

Positivism and the Pesky Sovereign

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Abstract

I argue that Hans Kelsen anticipated the main contribution of Jeremy's Waldron's article: the idea that the place of nation states in the international legal order is akin to that of administrative agencies in the domestic legal order, and thus as wielding delegated rather than original authority. For both wish to understand sovereignty as a kind of metaphor for the unity of a legal system rather than as a pre-legal entity. However, legal positivism is unable to make the move to conceiving of sovereignty that way, since the positivist prejudice against natural law has the result that the idea of a pre-legal sovereign is repressed in one place only to pop up in multiple others. In issue in this debate are two conceptions of the rule of law, a positivistic conception that the rule of law consists mainly of determinate rules and a Fullerian conception in which the rule of law is understood as facilitating a certain process of reason and argument. Since Waldron sees the attraction of the latter conception, and since that conception avoids the problem of the pesky sovereign, I suggest that Waldron should embrace it.

'Kelsen's dislike of natural law is largely influenced by the view that natural law may be and has been abused for political purposes in a manner not always consistent with progress or justice. Undoubtedly, like everything else, natural law lends itself and has lent itself to abuse. . . . However, exaggeration and abuse ought not to determine the fate of an otherwise beneficent idea. . . . We would rather retain natural law with its possible abuses than cut off the branch of law from the tree of justice . . . [A] slight retreat [on Kelsen's part] would strengthen the position as a whole. He has only to admit – as every positivist lawyer ought to do in justice to himself – that positive law has always and does incorporate ideas of natural law and justice. There would, on our part, be no difficulty in admitting that natural law thus incorporated has ceased to be an independent system and has become part and parcel of positive law.'

Hersch Lauterpacht, 'Kelsen's Pure Science of Law' (1933)¹

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¹ Lauterpacht, 'Kelsen's Pure Science of Law', in H. Lauterpacht, *International Law: Collected Papers*, 2. *The Law of Peace, Part I, International Law in General* (ed. E. Lauterpacht, 2009), at 404, 428–429.

Introduction

In the epigraph one great international lawyer advises another to embrace a version of natural law. I will argue that Jeremy Waldron should also consider taking Lauterpacht's advice in order to sort out the ambivalence in his treatment of the topic of the rule of law in international law: between, on the one hand, his positivistic commitments and, on the other, his growing sense over the last few years that the rule of law is best conceived in a way antithetical to positivism.

As we will see below, Kelsen anticipated the main contribution of Waldron's article: the idea that the place of nation states in the international legal order is akin to that of administrative agencies in the domestic legal order, and thus as wielding delegated rather than original authority. For Waldron, like Kelsen, wishes to understand sovereignty as a kind of metaphor for the unity of a legal system rather than as a pre- or extra-legal entity. However, legal positivism is unable successfully to make the move to conceiving of sovereignty that way, since the positivist prejudice against natural law has the result that the idea of a pre- or extra-legal sovereign – what H.L.A. Hart called the 'uncommanded commander'² – is repressed in one place only to pop up in multiple others.

This was Carl Schmitt's criticism of Kelsen the year after Lauterpacht wrote his essay. In *Political Theology* (1922), Schmitt noted that Kelsen in a work on international law had said that the 'concept of sovereignty must be radically suppressed'.³ But, as Schmitt argued in his 1932 essay on the nature of the liberal state, *Legality and Legitimacy*,⁴ the way in which Kelsen went about that task has the result of the multiplication of sovereignties of just the sort he wished repressed. In Schmitt's view, the liberal dream of a legislative state in which public coercive judgements would be made by a centralized legislature and put into laws of general application inevitably deteriorates both in practice and in Kelsen's theory into the nightmare of the administrative state, in which such judgements are made by the decision of particular officials at the point of application of the laws. That is, we get an exercise of arbitrary power by a particular official.

I will come back to this point later. But we can note that the very way Waldron sets up the problem – 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' – suggests a dualism between sovereignty on the uncommanded commander model and the law, in that it supposes that we could have multiple sovereigns not subject to law's rule. In addition, when Waldron sets out the requirements of the rule of law, he supposes that there is a special tension between the requirement that there be general rules laid out in advance to enable people to figure out what the legal consequences of their actions will be and the requirement that there be courts in which law's subjects can contest the legality of official action before impartial adjudicators. That claim provides one of the most significant points of intersection between his and

² Hart, 'Positivism and the Separation of Law and Morals', reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983), at 49, 59.

³ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (2005), at 21.

⁴ (2004).

Kelsen's positivist accounts, and it leads to the problem Lauterpacht detected and which Schmitt made more precise.

Lauterpacht's Critique of Kelsen⁵

Lauterpacht admired Kelsen's advances both in philosophy of law and in international law. He regarded as most significant of all Kelsen's Identity Thesis – the doctrine of the identity of state and law. The state, on Kelsen's view, is a normative order coextensive with the normative order of a legal system. The state is nothing more than the personified expression of the unity of legal order.⁶

To the objection that the state is not a normative order, but a power or force, Kelsen responds that the acts referred to are the acts of men, and these are valid as state acts only in so far as they conform with the law. The dualism of state and law presupposed in the view that the state exists outside the legal order is the product of the natural human desire to personify what we wish to comprehend. Just as theology posits a being who is both transcendent and capable of limiting his own power, so the state is said to be capable of the miracle of creating legal order and then subjecting itself to its laws. Thus, the Identity Thesis is practically important. Dualism lends itself to political abuse, permitting the state to claim the right to act against the law when the government deems this to be in the public interest. The state is for the law, not the law for the state. Lauterpacht says that the pure theory of law has its most important application to international law, in particular to the issue of sovereignty. Sovereignty is the expression of the unity and exclusiveness of the legal system. From a purely legal point of view an international state is in existence. It exists if 'the State is only an expression for the unity of the legal system and if international law is recognized – as admittedly it is – as a body of rules binding upon states independently of their will'.⁷

For a single state to assert sovereignty is to exclude the possibility of an international state. But it also excludes the possibility of other sovereign states, since these others exist only in so far as they have been recognized by the law of the sovereign state, which means that they are not sovereign. One has therefore to choose as one's juridical hypothesis between the sovereignty of an individual national state and international law. On the latter view:

The legal system of the individual State is a partial legal system derived by way of delegation from the legal order of the *civitas maxima*, which in turn is based on the fundamental rule *pacta sunt servanda*. The world order is already in being as a result of the existence of international law, and its existence is not affected by the absence of law-creating and law-enforcing agencies such as are found in a developed society. If such agencies were established they would not add essentially to what already exists. States would not be subordinated to a tangible super-State or to its political organs; they would continue to be subordinated to the same rule of law to which they are in principle subordinated today.⁸

⁵ In this section I will adopt by and large verbatim Lauterpacht's way of putting things, but will use quotation marks and pinpoint citations only for his more striking observations.

⁶ Lauterpacht, *supra* note 1.

⁷ *Ibid.*

⁸ *Ibid.*, at 420–421.

As Lauterpacht points out, Kelsen's claim that it is juridically permissible to choose between these hypotheses seems a little odd, given that the hypothesis of the sovereign national state is incompatible with the ultimate unity of legal knowledge; for it follows that each national state has to be conceived as ultimately sovereign over and at the same time subordinate to every other. It is also incompatible with the idea of international law as regulating the relations of coordinated and equal states, which presupposes the existence of a higher authority, as well as with accepted rules of international law, for example, the rule of the continuity of the state. Ultimately, however, Kelsen thought that the choice will be determined by one's philosophy of life and that such a choice is not a matter of legal science, despite his sense that the affirmation of the national state as the fundamental unit is also the affirmation of mere force.

Hence, Lauterpacht suggests that Kelsen's preference for international law is evidence of his attraction to natural law. Indeed, it is difficult otherwise to comprehend Kelsen's 'proud insistence' that the initial juridical hypothesis transforms power into right.⁹ But for its peace-creating effectiveness the achievement would be of doubtful value. Nevertheless, Kelsen asserts that the primacy of international law is merely a matter of choice in order to maintain his distance from natural law. And Kelsen wishes to maintain that distance because he thinks that the attraction to natural law is of a piece with the attraction to some idea of an ideal that transcends human experience, and so something inconsistent with the dignity and autonomy of man.

But, argues Lauterpacht, the rejection of natural law is not always consistent with the positivist idea. 'We may', he goes on, 'have abandoned the theory that statutes repugnant to natural justice are void, but that does not mean that we have ceased to shape positive law and to interpret it, sometimes out of recognition, by ideas for which the term natural law is an elastic and convenient expression.'¹⁰ To the extent that positivism disregards this phenomenon, it

becomes a dogma divorced from the general trend of legal thinking. The manner in which judges have recourse to the 'law above the law' or the 'law behind the law' in order to obliterate the gap between law and justice has been for a long time the persistent and central theme of legal philosophy . . . This is the problem of reconciling the antinomy of rule and discretion, of security and justice, of stability and change. But it is a problem which is outside the range of Kelsen's writing.¹¹

Waldron and Kelsen Compared

Waldron's main reason for seeing national states as the bearers of delegated authority is, following Kelsen, a theoretical one – that the states are 'already law-constituted entities'. 'Considered in *both* its municipal aspect *and* in its international aspect, a state's sovereignty is an artificial construct . . . a particular tissue of legal organization: it is the upshot of organizing certain rules of public life in a particular way . . . In

⁹ *Ibid.*, at 427.

¹⁰ *Ibid.*, at 425–426.

¹¹ *Ibid.*, at 426.

its international aspect, the sovereignty and sovereign freedom of the state is equally an artifact of [international law].’ (at 328)¹² His hope is that with the help of this insight we will be able to see why international law and the rule of law in international law are for the benefit of the individuals subject to national states, rather than for the benefit of the states themselves.

But Waldron also sees some obstacles in the path of achieving this benefit. He draws on Edward L. Rubin’s argument that classic understandings of the rule of law have little application to the relationship between a legislature and an administrative agency.¹³ In particular, Rubin argued that in the USA the legislation that makes up the bulk of administrative law is not law in Lon L. Fuller’s sense of law that conforms more or less to eight principles of the rule of law that together make up an ‘inner morality of law’.¹⁴ The reason is that much administrative law is ‘intransitive’, in that it does not directly affect the rights of individuals, nor indeed sets out a determinate content for officials to apply. Rather, it simply gives to officials the authority to develop the policy of administrative law in accordance with a very broadly sketched mandate. In other words, standard delegations of authority to such agencies give so much discretion to the agencies that their authority cannot plausibly be said to be subject to the kinds of principles of the inner morality of law, for example, clarity or (as Waldron terms it) determinacy and predictability. Thus Rubin detects the problem for administrative law that Schmitt had fully sketched in 1933 and suggests that we should adopt a legal realist account of law, one which gives up on the quest to understand law as a unified normative order.¹⁵

However, as Peter L. Strauss pointed out, the intransitivity of much modern legislation is tolerable ‘because it exists within a system that does give legal obligations or restrictions more precise shape before the citizen is asked to act or subjected to penalties for unwanted behavior’.¹⁶ The important point is that Fuller was seeking to describe the ‘morality of a system, not its particular elements’.¹⁷ Indeed, what makes a legal order such, according to Fuller, is not, or at least not primarily, that it exhibits certain systemic qualities, for example, that it has a legislature, which has the principal responsibility for making law, and a judiciary, which has the principal responsibility for interpreting the law. Rather, the main question is always whether a particular order complies substantially with legality – the principles of the inner morality of law.

At stake here are two conceptions of the rule of law, Fuller’s and a positivistic conception. As Waldron notes, it is controversial whether, as positivism would have it, the rule of law consists mainly of determinate rules or is better understood as facilitating

¹² Citing Kelsen in note 44 for the claim about the law-constituted nature of the state (emphasis in original).

¹³ Rubin, ‘Law and Legislation in the Administrative State’, 89 *Columbia L Rev* (1989) 369.

¹⁴ L.L. Fuller, *The Morality of Law* (1969).

¹⁵ See further Vermeule, ‘Our Schmittian Administrative Law’, 122 *Harvard L Rev* (2008–2009) 1095.

¹⁶ Strauss, ‘Legislative Theory and the Rule of Law: Some Comments on Rubin’, 89 *Columbia L Rev* (1989) 427, at 445, his emphasis.

¹⁷ *Ibid.* For detailed discussion see Dyzenhaus, ‘The Concept of (Global) Administrative Law’, *Acta Juridica* (2009) 3.

‘a certain process of reflection and argument, rather than the mechanical conformity of behavior to an empirically or even numerically defined requirement’ (at 336). However, his remarks in this regard are rather tentative and may even suggest that the default position for understanding the rule of law is legal positivism’s, in which the rule of law is the rule of general rules with determinate content. The benefit for legal subjects on this conception of the rule of law is for the conception of liberty that Waldron calls ‘Hayekian liberty’: legal subjects will know precisely the limits of their liberty and are thus enabled to plan their lives (339).

This tentativeness is evidence of the ambivalence mentioned earlier. I take Waldron in this article as in other work to be undecided between these two conceptions of the rule of law, and I think that the advances he wishes to make can only be made by embracing the kind of natural law position Lauterpacht has in mind, which is to all intents and purposes Fuller’s inner morality.

Waldron’s tentativeness is manifested early in his article when he raises the issue he describes as the ‘Hobbesian problem of subjecting the sovereign to his own laws’. In Waldron’s view, Hobbes not only considered it undesirable that the sovereign be subject to the law, but also impossible, inasmuch as the ‘sovereign himself controls the application of the laws’. Here he quotes lines from the passage in *Leviathan* where Hobbes says that the sovereign is free from the law because he can repeal laws to which he is subject: ‘[f]or he is free, that can be free when he will’.¹⁸

But notice that, on Hobbes’s conception, for the artificial person of the sovereign to be free when he will he has to *will* publicly, that is, to express himself in a way that is publicly accessible and recognizable to his subjects as an expression of will. Since the sovereign has to make a law in order to free himself from a law, the subject can count on the security of the stable framework of civil law not being disturbed other than by the enactment of a new law.

Waldron also quotes lines from Hobbes’s regress argument: the argument that if there are legal limits on sovereign authority, there must be a judge to judge when they have been transgressed, which would make that judge the true sovereign, and so on.¹⁹ But in the very same passage Hobbes is careful to qualify his claim. He states that the sovereign’s lack of legal limitation does not mean that the sovereign is free to disobey enacted law. The sovereign is free only to change the enacted law, and that lack of legal limitation pertains to the limits set by enacted law, not, Hobbes emphasizes, to the limits set by the laws of nature.

So for Hobbes the sovereign has to rule *through law* because, in order to make his will known, he has to enact a law. But he also has to rule in accordance with the *rule of law* – the principles immanent to a legally constituted political order – the laws of nature Hobbes sets out in chapters 14 and 15 of *Leviathan*.²⁰ The rule of law is the flip

¹⁸ (ed. R. Tuck, 1997), ch. 26, at 184.

¹⁹ *Ibid.*, ch. 29, at 224.

²⁰ See Dyzenhaus, ‘Hobbes’s Constitutional Theory’ in I. Shapiro (ed.), *Leviathan* (2010), at 453 and Dyzenhaus, ‘How Hobbes met the “Hobbes Challenge”’, 72 *MLR* (2009) 488, at 498.

side of rule through law, since the 'Law of Nature, and the Civill Law, contain each other, and are of equall extent'.²¹ This fact has at least one important institutional manifestation. In chapter 26, Hobbes tells us that all laws, written and unwritten, need interpretation and judges are the officials who are delegated authority by the sovereign to do that task.²² In addition, Hobbes insists that when judges do that task, they must interpret law in general so as to make it comply with their understanding of the laws of nature. It would be a great insult – a 'contumely' – for judges to think other than that the sovereign intended to implement the laws of nature.²³

There is one more factor to take into account. Judges are, as Hobbes tells us in 'The Introduction', the 'artificiall *Joyntes*' of that artificial creation, the sovereign, who wields, Hobbes says (in a little noted phrase), 'just Power'.²⁴ In other words, judges are part of the institution of sovereignty. And, while it is difficult to avoid the grip on our imagination of the sovereign as a natural individual issuing commands at the apex of the political hierarchy, Hobbes put in place the elements of theory of a civil society that goes a considerable way to loosening that grip. In such a theory, the state is not understood as an entity that has for some or other reason to abide by law and the rule of law, but as an entity that is constituted by law, and thus, necessarily, by the rule of law.

To the extent that Hobbes does not rigorously follow through on the revolutionary idea that sovereignty is just the name we give the law-constituted, artificial person of the state, he puts in place the possibility of the kind of legal positivism that develops through Bentham and Austin, culminating in the work of Hart and his foremost student, Joseph Raz. It has always seemed odd to me that Hart thought that Bentham and Austin were unaware that even the supreme authority in a legal order has, in order to make law, to comply with the marks of law that are recognized in the legal practice of a particular legal order. When Bentham and Austin claimed that the sovereign was legally unlimited, they supposed that he was not subject to the commands of any other sovereign, not that he could make law without complying with the rules of manner and form for making law. As I have argued in detail elsewhere, their theories of law are not only consistent with but require that the sovereign's law strive to live up to marks of legality that will assist to the greatest extent possible the purpose of transmitting to those subject to the law the determinate content of a particular law that the supreme authority judges appropriate.²⁵

But they were not concerned, as Hobbes was, to elaborate the legal constitution of the artificial person of the state, and they expressly disavowed any role for natural law in their legal theories. Thus, once we see that what Hart was to term the 'rule of recognition'²⁶ is both required by and consistent with the theories of his positivist predecessors,

²¹ Hobbes, *supra* note 18, ch. 26, at 185.

²² *Ibid.*, ch. 26, at 190.

²³ *Ibid.*, ch. 26, at 192.

²⁴ *Ibid.*, 'The Introduction', at 10.

²⁵ D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2010), ch. 8, 'The Genealogy of Legal Positivism' and Dyzenhaus, 'Austin, Hobbes, Dicey', 24 (2) *Canadian J L and Jurisprudence* (2011, forthcoming).

²⁶ H.L.A. Hart, *The Concept of Law* (1994), at 94.

the differences between his version of legal positivism and theirs diminishes greatly, especially because he follows them wholeheartedly in his rejection of natural law.

Notice in this regard that Raz has argued that characteristic of an authoritative legal reason is that its content can be determined by factual tests that do not rely on any idea of transcendent legal principles.²⁷ To the extent that Raz supposes that there are principles of legality inherent in any legal order, these principles are, on his account, not moral principles; rather, they are principles that assist officials in determining a factual content.²⁸ He thus provides the theoretical account of law's authority that makes conceptual sense of the English branch of the positivist tradition's idea of the judge as the transmitter of the determinate content – the factually determined content – of the law determined by the sovereign at the apex of the legal hierarchy.

Once we see this, we can understand why contemporary legal positivists have been forced to understand much of what judges do as involving an exercise of discretion uncontrolled by law. Since in contested or hard cases, the issue arises precisely because there is no agreement as to what that content is, the law cannot be said to control the judge's decision, which means that ultimately it is the judge's personal moral and political views that determine his interpretation of the law. It is on this kind of positivist conception that the special tension arises that Waldron sees in the requirements of the rule of law, and Rubin's critique of administrative law assumes that the same tension is manifested even more dramatically in the work of the public officials who are charged with interpreting the legislative mandates of the administrative state.

Kelsen's pure theory is rather different. Though Kant, not Hobbes, is his philosophical inspiration, Kelsen shares with Hobbes the idea that terms like sovereignty and state are but names that we give to the complex order of a political society that is constituted by law. This idea is generated not by attending to practices that are inconsistent with the claim that the sovereign is legally unlimited, but as a demand of legal science. However, at other times Kelsen seems to confess that the point of understanding law as a normative order is to appreciate how might is changed into right in the interests of social and political peace, to the ultimate benefit of the individuals subject to the law.

There is, however, a major problem with his theory, as Schmitt pointed out. Kelsen shares with the English tradition of legal positivism a deep aversion to natural law. But his commitment to the unity of legal order means that he did not think that there are gaps in the positive law of a legal order. Even if the determinate content of the positive law does not control the outcome, the law will give an official the authority to determine an outcome, and that suffices for the claim that law controls the outcome. But, in part because of Kelsen's aversion to natural law, this kind of control becomes merely formal. The arbitrary individual at the apex of the political order – the sovereign – is repressed, only to pop up whenever an official has to make a decision.

²⁷ Raz, 'Authority, Law, and Morality', in J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994), at 194.

²⁸ Raz, 'The Rule of Law and its Virtue', in J. Raz, *The Authority of Law* (1983), at 210.

We have then a basis for concluding that the only way to implement fully the project of understanding legal order as a unified order of norms that conduces to serving the interests of legal subjects is with Hobbes, Lauterpacht, and Fuller to explore the implications of taking a rich conception of legality as the main constitutive element of legal order, both international and national. Indeed, the same kind of dualism that comes about when one supposes that there could be a pre- or extra-legal sovereign is manifested when one adopts the stance that a domestic legal order is dualist – that the norms of international law other than customary international law require explicit statutory incorporation before they may have domestic effect.

As Lauterpacht argued in a brilliant essay, the issue is not, as dualists have it, about the incorporation of particular norms of international law by statute, but about the incorporation of the whole of international law by a domestic legal order.²⁹ This requires an act of will of the individual state, a voluntary act of submission which so long as it lasts ‘has the effect of elevating to the authority of a legal rule the unity of international and municipal law’.³⁰ From the ‘point of view of municipal law’ that submission may, Lauterpacht says, be ‘validly refused or withdrawn, but the sanction of such action must be, in Blackstone’s words, that the state would ‘cease to be part of the civilized world’.³¹ Towards the end of his critique of Kelsen, Lauterpacht made the following intriguing comment:

If there existed an effective international order it might be possible to secure in the fundamental hypothesis of municipal law some element of material justice by the simple means of international law refusing to recognize a municipal system which is lacking in certain minimum standards of justice. At present there is no such international authority, and, recognition being a matter for each individual State, international law recognizes a State, i.e. its legal order, on the sole basis of actual power, that is to say, of habitual obedience to the successful authority. Peace and authority and government are in any case better than anarchy. This *désintéressement* of the international society in the quality of the bases of the municipal system is not necessarily permanent. It is a function of the degree of integration of the international community. But in the meantime an initial hypothesis transforming power into right undoubtedly constitutes, juridically, the basis of a peaceful order.³²

But it would be mistaken to assume, as Lauterpacht seems to, that the traffic is one way in achieving the ‘the integration of the international community’, or, as he supposed in other work, as did Kelsen, that a centralized adjudicative institution with compulsory jurisdiction is essential to such a project.³³

Recently, for example, the European Court of Justice and two domestic courts, the Canadian Federal Court of Appeal and the English Supreme Court, have rebuked the 1267 Committee of the Security Council for its practice of listing individuals

²⁹ Lauterpacht, ‘Is International Law a Part of the Law of England?’, in Lauterpacht, *supra* note 1, at 537.

³⁰ *Ibid.*, at 549.

³¹ *Ibid.*

³² Lauterpacht, *supra* note 1, at 427.

³³ H. Lauterpacht, *The Development of International Law By the European Court* (1958); H. Kelsen, *Peace Through Law* (1944).

in the cause of the ‘war on terror’ in ways which have severe implications for the individuals while affording them no opportunity to contest the basis of the listing.³⁴ In each of these cases, rule-of-law principles from European Community law and from Canadian and United Kingdom domestic law have been invoked in a bid to bring an international legal body into rule-of-law line, thus transforming what would otherwise amount to what Fuller called a ‘managerial order’, one built around a positivist top-down conception of authority, into something more like a legal order, one that complies with the rule of law.³⁵

Lauterpacht attributed the dualist cast of mind to the rise of positivistic doctrines of absolute state sovereignty, doctrines that amounted to a ‘barren type of legal positivism’.³⁶ This last term implies that there can be fruitful types of legal positivism, and it is clear that Lauterpacht thought that Kelsen’s legal positivism fell into that class. I venture that he would have thought that Jeremy Waldron’s efforts to understand the rule of law in international law make legal positivism into an even more fruitful doctrine, but would have thought correspondingly that the distance between Waldron’s legal theory and a natural law theory of immanent principles of legality is close to the vanishing point.³⁷

³⁴ Respectively, Joined Cases C–402/05P and C–415/05P, *Kadi v. Council of the European Union* [2008] ECR I–6351; *Abdelrazik v. Canada*, 2009 FC 580; *Her Majesty’s Treasury v. Mohammed Jabar Ahmed and others* [2010] UKSC 2.

³⁵ Fuller, *supra* note 14, at 207–208.

³⁶ Lauterpacht, *supra* note 33, at 568.

³⁷ This comment applies, in my view, with as much force to Benedict Kingsbury’s work in international legal theory – e.g., ‘The Concept of “Law” in Global Administrative Law’, 20 *EJIL* (2009) 23.