Hans Kelsen’s Theory of Legal Monism.  
A Critical Engagement  
with the Emerging Legal Order of the 1920s

Peter Langford\textsuperscript{a)} and Ian Bryan\textsuperscript{b)}

\textsuperscript{a)}Department of Law and Criminology, Edge Hill University, Ormskirk, United Kingdom
\textsuperscript{b)}Lancaster Law School, University of Lancaster, United Kingdom

This article concentrates upon Hans Kelsen’s theory of legal monism, as presented in his Lecture delivered at the Académie de droit international, The Hague, in 1926. This Lecture propounds a legal theory which enables a critical engagement with the emerging legal order of the 1920s. The article draws upon recent scholarship regarding the international legal agreements adopted in 1924 (the London Accords) and 1925 (the Locarno Accords) to demonstrate their potential for a new form of European and international stability. This potential, however, remained constrained by the logic and limitations of the primacy of State sovereignty. Within this context, Kelsen’s Lecture sought to set the emerging international order within a unified legal framework of national and international positive law. This framework enabled Kelsen to identify two variants of legal monism, differentiated by the role of State sovereignty in the relationship between national and international law. For Kelsen, it is the choice between the broader ethico-political consequences of these two variants which will shape the further evolution of the global legal order.

Introduction

Legal monism, the theory of positive law in which the State legal order is a partial legal order of international law, finds its most sustained initial
formulation in the work of Hans Kelsen. Kelsen's legal monism is, however, conventionally regarded as having been rendered of marginal significance with the establishment of the United Nations after the end of World War II. In the conventional interpretation, Kelsen's legal monism is rendered historical in a double sense. First, it is marked as a theoretical project which is essentially associated with the inter-War period; and, secondly, this association renders Kelsen's theory of merely historical interest, and thereby consigned to the domain of the history of ideas or the history of legal philosophy.¹ The marginalisation of Kelsen's legal monism is reinforced by the continuing presence, within the historical accounts of international relations during the 1920s, of a perspective in which “[t]he 1920s were an anomaly and an interlude, a pause on the road to depression and dictatorship and a brief truce in the century of total war. The decade of peace was an era of illusions”.² Hence, when placed within this interpretative context, Kelsen's theoretical project to elaborate a theory of positive law, in which the primacy of the State legal order is displaced by the primacy of international law, becomes a reflection of this anomalous decade.

This article proposes an alternative understanding of the historical importance of Kelsen's theory of legal monism. It commences from recent historical scholarship concerned with international relations of the 1920s, much of which has sought to detach this decade from its retrospective interpretation as the mere prelude to the Second World War.³ This reinterpretation has been undertaken by revealing both the fluidity and openness of possibilities


³) The most recent expression of this position is contained in P. O. Cohrs, The Unfinished Peace after World War I: America, Britain and the Stabilization of Europe 1919–1932 (Cambridge: