of relative stability in the Weimar Republic, so much so that the Social Democratic Party (SPD) in which he was an influential figure increased their share of the vote in the federal elections of 1928 at the expense of both the main nationalist party and the Nazis, he had a sense of impending doom which he had conveyed already in 1926 in ‘The Crisis of State Theory’ and which informs both the Foreword and the last chapter of *Sovereignty*.

Heller took the crisis in state theory to reflect a wider social and political crisis, one to which the dominant Kelsenian strand had no helpful response. However, he was just as determined as Kelsen to explain the modern, legal state as a *Rechtsstaat*—to give an account of ‘sovereignty in the legal sense’. That brought his theory so close at times to Kelsen’s that Kelsen, in commenting on a public lecture Heller gave in 1927 before he had finished work on *Sovereignty*, expressed deep puzzlement at Heller’s vehemence towards him. Indeed, he went further and suggested that Heller had silently appropriated most of the Pure Theory of law, a suggestion which Heller understood as a charge of plagiarism.⁵¹ In return, Heller expressed equal astonishment and indignantly refused his ‘induction’ into Kelsen’s school.⁵²

Put differently, in a manner closer to the spirit of Kelsen’s enterprise than to Schmitt’s, Heller wished to emphasize that the ultimate decider—the sovereign decision unit of the political

order of liberal democracy--is entirely legally constituted. His intervention in the sovereignty debate can then be seen as seeking to rescue the importance of legality from Schmitt's critique of Kelsen, while retaining from Schmitt the thought that sovereignty cannot be understood except in terms of the actual exercises of power by some actual person or body of actual persons who have been authorized so to act. One might say that Heller seeks to elaborate a juridical conception of 'the political', to use Schmitt's term, a conception that is peculiar to the modern, legal state but which does not seek to displace politics and which can respond appropriately to the paradox of sovereignty, which the next section sets out.

The Paradox of Sovereignty

In engaging in this quest, Heller joins a long line of scholars who have tried to grapple with, even resolve, the paradox of sovereignty, which I presented above as one to do with the necessity of submission to an absolutist sovereign in order to have a tolerant civil society. But this is only one of the many ways in which this paradox manifests itself. In contemporary political philosophy, it is usually presented as a problem to do with individual freedom or 'autonomy', following the influential argument by Robert Paul Wolff in *In Defence of Anarchism*.⁵³ Wolff asserted, following Kant, that the 'autonomous man' is one who 'gives laws to himself, or who is self-legislating.' As such, 'he is not subject to the will of another' and is 'in the political sense of the word, *free*.'⁵⁴ Since Wolff argued that submission to the authority of the state involves a forfeiture of autonomy, he concluded that the response to the 'dilemma' between political authority and autonomy is to opt for autonomy.⁵⁵

Two substantive points arise out of Wolff's terminology. First, the Kantian vocabulary of self-legislation is important. It tells us that the issue for an autonomous individual is whether the state has *de jure* or legitimate authority over him in that he should accept its laws as binding. It also

indicates how the same problem can arise with states when the latter are conceived as autonomous or sovereign. It arises at the domestic level because it may seem that if one is bound only by one's own legislation, one is not bound at all, which is why Wolff gave his book its title.

Notice that this is not a denial of the existence of any constraints whatsoever, only of the constraints relevant to the kind of authority in issue. If it is moral authority, there may well be social, political or prudential factors that limit the scope of an individual's legislative power, notably the coercive forces at the state's disposal when it comes to the enforcement of law as well as the force of convention and tradition in that individual's society. With the state, the denial is of the subjection of the state both to its own law and to international law. But still the state may be subject to the constraints set by social, political or prudential factors, or even moral factors if one is some kind of moral objectivist or realist, or if one merely notes the existence of social or positive morality--what people take to be moral.

This last position is exactly the influential view set out by John Austin, the English nineteenth century legal positivist, in his command theory of law. According to that theory, law is the commands of a legally unlimited sovereign, whom we identify by the fact that he is habitually obeyed by the bulk of those subject to his power but who obeys no one else, and who motivates the obedience of his subjects by attaching sanctions to each command that will in general make non-compliance too risky. At least in the domestic sphere, there is law on this theory in the sense of the law made by the sovereign for those subject to the sovereign's power. But in the international sphere, since there is no international sovereign, there is no law 'properly so called', to use Austin's term. Austin denied for the same reason that there is constitutional law. What passes for both international law and constitutional law are, he said, rules of 'positive morality' akin to the moral rules individuals in a particular society choose to obey. Such rules may be equipped with their own

sanctions—the sanctions of disapproval by others. But since the sanctions are in a different register from the law's, they do not make such rules into law properly so-called.⁵⁶

Austin's position is consistent with Wolff's since it states that one's reason to obey the law does not require the autonomous individual to recognize the law as an authority, but only as a source of pain. Law is envisaged not as an authority but as a 'gunman situation writ large', as HLA Hart—the English-speaking world's leading legal positivist philosopher of the last century--put it.⁵⁷ But as Hart clearly saw, the attempt to understand the law as a matter of authority rather than sheer or unmediated coercive power risks a kind of absolutism about the law that he associated with Hobbes in which the commands of the sovereign are by definition legitimate; exactly the kind of absolutism that Hobbes is reputed to have inherited from Bodin.

On this view, Bodin and Hobbes following him opt for the inherent political authority of the state when faced with the dilemma between that authority and autonomy. Put in terms of the classical debate in political and legal theory, they think that if a state exists as a matter of fact, and so has *de facto* power, it will also have *de jure* or legitimate authority. And if that were right, there would be no paradox of sovereignty in Bodin, merely a dilemma, which brings me to the second substantive point that arises out of Wolff's terminology.

The distinction between dilemma and paradox matters because 'paradox' often implies a statement that seems on the surface contradictory but may be shown to conceal some deeper truth that responds appropriately to the apparent contradiction. This distinction provides a useful marker between those who think there is a paradox, resolvable or not, and those who think there is merely a dilemma that faces one with a choice between power and law, as one can see not only in Weimar, but also in both the nineteenth century discussion that laid the groundwork for the debate between Kelsen, Schmitt and Heller and debates in the current era.

The main figure in the German debate prior to Weimar was Georg Jellinek, who developed a 'two-sided' theory of state in an attempt to explain how a sovereign could be sovereign and yet bound by both constitutional law and by international law. Jellinek belonged to the school of 'statutory positivism', which was not unlike Austin's command theory of law in that its legal theory was built on the idea of the primacy of statute law made by a legally unlimited and thus sovereign state. His predecessor in this tradition was Paul Laband who presented a legal theory that justified constitutional monarchism--the constitutional order of the late nineteenth century Prussian state--at the same time as insisting on the exclusion of politics from legal science.⁵⁸

Laband and other 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).'⁵⁹ All rights were understood as the creatures of statute law. Individuals possessed no inherent rights against the state but only those rights that the state had seen fit to grant them in its legislation.

This apparently authoritarian theory is tempered by the fact that the public officials may exercise power against individuals only when authorized to do so by statute, and the enactment of statutes is the preserve of the legislature. And unlike Austin, Laband did not deny the existence of international law. Rather, he saw it as the product of treaties between states, enforceable as such by the states, and capable of becoming part of domestic law if the public law institutions of the state enacted international law provisions into domestic instruments.⁶⁰ However, he, like others in his school, had no way of explaining how as a juridical matter either domestic constitutional law or international law could be understood as legally binding on the sovereign. Both kinds of law were recognized as existing in fact, though how the 'ought' of legal authority could be derived from the

'is' of these facts was beyond the reach of a legal theory of statutory positivism, as one might think Austin more frankly recognized when it came to the command theory of law.

But the frankness comes at a revealing cost—of denying that both international law and domestic constitutional law are law which makes the political project of subjecting political power to the rule of law futile. As I have already indicated in respect of Laband, his legal theory, despite his claims as to its scientific nature, was an attempt to develop and account of the *Rechtsstaat*—the rule-of-law state—which would explain the *juridical* nature of *constitutional* monarchy. That is, it would explain how political decision making in such a system is not arbitrary because all decisions require prior legal authorization of a particular sort.

Exactly the same point can be made about both Austin and Jeremy Bentham, the founder of the English school of legal positivism, that is, the command theory of law, since their legal theory, while presented as scientific or value free, is hard to understand except as a part of their utilitarian project to reform the political and legal institutions of their society so as to maximize general happiness. There were differences between them, notably that Bentham, far from having doubts about whether international law is law, is credited with having coined the term 'international law' and had, as the pioneering article on Bentham's vision of and for international law says, 'grand plans for world peace: renouncing colonies, reducing navies and armies, settling international disputes in an international court.'⁶¹

However, the recognition of constitutional law and international law as a matter of fact does not so much address the paradox of sovereignty as evade it, as is illustrated by Jellinek's two-sided theory. That theory responds to the paradox of sovereignty 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, 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 must satisfy and by the other locations of social power in the society. In its legal side,

on the other hand, the state may legislate as it pleases, but it is to be understood as legally constituted--as a system of legal norms. The authority of both constitutional law and international law is understood to come from the fact that the state has willed that it be subject to the limits to be found in the positive law of both—it has bound itself.

But the reasons for the state's acts of will are extra-legal, the subject matter of social and political theory. As a result, when the state wills in such a way that it no longer abides by these limits, the matter is not one on which law or legal science may speak. As a result, the two-sided theory consigned 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 or, in the international realm, by agreements between states. At a political level, as a matter of legal theory, it assumed the legitimacy of the *de facto* state, but made actual legitimacy turn on considerations beyond legal theory.⁶²

The challenge that Jellinek bequeathed to the public lawyers of Weimar was whether they could do better. Kelsen and Schmitt can be said to have continued to evade the challenge by turning the paradox into a dilemma and then choosing one of its two limbs. Kelsen did so by focusing exclusively on the legal side of Jellinek's theory, in his attempt to show that the authority of both constitutional law and international law is to be juridically explained as a matter of the normative structure of legal order, in which the basic norm provides the assumption that makes it unnecessary to resort to extra-legal political or social factors. Sovereignty, as we have seen, becomes a kind of property of legality, the title we bestow on a legal order rather than a norm-creating force with which legal theory must contend. Every state, Kelsen contends, is a *Rechtsstaat*, which is not to say that it is legitimate since, as he also says, law may have any content, and questions about the rightness or wrongness of that content fall outside the purview of legal theory. Schmitt, in turn, developed the

political, social side, arguing that because legitimacy is located outside of law, and because law can be given any content, the sovereign is he who is able to make the decision that will attract the acclaim of ‘the people’, that is, of that homogeneous group within the population who recognize themselves (and are recognized) as being on the friend side of the existential distinction between friend and enemy.

Notice that one can identify the problem of sovereignty as a paradox and regard the deeper truth to be that it cannot be resolved as a matter of theory, and so one should turn to practice. The question then arises whether one thinks it is resolvable in practice, as one might say pragmatically instead of theoretically, or will simply reproduce itself endlessly, leaving those who must make the decision with having to choose between two incommensurable options, a choice that will be determined by which better promotes the self-interest of the more powerful party.

Heller fully embraced a turn to practice, as is evidenced by his dedication of *Sovereignty* to Victor Bruns, the founding director of the Kaiser Wilhelm Institute for Comparative Public Law in and International Law in Berlin, who encouraged a move away from the theoretical study of international law to the study of practice, and who gave Heller his first full time academic position.⁶³ However, Heller’s position is rather ambiguous between the options just sketched, as one can see in his most elaborate attempt at a definition of sovereignty:

[T]he sovereign is whoever has decided [on the normal situation through a written or unwritten constitution and, because he intentionally maintains its validity, continues permanently to decide. And only the one who makes decisions on the normal constitutional situation can also make juristic decisions on the state of exception, sometimes ‘against the law’. Only he is reasonably entitled to make the final decision on whether his law must give way to the exigencies of the moment or not. If one were to assume two units of will that are independent of each other, of which one would make decisions on the state of exception

and the other on the normal situation, one would be presuming two sovereigns in the same state.⁶⁴

This definition is, of course, a direct response to Schmitt's '[s]overeign is he who decides on the exception.' It is deliberately cumbersome to contrast the complexity Heller needed to convey with Schmitt's reduction of sovereignty to certain facts about power. It emphasizes that the sovereign is the ultimate decider, but in the legal sense, which one can glean only from the normal situation when the sovereign decides through the institutional mechanism of the constitutional order. But against Kelsen, and with Schmitt, Heller opposes reduction in the other direction.

More accurately, he opposed the elimination of the sovereign decision by its reduction to the totality of the norms of a legal order. And in opposing both reductions, he demonstrates his determination to preserve both sides of Jellinek's theory, but within an overall juridical structure. The question then becomes whether this complexity is sustainable and that has led to difficulties in understanding his position.

Consider, first, that in his fine book on Weimar legal theory, Peter C. Caldwell charts Heller's development from a kind of left-nationalist position in the first several years of the Weimar Republic to a position in the late 1920s which, whether he admitted this or not, advanced a theory of law that 'corresponded better to that of left-liberals like Kelsen and Thoma than to the conservative theories of Schmitt and Smend that he had earlier sought to emulate.'⁶⁵ The crucial transition in Heller's thought, suggests Caldwell, came in 1928 when, after a visit to Italy, Heller produced a critique of fascism, and consequently shifted his enemy 'from Kelsenian liberalism to fascism'.⁶⁶

This claim, which broadly correct, leaves Caldwell in two minds about what to make of Heller's *Sovereignty*. On the one hand, in sketching Heller's earlier position he describes the book as a defence of the 'state's right to self-preservation' in a way that 'justifies state actions against existing

international or state law.’ Thus, ‘[f]rom the perspective of foreign affairs, Heller conceived of the state as a living, willing entity standing above law—hardly any differently, in other words, than did Carl Schmitt.’⁶⁷ But, on the other hand, in discussing Heller’s later position, Caldwell says that ‘at the heart of Heller’s shift in focus was a new conception of the state, first elaborated in his 1927 work on sovereignty.’⁶⁸

Second, Jens Meirhenrich has recently diagnosed Heller’s position as legal positivist and ‘statist’ in light of Heller’s frequent claim that sovereignty transcends positive law because the sovereign can decide against the law;⁶⁹ and he suggests that Heller is intent on understanding the ‘is’ rather than the ‘ought’ of the state. In addition, Meirhenrich claims Heller along with Schmitt as one of the main proponents of what he describes as the ‘turn’ in Weimar public law to “concreteness” in philosophical thought’, which involves a ‘war against abstraction’ and a ‘concern with the situatedness of life’; though he does note that, in contrast to Schmitt, Heller’s hope was to save democracy and the *Rechtsstaat* in making the turn.⁷⁰ But he also says that Heller established a ‘dialectical relationship’ between the ‘normative sphere of law’ and the ‘factual sphere of power’.⁷¹

It is possible that Caldwell and Meirhenrich have identified contradictory positions in Heller rather than made contradictory claims about his position, namely, that he both regarded the sovereign as legally unlimited albeit constrained by factual or situational contingences, and that he was trying to articulate a new conception of the state that could respond to the state both as a normative entity—a *de jure* authority and as a wielder of power in fact. And even if one understands him as doing the latter, one has to keep in mind that Schmitt too responds to the state both as a normative entity and as a wielder of power. In Schmitt’s theory, though, it is through the state wielding the power to make the distinction between friend and enemy that it becomes a normative entity—the source of all political legitimacy. Moreover, if Heller were doing the former, it may be

that the world as it developed after World War II has developed to the point where his conception of state sovereignty is simply controverted by the facts, as I will now explain.

From the Political to the Juridical?

Bardo Fassbender said in a 2003 collection on sovereignty that in his last work of 1934, ‘Hermann Heller still referred to sovereignty as “a highest, exclusive, irresistible and independent power” of a state.’⁷² But, comments Fassbender, ‘[t]oday, such a power no longer exists, neither in a factual nor in a legal sense.’⁷³ In his view, this original political meaning of sovereignty, which he recognizes as due originally to Bodin, has been replaced by the idea of ‘sovereign equality’. With the founding of the United Nations in 1945, he claims, in a direct response to Heller’s definition of sovereignty just quoted, that the “sovereign state” of the past turned into a (primarily territorially defined) organization with a large number of legal obligations (arising with, without, and even against its will)—an organization which in the complex structure of the universal legal order is endowed with, comparatively, the highest degree of autonomy.’⁷⁴ Fassbender dates the beginning of this development of this concept to the era of the League of Nations, even though the League itself did not establish sovereign equality.⁷⁵

Fassbender’s understanding of sovereign equality is the standard view in international law today, but he chooses to source it directly in an article by Kelsen in the 1944 *Yale Law Journal* and in particular from this passage:

Therefore, the sovereignty of the States, as subjects of international law, is the legal authority of the States under the authority of international law. If sovereignty means ‘supreme’ authority, the sovereignty of States as subjects of international law can mean, not an absolutely but only a relatively supreme authority. A State’s legal authority may be said to be

‘supreme’ insofar as it is not subjected to the legal authority of any other State; and the State is then sovereign when it is subjected only to international law, not to the national law of any other State. Consequently, the State’s sovereignty under international law is its legal independence from other States.⁷⁶

Kelsen goes on to argue that those who talk of sovereignty as ‘supreme power’ either just mean ‘authority’ by ‘power’ or are making a causal claim about the reality of the international order, which cannot be true because the factual inequality of states means that there are states, for example, Lichtenstein, which have ‘no power at all’. The only other alternative is an understanding of sovereignty as a ‘first cause, a *prima causa*, and, in this sense, only God as the Creator of the world is sovereign.’ This concept of sovereignty ‘is a metaphysical, not a scientific one, derived from a tendency to deify the State which inevitably leads to a political theory which is rather a theology than a science of the State.’⁷⁷ That is, the only other alternative is Schmitt, though Kelsen does not deign to refer to him, but cites Bodin instead, adding that ‘it is characteristic of jurists to present as logically impossible that which is politically undesired because at variance with certain interests.’⁷⁸

As Fassbender, however, admits at the end of his essay, there is an ‘untamed side of sovereignty’. The ‘political dimension’ of sovereignty is an ‘ever present threat to the legal idea’-- ‘which one can deplore or disapprove of’ but which it would be a ‘mistake to ignore’.⁷⁹ Here he quotes from Kelsen’s book on sovereignty from the 1920s, written, he aptly says, during a time which Kelsen saw as a ‘transitional period’ in international law, and whose character Kelsen described in the book as reflected in the ‘contradictions of an international legal theory which in an almost tragic conflict aspires to the height of a universal legal community erected above the individual states but, at the same time, remains a captive of the sphere of the power of the sovereign state.’⁸⁰

The hope was that the international legal order established in light of the experience of the World War I would lead to the creation of such a universal legal community. For those who held that hope, it was premised largely on what one might call the legalist vision of an order in which all nations would agree to compulsory arbitration by an international court of all international legal disputes and in regard to disputes that could not be characterized as legal in nature to decision by a conciliation council of experts, that is, an impartial commission would be set up which would try to define a settlement acceptable to the parties but which not be binding on them.⁸¹ At the same time, substantive international law would be developed so as to provide a body of rules that could be drawn on by the international court. The effect would be not only that war would be outlawed, but also the conduct of politics by means of war would be by and large be ended, since that same order would provide an effective system of sanctions against nations that failed to comply with the judgments of the court.⁸² This legalist vision was espoused not only by theorists such as Kelsen, but also by experienced politicians such as the former US President Howard Taft and the Republican senator and general statesman Elihu Root.

This hope was, however dashed, as the Covenant 'abandoned the legalist paradigm almost entirely' by putting in place a legislative body rather than a court, composed of the Council which had Great Power permanent members and four rotating elected Lesser Power members, an assembly in which decisions were made by one member one vote, and secretary general as the administrative executive.⁸³ The legalist model was preserved only in that the Covenant envisaged the creation of the Permanent Court of International Justice to decide legal disputes between member states, but the Court had jurisdiction only if the states had agreed to opt it into its general jurisdiction or the jurisdiction arose out of a special agreement.⁸⁴

Moreover, the assembly had no lawmaking power and was subject to veto by any council member, and the only penalty for defiance by a member state of its commitments to the League was

boycott and sanctions. The Council could recommend action against a member but had no resources for ensuring that action took place. Finally, despite the fact that US President Wilson had provided the main political impetus for the League, the US did not become a member. The US Senate refused to ratify the Covenant in large part because it put in place a political body rather than the judicial system envisaged by the legalists. That effectively made the League the instrument of France and Britain, its two most powerful member states. In sum, the League failed to bring to a close the transitional period in which the legalist or internationalist hopes for an international legal order remained, as Fassbender put it, a ‘captive of the sphere of the power of the sovereign state.’

Kelsen’s 1944 article, as well as other of his writings of this time, were, then, built on a renewed hope that the Allied victory in World War II would end the transition by ushering in an international organization of nation states in which all disputes would be settled by an international court with compulsory jurisdiction,⁸⁵ a hope that still remains largely unrealized by the United Nations and the ensuing developments in international law and the institutions of the new international legal order, including the Permanent Court’s successor in the International Court of Justice. Thus, Fassbender concludes by saying that more than 50 years after the founding of the UN the ‘contradictions have not disappeared.’ The power of the ‘political’ images of sovereignty was underestimated, a power, admittedly, perhaps greater than that of sovereignty’s tamed version.⁸⁶

I drew attention to the date of publication of this essay because at that time it was still possible for an international lawyer like Fassbender to make the argument that the world of international relations had been transformed by the development of both the institutions and the positive law of the international legal order, even as he recognized what he took to be the ever present potential for the untamed side of sovereignty to assert itself. And in the 2000s there has been a flurry of books on the institutions of the international order, including the international

courts that have been developed to adjudicate its disputes, that support his claim about transformation.

For example, in a recent work on the role of international courts in the contemporary world, Karen J. Alter writes that there has been a ‘shift in the nature of international law and in acceptable moral discourse ... away from a contractual conception of international law toward a non-Austinian rule of law conception where law exists beyond the confines of the nation-state and where law generates obligations for nation-states.’⁸⁷ She and others argue that the shift away from the call for an international court with compulsory jurisdiction that so occupied Kelsen and others in the first fifty or so years of the last century should not be seen as a sign of the waning of international law. Rather, in place of one such court, one finds a multiplicity of international tribunals that decide on discrete regimes of international law and which cumulatively have transformed international law in the way Alter describes.⁸⁸

But in a book published in this same period, Mark Mazower, the leading historian of twentieth century international relations, delivers a rather different verdict:

Jeremy Bentham envisaged international law two centuries as a way of spreading universal well-being, independent of nation or creed. Today, in contrast, the appeal to law has become a vocabulary of permissions, a means of asserting power and control that normalizes the debatable and justifies the exception.⁸⁹

Mazower’s reference to the exception is an altogether deliberate invocation of Schmitt,⁹⁰ and indicates the general theme of the book. He sets out the earlier vision of an international ‘empire of law’⁹¹ articulated by figures such as Root, who figures in Heller’s discussion of the drafting process of the Convention, and who as a leading American international lawyer, statesman, and winner of the Nobel Peace Prize in 1912, was, as I have indicated, one of the proponents of an international court that would reduce ‘clashes of interests and equity to matters of legal principle’.⁹² By the turn of

the twenty first century, according to Mazower, at the very time when in 2006 the American Society of International Lawyers at its centennial invoked the memory of its founder Root to ‘set America straight’ in the dark days that followed the invasion of Iraq,⁹³ the ‘idea of a law binding upon all states and those governing them seems as far away as ever’.⁹⁴ And this, note, is four years before the Trump era in international relations could be properly imagined!

In sum, we seem again to be in a ‘transitional period’ in international law, the character of which is reflected in the ‘contradictions of an international legal theory which in an almost tragic conflict aspires to the height of a universal legal community erected above the individual states but, at the same time, remains a captive of the sphere of the power of the sovereign state.’ But it may appear that we are in such a period with one major difference.

In writing his book on sovereignty at the same time as the Great Powers were struggling to draft the Convention that would be the basis for the League of Nations and the international court that would adjudicate their disputes, Kelsen could hold onto the hope that the transition was a progressive one, as he could when, in 1944, he could see the seeds of a renewed attempt to craft an international legal order, this time with the benefit of the lessons learned from the failures of the order created by the League. But today with an acceleration of the trends that, according to Mazower, display the triumph of Schmitt in light of the perceived failure of post-World War II experiment, the transition might seem to be going in precisely the wrong direction, at least from the perspective of those who seek to understand sovereignty in the legal sense.

Before we take the plunge into an abyss of pessimism, it is worth noting that when one looks at the literature on international law in the 1930s produced by those in Europe who wished to build the international legal order rather than destroy it, it is remarkable to encounter their sense of the importance of continuing with this task in a period when Nazism and fascism were on the ascendant. Consider these words of Georges Scelle in a book on international law published in 1934

at a time when, as he put it, 'The whole world is suffering from a kind of medieval anarchy made up of state tyrannies. The fiction of collective personality is reappearing in dogmas and in mystical doctrines with a virulence which is perhaps nothing but the death throes of political and legal structures in the process of transforming themselves to adapt to new needs.'

Despite this bleak outlook, Scelle went on to say, referring directly to the persecution of the Jews and other political minorities in Germany which in October 1933 had been brought to the attention of the Assembly of the League of Nations:

It may perhaps seem paradoxical to devote this first chapter to what the classic legal literature calls individual rights at a time when in many countries these rights are openly ignored or brutally violated by governments while other governments, and the League of Nations itself, which, it is submitted, have a duty to intervene and safeguard the law, do not appear willing to make the necessary effort to fulfil this legal duty.

Their excuse can perhaps be found in their impotence. Without question, the law is in a period of regression. Is this a reason to refrain from setting forth the rules? Quite the contrary, it is important not to weaken their expression. Nothing could be more pernicious than to imagine that the violation of positive law can be confused with its evolution. Already in the history of humanity there have been several periods of regression followed by enlightened stages of progress. It is while waiting for the return of these enlightened stages that we are continuing with the academic study of legal phenomena.⁹⁵

Scelle belonged to the French sociological school of law in which the main figure was the public law theorist Léon Duguit, which understood law as the expression of a kind of social solidarity, though one that that was essentially universalistic in spirit, that is, French as opposed to German.⁹⁶ As such, it was not only able to accommodate international law but led to a conclusion similar to Kelsen's about the subordination of sovereignty to law. Heller does not refer to Scelle.

However, he does have quite a bit to say about Duguit, since he supposed that Duguit's legal theory suffers from the same flaws as Kelsen in its attempt to eradicate the state and sovereignty from its field of enquiry, albeit that the attempt is made on a sociological rather than a philosophical basis.⁹⁷ But, no less than Duguit's sociological school, Heller wanted a realistic social account of the state and sovereignty, just as no less than Kelsen he wanted a philosophical account of the same ideas in terms of legal norms, and so thought the academic task of articulating the content of the *Rechtsstaat* ideal of crucial importance, especially when that ideal was most imperiled.

The main issue for Heller's theory of sovereignty is whether his realism, or his turn to the concrete as I put things earlier, overwhelmed the normative side of his legal theory. And, as the reader will see, there are moments in *Sovereignty* where it is hard to understand things otherwise. In the next section, I will discuss some of the examples that Heller supposes illustrate his claim that a mark of sovereignty is the ability of the sovereign to decide 'against law', thus proving that 'there is a state that is not identical to the legal order, and that is sovereign as a universal decision-making unit.'

Deciding 'Against Law'

Recall Lauterpacht's remark that Heller's *Sovereignty* 'is a somewhat intolerant denial of international law as a system of law, and an affirmation of the absolute sovereignty of the state.'⁹⁸ It may seem hard to resist Lauterpacht's claim given that Heller seems to endorse in his book the views of Erich Kaufmann, another public lawyer prominent in Weimar.

Kaufmann belonged to the organic school of law of Otto von Gierke. Since it was based on a romantic, Hegelian idea of law as German-ness, as reflecting a specifically German ethical community, it may seem ominous given the later reliance of Nazi lawyers on similar tropes about the 'spirit' of German law.⁹⁹ Indeed, Kaufmann was an opponent of liberal democracy from the

conservative right and held the view that international law is inferior to national law given that it cannot reflect the spirit of the nation. At most, it is the product of agreements between states, but it is binding only so long as the states did not suppose that circumstances had changed such that the treaties no longer reflected the national interest.¹⁰⁰

Kaufmann had a significant influence on both Schmitt and Heller and in *Sovereignty*, Heller quotes Kaufmann as saying that international law treaties only bind ‘as long as the situation of power and interests obtaining at the time they are concluded does not change so much that essential provisions of the treaty become incompatible with the right of self-preservation of the contracting states.’¹⁰¹ Put in legal terms, Kaufmann made the ‘*rebus sic stantibus*’ proviso—that an agreement could not survive a serious change in the material circumstances under which the states had concluded the agreement—the fundamental principle of international law.¹⁰² And, as Lauterpacht pointed out in 1933, in making that claim Kaufmann denied international law its authority.¹⁰³

Heller says that the proviso ‘thus formulated must be unreservedly endorsed. It is to this extent merely an application to treaties under international law of the state right of self-preservation, and signifies nothing more than this right.’¹⁰⁴ And earlier he emphasizes that the state’s right to self-preservation as an international law person is greater than its right to preserve itself in the face of an internal threat that amounts to a state of emergency.¹⁰⁵ But he also qualifies his endorsement of Kaufmann in way that introduces a large tension into his account: ‘Of course, the state’s absolute right of self-preservation does not mean its absolute implementation in every single case. Such a concept of sovereignty, which incidentally neither Bodin nor anyone else has advocated, would radically preclude any international law.’¹⁰⁶ So the question is whether he is entitled to this qualification and what its content is.

Heller discusses two examples of treaties in which states sought to bind themselves without reservation to resolution of their disputes by some independent body. The first is the treaty between

Italy and Switzerland of 1924 which followed a model of the time that required the parties to resort first to conciliation; if that failed, the dispute would go to the Permanent Court of International Justice which would either issue a judgment or, if the Court did not consider the dispute to be of a juridical nature, the matter would go to binding arbitration *ex aequo et bono*, that is, on the basis of equity.¹⁰⁷

This example interests Heller because of the apparent total commitment to binding judicial settlement. He finds in statements made by the Swiss Federal Council, the executive body of the Parliament, as well as by the Parliament itself, a commitment to sovereignty, because these statements highlight the treaty's basis in trust that the binding decisions would not violate sovereignty. In other words, he finds a reservation as to the right to assert sovereignty in cases where the preservation of the legal personality of the state is put in risk and so trust is at an end.¹⁰⁸

The second example Heller discusses is the Geneva Protocol, an attempt in 1924 to introduce compulsory arbitration in all matters to the members of the League which was approved by 47 members. However, the attempt foundered when in 1925, after a change of government, Britain made it clear that it would not ratify the Protocol. Heller is less interested in the reasons that it failed than in highlighting the flaw in the treaty. The Protocol required basically that members of the League submit all disputes of a legal nature to the Permanent Court of International Justice, while all other disputes would go either to an agreed Committee of Arbitrators, or, if there were no agreement between the parties, to the Council of the League. If the Council could not resolve the matter either by conciliation or by making a unanimous decision, it was empowered to set up by majority decision a Committee of Arbitrators. A member state that failed to comply with a judicial or arbitral order would be subject to the sanctions mechanisms of Article 13 of the Covenant. Moreover, if a member state resorted to war in violation of its undertakings, it would be considered the aggressor.¹⁰⁹

Two aspects of the Geneva Protocol interest Heller. First, it is, in his view, not really a juridical solution since ultimately settlement of political disputes would be by a political body, that is, the body appointed by the Greater Power-dominated Council. Second, and more important, is that Nicolas Politis, one of the main architects of the Protocol (and a member of the French sociological school), admitted at the time that the Protocol's arbitral jurisdiction did not permit review of international treaties or of territorial rights. But with such review excluded, Heller suggests, the gap was opened for the fact of sovereign power to assert itself.¹¹⁰

Heller makes an analogous argument in the domestic context in his sketch of an episode in 1925 in Austria when the government decided to stave off the collapse of the Central Bank by backing it with an amount that was almost a tenth of the entire revenue of the state without getting, as was constitutionally prescribed, prior legislative authorization. He quotes the Chancellor's defence of this measure as the required response to a dire state of emergency to make the point that emergency measures can be required even when the Constitution explicitly makes no provision for a state of emergency, a point in which Heller rather unkindly revels. For as he mentions, Kelsen was the one of the main drafters of the Constitution and 'proudly' noted in his book on Austrian constitutional law the absence of such a provision.¹¹¹

Heller's conclusion is that this is a case of an unconstitutional act of state, the validity of which is unquestionable, but for which the pure theory of law would not only have to condemn the government, but also to declare the act itself absolutely null and void. The magisterial representation of the people, as the executive, would have had to decide here whether the interest protected by observing one of the most important constitutional norms should be placed higher or lower than the interest that could only be protected by a violation of that constitutional norm. But only the

representative unit of will, not the legal order itself, can balance interests and sometimes decide against the legal order.¹¹²

It may well then seem that if one puts this train of thought together with other claims in *Sovereignty* that Heller cannot in substance be prised apart from either Kaufmann or Schmitt; for example, ‘the essence of sovereignty can be found in the possibility of finally and effectively deciding any issue involving the unity of social interaction in the territory, even sometimes in opposition to positive law, and of imposing this decision on everyone--not only members of the association, but absolutely all residents of the territory.’¹¹³

Moreover, Heller neglects to mention that the Austrian government during the 1920s was headed by the clerical, conservative Christian-Social Party, who were also in charge of most Austrian provinces, but not of Vienna. Vienna was ruled by the Socialists, who also held over 40% of parliamentary seats, but never joined the government. The ruling party was corrupt and in the habit of borrowing money from provincial banks for speculation in the financial markets. It resorted to the emergency measure to save the Central Bank—the clearing bank for Austria’s savings banks--before there could be a debate in Parliament, because it did not want a public discussion in Parliament of its practices. So there is a good case to be made that this measure was nothing better than the act of corrupt party politicians trying to cover-up their miscarried investments undertaken illegally by using citizens’ deposits at saving-banks.¹¹⁴

Heller’s treatment of the example is in part to be explained, in my view, as his giving way to the temptation to taking a cheap shot at Kelsen in revenge for Kelsen’s claim in 1927 that Heller had attempted to cover his plagiarism of the Pure Theory with a cloak of invective. But his analysis of this example, when put together with his claim about state submission to compulsory arbitration, may seem to amount to a larger theoretical point. Even the constitution which Kelsen had himself designed to eliminate the possibility of a legally ungoverned state of emergency would be vulnerable

to an assertion of sovereignty by the executive, just as a treaty that provided for the compulsory submission to arbitration of all disputes between states could not preclude a valid claim by a state on the basis of its right to preserve itself. Heller would then be embracing the same anti-legalist logic of Schmitt's argument, an impression which can only be reinforced when one notices that in the discussion of federalism in *Sovereignty*, he insists that the federal state must be able to assert itself in times of crisis against the sub-state units.¹¹⁵ In short, Heller's theory would amount to a leftwing version of Schmitt, as Michael Stolleis, the eminent historian of German legal thought, suggests when he says that 'Heller's effort to set himself apart from Kelsen's Neo-Kantian positivism was almost pathological in its intensity, while upon closer inspection his opposition to Carl Schmitt is reduced to political—although in this realm fundamental—differences.'¹¹⁶

However, it is important to see that Heller's position is much more nuanced than Schmitt's, even though his analysis of the Austrian situation is Schmittian. The key words in the passage just quoted are 'magisterial representation of the people', which harken back to his criticism of Schmitt earlier in the book for substituting a notion of 'organ sovereignty' for the legal idea of the sovereignty of the state. They also harken forward to Heller's argument in 1932 in the *Preussenschlag*, the case in which the Prussian government contested the federal government's seizure of its state machinery.¹¹⁷

That intervention was part of a wider strategy by the government of rightwing aristocrats to get rid of the system of parliamentary government. It was supposed to work, first, by provoking civil strife in Prussia at the same time as hamstringing the Prussian government's ability to prevent such strife, second, by claiming that the ensuing 'state of emergency' justified the takeover thus eliminating the main power base of the SPD, third, by crushing the communists at the same time as neutralizing Hitler by drawing him within the federal cabinet.

For the strategy to succeed, the *Staatsgerichtshof*—the Court charged with hearing disputes between the federal government and the *Länder*—had to uphold the validity of the federal government’s claim to be justified by Article 48. This the Court substantially did, and so paved the way for rest of the plan to unfold, though, as we know, it failed in one respect in that Hitler outmaneuvered the aristocrats and seized power in 1933. The *Preussenschlag* was thus a crucial moment in the breakdown of Germany’s first experiment with democracy. Stolleis calls it a ‘milestone in the constitutional history of the downfall of the Republic’¹¹⁸ and says that it ‘was a preview of the equally violent *Gleichschaltung* [political alignment] ... of the *Länder* by the National Socialists once they had come to power.’¹¹⁹

Heller appeared in the matter on behalf of the SPD faction within the Prussian government, while Schmitt appeared as the legal advisor to the chief architect of the measure, General von Schleicher, the Minister of Defence in the Federal Cabinet headed by Franz von Papen.

In his argument to the Court, Schmitt contested the Court’s claim to have any jurisdiction over the matter.¹²⁰ He also argued that the legitimacy of a state institution stemmed from its independence from parliamentary politics, which rendered only the federal government capable of dealing with its enemies, who included those who wished to save parliamentary democracy. For on Schmitt’s view, it was political parties in general that pose a threat to the sovereignty of the state. A decision to intervene to preserve parliamentary democracy would perpetuate the struggle between political parties which, according to Schmitt, could poison Germany. A government that enjoyed a parliamentary mandate was part of the problem since such a government is under the control of one or more political parties, which is why the President had to be considered to have an unlimited discretion.¹²¹

Heller’s contention, in contrast, was that the idea of an unlimited jurisdiction is self-contradictory. The President’s jurisdiction under Article 48 had to be limited by the very

Constitution which granted that jurisdiction. Those limitations were the ones that accorded with the correct understanding at law of the presuppositions of the Constitution.¹²² It was not political conflict *per se* that constituted an emergency, but political conflict which threatened the maintenance of parliamentary democracy. A state of emergency is not simply a situation of political crisis: it is a constitutional-legal response to such a crisis. No matter the depth of political conflict, for a declaration of a state of emergency to be valid, that declaration must be aimed at the return to the normal, constitutional situation in whose service the relevant legal provisions stand. And that understanding of a state of emergency meant that both its definition and its resolution were framed by law.

His argument before the Court, then, amounted to more than a call to a return to the legal *status quo ante* of parliamentary democracy. He wanted the Court to understand that it had to play a role in restoring the institutional or organizational integrity of democracy. He was asking the Court to help keep alive the democratic pulse of the Weimar Constitution because this pulse should inform the judicial understanding of fidelity to law. In this context, he reasoned that the crucial question for the Court was whether the Prussian government had been willing and able to deal with the disturbance. And, he maintained, not only was it clearly willing and able, but it had, in view of the violence that followed the measure, proved itself better able to do so than the Commissioner appointed to govern Prussia. Heller warned the Court in the clearest terms of the consequences of a decision of the kind it eventually did give. If the Court were to uphold the validity of the Federal Government's intervention, it would in effect uphold the contention that the participation of the SPD in government was itself a threat to public safety and order. The SPD's role in building democracy in Germany would be at an end and, he said, the consequences were obvious to all present.¹²³

He noted that Arnold Brecht, the lawyer for the Prussian government, had invited the Court to speak clearly if it were to uphold the validity of the intervention. Heller repeated the invitation; for then, he said, speaking as a social democrat, it would be clear for once and for all what the political situation of Germany was. But he said that, as a jurist and as a German, he wanted the Court to take account of the fact that the route one adopts to reach an end can be crucial and that one cannot build a legal order unless one genuinely binds oneself to the law.¹²⁴

It is this analysis that is required by the idea of the ‘magisterial representation of the people’, not the one involved in the cheap shot at Kelsen.¹²⁵ For had the issue in Austria been challenged in court, the question for the court would have been precisely whether the executive’s step was justified in law. For, on the basis of the legal theory set out in *Sovereignty*, the *Rechtsstaat* is a very particular form of legal and normative order. What distinguishes the *Rechtsstaat* from absolutist forms of state is that it exhibits a division of powers between legislature, executive, and judiciary, which equips the bond between ruler and ruled with legal sanctions. And it is these sanctions which operationalize what Heller called in later work the ‘polemical principle’ of democracy or of the sovereignty of the people.¹²⁶

That principle is that power in a democracy should go from bottom to top--all power resides in the people. The *Rechtsstaat* institutionalizes that principle by requiring that law be made by elected representatives, whose accountability to the people is legally ensured, and that same law must be implemented and interpreted by officials and judges who are similarly accountable to the law.

The principle is polemical in the sense that it is intended to provide a basis for a rule-of-law stance amidst political conflicts. Its polemical nature resides in two of its features. First, it opposes directly the autocratic principle which seeks, as far as possible, to unite all power in the hands of the ruler. Second, it points to the inevitable and sometimes very large gap in any *Rechtsstaat* between ideal

and reality. The importance of its being seen as a polemical principle is that, once institutionalized, it requires a constant attempt to narrow the gap under the impulse of interpretations of the principle.

But given that the international legal order is neither a democracy nor exhibits such a separation of powers it does not amount, in Heller's view, to an order of rule in which a sovereign makes law to regulate the interactions of his subjects. Rather, it is a 'contractual' legal order, in which law is made by formally legal sovereign states to regulate their interactions with each other. As he says in *Sovereignty*: 'The emergence and demise of states is essentially not regulated by international law; they themselves regulate international law.'¹²⁷ That view of international law usually either explicitly or implicitly denies it any authority, and we have seen that Lauterpacht's verdict in 1933 was that Heller's theory fell into the explicit denial camp. In following two sections, I will suggest that Lauterpacht and Heller share much with each other and also with Kelsen. Their common ground is important because it indicates that there is a kind of logic to the legal idea of sovereignty to which all who wish to make sense of that idea are drawn. In addition, I will argue that the logic is political as well as legal, something Heller appreciated better than either Lauterpacht or Kelsen.

Sovereignty in International Law

Heller begins *Sovereignty* with a reference to the *Wimbledon* case, decided by the Permanent Court of International Justice in 1923.¹²⁸ All he says about the case itself, perhaps because he assumes that his readers would be familiar with it, is that it 'offered frequent opportunities to discuss the problem of sovereignty'.¹²⁹ He chooses instead to focus on a claim made in argument to the Court by Professor Jules Basdevant, France's legal representative and distinguished international lawyer, in which Basdevant poked fun at the argument of Germany's legal representative, saying: 'I know that such a

conception of sovereignty holds a considerable place in German jurisprudence, as it did formerly in French jurisprudence in consequence of the work of Jean Bodin.¹³⁰

As Heller observes, Basdevant's point is that France, the country in which Bodin was born and formed his views, has moved with other nations away from his 'absolutist and imperialist mindset' to a position 'compatible with the legal consciousness of our present day civilization' while Germany remained 'mired' in Bodin's absolutism, as evidenced by her legal argument to the Court. Heller proceeds to argue that Basdevant along with others did not 'know what Bodin was talking about' when he ascribed this view of sovereignty to Bodin.¹³¹

Heller does not comment on Basdevant's claim that an absolutist view of sovereignty, whether or not it was Bodin's, animated Germany's argument to the Court, nor on the fact that the Court rejected such an argument. And he returns to international law much later, as chapters 1 – 5 are devoted to rectifying the mistaken view of Bodin and unpacking the implications of the correct view for the modern conception of sovereignty mostly within the nation state, while chapters 6 -10 are an in-depth discussion of the role of sovereignty in international law.

However, in opening *Sovereignty* with the *Wimbledon* case, Heller made the question of sovereignty in international law the book ends of his monograph; and in doing so he raised the question of the paradox of sovereignty in a way that brings to light the central tension of his argument, and indeed, of his public law theory as a whole. I will show here that, with the context of the case filled in, we can understand Heller's position better and in particular why his legal theory was not of the pragmatic kind that involves a total immersion in practice, but rather a theoretically informed pragmatism that allows for understanding the space in which decisions have to be made. Very useful is that the best account of the case I know is by Jan Klabbers, an international lawyer, who embraces the first kind of pragmatism.

Klabbers points out that *Wimbledon* was the ‘first contentious case decided by the first ever permanent international tribunal, the Permanent Court of International Justice.’¹³² At the time it was decided, he says, ‘international law needed an authoritative decision to clinch its conception of sovereignty, and to bring it into line with the possibility of international law itself’,¹³³ thus facilitating the ‘development of international law as a more or less coherent system of rules binding upon states.’¹³⁴ This was, in Klabber’s view, the achievement of the decision and he sees it as preparing the way for the more famous dictum in the *Lotus* case, decided by the same Court 4 years later in which it stated:

International law governs relations between independent States. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.¹³⁵

Klabbers argues that these two cases ‘together establish that in a horizontal order of sovereign equals international law is by no means impossible; indeed, it is precisely because states are sovereign that they can make international law. But the same conception of sovereignty entails that rules can only be made on the basis of consent; the rules of international law emanate from the freely expressed will of sovereign states.’¹³⁶ International law can thus be said to amount, he claims, to a ‘positivist system in that rules are created by the consent of the states themselves, and do not flow from elsewhere.’¹³⁷ I believe that this conclusion and the premise from which it follows can be shown, through an analysis of the case, to be flawed in a way that establishes Heller’s distance from Kaufmann, and even more important, his proximity to important elements of both Kelsen’s and Lauterpacht’s theories of international law.¹³⁸

The dispute in the case arose over Article 380 of the Versailles Treaty which provided that the Kiel Canal--an internal waterway in Germany—‘shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.’ In 1920 Poland and the USSR were at war. Germany was a party to the Treaty, though, as I have pointed out, a reluctant one. In 1920, she had issued two ‘Neutrality Orders’ in connection with the war which stated her stance of neutrality—that is, that she had adopted the legal status recognized by international law of non-participation in a conflict.¹³⁹ As a result, she prohibited the ‘export of arms, munitions ... and other articles of war material in so far as these articles are consigned to the territories’ of the warring countries.

As Eugen Schiffer, Germany’s legal representative and Minister of Justice, pointed out, the war had spilled in dramatic ways across Germany’s borders, with outbreaks of violence and incursions by foreign troops so that Germany had had to intern 2,000 Poles and 65,000 Russians, lacked the means to deal with the situation because she had been disarmed by the Treaty of Versailles, and was receiving contradictory instructions from the Allied Powers.¹⁴⁰ Hence, she barred passage through the Canal to the S.S. Wimbledon, an English steamer chartered by a French company that was carrying munitions and artillery stores to the Polish naval base at Danzig.¹⁴¹

The majority of the Court—8 judges--held that the plain meaning of Article 380 required Germany not to bar passage because she was at peace with both Poland and the USSR. Two judges wrote a joint dissent, the Swiss international lawyer Max Huber and the Italian international lawyer Dionisio Anzilotti, both of whom figure in *Sovereignty*, particularly the latter.¹⁴² The German-appointed, *ad hoc* judge and international lawyer Walter Schücking wrote a separate dissent.¹⁴³

Huber and Anzilotti pointed out that a ‘purely grammatical’ interpretation could not settle the issue.¹⁴⁴ In fact, the majority opinion implicitly recognized this claim as they went beyond their exercise of literal interpretation to say:

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.¹⁴⁵

The implication here is that Germany, in consenting to be bound by Article 380, gave up her sovereign right to assert her neutrality in a way that eviscerated one of her treaty obligations. But that line of reasoning is in tension with the one that followed immediately in which the majority reasoned from what they took to be the analogous jurisprudence on provisions in the treaties governing the Suez and Panama Canals that ‘the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign state under whose jurisdiction the waters in question lie.’¹⁴⁶ For if that were the main line of reasoning, neutrality would not be compromised and there would be no need for the majority to try to solve the paradox of sovereignty.

In my view, this second line of reasoning was forced on the majority by the reliance both by Schiffer¹⁴⁷ and by the joint dissent on the argument that these treaties showed that different explicit language in Article 380 was required if Germany was to be precluded from acting on her stance of neutrality. For Huber and Anzilotti reasoned that the question posed by the case was whether the clauses of the Treaty relating to the Kiel Canal applied even when Germany had adopted a stance of neutrality or whether they ‘only contemplate normal circumstances, that is to say, a state of peace, without affecting the rights and duties of neutrality’.¹⁴⁸ Since the latter was, in their view, the correct interpretation, they were thus invoking the *rebus sic stantibus* proviso of international law jurisprudence; a topic which we saw in the last section exercises Heller in *Sovereignty*.

But as with the majority, this invocation depended on a particular conception of sovereignty which they expressed in the following way: ‘The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it’.¹⁴⁹ The Treaty would, they emphasized, have had explicitly to stipulate that the Canal was to remain open in a time of war between third parties if it were to have the effect of precluding Germany from barring passage.

In adopting this line of reasoning, the two dissenting judges were not, then, differing all that much from the majority since they accepted that if Article 380 had been worded differently, Germany would have been bound to allow passage. Indeed, the passage just quoted nicely shows that international law’s framing of sovereignty is in turn framed by sovereignty, such that the two are intertwined, which is exactly the aim of Heller’s argument. Since the German judge used a technical argument about the nature of public servitudes to justify his conclusion that Germany could bar passage, 10 of the 11 judges must be taken to have agreed that ‘the right of entering into international engagements is an attribute of State sovereignty’ with the result that ‘a restriction upon the exercise of the sovereign rights of the State’ is placed ‘in the sense that it requires them to be exercised in a certain way.’

Hence, no judge accepted the argument put by Schiffer, at least as portrayed by Basdevant, as based on ‘the idea that [Germany] ... was in possession of full sovereignty, and that, by virtue of this sovereignty, she was right in limiting the obligations resulting to her from the Treaty of Versailles’;¹⁵⁰ Schiffer, we should note, did argue, in what Klabbers calls an ‘ominous formulation’,¹⁵¹ that ‘neutrality is one of the essential attributes of sovereignty’ and thus in the nature of a ‘personal, imprescriptible and inalienable right’.¹⁵² However, it is unclear that Basdevant’s or Klabber’s characterizations are entirely fair, given that Schiffer also claimed that he was not relying on the

argument that Germany could invoke a defence of necessity.¹⁵³ Moreover, in Schiffer's closing remarks to the Court he claimed that his main argument did not depend on such a conception of sovereignty,¹⁵⁴ and in his opening statement he said that he had been ordered by his government 'to assure the Court that Germany regards it with the most profound respect' and that Germany would 'rejoice ... if the Court ... will more and more enlarge its activities for the purpose of solving all international conflicts.'¹⁵⁵

This opening statement does not read like an insincere abasement before the judges to prepare the way for an argument that in effect Germany could do as it pleased. Rather, it expresses the desire of Germany to be considered an equal member in the international law family of 'civilized nations'—to quote from Article 38 of the Court's statute—to be part, that is, of a jural community. Similarly, the fact that the *ad hoc* German judge, as expected in international law matters, decided in favour of Germany, but was outvoted by the majority, does not show that the judicial reasoning was a charade, with judges seeking to get to the result that would reflect the balance of power as they wished it to be. Schücking was not only a dedicated international lawyer, but also one of the most fervent pacifists and legalists of his day. And that of the judges he delivered the most technical legal opinion evinces his undoubted commitment to resolving international disputes by peaceful legal means.¹⁵⁶

I emphasize these points because they help to understand not only why Klabber's characterization of Germany's argument is controversial, but also why this gives us reason to doubt his conclusion that the upshot of *Wimbledon* and of the *Lotus* decision that followed it is a conception of sovereignty at home in a 'positivist system [of international law] in that rules are created by the consent of the states themselves, and do not flow from elsewhere.' For if these cases deliver a conception of sovereignty at home in an international law system in which the sole basis of legal rules is a positivistic doctrine of state consent, they reproduce the paradox of sovereignty by

resurrecting the line of argument that runs from Laband to Jellinek, one which is supposed to somehow make cohere the ideas of the legally unlimited sovereign and the fact of international law, but cannot provide the juridical resources to do so.

As Lauterpacht pointed out in *The Function of Law in the International Community*, and we have seen that he thought the same was true of Heller, theories in which international law plays a mere coordinating function deny international law any authority because it can play that function only so long as a state deems it in its interests to coordinate in this fashion.¹⁵⁷ That this is the case is borne out by the fact that Klabbers does not in fact indicate a conception of sovereignty that was, as he suggests, ‘clinched’ by the Court’s decision. Rather, as he puts it, the Court reckoned with the ‘sovereignty dilemma’ by rejecting the ‘standard textbook reconciliation’ international law with state sovereignty through *rebus sic stantibus*, while embracing a pragmatic solution. It did so by concluding that in practice a sovereign may be found to have limited its sovereignty even if, at the level of abstract theory, this cannot be explained.¹⁵⁸ But this solution is of the pragmatic sort that leaves the one who decides with having to choose between the incommensurable options of legal authority and power, which leads to an oscillation between law and power which must ultimately be resolved by power.

Moreover, in a short monograph of 1934, *The Development of International Law by the Permanent Court of International Justice*, Lauterpacht argued that in decisions such as *Wimbledon* and *Lotus*, one could conceive of the work of the Court ‘to a large extent ... in terms of a restrictive interpretation of State sovereignty.’¹⁵⁹ This claim may seem at odds with the lines we saw Klabbers quote from the *Lotus* decision. But Lauterpacht, in commenting on the same quotation, said that the ‘rigid positivist doctrine’ that the Permanent Court seemed to be stating would be dismissed by ‘[m]any an international lawyer’ as ‘obsolete and contrary to the very terms of Article 38 of the Statute’.¹⁶⁰ He continued that the Court in fact ‘qualified considerably the principle that rules of international law

emanate from the free will of States' in that it referred to that free will as expressed not only by conventions, but also by 'usages generally accepted' and general acceptance, he pointed out, is acceptance 'by the generality of States, not by every single State'.¹⁶¹

Lauterpacht's argument is premised on his view of both the Court and his conception of law. He said of the Court that for the 'first time in modern history there has functioned an international institution of unprecedented authority able and competent to probe the legal value of some of the traditional pretensions. In the atmosphere of diplomatic negotiations and conferences these claims are high-sounding, uncompromising, clad in the garb of the dignity of States ... An assertion by one sovereign State, provided that it is advanced in the plausible form of a legal phrase, is as good as that of another.' Prior to its establishment, he pointed out, 'there was no agency to disprove them and to show by clear and final decisions that they were one-sided, arbitrary, and contrary to law.'¹⁶² The 'critical attitude of the Court towards claims of State sovereignty' was not, he continued, 'a case of judicial idealism in which the judges allow their sentiments to remain victorious at the expense of the law':

The simple explanation of this striking phenomenon is that once a State has accepted the jurisdiction of the Court in a given case, the metaphysical majesty of sovereignty has largely departed from it; it has become a plain party governed by the Statute and the rules of the court; a party who may put forward any pleas and arguments to which he attaches importance, but who can derive no hope from the mere fact that the argument has been advanced by a sovereign State. ... Such submission means subjection to law with all its generality, comprehensiveness, and impatience of inconsistencies and evasion.¹⁶³

These quotations may seem proof of the claim we saw Koskenniemi make at the beginning that Lauterpacht believed that 'international lawyers, in particular international judges, should rule the world'.¹⁶⁴ But Lauterpacht, here as elsewhere, is better understood not as holding this naive view,

but as trying to work out the implications of the experiment in creating a new internal legal order that the League and the Permanent Court represented. He knew perfectly well that this was, as Koskenniemi says, a ‘political project’ in competition with others, each imposing its own set of advantages and disadvantages on participants.¹⁶⁵

Indeed, Lauterpacht began his book on the Permanent Court by pointing out that the Court had failed to achieve the end of being a ‘bulwark of peace’ because it, ‘as indeed any other’ court, is ‘dependent upon the state of political integration of the society whose law it administers’.¹⁶⁶ And he recognized that international relations had unfolded in ways that failed to achieve the kind of integration desired by the founders of the League. However, the Court had, he said, been very successful in another respect. It ‘had consciously, and with few exceptions, consistently fulfilled its secondary function, namely, the developing of international law.’¹⁶⁷ And in the closing lines of his work published the year before—*The Function of Law in the International Community*—he said that peace ‘is pre-eminently a legal postulate. Juridically it is a metaphor for the postulate of the unity of the legal system. Juridical logic inevitably leads to condemnation, as a matter of law, of anarchy and private force.’¹⁶⁸ He thus bemoaned the fact that ‘modern international law’ had ‘neglected to find a legal foundation for the so-called pacifism which it has relegated to the domain of morals and sociology’ and thus the search for ‘higher legal principle’. That search, he suggested in the very last line, can be ‘performed by means of the legitimate methods of juridical criticism and analysis.’¹⁶⁹

In making the distinction between the Court’s failure in one respect because of the lack of political integration on which its primary function depended and its success in its secondary function of developing international law, Lauterpacht brought his theory very close to Heller’s despite his rejection of what he took to be Heller’s ‘intolerant denial of international law’. Moreover, as one can see from Heller’s critique of Kelsen in *Sovereignty*, Heller thought it just as important to explain the assumption of the unity of legal order in terms of peace and as matter of ‘higher legal principle’.

Both follow Kelsen in adopting the legal idea of sovereignty. But Heller, like Kelsen, wishes to set that idea within a general legal theory, while Lauterpacht is content to proceed from the assumption that the idea is sound and to devote his more theoretical work to demonstrating that it is not only consistent with international law, but also helps both to explain it and to advance the legalist project within it. Put differently, he supposes that the idea can be generated doctrinally, by elaborating a theory of international law practice and of judicial interpretation within that practice, in much the same way that Ronald Dworkin defended an ‘interpretive’ theory of law with judges at its centre in the second half of the century.¹⁷⁰ As I will now explain, Heller, in contrast to Lauterpacht, starts with a theory of the legal state and with that theory in place seeks to show how the state relates to international law.

Fundamental Principles of Law

In *Sovereignty*, Heller places great emphasis on Section 3 of Article 38 of the Court’s statute which required it to decide in accordance with ‘the general principles of law recognized by civilized nations.’ He takes this Section to recognize the distinction he makes earlier in *Sovereignty* between ‘fundamental principles’ of legal order and positive legal rules, and takes the job of the judges of the Court to be to concretize these fundamental principles into positive legal rules. This he describes as a creative act of legislation, but one which takes place within the ‘scope’ of the fundamental principles, and which he thinks is qualitatively different from the equitable discretion that judges had in terms of Section 4.

In fact, there are only three points where Heller differs from Lauterpacht. First, Heller thinks that *non liquet*, or a judicial declaration that there is no law applicable to a dispute with the result

that the judge has no jurisdiction, exists as an option in international law, though both think it does not exist in domestic law. Lauterpacht, in contrast, claimed in a lecture in 1937 that Article 38(3) was a 'death blow' to legal positivism because it 'denies the fundamental tenet of positivism that custom and treaty are the only sources upon which the judge is entitled to draw [and] ... in particular, the doctrine that there exist gaps in international law and that as a result international tribunals are at liberty, nay, are under an obligation, to pronounce a *non liquet* when the point at issue is not covered by either custom or treaty.' The Article, by 'throwing open to the judge the unbounded field of the legal experience of mankind, in substance removes altogether the possibility of the absence of an applicable rule of law.'¹⁷¹

This difference is more empirical than theoretical because it reflects for the most part Heller's lack of confidence that there existed as much of what Lauterpacht called 'The Law behind the Cases',¹⁷² that is, the interpretative resources to decide any legal dispute that could conceivably come before the Court. He suggests that even if there were an international court in existence that was the equivalent of the Roman highest magistracy or *praetor*, there was simply not enough law in existence to make it possible for that Court to avoid a *non liquet* in all cases.¹⁷³

Second, Heller wishes to source 'general principles of law recognized by civilized nations' in state will because such general principles exist only through recognition, whereas Lauterpacht regarded Article 38 as 'purely declaratory' because these principles had been recognized in arbitral practice and agreements prior to the statute and, moreover, such principles express 'that social and legal necessity without which law, international and other, is inconceivable.'¹⁷⁴

This second difference is also not significant at the level of theory. Lauterpacht said that his claim about general principles did not do away with the role of the will of sovereign states and that Article 38 required the Court to take such will into account by making the first mandatory source of law--'International conventions, whether general or particular, establishing rules expressly

recognized by the contesting States.¹⁷⁵ He did qualify this claim by saying that it is important that such will is always to be interpreted against a backdrop of principles of customary international law, recognized as a source of law in Article 38(2) as well as the general principles of law recognized by civilized nations.¹⁷⁶ But since Heller constantly affirms that state will is to be determined in a process of juristic construction, he and Lauterpacht are pretty much in agreement.

Third, Heller and Lauterpacht take opposite sides in the persistent debate in international law about how a state-like entity acquires international legal personality. The ‘declaratory theory’ argues that recognition of an entity as a state merely confirms its legal status, while the ‘constitutive theory’ argues that an entity that aspires to legal statehood requires the recognition of other states. The debate replays that over sovereignty in general. Legalists like Lauterpacht and Kelsen tend to argue that the legal idea of sovereignty requires the constitutive theory. In contrast, those who assert the primacy of a political conception of sovereignty will usually adopt the declaratory theory, and consequently the view that the decision by states to recognize an entity as a state is a political act. In *Sovereignty*, Heller proclaims his allegiance to the declaratory theory and in fact regards it as the ‘most important rationale and proof’ of his conception of sovereignty.¹⁷⁷

This difference is theoretical. But I will now show both that the theoretical difference is more apparent than real despite the fact that the consensus today in international law is that the declaratory theory has prevailed. For the debate persists at least in that the elements that supported the constitutive side can no more be eliminated than the deciding dimension of sovereignty. In turn, that will explain why Heller’s theory is not only less hostile to international law than Lauterpacht supposed, but also supplies an account of ‘the higher legal principle’ which Lauterpacht thought international legal theory badly needed.

Heller’s argument is that before a unit of ‘territorial decision-making power’ comes into existence, there can be neither state law nor international law for it. Indeed, international law cannot

come into existence before there are at least two such states capable of being regulated by it. However, he also says that no jurist can afford to ignore that the 'concept of the capacity to act is insufficient' for the establishment of a state as the concept of sovereignty is required. He distinguishes between the recognition of a 'fact situation as a state' and recognition of the same fact situation as an 'international law person'. In the former case, recognition is not constitutive, whereas in the latter it is not simply declarative. Put differently, the capacity of an entity to be the final legal authority within a territory is sufficient to establish that entity as a sovereign state, which does not mean that it has international law qualifications since these require both recognition by other states and a willingness by the state in question so to be recognized. It is this distinction that permits Heller to respond to the fact that there are sovereign states whose laws will be recognized by other states as having effects for other states, at the same time as these states are not recognized as capable of effects that are 'normative within international law'.¹⁷⁸

In sum, what we can call internal sovereignty is a necessary condition for a state to acquire international law personality. But international law personality is not necessary for a state to be considered sovereign in this sense. This does leave Heller's theory unable to account for the example of states that are considered to have international legal personality, even though as a matter of fact they have ceased to exist. For example, when the USSR occupied and annexed the Baltic States of Lithuania, Latvia, and Estonia, the international community refused to recognize their annexation and considered their governments-in-exile to be the true representatives. Their statehood was considered to have been merely interrupted in 1940 and resumed properly with the dissolution of the USSR in 1991.

Heller would not regard this kind of example as a refutation of his theory. While he does not deal specifically with it in his discussion of the constitutive and declaratory theories, he cautions against letting exceptions drive one's theory, because one might end up constructing the

international law person and hence ‘the anatomy of international law’ ‘on the basis of a pathological object’. As he says, ‘all juristic concepts are clear only at their center, but have an “aureole” at the margins. Sovereignty forms the center of the concept of the international law person. To give it up because this concept, too, has an aureole would ... render the concept of the international law person completely incomprehensible.’¹⁷⁹

But there is also a substantive reason for Heller to regard this kind of international law personality as at best in the aureole, not the center, of the concept of sovereignty. The only candidate for bearer of sovereignty in the case of the Baltic states between 1940 and 1991 was a government-in-exile and to regard these governments-in-exile as sovereign would be to make the same mistake as Heller thought Schmitt made in claiming that the Reich President was in Weimar the true bearer of sovereign authority. It would, that is, confuse state sovereignty with organ sovereignty—the authority of one institution within the state apparatus with the apparatus as a whole.

Notice that the source of the confusion is the same. It stems from regarding the organ as the authentic voice of ‘the people’, as representing ‘we, the people’. Heller’s objection to this claim is at once juridical and political. It is juridical because he follows Hobbes’s precise ‘juristic’ formulation in arguing that to say that ‘a people’ ‘wills’ something is to say that the state wills it, that is, the collection of institutions that make up the legal state. In expressing this will, the state performs the act of representation that follows from the assumption that each legal subject had agreed with every other legal subject that ‘on matters essential to the common peace’, the unitary expression of state will must be accepted as the will ‘of all and each’. Just in this formulation, Heller suggests, there is a democratic quality, even though to have democracy properly so called, there must be not only a people but also majority voting.¹⁸⁰

It is political because it opposes the conception of the political advanced by Schmitt which seeks to reduce the essence of politics to an existential, extra-legal decision. It does so by elaborating a theory in which politics involves the renunciation of anarchic violence and a commitment to working out conflicts within the framework of the law. It is with the establishment of such a framework that sovereignty in the primary legal sense is achieved—that a legal state comes into existence. That such a state may not achieve recognition as an international legal person does not detract from its sovereignty in this sense.

In sum, Heller seeks to show explicitly, even as he chooses the side of the declaratory theory in the debate, why any realistic theory must account for both the declaratory and the constitutive aspects of the problem.¹⁸¹ And while Lauterpacht took the constitutive side because he wished to emphasize that recognition is a juridical matter, that is, not merely political, he too acknowledged that ‘while recognition is constitutive in one sphere, it is declaratory in the other. It is declaratory in the meaning that its object is to ascertain the existence of the requirements of statehood and the consequent right of the new State to be treated henceforth as a normal subject of international law.’¹⁸² Moreover, while he regarded as a ‘grotesque spectacle’ the prospect of a ‘community being a State in relation to some but not to other States’ and said this prospect was a ‘grave reflection upon international law’, he also fully conceded that this international law problem resulted from the lack of ‘political integration of international society’.¹⁸³ Because, as we have seen above, he knew that precisely this lack made impracticable an international tribunal with compulsory jurisdiction, he had to resort to the vague idea that the constitutive theory was tempered by a duty on all states to the international community at large to grant recognition.¹⁸⁴

That those who start off on one side of this debate seem to end up with a theory that imports the other side is often thought to lead to the conclusion sketched above: We should eschew theory and embrace a kind of pragmatism that regards practice as the only site where this issue, or

for that matter the issue of the paradox of sovereignty which it reflects, can be resolved.¹⁸⁵ For it remains the case that whether or not an entity can exercise its statehood depends on its recognition by other states, and that it remains open to each state to decide whether or not to treat an entity as a state in their relations with it. Furthermore, recognition patterns are treated as playing an evidentiary role, which introduces an element of circularity. As a result, there are many examples of inconsistent practice which illustrate (a) the political dimensions of recognition (both when states decide, for political reasons, decide to withhold recognition of entities that meet the criteria – e.g. Taiwan - or to recognize entities that do *not* meet the criteria – e.g. Kosovo) and (b) the frequently invoked rationale for the declaratory theory, i.e. that recognition is a political decision for each state to make, and that the declaratory theory allows for that by liberating the existence of the entity in question from the recognition by others.¹⁸⁶ As I will now show, Heller's pragmatism makes room for a kind of pragmatic decision-making that responds to such circularity without reducing the content of law to whatever happens to have been decided.

His theory accomplishes this task in that it poses the question whether states should withhold recognition of international law personality when the entity that desires it has failed to establish itself as a *Rechtsstaat*, in the same way that states, in exercising their discretion whether or not to recognize another state, may take into account the latter's democratic nature, as well as its commitment to human rights.¹⁸⁷ Now this theory appears only in embryonic form in *Sovereignty* and Heller never fully elaborated it, as he died in 1933 while still working on his *Staatslehre* or 'theory of state'.

The main elements of the theory emerge in *Sovereignty* mainly through Heller's account in his first two chapters of Bodin. Above all, Heller emphasizes, the legal nature of Bodin's conception of sovereignty. Sovereignty is legislative power—the power to make binding, final decisions about law for all those within a territory.¹⁸⁸ He also emphasizes that while for Bodin the sovereign is legally

unlimited, this is only in the sense that he is free from positive law—*legibus solutio*. No sovereign is however legally unlimited in another sense, for all are subject ‘to the laws of God, of nature, and of nations’.¹⁸⁹ The job of sovereignty is to make decisions that will give concrete expression to these laws informed by the social, political and economic context in which the state institutions operate. It is such laws that Heller calls, in a phrase he regards as appropriate in a secular age, ‘fundamental legal principles’.

The idea of sovereign subjection to law has, Heller says, been preserved in the secular era. But, he argues, in its dominant form, as exemplified in Kelsen’s Pure Theory, this is done through eliminating the fundamental principles involved in the second sense of subjection and substituting for them the first sense, that is, positive law. In making the sovereign subject to positive law alone, he argues, more than the fundamental principles are eliminated. For a sovereign who is utterly subject to positive law becomes identical with positive law. In other words, sovereignty itself is eliminated and in this way the dream is achieved of the *Rechtsstaat*--of the elimination of arbitrariness from political life through putting in place the impersonal rule of law.

That achievement is at most theoretical. In practice, the moment cannot be eliminated when some person or institution must make a concrete, final decision, so sovereignty will constantly assert itself. Indeed, Heller details many instances where Kelsen and others who would eliminate sovereignty recognize the futility of this task; and, as I have already mentioned, he takes Schmitt’s signal but only service to legal theory to be his argument that the deciding sovereign must be brought back into the centre of legal theory. It is Schmitt’s only service, because for the sovereign properly to re-enter legal theory, he must come accompanied by the fundamental legal principles which it is his job to concretize and which make sense of the idea that sovereign power is ultimate legal power.

In *Sovereignty*, Heller does not provide much detail about such principles. He asserts a distinction between ethical and logical fundamental principles and in his discussion of international law puts both the principle of equality of states and the principle that states must keep to their agreements—*pacta sunt servanda*—on the logical side of the distinction. He also argues that the ethical principles take their colour from the context in which they are concretized.¹⁹⁰ In his *Staatslehre* and in other later work he is more forthcoming, with the major change being that the principle of equality is said to be both an ethical and a logical fundamental principle. In the paragraphs that follow I will supplement the account in *Sovereignty* of Heller's theory of state with material from these later works.¹⁹¹

In *Sovereignty*, and again in *Theory of State*, Heller regards as crucially important to legal order the juristic assumption that a legal order is autonomous, that is, a closed or gap-free system of norms. It is this assumption that makes it possible for law to be studied dogmatically, as a discrete phenomenon with its own peculiar structure rather than as, say, the mere effects of social and other forces. What makes the assumption crucially important is that it is constitutive of legal order. It makes it possible to order a society along legal lines; in particular it makes possible constitutional legal order, an order which binds the powerful to the rule of law. In these respects, Heller's position is very close to Kelsen's, but note also to Lauterpacht's when we recall his claim that 'juridically' peace 'is a metaphor for the postulate of the unity of the legal system.' All three saw law as a gap-free and contradiction-free system of norms and gave priority in the legal order to a basic or constitutional norm.

On the one hand, Heller points out that legal order brings immense advantages to the powerful because of the certainty imparted by a framework of legal rules applied and enforced by state institutions. It permits the powerful to transform a fairly tenuous hold on power in a very fluid situation into a firm hold in a relatively stable situation. This aspect of the *Rechtsstaat* Heller calls the

law-formative character of power: legal order secures and even increases the resources of the powerful. On the other hand, he always emphasizes that increased and more stable power comes at a price: the powerful performers find themselves constrained by the legal order. This aspect of the *Rechtsstaat* Heller calls the power-formative aspect of law. What connects these two aspects, establishing a dialectical relationship between law and power, is ethics, more precisely the ethical fundamental principles of law. The function of the juristic assumption is to serve legal order conceived as a dialectical unity of law, power, and ethics. In this way, Heller seeks to bring together in one juridical framework both sides of Jellinek's two-sided theory of the state.¹⁹²

The assumption does this service by enabling an interpretation of the law, in particular of the law of the constitution, which strips the law of its quality of temporality in order to help ensure its historical continuity. The law is necessarily temporal, in a state of flux because it is but part of an ever-changing, overarching political and social order. The role of law in that overarching order is to give the order some relative stability and that requires the jurist to ignore the flux for the purposes of stability-enhancing interpretation.

Heller thus rejects Kelsen's view that the demand that law should be seen as gapless is a logical, *a priori* one set by a scientific understanding of law. The result of this view is that law is thought of a logical system of norms. For Heller, by contrast, law as it exists is always full of gaps. The juristic assumption that law is an autonomous system is not made for the sake of science or logic but as a moral duty of the jurist. The jurist must interpret the law as if it were autonomous to facilitate the endeavour of the *Rechtsstaat* in achieving an aim which in reality can never be achieved. That aim is of ensuring that the whole of the state organization will function in compliance with norms. Now, this duty would not amount to much if the only legal norms that counted were the norms of positive law. But, as we have seen, for Heller law includes the fundamental principles of law, especially those he terms ethical.

His view in his *Staatslehre* seems to be that the logical principles are essential to the form of law, while the ethical principles give law both its value and its substance. The logical are, he says already in *Sovereignty*, the ‘constitutive principles of the form of pure law’.¹⁹³ 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. 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 to govern 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 of substantive ethical fundamental principles of law.

Thus, while logical fundamental principles are formal, in the sense that all law, to be law, must observe requirement of legality, 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 form of law. In his view, it is their very lack of determinate content that permits ethical fundamental principles of law to stabilize a constitution. The ethical aims of legal order are then expressed in the ethical fundamental principles of law. They are supra-positive in the sense of being beyond positive law. But they are not supra-cultural: they are principles which formulate the values embedded in our cultural practices which the *Rechtsstaat* institutionalizes.

In Heller’s vision, the ethical fundamental principles of law are presupposed by positive law in a dynamic way which makes the principles accessible to reason. The principles 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. Moments of authoritative interpretation are necessary, debate

stoppers where an exercise of political power is what ends the debate. But each interpretation is authoritative only within the institutional structure of the *Rechtsstaat*.

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 or moral principles. The principles cannot be determined in the way the question seems to require because their determination depends on the cultural practices of the inhabitants of a particular state. The principles are those values which the culture regards as constitutional values--as the legal foundation of social cooperation. As such, they make up the stock of values which is the 'substantive constitution in the narrow sense'. If there is a written constitution, it will, in so far as it is possible, try 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.¹⁹⁴

For Heller, the distinction between the formal constitution and the substantive constitution is not a hard and fast one, just as he thinks that the general distinction between form and content in law is not hard and fast. But his thesis about form and content was quite different from Kelsen's view that law simply provides the form into which the powerful may pour any ideology they choose. While Heller does not think that there is a list of timeless ethical or moral fundamental principles of law, he also does not think that just any ideology can be injected into the law of a democratic *Rechtsstaat*. His position seems altogether contemporary in that it aims to undermine the dichotomy between moral absolutism and an 'anything goes' kind of relativism. While he did not live to present this aim in detail, he clearly saw the *Rechtsstaat* as the institutional expression of this position, particularly when its political institutions are democratic.

The *Rechtsstaat* is an organization or institutional structure which seeks to realize the polemical principle of democracy. It seeks to make the exercise of political power accountable to the people by requiring justification of exercises of such power to them. Heller is clear that the organs of

state might have to act in an emergency to uphold law, in the sense of ethical fundamental principles of law, in the face of positive law. We have also seen that he is clear that legal interpretation is to be guided by more than the value of certainty, where the interpretative assumption is the dogmatic one that the legal order is a gap- and contradiction-free system of positive laws. It must be guided by the judicial and general juristic sense of the ethical fundamental principles of law which those norms must aspire to concretize. Even Kelsen, as Heller notes, sometimes concedes that the assumption of unity brings the Pure Theory of Law close to natural law. And he expresses much interest in the natural law direction in which Alfred Verdross--an international lawyer and prominent member of Kelsen's circle in Vienna--was pushing a Kelsenian theory of international law, though he did not think that Verdross had pushed far enough.

Verdross did in fact go further in the 1930s and is considered to be primarily responsible for developing the idea of *jus cogens*—that there are norms of international law that are peremptory neither because states have consented to be bound by them, nor simply because they have been established over time as customary.¹⁹⁵ Rather, they are binding because they must be considered fundamental to the international legal order, that is, they are the equivalent of Heller's fundamental principles of law.

It is significant that, in developing this idea, Verdross also came round to articulating a position very close to Heller's claim about the state's right of self-preservation, as he in this way brought to the surface the logic of the legal idea of sovereignty, in particular that recognition of the role of fundamental legal principles must be accompanied by recognition of the right of the legal subject to preserve itself, whether human individual or state. In an influential article of 1937, he argued that the ability to make a treaty presupposes the prior existence of formal legal norms that make it possible for two or more states to make a binding treaty. "That is the reason why the

possibility of norms of general international law, norms determining the limits of the freedom of the parties to conclude treaties, cannot be denied *a priori*.¹⁹⁶

In addition, there are two kinds of substantive norms. First, there are ‘different, single, compulsory norms of customary international law’, for example, the norm that states not disturb each other in the use of the high seas which has the effect that two states may not conclude a treaty that tended to violate the norm. Second, there is the ‘general principle prohibiting states from concluding treaties *contra bonos mores*’:

This prohibition, common to the juridical orders of all civilized states, is the consequence of the fact that every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community.¹⁹⁷

Verdross also insisted that a compulsory norm ‘cannot be derogated either by customary or by treaty law ... A treaty norm, violative of a compulsory general principle of law, is, therefore, void’.¹⁹⁸ He recognized that this claim presents ‘difficulties’ because the ethics of the international community are less developed than those of national communities and because it includes ‘different juridical systems, built upon different moral conceptions’. But the ‘courts of civilized nations give an unequivocal answer’: treaties may not ‘*restrict the liberty of one contracting party in an excessive or unworthy manner or which endanger its most important rights*’.¹⁹⁹

In order to know what international treaties are immoral, we must ask what are the moral tasks states have to accomplish in the international community. In doing so, we must restrict ourselves to find those principles which correspond to the universal ethics of the international community. We must, so to speak, try to find the *ethical minimum* recognized by all the states of the international community, and must leave aside those particular tasks of the state represented only by particular régimes.²⁰⁰

These tasks amount to ‘maintenance of law and order within the states, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, protection of citizens abroad.’²⁰¹

It follows that a treaty would be void if, for example, it bound a state ‘to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an adequate manner, the life, the liberty, the honor or the property of men on its territory.’²⁰²

An implication of Verdross’s position is that if a validly enacted norm of international law violates a fundamental legal principle, it loses its authority over the subjects over whom it claims authority because it undermines their status as free and equal members of a jural community. Fundamental legal principles thus set a limit to the positive law. With this condition in place, one can appreciate why the insistence on the right to self-preservation accompanies it, that is, a violation of the fundamental principles entails a subversion of legal personality.

It still is not, however, clear how that limit is to be set. Verdross, following Kelsen, acknowledged the possibility that in any domestic legal order norms might come to be enacted that violate norms of international law and yet there exists no procedure for invalidating the former. But they thought this was no more of a problem than the fact that within such an order, norms might come to be enacted that violate norms of that order’s constitutional law and yet there exists no procedure for invalidating the former.²⁰³

To say that it is no more of a problem is not to say that it is unproblematic; and both Kelsen and Verdross argued that legality requires that a procedure be institutionalized, in the domestic case through the establishment of a constitutional court, in the international case, by the establishment of a court of universal jurisdiction.²⁰⁴ They also acknowledged that, in the absence of such an institution, the persistence of the violating norm might have the result that with time it replaced the norm it had violated. The difference between Kelsen and Verdross, or at least Verdross as he moved closer to a natural law position, is that Verdross must be committed to holding that when the norm

violated is a fundamental legal principle, the tension between it and the violating norm cannot be eradicated even when there is no legal procedure available that can issue in a final decision on the matter.

What this goes to show, as suggested, is the complexity that results when one recognizes that sovereignty is both a matter of fundamental legal principles and of having institutions in place that can make an effective, binding decision. That complexity is exactly what Heller sought to elaborate in *Sovereignty*. He shared with Kelsen and Lauterpacht a commitment to elaborating the legal idea of sovereignty. But he differed from both in that he did not think that international society would ever achieve the stage of political integration that would permit the establishment of a court with effective, universal jurisdiction. If, against his prediction, that stage were to be reached, he makes it clear in *Sovereignty* that international law would be at an end, because there would be in existence a world state.

In addition, even if such a court were established, Heller did not have enough confidence, as we have seen, in the development of substantive international law to suppose that the legal resources sufficed for the court to avoid *non liquet*. But these qualifications on the thought of other legalists did not, in his view, commit him in any way to the denial of the authority of international law, as charged by Lauterpacht. Rather, he would have argued for the ‘relative normativity’ of international law, to adopt the title of a well-known article from the 1980s,²⁰⁵ and would not have been surprised, I think, to discover that in place of such an international *praetor*, one finds the multiplicity of international tribunals that decide on discrete regimes of international law to which authors today draw our attention.

As I have also indicated, Heller differed from Kelsen and shared with Lauterpacht the quest to find the higher legal principles at the base of legal order, but differed from both in that he regarded the quest as part of a deeply political project. Rather than trying, as did Kelsen, to debunk

Schmitt by showing the flaws in his reasoning from the perspective of a value free legal science, Heller opposed Schmitt by elaborating the politics of a commitment to legality. Heller had already 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, he says, would be a revolution against both Bodin and 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.²⁰⁶ And it is in this thought, says 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.²⁰⁷ Ultimately, though, as Heller argues in the last chapter of *Sovereignty*, it is not courts or other legal institutions that will save us, but the individual legal conscience, the topic of my next section.

The Individual Legal Conscience

At the end of *Sovereignty*, Heller returns to the paradox of sovereignty in order to evaluate its implications for the individual legal subject, the citizen. He emphasizes 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 through providing a regular, predictable framework for common life. To have that certainty, we must 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 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, often Jewish, 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'.²⁰⁸ 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 both 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.

However, what distinguishes Heller from Kelsen is that Heller provides an argument 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, through 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. 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 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.

I mentioned at the beginning that Wolfgang Schluchter, writing in 1968, concluded a book on Heller by saying that contemporary political and social theory should not decline Heller's legacy. 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 today. 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', 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 and international law theory, there is not only a turn to Schmittean accounts either in an allegedly scientific, diagnostic mode,²⁰⁹ or in a mode of giving

ultimate value to an existentially conceived politics of authenticity,²¹⁰ or as a way of debunking international law by showing how it is an elaborate disguise for national self-interest,²¹¹ but also a turn to Schmitt himself as the direct source of inspiration.

Recall Scelle's observation in 1934: "The whole world is suffering from a kind of medieval anarchy made up of state tyrannies. The fiction of collective personality is reappearing in dogmas and in mystical doctrines with a virulence which is perhaps nothing but the death throes of political and legal structures in the process of transforming themselves to adapt to new needs."²¹² This description may well seem to apply to the world we live in, which would explain the 'crisis in state theory' exemplified in the return of Schmitt. Perhaps all we can hope for is, as Scelle suggests, that what might appear to be a transition away from the legalist vision to a pre-Enlightenment era is in fact the final death throes of those tendencies in our political culture that still yearn for the certainties of a pre-Enlightenment era. It would then be high time to return to the work of those in the interwar years who, with Kelsen, Heller, and Lauterpacht, set out the legalist vision that has remained a work in progress even during more auspicious times.

But, as I have argued in this Introduction, it is important in particular to return to Heller's *Sovereignty*. For he made clearer than perhaps anyone else writing at that time the politics of the legal idea of sovereignty and so why the preservation and maintenance of that idea is both valuable and requires constant political effort. There is no trace, however, in his work of a naïve Western universalism that results in an imperial projection of power under the guise of morality. As his reference to the experience of colonial peoples reveals, he was all too aware of the kinds of abuse that can be perpetrated in the name of fundamental principles.²¹³ He was also completely aware that the idea of law and legal order he was defending is, as an historian of the ancient world recently put it, an 'invention ... in the West'.²¹⁴ And he would have agreed fully with the conclusion of that work—that 'the formalism of its law remains for now the destiny of the West; its civil soul; its only

fully utterable public discourse' and that this idea 'continues to speak to us: about the possibility of a historically determined relationship between form and power as the sole element upon which we can (thus far) rely for an order of the world that is at the same time both realistic and open to hope.'²¹⁵

A Brief Biographical Note

Heller was born in 1891 in Teschen, part of the Austro-Hungarian empire.²¹⁶ His family were Jewish and his father a lawyer. He studied law in Vienna, Innsbruck, and Graz. In 1914, he volunteered for the Austrian army and at the end of the war returned to his studies, first in Leipzig, then, in Kiel, where in 1920 he was awarded his habilitation, the European senior doctorate required for entry into the academic profession. His supervisor was Gustav Radbruch, one of Germany most influential philosophers of law. Heller was immediately caught up in the birth pangs of the Weimar Republic. Already a member of the Social Democratic Party, he and Radbruch participated in the armed resistance to the Kapp putsch which sought to overthrow the new order.

Heller's bid to secure an academic position was thwarted by anti-Semitism and he occupied himself for several years with worker education and with promoting the social democratic movement. In 1926, he was appointed to an academic position in Berlin at the Kaiser Wilhelm Institute for Comparative Public Law and International Law. In 1928, the Prussian government appointed him to the rank of *Extraordinarius* (professor without a chair) in the Berlin Law Faculty despite the Law Faculty's resistance, and in 1932 he was appointed as *Ordinarius*, a professor with a chair, in the Frankfurt Law Faculty.

Heller was not the first choice of the Faculty. Rather, they wanted a respected practitioner, but he declined the offer. Among those who were then considered were Schmitt and Heller. It appears that the Faculty were strongly divided between them on political grounds whilst, it appears,

united in a common appreciation of their scholarly merit. In the end, with the support of the Dean, Heller got the offer.²¹⁷

Heller's appointment lasted at most nine months. In early 1933, the National Socialists had seized power and begun their policy of *Gleichschaltung*—the political alignment along ideological lines of German society. This alignment was not confined to the political sphere. The universities were also politically aligned by various laws, beginning with The Law for the Restoration of the Professional Civil Service of 1933.

In early 1933 when Hitler seized power, Heller was on a lecture tour of England. He was warned by friends against a return to Germany where he might face detention and a trial on a charge of political crimes. He had been invited to be a guest professor in Madrid, and so he asked for leave from the University for the summer semester of 1933 and the winter semester of 1933/34,²¹⁸ but was formally dismissed from his position on 11 September 1933. He died on 5th November of that year of a heart condition, a relic of wartime service.

Heller thus spent very little time as a professor at Frankfurt. Moreover, much of his energy during that time must have been focused on politics in Berlin because of his involvement in the *Preussenschlag*. But despite the fact that in the nine months of his effective tenure of his appointment Heller was hardly a presence in the Law Faculty, it is clear that he felt that on the whole he was supported by his new colleagues in Frankfurt, especially by the Dean. For on 5 October 1933, exactly a month before his death, and having just learned from the newspaper that he had been finally dismissed from the Faculty, he sent a warm letter of thanks to the Dean for his support and asked him to convey the thanks to those among his colleagues from the Law Faculty who had not turned against him.²¹⁹

Germany in general and Frankfurt University in particular had, however, changed radically between Heller's appointment and his letter to the Dean. Stolleis comments that the 'racial and

political dismissals under the Nazi state fell so heavily upon Frankfurt that the closure of the university seemed imminent',²²⁰ which was not surprising given that politically 'the majority of the faculty was "social liberal" in its thinking, democratic, and republican ... in keeping with the traditions of the old trading city and an intellectual climate that was shaped by its Jewish bourgeoisie'.²²¹ Such changes, let alone the horrors to come, were perhaps unimaginable in early 1932, even to politically attuned and realistic sorts, as I think is attested by the Law Faculty's discussions around Heller's recruitment.

On the 17th of July 1933, Heller wrote a postcard to Schmitt from Madrid congratulating him on his appointment as Prussian State Councillor: 'Hermann Heller sends his congratulations on the more than deserved honour bestowed on you by Minister Göring'.²²² In light of the rivalry between him and Schmitt, both academic and political, he must have intended its lapidary tone to indicate not only that he was unsurprised by the fact that Schmitt had climbed so quickly and enthusiastically aboard the Nazi train, but also that Schmitt had prepared the way for the train to leave the station. Perhaps Heller meant in addition to convey that whatever Schmitt's particular reservations about Hitler, that is, his preference for a dictatorship of the aristocratic right to the plebeian National Socialists, there was no great surprise in either his immediate attempts to curry favour with the National Socialists after their victory or in the success of these attempts.

On the 20th January 1934, Karl Mannheim, the sociologist who had also been purged from Frankfurt University in 1933, wrote from London to Albert Einstein in the USA to inform him that Heller—'the legal scholar whose high esteem you share'—had died: 'the first significant victim of the emigration experience'.²²³ Heller had been discussing with Einstein establishing a German university in Belgium where the academic refugees would teach, in this way preserving the culture of the liberal German academy, in particular, the German-Jewish influence within that culture.

¹ Hermann Heller, *Die Souveränität: Ein Beitrag zur Theorie des Staats- und Völkerrechts* in Heller, *Gesammelte Schriften* (Tübingen: J.C.B. Mohr, Christoph Müller ed.), Volume 2, 31.

² Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu Einer Reinen Rechtslehre* (Aalen: Scientia Verlag, 1981, reprint of the second edition of 1928). See Hans Kelsen, *The Problem of Sovereignty and the Theory of International Law*, translated by Paul Silverman (Oxford: Oxford University Press, forthcoming).

³ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005, George Schwab, trans.).

⁴ Martti Koskenniemi, 'Introduction' to Hersch Lauterpacht, *The Function of Law in the International Community* [1933] (Oxford: Oxford University Press, 2011), xxviii, at xlvi

⁵ Ibid.

⁶ Ibid.

⁷ Ibid, xlvii.

⁸ Martti Koskenniemi, 'Conclusion: Vocabularies of Sovereignty – Powers of a Paradox' in Hent Kalmo and Quentin Skinner, eds., *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010) 222, at 229 and 241.

⁹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001), 239-40.

¹⁰ Ibid, 240.

¹¹ Lauterpacht, *The Function of Law in the International Community*, note 2 at 416-17.

¹² Wolfgang Schluchter, *Entscheidung für den Sozialen Rechtsstaat: Hermann Heller und die Staatstheoretische Diskussion in der Weimarer Republik* (Baden-Baden, Nomos, 1983), 290. The most comprehensive work on Heller's thought is Michael Henkel, *Hermann Hellers Theorie der Politik und der Staates* (Tübingen: Mohr Siebeck, 2011).

¹³ Parts of this section and the next are adapted from my 'Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought' (2015) 16 *Theoretical Inquiries in Law* 337 and I am grateful to the Journal for permission to repurpose these parts.

¹⁴ *Sovereignty* was, however, reviewed quite favourably in (1928) 22 *American Journal of International Law* 706 by Francis Deák. For some signs of a revival of interest in Heller, see (2015) 21 *European Law Journal*, issue 3, a collection devoted to the theme of 'authoritarian liberalism', a term coined by Heller in the last paper he published before leaving Germany. (The collection begins with his essay of 1933, 'Authoritarian Liberalism?', translated at 295 by Bonnie Litchewski Paulson, Stanley L. Paulson and Alexander Somek.) See also Anthoula Malkopoulou and Ludvig Norman, 'Three Models of Democratic Self-Defence: Militant Democracy and its Alternatives' (2018) 66 *Political Studies* 442, which revives against Schmittian decisionist and Kelsenian formalist accounts of democracy in contemporary debates Heller's idea of 'social homogeneity' as the basis of democracy.

¹⁵ Carl Schmitt, 'Der Führer schützt das Recht', in Schmitt, *Positionen und Begriffe in Kampf mit Weimar-Genf-Versailles 1923-1939* (Berlin: Duncker & Humblot, 1988) 199.

¹⁶ See Reinhard Mehring, *Carl Schmitt: A Biography* (Cambridge: Polity, 2014, Daniel Steur, trans.) and Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven: Yale University Press, 2003).

¹⁷ As a search of, for example, the New York Times, the Guardian, and the Washington Post will show.

¹⁸ Perhaps the most dramatic title in recent years is George Edmonson and Klaus Mladek, eds., *Sovereignty in Ruins: A Politics of Crisis* (Durham: Duke University Press, 2017) in which the extent of the ruin is confirmed by the fact that sovereignty is hardly discussed by any of the contributors to the book.

¹⁹ Compare, for example, the index citations in Richard Bourke and Quentin Skinner, eds., *Popular Sovereignty in Historical Perspective* (Cambridge: Cambridge University Press, 2016); Richard Rawlings, Peter Leyland, and Alyson L. Young, eds., *Sovereignty and the Law: Domestic, European, and International Experiences* (Oxford: Oxford University Press, 2013); Kalmo and Skinner, eds., *Sovereignty in Fragments*, and Neil Walker, ed., *Sovereignty in Transition* (Oxford: Hart Publishing, 2003). The last contains one of the rare discussions of Heller—see Miriam Aziz, ‘Sovereignty Über Alles: (Re)Configuring the German Legal Order’, 279, especially 295-6, as well as a reference in Bardo Fassbender, ‘Sovereignty and Constitutionalism in International Law’, 115, at 124-5. For a more balanced approach to Schmitt and Kelsen, see Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism* (Cambridge: Cambridge University Press, 2012) and Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford: Oxford University Press, 2016). In a comprehensive but succinct account of the sovereignty debate, as eminent a scholar as Dieter Grimm has Schmitt feature more in his text than Kelsen, and has only a scant footnote reference to Heller: Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (New York: Columbia University Press, 2009), Belinda Cooper, trans., 130.

²⁰ Although in groups that remain for the moment on the political margins, the criteria are often frighteningly precise; and these groups have become less marginal with the election of Trump, the move towards illiberal democracy in Central and Eastern Europe, and so on.

²¹ Except for the USA, which decided not to join despite the fact that President Wilson had been its main proponent.

²² Schmitt, *Political Theology*, 5.

²³ Carl Schmitt, 'Der Begriff des Politischen', (1927) 58 *Archiv für Sozialwissenschaft und Sozialpolitik* 1. This article was not available to Heller at the time he was finishing *Sovereignty*. For his 1928 response to it, see Hermann Heller, 'Political Democracy and Social Homogeneity', David Dyzenhaus trans., in Arthur J. Jacobson and Bernard Schlink, eds, *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000) 256.

²⁴ Carl Schmitt, *The Concept of the Political*, George Schwab trans. (Chicago: University of Chicago Press, 1996).

²⁵ Kelsen, *Das Problem der Souveränität*, 320.

²⁶ For a complete statement of his view, see his *Reine Rechtslehre* of 1934, translated as Kelsen, *Introduction to the Problems of Legal Theory*, Bonnie Litchewski Paulson and Stanley L. Paulson trans. (Oxford: Clarendon Press 1992).

²⁷ Schmitt, *Political Theology*, 15, 48. Translation at 48 amended.

²⁸ In the late nineteenth century, philosophers and social theorists in Germany were deeply interested in the problem of the objectivity of the social sciences as well as the relationship between causal explanations of behaviour and normative explanations that took seriously the participants' own understanding. Heller refers most often to Max Weber, one of the founders of modern social theory (1864-1920) and sometimes to Heinrich Rickert (1863 -1936), a neo-Kantian philosopher whose work influenced Weber. Heller does not state an allegiance to any particular school in this

methodological debate but instead picks and chooses what he finds useful to his own position, which combines causal and normative explanation. For a most illuminating account of the methodological debate see Guy Oakes, *Weber and Rickert: Concept Formation in the Cultural Sciences* (Cambridge, Mass.: MIT Press, 1988) and for an equally illuminating account of that debate set in the context of the political and legal theory of the time, see Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt and Franz Neumann* (Oxford: The British Academy, 2008).

²⁹ For notable examples, see Daniel Lee, *Popular Sovereignty in Early Modern Thought* (Oxford: Oxford University Press, 2016) and Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law* (Cambridge: Cambridge University Press, 2015).

³⁰ See Cohen, *Globalization and Sovereignty*. For different optimistic takes, see, first, Evan J. Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford: Oxford University Press, 2016), arguing that sovereignty should be reconceived along the lines of the private law fiduciary relationship, so that sovereigns are 'an entrusted power' or 'trustees for humanity' at large; and, second, Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon and Schuster, 2017) arguing that the twentieth century pacifist international lawyers such as Kelsen and Lauterpacht succeeded against Schmitt in bringing about the 'outlawry' of war.

³¹ Pasquale Paquino has given me permission to report the following anecdote, which I first heard him relate at a conference on the work of Ernst-Wolfgang Böckenförde, the public law scholar and Constitutional Court judge who, with Ernst Forsthoff, worked after the war to preserve and extend Schmitt's place in German public law thought. In the early 1980s, Pasquino, who was working on state theory in Weimar, had a conversation with Schmitt about his project. Schmitt said: 'Do you want to write yet another stupid book about me? You should much rather work on Hermann Heller;

he was the best mind in Germany'. ('Wollen Sie noch ein dummes Buch über mich schreiben? Sie sollten eher über Hermann Heller arbeiten; er war der beste Kopf in Deutschland'.)

Forsthoff had been a Nazi by conviction in the 1930s and been appointed to the Frankfurt Law Faculty in 1933 as a replacement for Heller and the other purged Jewish professors. After the War he became one of Germany leading public lawyers and was firmly on the conservative right. See Peter C. Caldwell, in 'Ernst Forsthoff in Frankfurt: Political Mobilization and the Abandonment of Scholarly Responsibility', both in Moritz Epple, Johannes Fried, Raphael Gross, Janus Gudian, eds., *Politisierung der Wissenschaft. Jüdische Wissenschaftler und ihre Gegner an der Universität Frankfurt vor und nach 1933* (Göttingen: Wallstein Verlag, 2015) 249. Böckenförde was a social democrat who claimed that Heller was also one of his 'intellectual roots'; see Dieter Gösewinkel, 'Interview with Ernst-Wolfgang Böckenförde', in Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory: Selected Writings*, (Oxford: Oxford University Press, 2017; Mirjam Künkler and Tine Stein, eds.) 369.

³² RTS!

³³ Heller anticipates Kelsen's devastating critique of Schmitt in the exchange between Schmitt and Kelsen in the 1930s about who was the 'guardian' of the Constitution. See Lars Vinx, ed. and trans., *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015).

³⁴ RTS!

³⁵ RTS!

³⁶ Stanton, 'Popular Sovereignty in the Age of Mass Democracy', in Bourke and Skinner, eds., *Popular Sovereignty in Historical Perspective*, 320, 339, note 88.

³⁷ Ibid.

³⁸ ‘Die Krisis der Staatslehre’, in Heller, *Gesammelte Schriften*, volume 2, 5.

³⁹ Ibid, 24.

⁴⁰ Ibid, 21. (For the same thought, see RTS!.) In the only reference I have found to Heller’s work in one of the major Anglophone figures in philosophy of law of the last century, Lon L. Fuller said of this observation in 1940 that ‘[i]n this article--which one cannot read today without some sense of the doom which then hung over the German social structure—Heller comments on the extent to which in Germany public law and political science had become passively positivistic. He remarks that that the foreign writings most esteemed abroad were unacceptable in Germany because, being tainted by ethics and natural law, they were not deemed sufficiently “scientific”.’ Fuller, *The Law in Quest of Itself* (Beacon Press: Boston, 1940) 72.

⁴¹ Ibid.

⁴² RTS!

⁴³ This is her introduction to her translation of Bodin’s *Heptaplomeres*—Marion Leathers Daniels Kuntz, *Colloquium of the Seven about Secrets of the Sublime*. (Princeton: Princeton University Press, 1975) xv.

⁴⁴ Ibid, xxxix.

⁴⁵ Rainer Forst, *Toleration in Conflict: Past and Present* (Cambridge: Cambridge University Press, 2016), 143-52.

⁴⁶ Marion Leathers Kunz, ‘The Concept of Toleration in the *Colloquium Heptlamores* of Jean Bodin’, in John Christian Laursen and Cary J. Nederman, eds., *Beyond the Persecuting Society: Religious Toleration Before Enlightenment* (Philadelphia: University of Pennsylvania Press, 1998) 125, 127.

⁴⁷ Forst, *Toleration in Conflict: Past and Present*, 151-2.

⁴⁸ Ibid.

⁴⁹ See C.H. McIlwain, 'Sovereignty Again' (1926) 18 *Economica* 253; John Dickinson, 'A Working Theory of Sovereignty I' (1927) 42 *Political Science Quarterly* 524 and 'A Working Theory of Sovereignty II' (1928) 43 *Political Science Quarterly* 32.

⁵⁰ Carl Schmitt, *The Concept of the Political* (New Jersey: Rutgers University Press, 1976; translated George Schwab).

⁵¹ Hermann Heller, 'Der Begriff des Gesetzes in der Reichsverfassung' in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 4 (Berlin: Walter de Gruyter & Co., 1928) 98, reproduced in Heller, *Gesammelte Schriften*, volume 2, 203. Kelsen's comments and Heller's response appear only in former at 168-180 and 210-204 respectively. The crucial paragraphs of Kelsen's comment are at 176:

Heller's paper awakens two very ambivalent feelings in me. On the one hand, I am happy to be able to agree with him on all essential points. Had I myself given the paper, and I refer here only to its theoretical part, there would have been hardly any difference in the result. And so my astonishment is all the greater that Heller found it necessary to set up both me and my academic friends in general as opponents, as the representatives of a completely rotten 'dominant theory', one which he openly has taken upon himself as a duty and service to eliminate.

That Heller fails to acknowledge the theory of the [Kelsenian] School in the same degree as he actually utilizes it would not matter much to me. Any well-informed person can come to his own judgment on this matter. But I must energetically protest against Heller's attribution of opinions to me and my School when we hold the exact opposite.

⁵² Heller's response is, *ibid*, at 202:

The peculiarity of Kelsen's polemic requires a full answer. According to Kelsen, not only have I plagiarized him and his school and failed to recognize the sources of my thought, but I denied these sources and gave the appearance of attacking them. So the question remains open of whether I was so stupid as not to know better or so bad as not to want to know. I must utterly reject my induction into the Kelsenian School.

⁵³ Robert Paul Wolff, *In Defense of Anarchism* (Berkeley: University of California Press, 1999, first pub. 1979).

⁵⁴ *Ibid*, 14, his emphasis.

⁵⁵ *Ibid*, 19. I do not think that there is any real difference between conceiving of the problem in terms of autonomy rather than freedom. For a contrary view, see Timothy Endicott, 'Sovereignty', in Samantha Besson and John Tasioulas, eds., *The Philosophy of International Law* (Oxford: Oxford University Press, 2012) 245. Endicott argues that if one conceives of the problem in terms of autonomy rather than freedom, one can distinguish between those freedoms that are 'necessary for a good life' of an individual and those that are not; 251. Similarly, state sovereignty 'is potentially valuable, because it can serve the good of persons (within the state and without the state)'; 254. But his argument is all about potentiality—about whether sovereignty is 'as least potentially compatible with the authority of international law'; 258. In this, he follows Joseph Raz's influential theory of authority (250-1). Raz sought to answer Wolff by proposing that authority is compatible with autonomy when the authority is better placed to determine what reasons apply to the subject of authority than the subject itself. (See Joseph Raz, 'Authority, Law, and Morality', in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press: 1994) 194.)

On this view, international law has authority over states when and only when it reflects the reasons that already apply to states and is better at determining what those reasons are than the states themselves. (Moreover, these reasons will in turn have to be reasons that help the states to further the autonomy of the individuals subject to them better than the individuals could, if left to their own devices.) But, as both Heller and Schmitt would have retorted, this view does not address the question—“Who is to decide?” And with that question left unaddressed, we are stuck with the anarchical view of international relations, exactly Wolff’s conclusion about the relationships between individuals. (For Raz’s own provisional view, see Joseph Raz, ‘The Future of State Sovereignty’ (November 18, 2017). Available at SSRN: <https://ssrn.com/abstract=3073749> or <http://dx.doi.org/10.2139/ssrn.3073749>.)

⁵⁶ John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* 5th ed. (London: John Murray, 1885, reproduced by Verlag Detlev Auvermann KG: Glashütten in Taunus, 1972) volume 1, 173, 183, 267,

⁵⁷ H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’, in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 49 at 59.

⁵⁸ See Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997), chapter 1, Kelly, *The State of the Political*, chapter 3, Koskenniemi, *The Gentle Civilizer of Nations*, chapter 3.

⁵⁹ Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, 34.

⁶⁰ Koskenniemi, *The Gentle Civilizer of Nations*, 185.

⁶¹ M.W. Janis, ‘Jeremy Bentham and the Fashioning of “International Law”’ (1984) 78 *The American Journal of International Law*, 405, 415. In my view, which I will not defend here, both the statutory positivists and the positivist command theorists adopted positivist theories of law on normative and

political grounds in the way set out in Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 *European Journal of International Law* 401.

⁶² See Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, 42-4.

⁶³ For a discussion of Victor Bruns and the Institute for Comparative Public Law and International Law, see Felix Lange, 'Between Systematization and Expertise for Foreign Policy: The Practice-Oriented Approach in Germany's International Legal Scholarship (1920–1980)' (2017) 28 *European Journal of International Law* 535.

⁶⁴ RTS!

⁶⁵ Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, 127-33. (This element of Heller's work survives into *Sovereignty—RTS!*) Richard Thoma was, together with Gerhard Anschütz, one of the main public law scholars who devoted themselves in Weimar to a defence of the Weimar Constitution by means of a doctrinal interpretation of it in light of its liberal democratic commitments. See Michael Stolleis, *A History of Public Law in Germany: 1914-1945* (Oxford: Oxford University Press, 2004), 70-6.

⁶⁶ Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, 130.

⁶⁷ *Ibid*, 129.

⁶⁸ Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, 131.

⁶⁹ Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018), 87-8.

⁷⁰ *Ibid*, 87-8.

⁷¹ Ibid, 90.

⁷² Fassbender, 'Sovereignty and Constitutionalism in International Law', 124. Fassbender's reference is to Hermann Heller, *Staatslehre*, in *Gesammelte Schriften*, volume 3, 79, at 246 and 278. This book—Heller's attempt at a definitive statement of his theory of the state—was unfinished at the time of his death, and the manuscript was completed by his assistant Gerhart Niemeyer, who went on to a successful career as a political scientist in the US. His first book was on international law—*Law Without Force: The Function of Politics in International Law* [1941] (New Brunswick: Transaction Publishers, 2001). It is dedicated to Heller and has a eulogy to him at xxvi which concludes as follows: 'Hermann Heller's life and death were a constant and forceful proclamation of the idea that to realize a genuinely rational order in the political side of human culture is not merely a pragmatic, but an ethical requirement.'

⁷³ Fassbender, 'Sovereignty and Constitutionalism in International Law', 124-5.

⁷⁴ Ibid.

⁷⁵ Ibid, 128.

⁷⁶ Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organisation' (1944) 53 *Yale Law Journal* 207 at 208. See the extract in Fassbender, 'Sovereignty and Constitutionalism in International Law', 129.

⁷⁷ Ibid.

⁷⁸ Ibid, 212.

⁷⁹ Fassbender, 'Sovereignty and Constitutionalism in International Law', 142.

⁸⁰ Ibid, quoting from the second edition of Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, at 320, his translation.

⁸¹ For discussion, see Lauterpacht, *The Function of Law in the International Community*, 268-77.

⁸² See Stephen Wertheim, ‘The League of Nations: a retreat from international law?’ (2012) 7 *Journal of Global History* 210; Hathaway and Shapiro, *The Internationalists*; Mark Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (New York: Penguin, 2012), and the still very useful Alfred Zimmern, *The League of Nations and the Rule of Law: 1918-1935* (London: MacMillan, 1936).

⁸³ Mazower, *Governing the World*, 135-6;

⁸⁴ Article 36:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force. The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

⁸⁵ Kelsen, ‘The Principle of Sovereign Equality of States as a Basis for International Organisation’ at 214: ‘The only way to establish on the principle of ‘sovereign equality’ an international organization able to “maintain international peace and security” more efficiently than the League of Nations did, is the establishment of an international community whose main organ is an international court endowed with compulsory jurisdiction.’

⁸⁶ Fassbender, ‘Sovereignty and Constitutionalism in International Law’, 143.

⁸⁷ Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014).

⁸⁸ See Mary Ellen O’Connell and Lenore VanderZee, ‘The History of International Adjudication’ in Cesare P.R. Romano, Karen J. Alter, and Yuval Shany, eds., *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013) 40.

⁸⁹ Mark Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (New York: Penguin, 2012), 404.

⁹⁰ As is evidenced by his references to Schmitt in the book, notably, *ibid*, 183-6.

⁹¹ *Ibid*, chapter 3.

⁹² *Ibid*, 91-3, at 92.

⁹³ *Ibid*, 92.

⁹⁴ *Ibid*, 404-5.

⁹⁵ Quoted in Hubert Thierry ‘The European Tradition in International Law: Georges Scelle, The Thought of Georges Scelle’ (1990) 1 *European Journal of International Law* 193, at 195-6.

⁹⁶ See Koskenniemi, *The Gentle Civilizer of Nations*, chapter 4, ‘International Law as Sociology: French “Solidarism”, 1871 – 1950’.

⁹⁷ He does engage quite deeply with the work of another member of this school, Nicolas Politis; for an account of Politis, see Koskenniemi, *ibid*, 305-9,

⁹⁸ Lauterpacht, *The Function of Law in the International Community*, 416-17.

⁹⁹ Though Gierke was a liberal, as was Hugo Preuss, often referred to as the ‘father’ of the Weimar Constitution because of his role in its drafting, who followed the organic school and was deeply committed to the values of liberal democracy. See Peter C. Caldwell, ‘Hugo Preuss’s Concept of the Volk: Critical Confusion or Sophisticated Conception?’ (2013) 63 *University of Toronto Law Journal*, 347.

¹⁰⁰ Kaufmann’s position may also be more nuanced than his reputation suggests. Consider that Koskeniemmi in his illuminating history of international law thought from 1870 to 1960 notes that some have seen Kaufmann as an ‘unwitting facilitator of fascism’. But, he suggests, Kaufmann’s work should be more charitably understood as an ‘effort to deal with the paradoxes and weaknesses that a purely rationalistic or a purely sociological scholarship entails – the mindless oscillation between voluntarism and naturalism that became the shared fate of variations of disenchanted-turn-of-the-century jurisprudence after 1918.’ *The Gentle Civilizer of Nations*, 256. He also says that Kaufmann’s ‘orientation towards the concrete and the substantive avoided the pitfalls of formalism and abstraction into which [the opposite camps of pacifists and nationalists] ... regularly fell’; 257. In offering his sympathetic gloss on Kaufmann, Koskenniemi may also be describing his own approach to international law, for he advances the endless reproduction thesis with ultimate determination by power politics throughout his influential body of work on international law theory,

most notably in *From Apology to Utopia: The Structure of International Argument* (Cambridge: Cambridge University Press, 2005, Reissue with an Epilogue) chapter 4, 'Sovereignty'. I point out the incoherence of this approach in 'Formalism, Realism, and the Politics of Indeterminacy' in Wouter Werner, Marieke De Hoon and Alexis Galàn, eds., *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge: Cambridge University Press, 2017) 39. In his response to the contributions, 'Epilogue –To Enable and Enchant –on the Power of Law', *ibid*, 393, at 397, Koskenniemi accuses me of abstraction and of 'having a two value tool kit': either it *is* law or then it is *not*.¹⁰¹ His emphasis. But what I show in my chapter is that he continually oscillates between these two alternatives which means both that only facts about power can provide a provisional resting place and that, in the result, the rule of law is stripped of all content. It is this feature of his work that makes Koskenniemi, in his own words, a 'closet Schmittian'; *ibid*.

¹⁰¹ RTS! quoting from Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus Sic Stantibus* (Tübingen: J.C.B. Mohr, 1911), 204. For discussion, see Stanley L. Paulson, 'Some Issues in the Exchange between Kelsen and Kaufmann' in (2005) 48 *Scandinavian Studies in Law* 269. At 273, note 15, Paulson suggests that there are similarities between Kaufmann's (unsuccessful in his view) critique of Kelsen and Heller's. See also the section on Kaufmann in Jacobson and Schlink, eds., *Weimar: A Jurisprudence of Crisis*, 189.

¹⁰² Here he took inspiration not only from Gierke, but also from Friedrich Julius Stahl, who had in the first half of the nineteenth century constructed a conservative positivist theory of law in a bid to justify the monarchy of his day. See Koskeniemmi, *The Gentle Civilizer of Nations*, 179-81.

¹⁰³ Lauterpacht, *The Function of Law in the International Community*, 420-23. Lauterpacht's trenchant criticism of Kaufmann's theory as well as of other theories of international law as mere coordination applies with equal force to the recent reinvention of such a theory in Jack L. Goldsmith and Eric A.

Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), a book oblivious to the existence of the history of the debate in which they engage.

¹⁰⁴ RTS!

¹⁰⁵ RTS!

¹⁰⁶ RTS!

¹⁰⁷ RTS! For discussion, see Lauterpacht, *The Function of Law in the International Community*, 42-7.

¹⁰⁸ RTS! For Lauterpacht's disagreement with Heller on this point, see *ibid*, 185, note 3.

¹⁰⁹ RTS! See John F. Williams, 'The Geneva Protocol of 1924 for the Pacific Settlement of International Disputes' (1924) 3 *Journal of the British Institute of International Affairs* 288 and James W. Garner, 'The Geneva Protocol of 1924 for the Pacific Settlement of International Disputes' (1925) 19 *The American Journal of International Law* 123.

¹¹⁰ RTS! Heller was not alone in drawing this conclusion. See Zimmern, *The League of Nations and the Rule of Law: 1918-1935*, 348-9.

¹¹¹ Heller omits mention of the fact that Kelsen was also at this time on the bench of Austria's and the world's first Constitutional Court, an institutional innovation for which Kelsen was responsible.

¹¹² RTS!

¹¹³ RTS!

¹¹⁴ See Nathan Marcus, *Austrian Reconstruction and the Collapse of Global Finance, 1921-1931* (Cambridge, Mass.: Harvard 2018) 275-6. (I rely also on personal correspondence with Professor Marcus, who generously provided me with some extra detail.) See also Charles A. Gulick, *Austria: From Hapsburg to Hitler* (Berkeley: University of California Press, 1948) volume I, 702-13.

¹¹⁵ RTS!

¹¹⁶ Stolleis, *A History of Public Law in Germany: 1914-1945*, 176.

¹¹⁷ For more detailed accounts of the case and the arguments see David Dyzenhaus *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Herman Heller in Weimar* (Oxford: Clarendon Press, 1997) and David Dyzenhaus, 'Legal Theory in the Collapse of Weimar', (1997) 91 *American Political Science Review* 121. For an account of the precarious political situation in Prussia at the time, set in the context of the precarious situation in Germany as a whole, see Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia 1600-1947* (London: Penguin Books, 2007), 640-54.

¹¹⁸ Stolleis, *A History of Public Law in Germany: 1914-1945*, 101.

¹¹⁹ *Ibid*, 102.

¹²⁰ The arguments made by the lawyers and the judgment of the Court are collected in *Preussen contra Reich vor dem Staatsgerichtshof: Stenogrambericht der Verhandlungen vor dem Staatsgerichtshof in Leipzig vom 10. bis 14 und vom 17. Oktober 1932*, (Glashütten im Taunus: Verlag Detlev Auvermann KG, 1976). For Schmitt's procedural argument, see 466-9.

¹²¹ *Ibid*, 39-41.

¹²² See also his argument in a paper published shortly afterwards, 'Ist das Reich Verfassungsmässig Vorgegangen?', in Heller, *Gesammelte Schriften*, volume 2, 405.

¹²³ *Preussen contra Reich vor dem Staatsgerichtshof*, 77-8 and 379-80.

¹²⁴ *Ibid*, 406-9.

¹²⁵ Kelsen published an analysis of the judgment in 1932, translated as 'The Judgment of the *Staatsgerichtshof* of 25 October 1932' in Vinx, ed., *The Guardian of the Constitution*, 228. While critical of

the judgment, his major criticism is of the Constitution for having failed to establish a Constitutional Court with clear jurisdiction to decide this kind of issue.

¹²⁶ Heller, *Staatslehre*, 360-1. See also the translation of extracts from this work as ‘The Nature and Structure of the State’, David Dyzenhaus, trans., (1996) 18 *Cardozo Law Review* 1139, at 1182-3.

¹²⁷ RTS!

¹²⁸ *S.S. Wimbledon*, [1923] *Publ. PCIJ*, Series A, no. 1, permanent link at

http://www.worldcourts.com/pcij/eng/decisions/1923.08.17_wimbledon.htm.

¹²⁹ RTS!

¹³⁰ Acts and Documents Relating to Judgments and Advisory Opinions Given by the Court, [1923]

Publ. PCIJ, Série C, no. 3, permanent link at <https://www.icj-cij.org/en/pcij-series-c>,

386-7.

¹³¹ RTS!

¹³² Jan Klabbers, ‘Clinching the Concept of Sovereignty: Wimbledon Redux’ (1998) 3 *Austrian Review of International & European Law* 345, at 347.

¹³³ *Ibid*, 348.

¹³⁴ *Ibid*.

¹³⁵ *S.S. Lotus*, [1927] *Publ. PCIJ*, Series A, no. 10, 18, quoted in Jan Klabbers, *International Law*

(Cambridge: Cambridge University Press, 2017, second edition), 25.

¹³⁶ *Ibid*, 27,

¹³⁷ *Ibid*.

¹³⁸ For a more detailed discussion of the judgments, see Ole Spiermann, *International Legal Argument in the Permanent Court of Justice: The Rise of the International Judiciary* (Cambridge: Cambridge University

Press, 2004) 175-86. Note that both Spiermann and Klabbers largely shares Koskenniemi's 'critical' approach to international law which, in my view (see note XX above), puts them in the same camp as Kaufmann. See also Clemens Feinäugle, 'Wimbeldon, The' in the *Max Planck Encyclopedia of Public International Law*

<http://opil.ouplaw.com.myaccess.library.utoronto.ca/view/10.1093/law:epil/9780199231690/law-9780199231690-e234?rskey=pqgF4Q&result=1&prd=EPIL>

¹³⁹ 'Neutrality' is a kind of out halfway station between an international legal order in which states have the right to go to war and one in which the use of force in international affairs is prohibited. Since the Charter of the United Nations prohibits the use of force, it may seem to make the doctrine of neutrality obsolete, but it in fact persists in international law. See Michael Bothe, 'Neutrality, Concept and General Rules' in the *Max Planck Encyclopedia of Public International Law*,

<http://opil.ouplaw.com.myaccess.library.utoronto.ca/view/10.1093/law:epil/9780199231690/law-9780199231690-e349?rskey=5Qq5jS&result=4&prd=EPIL>

¹⁴⁰ Acts and Documents, 310-316.

¹⁴¹ Ibid, 310-16.

¹⁴² For an account of Huber, see Koskenniemi, *The Gentle Civilizer of Nations*, 227-8. Heller was drawn to Anzilotti despite the latter's legal positivism because of Anzilotti's emphasis on state sovereignty as the foundation of international law. See Georg Nolte, 'From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations', (2002) 13 *European Journal of International Law* 1083.

¹⁴³ See Christian J. Tams, 'Re-Introducing Walther Schücking' (2011) 22 *European Journal of International Law* 725.

¹⁴⁴ *S.S. Wimbledon*, 36.

¹⁴⁵ *Ibid*, 25.

¹⁴⁶ *Ibid*, 27.

¹⁴⁷ Acts and Documents, 344-50.

¹⁴⁸ *S.S. Wimbledon*, 36.

¹⁴⁹ *Ibid*, 37.

¹⁵⁰ Acts and Documents, 386.

¹⁵¹ Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon Redux', 346.

¹⁵² Acts and Documents, 342.

¹⁵³ *Ibid*, 314.

¹⁵⁴ *Ibid*, 303-4.

¹⁵⁵ *Ibid*, 309.

¹⁵⁶ See Tams, 'Re-Introducing Walther Schücking' and Koskenniemi, *The Gentle Civilizer of Nations*, 215-22.

¹⁵⁷ Lauterpacht, *The Function of Law in the International Community*, 415-28.

¹⁵⁸ Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon Redux', 362-4.

¹⁵⁹ Hersch Lauterpacht, *The Development of International Law by the Permanent Court of Justice* (London: Longmans, 1934), 89.

¹⁶⁰ *Ibid*, 102-3. Article 38:

The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice accepted as law;

-
3. The general principles of law recognized by civilized nations;
 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

¹⁶¹ Lauterpacht, *The Development of International Law by the Permanent Court of Justice*, 103. In addition, Lauterpacht argued, *ibid*, that the principle that the Court articulated that '[r]estrictions upon the independence of States cannot ... be presumed' does not amount to much since all it means is that if the Court, in using all the interpretative resources Article 38 enjoins it to use, cannot find a 'reason for limiting a State's freedom of action, it will not presume such a limitation.'

¹⁶² *Ibid*, 104-5.

¹⁶³ *Ibid*, 105.

¹⁶⁴ Koskenniemi, 'Introduction' to Lauterpacht, *The Function of Law in the International Community*, xlvii

¹⁶⁵ *Ibid*, xlvii. See for example, Lauterpacht's paper 'Sovereignty and Federation in International Law', which he did not publish, but which is dated around 1940, in Hersch Lauterpacht, *International Law, Collected Papers*, E. Lauterpacht, ed. (Cambridge: Cambridge University Press, 2009), volume 3, 5.

¹⁶⁶ Lauterpacht, *The Development of International Law by the Permanent Court of Justice*, 1.

¹⁶⁷ *Ibid*, 2.

¹⁶⁸ Lauterpacht, *The Function of Law in the International Community*, 446.

¹⁶⁹ *Ibid*.

¹⁷⁰ See Koskenniemi, *From Apology to Utopia*, 53-6, who attempts to debunk both.

¹⁷¹ Hersch Lauterpacht, ‘Les principes généraux de droit comme source du droit des gens’ (1937) IV *Recueil Des Cours* 97, 164. I will refer to the translated version, ‘The Place of International Law in Jurisprudence’, in Lauterpacht, *Collected Papers*, volume 1, 93, 242-43.

¹⁷² Lauterpacht, *The Development of International Law by the Permanent Court of Justice*, chapter 1.

¹⁷³ RTS!, ... The difference must also in part reflect Heller’s civil law temperament. Lauterpacht, like both Kelsen and Heller, was a Jew whose early formation was in the Austro-Hungarian Empire, and had in fact been Kelsen’s student in Vienna in the 1920s. But he had moved to London in 1925 where he had quickly immersed himself in and embraced the common law tradition with its confidence that judges can find within the law legal solutions to all problems that might come before a court. See the biography by his son, also an eminent international lawyer, Sir Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge: Cambridge University Press, 2012). There is a recent resurgence of interest in Lauterpacht, as is demonstrated by the accounts of his influence in the last century in Koskenniemi, *The Gentle Civilizer of Nations*, chapter 5, Philippe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (London: Weidenfeld & Nicolson, 2016), James Loeffler, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (New Haven: Yale University Press, 2018); and he emerges as the hero of Hathaway and Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World*. For a polemical critique of Lauterpacht’s claim that there is a ‘law behind the cases’ see Schmitt, *The Turn to a Discriminating Concept of War* (1937) in Carl Schmitt, *Writings on War* (Cambridge: Polity Press, 2011) Timothy Nunan, ed. and intro., 48-53. Schmitt’s argument is the precursor for the kind of critical theory of international law that emerged in the late twentieth century, as is E.H. Carr’s classic *The Twenty Years Crisis* (1939) (Houndsmills: Palgrave, 2001). In chapter 2, at 38-9. Carr attempted to shred the project of Lauterpacht and other legalists—the ‘utopia of international theorists’—on the basis that it had no impact on reality. For an uncharacteristically polemical yet powerful response to this intemperate ‘realist’ attack, see

Lauterpacht, 'Professor Carr on International Morality' in Lauterpacht, *Collected Works*, volume 2, 67.

(Lauterpacht did not publish this paper. The editor, his son, suggests that it was written in 1941.)

This response is worth reading today as one to the critical international law theory that emerged in the 1980s and 1990s.

¹⁷⁴ Lauterpacht, 'The Place of International Law in Jurisprudence', 242.

¹⁷⁵ Ibid, 243-4.

¹⁷⁶ Ibid.

¹⁷⁷ RTS!

¹⁷⁸ To give a contemporary example, the distinction permits one to understand why marriages or contracts concluded in Taiwan will be recognized as valid by the courts of other countries while Taiwan since 1971 has not been recognized as having international law personality. See Oda Shigura, 'Taiwan as Sovereign and Independent State - Status of Taiwan under International Law', (2011) 54 *Japanese Year Book of International Law* 386. (Shigura argues that this lack of recognition is most anomalous.)

¹⁷⁹ RTS!

¹⁸⁰ RTS!

¹⁸¹ See James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 2006), chapter 1.

¹⁸² Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947), 75.

¹⁸³ Ibid, 78. The section is entitled ‘The Problem of Recognition and the Political Integration of International Society at 77.

¹⁸⁴ Ibid, 74-5.

¹⁸⁵ Crawford, *The Creation of States in International Law*, 19-28, Koskenniemi, *From Apology to Utopia*, chapter 4, Kalmo, ‘A Matter of Fact?’ in Kalmo and Skinner, eds., *Sovereignty in Fragments*, 114. As these three note, Kelsen switched sides completely, from the declaratory to the constitutive. Kalmo argues that H.L.A. Hart’s conception of sovereignty is helpful here but does not note that conception issues in the Schmittean conclusion that in difficult cases, ‘all that succeeds is success’. See Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994, second edition), 153.

¹⁸⁶ This confusion has led to an interesting situation in a Canadian case (*Parent v Singapore Airlines Limited and the Civil Aeronautics Association* (2003) 133 *International Law Reports* 264 (Quebec Superior Court), in which the Court concluded that Taiwan met the traditional criteria for recognizing statehood at international law and so, under international law, was a state. As a result, Taiwan was entitled to state immunity despite the fact that the Canadian government continues to adhere to the ‘one China policy’ and has not recognized Taiwan. For discussion, see Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), chapter 10, at 401-2. In my view, Heller would not have regarded Taiwan as sovereign in any sense if it is correct, as I have been told by Taiwanese constitutional scholars, that if Taiwan were to put in place a constituent assembly to draft a new constitution, China would immediately invade. As a result, Taiwan is stuck with the 1947 Chinese Constitution that the retreating nationalist forces brought with them.

¹⁸⁷ For an argument that this should be the case, see Criddle and Fox-Decent, *Fiduciaries of Humanity*, 63-76, where they set out an ‘earned-sovereignty paradigm’.

¹⁸⁸ For a contemporary account of these features of Bodin's thought, see Daniel Lee, 'Unmaking Law: Jean Bodin on Law, Equity, and Legal Change', (2018) 39 *History of Political Thought* 269.

Compare Marlin Loughlin, 'Why Sovereignty?' in Rawlings, Leyland and Young, *Sovereignty and the Law*, 34, who offers a Bodinian account of sovereignty that is remarkably similar to Heller's, except for the fact that he claims that 'there can be no fetter on the law-making authority of the State, whether deriving from divine law or natural law'; *ibid.*

¹⁸⁹ RTS!

¹⁹⁰ RTS!

¹⁹¹ These paragraphs are adapted from Dyzenhaus *Legality and Legitimacy*, chapter 4. The extracts from Heller's *Staatslehre* on which the paragraphs are based are to be found in Hermann Heller, 'The Nature and Structure of the State', David Dyzenhaus, trans., (1996) 18 *Cardozo Law Review* 1139.

¹⁹² See, for example, Heller, *Staatslehre*, 179-81.

¹⁹³ RTS!

¹⁹⁴ Heller, 'The Nature and Structure of the State', 1212-3.

¹⁹⁵ On *jus cogens*, see Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291. On Verdross, see David Dyzenhaus, 'A Monistic Approach to the Internationalization of Constitutional Law' in Iulia Motoc, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek, eds., *New Developments in Constitutional Law: Essays in Honour of Andràs Sajó* (The Hague: Eleven International Publishing, 2018) 97 which relies on the following sources: Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 *European Journal of International Law* 33; Jochen von Bernstoff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge: Cambridge University Press, 2010, Thomas Dunlap, trans.); Aoife O'Donoghue, 'Alfred Verdross and the Contemporary Constitutionalization Debate' (2012) 32 *Oxford Journal of Legal Studies* 799; and Thomas Kleinlein, 'Alfred Verdross as a Founding Father of

International Constitutionalism?’ (2012) 4 *Goettingen Journal of International Law* 385. I will not deal here with the vexed question of the relationship between general principles of international law, *jus cogens* norms, customary international law, obligations *erga omnes*, and so on. See Shelton, ‘Normative Hierarchy in International Law’; Wolfgang Friedmann, ‘The Uses of “General Principles” in the Development of International Law’ (1963) 57 *American Journal of International Law* 279; Alfred Verdross, ‘*Jus Dispositivum* and *Jus Cogens* in International Law’ (1966) 60 *American Journal of International Law* 55; and M. Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law’ ((1990) 11 *Michigan Journal of International Law* 768.

¹⁹⁶ Alfred Verdross, ‘Forbidden Treaties in International Law: Comments on Professor Garner’s Report on the “The Law of Treaties” (1937) 31 *American Journal of International Law* 571, at 572, his emphasis.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid, 573.

¹⁹⁹ Ibid, 574, his emphasis.

²⁰⁰ Ibid, his emphasis.

²⁰¹ Ibid, emphasis removed.

²⁰² Ibid.

²⁰³ Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (JCB Mohr (Paul Siebeck): Tübingen, 1923), 159-69.

²⁰⁴ See, for example, Alfred Verdross, ‘Reichsrecht und internationales Recht’ (1919) 7/8 *Deutsche Juristenzeitung* 291. I refer to this paper as reproduced in Hans Klecatsky, René Marcic, Herbert Schambeck, eds., *Die Wiener rechtstheoretische Schule: Hans Kelsen, Adolf Merkel, Alfred Verdross* (Vienna: Europa Verlag, 1968), volume 2, 2059, at 2062.

²⁰⁵ Prosper Weil, 'Towards Relative Normativity in International Law', (1983) 77 *American Journal of International Law* 413.

²⁰⁶ Hermann Heller, 'Die Politischen Ideenkreise der Gegenwart' in *Gesammelte Schriften*, volume ,1 267, at 287-89.

²⁰⁷ Heller, 'Political Democracy and Social Homogeneity', 258-60.

²⁰⁸ See Hans Kelsen, Nadia Urbinati and Carlo Invernizzi Accetti, eds., Brian Graf, trans. *The Essence and Value of Democracy* (Plymouth: Rowman and Littlefield, 2013) [1929], 27. For discussion, see Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2007), chapter 4;

²⁰⁹ See Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010).

²¹⁰ See Paul Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2012).

²¹¹ See Goldsmith and Posner, *The Limits of International Law*.

²¹² Text to note XX, above.

²¹³ RTS!

²¹⁴ See Aldo Schiavano, *The Invention of Law in the West* (Cambridge, Mass.: Harvard University Press, 2012).

²¹⁵ *Ibid*, 460.

²¹⁶ See Christoph Müller, 'Hermann Heller (1891-1933): Vom liberalen zum sozialen Rechtsstaat' in Helmut Heinrichs, Harald Franzki, Klaus Schmalz, Michael Stolleis, eds., *Deutsche Juristen Jüdischer Herkunft* (Munich: CH Beck, 1993) 768-80.

²¹⁷ Notkar Hammerstein, *Die Johann Wolfgang Goethe-Universität Frankfurt am Main: Von der Stiftungsuniversität zur staatlichen Hochschule* (Neuwied: Alfred Metzner, 1989), volume 1, 142-43. For a more detailed account, see David Dyzenhaus, 'Hermann Heller and the "Jewish Element" in German Public Law Theory' in Epple *et al.*, eds., *Politisierung der Wissenschaft* 209.

²¹⁸ Hammerstein, *Die Johann Wolfgang Goethe-Universität Frankfurt am Main*, 226.

²¹⁹ Reproduced in Inge Staff, 'Hermann Heller (1891 -1933)' in Bernard Diestelkamp and Michael Stolleis, eds., *Juristen an der Universität Frankfurt am Main* (Baden-Baden: Nomos,) 187, 199.

My dear Dean,

I have learned from the newspaper of my definitive dismissal from my post as a university teacher. Despite everything, it is important to me that I do not take my leave of the Frankfurt Faculty without a word. Insofar as the convictions of individual members of the Faculty have during the last months or weeks changed, I ask that they will not take my parting words to have any bearing on them. But in regard to those colleagues who have, despite the intervening events, maintained a benevolent memory of me, I ask that you convey to them my heartfelt thanks and good wishes. My indestructible belief in the intellect that alone elevates us above the animal kingdom and that constitutes our dignity as humans, gives me the certainty that I would be connected in the future to these colleagues, if the external circumstances of such a relationship are not permitted.

In this sense, I am sincerely thankful for all the humane accommodation that you, my most esteemed Dean, as well as the Faculty, have shown me.

Yours sincerely,

Hermann Heller.

²²⁰ Stolleis, *A History of Public Law in Germany: 1914-1945*, 275.

²²¹ Ibid.

²²² Mehring, *Carl Schmitt*, 264.

²²³ Letter dated 20 January 1934, sent from the London School of Economics and Political Science, Einstein Archive, Jerusalem.