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## Opportunity and Impasse: Social Change and the Limits of International Legal Strategy

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*A diverse range of actors, from practitioners and academics to civil society groups and activists, appear to see hope in international law for the advancement of their causes. This article examines whether this optimism is well-founded. It explores whether international law can serve as an agent of social change, and whether it can accommodate radical changes in social order. It begins by exposing a formalist stance that is immanent to much 'legal activist' discourse. It then explores links between this mode of jurisprudential thought and idealist epistemology. Drawing from the philosophy of Theodor Adorno, and in particular his notion of 'identity-thinking', it uncovers structural connections between formalism, idealism, law and economy that call into question international law's socially-transformative potential. The perspective advanced in this article falls somewhere between the polarities of opportunity and impasse, seeking to acknowledge the importance of legal strategies in safeguarding the disenfranchised, while remaining alive to their potential dangers and limitations.*

International law is often portrayed as an institutional and normative framework that, while imperfect, is capable of facilitating the realization of ambitious global objectives.<sup>1</sup> It has been characterized as 'a discipline, discourse, and practice of reform [that] tells a story of its own progressive development, and of its prominent role in the betterment of others.'<sup>2</sup> For David Kennedy, 'whether in practice or the academy, whether working on particular legal issues or generating broad new proposals for the field as a whole, the work international lawyers do is in large part the generation of arguments for reforms.'<sup>3</sup> Today, international law is a site of intersection between practitioners, civil society groups, activists and scholars seeking to advance a range of agendas.<sup>4</sup> Implicit in many of their activities is a degree of faith in the socially-transformative or even emancipatory potential of international law – the idea that the establishment of new legal regimes or reform to existing standards may ultimately serve 'progressive' ends. Whether such a belief is well-founded is the central concern of this article. It explores whether international law can serve as an agent of social change, and whether it is capable of accommodating radical changes in social order.

The article proceeds in three parts. Part I sketches what might be termed an 'activist-reformer' stance in international law, drawing from developments in the field of business and

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<sup>1</sup> Altwicker and Diggelmann 2014, 425.

<sup>2</sup> Sinclair 2017, 2.

<sup>3</sup> Kennedy 2000, 348.

<sup>4</sup> Bradlow and Hunter 2020.

human rights by way of illustration. Its purpose is to expose a ‘formalist’ tendency lying behind much activist discourse. It then explores parallels between formalist jurisprudence and Kantian idealism. This connection is most pronounced in Hans Kelsen’s Pure Theory of Law, which is used as an exemplar throughout.<sup>5</sup>

Part II examines the theoretical implications of this idealist orientation via the work of the social theorist, Theodor Adorno. It uncovers structural connections between idealist epistemology and political economy that call into question its suitability as a theoretical framework for those seeking provoke social change through international law. Part III advances this analysis, drawing from a materialist theory of law developed by the Soviet theorist, Evgeny Pashukanis.<sup>6</sup> While contemporary Pashukanite scholars have not explicitly engaged with Adorno’s work, this article reveals significant harmony in their methods, such that the phenomenon of law may be conceived as an emanation of what Adorno termed ‘identity-thinking’. Viewed from this perspective, legal activism – and the severe separation between ‘form’ and ‘content’ that it often entails – betrays a fundamental subservience to prevailing forms of socio-economic organization.

This article argues that structural affinities between law, economy and idealist epistemology serve to limit international law’s socially-transformative potential. These insights are particularly apparent when situated in the business and human rights context, where the limits of legalism in the face of economic power are plainly exposed. Yet, while Adorno’s insights paint a rather bleak picture of both formalist argument and legalism generally, they do not necessitate the wholesale abandonment of either. Rather, Adorno offers a perspective that acknowledges and encourages reflection on their dangers and limitations, while remaining alive to the opportunities they present for real-world benefits. The main contributions offered by this article, then, are threefold. First, it offers a robust and novel critique of formalist jurisprudence. Second, it exploits underexplored connections between Adorno’s scholarship and wider Marxist jurisprudence. Third, in subjecting the theoretical issues raised by movements such as business and human rights to detailed critique, it provides an opportunity to reflect on the strategies pursued by those seeking to effect social change through international law.

Before proceeding, a word on the positionality of this work is necessary. While terms such as ‘emancipatory’, ‘transformative’, and ‘progressive’ are used interchangeably throughout this article, they are left intentionally without positive definition. This approach is integral to the theoretical perspective adopted. As will become clearer below, Adorno’s work relies on the notion that ‘[o]ur ideas of freedom emerge in the negation of what is negative, of

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<sup>5</sup> Kelsen 1967.

<sup>6</sup> Pashukanis [1924] 1983. Miéville 2004.

the unfree conditions in which we live.’<sup>7</sup> As such, for Adorno, a ‘utopian future could not be affirmatively defined.’<sup>8</sup> It is only through critique – through the constant negation of the falsity that taints our thought – that emancipatory potential can be glimpsed. This is to say very little about what ‘a better life’ is to look like, or whether this can be achieved via legal strategy. All that is implied is that things can be different – an underlying refusal to accept as given the existing state of affairs. This core theme is returned to and significantly expanded in what follows.

## I. Opportunity and International Law – The ‘Empty Formalism’ of the Legal Activist

International law is depicted as an agent of progress in at least two senses. In the first, progress is integral to the project itself. International law possesses ‘an immanent progressive value for the world, for civilization, for humanity.’<sup>9</sup> Indeed, the UN Charter commits to the promotion of ‘social progress and better standards of life in larger freedom’.<sup>10</sup> Perhaps as a consequence of these professed values, the discipline is said to engender a particular professional milieu. International lawyers ‘almost invariably see themselves as “progressives” whose political objectives appear not merely as normative hopes, but as necessary insights into the laws of historical or social development’.<sup>11</sup> Whereas ‘to work in a bank is not to be *for banking*’, this cannot be said for many international lawyers.<sup>12</sup> Yet, a more detached stance is also conceivable. It is clearly possible to acknowledge the utility of international law in advancing particular objectives while eschewing any firm commitment to the wider project. In this second sense, international law is merely a vehicle for ‘external’ projects. The primary commitment of the activist is to their cause rather than the discipline.<sup>13</sup>

These positions are neither mutually-exclusive nor exhaustive of the professional attitudes permeating the field. They do, however, provide a useful contextual backdrop. Either or both can be said to be at play in recent business and human rights discourse. This diverse movement seeks to respond to the growing public influence wielded by corporate actors, and the adverse consequences their operations produce for much of the world’s population.<sup>14</sup> Many advocate the establishment of new international regulatory standards, absent the will and capability of States to provide appropriate domestic safeguards. Proposals include a business

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<sup>7</sup> Cook 2014, 78.

<sup>8</sup> Buck-Morss 1979, 89.

<sup>9</sup> Skouretis 2011, 6.

<sup>10</sup> Charter of the United Nations (26 June 1945) 1 UNTS XVI, Preamble.

<sup>11</sup> Koskenniemi 2017, 39.

<sup>12</sup> Kennedy 1994, 335 (emphasis added).

<sup>13</sup> Koskenniemi 2017, 61.

<sup>14</sup> Khoury and Whyte 2017; Clapham 2006, 3–12.

and human rights treaty,<sup>15</sup> reform to investment treaty regimes providing asymmetrical rights to the corporations of investment-exporting States,<sup>16</sup> and the adoption of soft law instruments that may gradually crystalize into hard law.<sup>17</sup> These initiatives may lead to ‘advancements’ in the field itself: expanding and reconfiguring conceptions of legal personality,<sup>18</sup> extraterritorial jurisdiction,<sup>19</sup> and shared responsibility between (and beyond) States.<sup>20</sup> Progress for the field may be seen as progress for the world at large. Alternatively, the field may simply act as a vehicle for particular causes by facilitating gradual improvements to global labour conditions, environmental protection and wealth distribution, or even serving as a stepping stone towards radical social transformation.

An implicit ‘formalist’ stance lies behind much activist-reformer discourse of this type. This term is employed to describe a range of characteristics in legal thought,<sup>21</sup> two of which are relevant to this article.<sup>22</sup> First, the term is associated with a theory of adjudication premised on the logical derivation of legal decisions from abstract principles.<sup>23</sup> While this *deductive formalism* is dealt with in the penultimate section of the article, the primary concern lies with a second characterization. *Empty formalism* represents a theoretical approach that prioritises the ‘form’ or ‘vessel’ in appraising legal validity.<sup>24</sup> So long as a norm meets certain formal requirements, its content will not affect this validity. Thus construed, formalism aims at an objective description of law,<sup>25</sup> conceived as an autonomous branch of knowledge.<sup>26</sup> To treat law ‘as a self-contained system of norms that is “there”, identifiable without reference to the content, aim, and development of the rules that compose it, is the very essence of formalism’.<sup>27</sup>

Empty formalism is seemingly immanent to many activist-reformer projects, including the business and human rights movement. International law is conceived as a mere servant to a larger cause. Its *content* is a site of struggle unrestrained by the essential properties of its *form*. Such a stance is arguably a necessary minimum in order to see hope in international law for the advancement of one’s agenda. While this may be supplemented by a belief in international law’s inherently progressive character, ‘from the activist’s perspective, a commitment to law only is a commitment to empty formalism’.<sup>28</sup> Yet, rarely is it suggested

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<sup>15</sup> Deva and Bilchitz 2017; McConnell 2017.

<sup>16</sup> Hang 2014; Choudhury 2011.

<sup>17</sup> Zerk 2006, 276–277; Weissbrodt and Kruger 2005.

<sup>18</sup> McConnell 2016.

<sup>19</sup> Methven O’Brien 2018.

<sup>20</sup> Karavias 2015, 91.

<sup>21</sup> d’Aspremont 2011, 13–19; Bergmann and Zerby 1945.

<sup>22</sup> Paulson 2008, 37.

<sup>23</sup> Leiter 1999, 1144; Reimann 1990, 860.

<sup>24</sup> Kammerhofer 2016, 408–411.

<sup>25</sup> Kelsen 2000, 77.

<sup>26</sup> Bernstorff 2010, 237–238.

<sup>27</sup> Shklar 1986, 33–34.

<sup>28</sup> Koskenniemi 2017, 61.

that international law may be blind to (or part of) the problem.<sup>29</sup> To do so ‘would put the activist in a strategically difficult position, running the risk of marginalization... The activist therefore needs to dress his or her objectives in international law claims.’<sup>30</sup>

While ‘formalism’ has arguably become ‘little more than a loosely employed term of abuse’,<sup>31</sup> this article seeks to explore the relationship between activist discourse and formalist argument in international law. It aims to discover whether formalism may be employed opportunistically, ‘as a counter-hegemonic strategy’,<sup>32</sup> by those seeking to effect social-transformation. Below, it sketches connections between formalist jurisprudence and Kantian idealism, before drawing on the work of Theodor Adorno to explore various theoretical implications for the pursuit of social change via legal strategy. Ultimately, it is argued that structural connections between formalism, idealism, law and economy diminish the socially-transformative capacity of international law. Given the confrontation between law and economy that characterises the field of business and human rights, this movement serves as a useful practical reference point throughout. While rooted in this context, this article does not engage in a detailed doctrinal appraisal of the diverse range of proposals advanced by the movement. Such matters have been dealt with elsewhere.<sup>33</sup> Rather, it focuses on wider theoretical questions concerning the adequacy of law as a vehicle through which adverse corporate conduct might be combatted, and meaningful social change might be achieved.

### A. *The Idealist Roots of Empty Formalism*

Empty formalism shares significant parallels with certain philosophies of natural science. This is evident in the idealist epistemology of Immanuel Kant, which posits a separation between the human subject and the object of knowledge. For Kant, it was not possible to acquire direct knowledge of an object as a ‘thing-in-itself’ – i.e. in a form unconditioned by the subject’s conceptual apparatus.<sup>34</sup> As such, Kant identified a number of invariant *a priori* conditions necessary for empirical knowledge of the natural world. There are two core components to this. First, in the *transcendental aesthetic*, Kant posits that the natural world appears to the human senses via the *a priori* conditions of ‘time’ and ‘space’.<sup>35</sup> Second, in the *transcendental analytic*, Kant posits a range of *a priori* intellectual ‘categories’ or ‘concepts’.<sup>36</sup> The subject applies these concepts to intuitions perceived by the senses, synthesizing them into an

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<sup>29</sup> Kennedy 2000, 408.

<sup>30</sup> Koskenniemi 2017, 61.

<sup>31</sup> Simpson 1990, 834.

<sup>32</sup> Koskenniemi 2006, 602.

<sup>33</sup> See e.g. Karavias 2013; McConnell 2016; Bittle and Snider 2013.

<sup>34</sup> Kant [1781] 1998, 114, Bxxvi.

<sup>35</sup> *Ibid.*, 172, A23/B38.

<sup>36</sup> *Ibid.*, 210, A77.

intelligible format. For example, sensory perceptions of a bat hitting a ball may be known via the category of ‘causation’.<sup>37</sup> Here, causality is the *form* of knowledge. The *content* is derived from ‘raw’ data as they appear by the senses. Put together, the subject can be taken to know the object.

The question of how ‘causality’ as a discrete form of knowledge is validated requires further consideration. Clearly, it isn’t possible to point empirically to the first cause that set the universe in motion. We might presuppose a ‘big bang’, but inability to prove this point would not cause us to doubt the validity of scientific observations. In effect, we ‘assume a first cause as a limiting idea, knowing that no such entity exists or even could exist.’<sup>38</sup> Thus, natural science must presume an unknowable first cause, or simply accept the transcendental validity of causal knowledge.

The structure of Kantian idealism is mirrored in empty formalist jurisprudence. It is replicated most explicitly in Hans Kelsen’s Pure Theory of Law, and for this reason, it is adopted as the archetypal empty formalist position throughout this article. Kelsen’s jurisprudence is premised on the *is/ought* dichotomy. Legal rules are normative prescriptions as to what *ought* to occur, as entirely separate from descriptions of fact (*is*).<sup>39</sup> Thus, the validity of the norm ‘all murderers ought to receive life sentences’ cannot depend on whether all murderers are, in reality, caught and punished. This logic pierces contractarian explanations of legal validity common to international law, whereby the State, as an entity comparable to a natural person, validates the law by expressing its ‘consent to be bound’.<sup>40</sup> The sociological characterization of the State implicit in contractarian theories – with its empirical features such as territory and population – belongs to the realm of *is*.<sup>41</sup> It cannot serve as validation for legal prescriptions (*ought*).

Kelsen conceived of the legal order as a hierarchy encompassing both international and domestic spheres. The validity of lower norms is derived from their compatibility with higher norms. At the apex sits the *Grundnorm* or basic norm – the only ‘non-positive’ norm in the system.<sup>42</sup> Accordingly, some have noted its proximity to a natural law source of validation.<sup>43</sup> For Kelsen, this was a mischaracterization:

the basic norm may be considered a natural law doctrine in keeping with Kant’s transcendental logic. There still remains the enormous difference which separates... the transcendental conditions of all empirical knowledge and consequently the laws prevailing in nature on the one side from the transcendent metaphysics beyond all

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<sup>37</sup> Ibid., 138, B5.

<sup>38</sup> Tur 1986, 169. Ross 2001, 193; Ebenstein 1969, 150–152.

<sup>39</sup> Kelsen 1967, 193.

<sup>40</sup> Portmann 2010, 47; Kelsen 1949, 185.

<sup>41</sup> Montevideo Convention on the Rights and Duties of States (1933) 165 LNTS 17, Article 1.

<sup>42</sup> Kelsen 1952, 314.

<sup>43</sup> Hall 2001, 300.

experience on the other. There is a similar difference between the basic norm which merely makes possible the cognition of positive law as a meaningful order, and a natural law doctrine which proposes to establish a just order beyond, and independent of, all positive law.<sup>44</sup>

Accordingly, Kelsen retains the ‘normativity’ inherent to natural law framings, while rejecting appeals to an ultimate moral foundation. Simultaneously, he retains the positive determination of the *content* of legal norms, while rejecting the inseparability of validity and fact maintained by dominant positivism.<sup>45</sup> Thus, Kelsen’s theory of law is rooted neither in empirical facts nor moral absolutes. While the *Grundnorm* validates the legal *form* in a manner comparable to a natural law principle, it is empty of substantive *content*.<sup>46</sup>

In justification, Kelsen often appealed to Kant’s *Critique of Pure Reason*.<sup>47</sup> Comparable to the transcendental validity of causal knowledge, the *Grundnorm* serves as an *a priori* concept that makes knowledge of law as a unified normative order possible:<sup>48</sup>

natural science becomes metaphysics when it attempts to discuss the creation of the natural universe... Just as self-contained natural science can say nothing of its own nature but must presuppose it as a hypothesis, self-contained legal science has its hypothesis in the basic norm.<sup>49</sup>

As such, the *Grundnorm* ‘makes evident the limits of human knowledge generally, and the limits of positive, normative legal knowledge in particular.’<sup>50</sup> For Kelsen, it was necessarily presupposed in any depiction of law as a normative order.

Nonetheless, Kant’s logic cannot be applied wholesale to the legal sphere. For Kant, it was impossible for the subject to know the empirical world in a form unconditioned by *a priori* categories. This is because empirical reality is a ‘given’ source of data that affects the subject’s senses; it is then necessarily rendered intelligible by the subject’s intellectual processes. Yet, ‘law’ is not an immediate ‘given’ in the same way as sensory data.<sup>51</sup> Instead, the *Grundnorm* constitutes a formal category that is not directed toward a ‘given’ object of study.<sup>52</sup> Rather, the object itself is *constituted* by the *subject*. Kammerhofer captures this perfectly:

What [the natural sciences] attempt to do is impossible with respect to normative [legal] theory, because here the theory through the creation of the intellectual superstructure determines its object: the ought. A purported ‘given’ that does not satisfy the criteria of normative theory is not a ‘given’ of normative scholarship... The

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<sup>44</sup> Kelsen 1949, 437–438.

<sup>45</sup> Paulson 1992, 320.

<sup>46</sup> Bernstorff 2010, 115–116.

<sup>47</sup> Kelsen 1967, 72.

<sup>48</sup> Ebenstein 1971, 628–639; Ross 2001, 192.

<sup>49</sup> Ebenstein 1969, 151.

<sup>50</sup> Tur 1986, 170.

<sup>51</sup> Paulson 1992, 326–332.

<sup>52</sup> Hammer 1999, 185–190.



choice is existential, because everyone cognising norms has already made the choice, even if they are not aware that they have done it. It is an expression of our existential freedom to choose our own dogmas and is thus most profound.<sup>53</sup>

That legal theories offer a *choice of dogmas* is indeed profound, particularly in light of what follows. For now, it suffices to note the implications of the empty formalist stance for the activist-reformer. Kantian idealism posits a form/content divide comparable to the empty formalism of the legal activist. International law is an empty vessel. Its form does not necessitate any particular content, permitting the activist to see hope in law for the advancement of their cause.

From the business and human rights perspective, an empty formalism such as Kelsen's may even merit explicit adoption.<sup>54</sup> While it is difficult to speak of a uniform movement employing complementary strategies in this field, a resurgent interest in the extension of international obligations to business actors has emerged. This is visible in the recent debates surrounding the inclusion of investor obligations within bilateral investment treaties,<sup>55</sup> and in strategic domestic litigation seeking to employ standards derived from customary international law against multinational corporations.<sup>56</sup> Such approaches entail the extension of international obligations to corporate actors in a manner that offends against State-centric, contractarian conceptions of legal validity. Kelsen's empty formalism is capable of accommodating this business and human rights agenda, given the radical restructuring of legal personality it permits. On this view, legal validity is no longer derived from the consent of the addressee of a norm during the law-making process.<sup>57</sup> Law-making competence is a power ascribed by international law's *content*, rather than being tied to the validity of its *form*. Consequently, scholarly concerns regarding the legitimacy of the extension of international obligations to corporate actors unable to directly consent to the norms are alleviated,<sup>58</sup> and the possibility of the direct regulation of business actors in international law emerges.<sup>59</sup> On the formalist view, legal personality is simply a bundle of rights and obligations imputed to an actor. The terms 'subject', 'validator' and 'law-maker' are not synonyms as presented by contractarian theory, but discrete and contingent statuses determined by the *content* of the international legal order. Thus, while the claim to *necessity* of an empty formalist conception of law such as Kelsen's is likely untenable, the approach deserves to be taken seriously. This is particularly so given its immanence to legal activist discourse, and its potential to respond to contemporary challenges within and beyond the field of business and human rights.

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<sup>53</sup> Kammerhofer 2011, 260–261.

<sup>54</sup> McConnell 2017.

<sup>55</sup> Krajewski 2020.

<sup>56</sup> *Nevsun Resources Ltd. v. Araya* [2020] SCC 5.

<sup>57</sup> Kelsen 1952, 48–49; Portmann 2010, 177; Collins 2016, 179–180.

<sup>58</sup> Ryngaert 2010, 73; Miller 2008, 381.

<sup>59</sup> McConnell 2017.

## II. Empty Formalism as ‘Identity-thinking’

This section introduces Adorno’s notion of ‘identity-thinking’ before employing it to expose structural affinities between idealist epistemology and economy. Such connections call into question the progressive potential of the activist’s empty formalist stance. This analysis is extended in Part III, which supplements Adorno’s insights with a materialist theory of law derived from Evgeny Pashukanis. In combination, this discussion allows a deeper examination of the problems particular to formalism than has been permitted in existing literature, while also addressing universal concerns surrounding international law’s socially-transformative potential.

Above, it was established that Kelsen’s formalism hinges on what might be termed ‘constitutive-subjectivity’. Simply put, the jurist (subject) perceives law (object) as a normative order via the *Grundnorm* (concept) in a fashion comparable to a natural scientist (subject) characterising empirical events (object) via causation (concept). Adorno was deeply critical of humanity’s willingness to passively accept the world in a conceptually-mediated form. For Adorno, this approach was prone to overlook that which falls outside of the concepts or categories applied by the subject. In his view, such a tendency was demonstrable of the social problems that pervade in modernity. Writing with Max Horkheimer, Adorno characterized these problems via two theses: ‘myth is already enlightenment and enlightenment reverts to myth’.<sup>60</sup> While these statements can seem frustratingly cryptic, they concisely express a number of insights concerning the techniques employed by humankind to know and control their world.<sup>61</sup>

For Horkheimer and Adorno, seemingly ‘primitive’ modes of thinking (e.g. appeals to magic, ritual etc.) are forms of rationality; they are ways of ordering and understanding the world, despite the mythic status with which they are branded in modernity.<sup>62</sup> Thus, *myth is already enlightenment*. Conversely, and despite Kant’s motivation to banish the dogmatic metaphysics of previous eras,<sup>63</sup> the idealist project itself reverts to myth when it treats objects in their conceptually-mediated form as complete, thereby discarding all appreciation of that which is not captured by the concept.<sup>64</sup> Adorno termed this tendency ‘identity-thinking’, a process that does not say what something is in its rich, manifold particularity, but ‘what it comes under, what it exemplifies or represents, and what, accordingly, it is not itself.’<sup>65</sup> Thus, while Kant posits the existence of a ‘noumenal realm’ of ‘things-in-themselves’, subjects are

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<sup>60</sup> Horkheimer and Adorno [1944] 1997, xvi.

<sup>61</sup> Held 2004, 148–156; Cook 2014, 64–69.

<sup>62</sup> Horkheimer and Adorno [1944] 1997, 8.

<sup>63</sup> Kant [1781] 1998, 148, B23.

<sup>64</sup> Horkheimer and Adorno [1944] 1997, 11–12.

<sup>65</sup> Adorno 1973, 149.

denied direct access to it. This ‘confines the subject to examining its perceptions because these are allegedly all it can know.’<sup>66</sup> The remainder or *surplus* of the object falling outside of the concept is what Adorno termed the *non-identical*.<sup>67</sup> As such, in *Dialectic of Enlightenment*, Horkheimer and Adorno were not merely standing in opposition to Kant’s Enlightenment rationality; their intention was not to hark back to some ‘golden age’, or to condemn all thought as equally mythic. Instead, they suggested that reason, as employed in idealism, is not enlightened enough.<sup>68</sup> It fails to appreciate the significance of the *non-identical* – the surplus that idealism’s conceptual apparatus cannot capture.

Rather than seeing modes of thought as invariant and universal, Adorno saw them as the products of objective socio-historical conditions. He offered a materialist response that echoed Marx’s aphorism: ‘life is not determined by consciousness, but consciousness by life’.<sup>69</sup> Yet, Adorno also recognized that ‘it is much more difficult to really think as a materialist than it is to lay claim to the label.’<sup>70</sup> While emphasising that the subject’s perception is coloured by the material conditions in which they are situated, Adorno did not claim immediate access to those objective conditions in thought.<sup>71</sup> To this extent, Adorno was in line with Kant in denying subjects *direct* knowledge of ‘things-in-themselves’. To posit such access would be to lapse into the same illusory thinking as idealism – to become another mythology masquerading as enlightenment.<sup>72</sup> Rather, Adorno encouraged a reflexive practice of critical thinking that aimed to highlight the *partial* and *impoverished* character of the subject’s conceptual apparatus. He sought to respect the object, ‘even where the object does not heed to the rules of thinking.’<sup>73</sup>

Among the techniques employed in this pursuit was immanent critique, by which Adorno sought to ‘uncover the contradictions and tensions within a given position... rather than judge it against some external or transcendent standard.’<sup>74</sup> Accordingly, Adorno rejected the possibility of a ‘fresh start’ in philosophy resting on an immediate materialist grounding. Instead, he used reasoning characteristic of prevailing idealist philosophy against itself. In doing so, he sought to expose the social antagonisms in material reality of which idealism is a product, and which it attempts to conceal.<sup>75</sup> A demonstration of this technique is evident in Adorno’s ‘metacritique’ of Kantian epistemology. Given Kelsen’s proximity to this branch of philosophy, this is of direct relevance to the argumentative thread of this article. As Chimni

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<sup>66</sup> Cook 2014, 37.

<sup>67</sup> Adorno 1973, 146–148.

<sup>68</sup> Jarvis 1998, 22.

<sup>69</sup> Marx and Engels [1867] 2004, 47; Cook 2006.

<sup>70</sup> Jarvis 1998, 149.

<sup>71</sup> Adorno 1973, 183–186

<sup>72</sup> *Ibid.*, 181.

<sup>73</sup> *Ibid.*, 141.

<sup>74</sup> Freyenhagen 2013, 13–14; Adorno 1973, xx.

<sup>75</sup> Buck-Morss 1979, 96; Adorno 1977, 127.

acknowledges, ‘a materialist critique of Kelsen must begin with a critique of Kant’s transcendental method.’<sup>76</sup>

Adorno’s critique begins by addressing the *transcendental analytic*, in which Kant sets out the intellectual conditions necessary for knowledge. Through this set of *a priori* categories or concepts, the subject is said to render ‘raw’ sensory data intelligible. Against Kant, Adorno claims that ‘[w]ithout “Something” there is no thinkable formal logic.’<sup>77</sup> Put another way, without being oriented towards a material object, our concepts would not simply be empty *a priori* forms. Rather, they would be unthinkable entirely.<sup>78</sup> For Adorno, concepts are always coloured by materiality or objectivity; they are ‘entwined with a non-conceptual whole’.<sup>79</sup>

To refer to non-conceptualities... is characteristic of the concept, and so is the contrary: that as the abstract unit of the noumena subsumed thereunder it will depart from the noumenal. To change the direction of conceptuality, to give it a turn toward non-identity, is the hinge of negative dialectics.<sup>80</sup>

Moreover, Kant presupposes that the subject’s senses are able to apprehend ‘given’ objects in a *pure* or *unmediated* form prior to this intellectual process taking place.<sup>81</sup> Thus, Adorno turns to Kant’s *transcendental aesthetic* – the sensible conditions underlying this process. Characteristically for Kant, unmediated material objects comprise of: i) the *matter* and ii) the *form*. The form is said to make the matter’s unmediated representation to the human senses possible. This form cannot be abstracted from sensory experience of the matter, since it must be presupposed in order for the subject’s senses to be affected in the first place. Rather, this form is brought to the matter by the perceiving subject as a necessary condition for sensory experience. But at the same time, the form cannot be a concept in the *intellectual* sense discussed above. If this were so, it would be impossible for objects to appear to the senses in a pure fashion, unmediated by the subject’s conceptual apparatus.<sup>82</sup> Thus, Kant was forced to posit ‘an *a priori* form of sensibility pertaining to the very structure of sensibility and constituting a necessary condition for all sense intuition.’<sup>83</sup> The two forms identified by Kant are *time* and *space*, and these supposedly ‘pure’ forms permit unmediated objects to be apprehended by the senses.<sup>84</sup>

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<sup>76</sup> Chimni 1993, 220.

<sup>77</sup> Adorno 1973, 135.

<sup>78</sup> Cook 2014, 62–63.

<sup>79</sup> Adorno 1973, 12.

<sup>80</sup> Ibid.

<sup>81</sup> Kant [1781] 1998, 154, A19/B33.

<sup>82</sup> Adorno [1956] 2013, 151; Jarvis 1998, 161.

<sup>83</sup> Copleston 1994, 236.

<sup>84</sup> Kant [1781] 1998, 166, A39/B56.

Perhaps understandably, Adorno found Kant's explanation that time and space are neither products of objective experience nor subjective concepts deeply problematic. Instead, Adorno contended that 'time' and 'space' were merely *subjective concepts*. Consequently, they were coloured or mediated by material objects to some degree.<sup>85</sup> The so-called pure 'forms' by which matter appears to the senses

are not intuitive, but rather the highest universals under which the 'given' may be grasped. The fact, however, that a given independent of these concepts is not possible, turns givenness itself into something mediated... Such a contradiction expresses a comprehension of the non-identity and the impossibility of capturing subjective concepts without surplus... It expresses ultimately the break down of epistemology itself.<sup>86</sup>

To simplify, the radical separations erected by Kant between form/content, concept/intuition, knowledge/sensibility, subject/object, are the source of its undoing. The polarities 'cannot be made intelligible without destroying the methodological separation in which they are supposedly held apart for epistemological analysis.'<sup>87</sup> Subjective concepts, including Kant's 'pure' forms of intuition, are unthinkable and unintelligible without any relation, however minimal, to the object.

This means that the object – the material circumstances in which the subject finds itself – must assume priority. In Adorno's words, there is

a difference of weighting... The forms are in fact *essentially* mediated by contents and cannot be conceived in their absence. The contents, however, always contain a reference to something that is not fully coextensive with form and cannot be fully reduced to it... [T]here is a priority [of matter] over form that amounts to the statement that our knowledge does not exhaust itself in pure mediation, in its purely formal aspect, but that it remains attached to something to which it refers.<sup>88</sup>

Simply put, while there is a dialectical relationship between subject and object, the object (or matter) ultimately takes priority over the subject's conceptual apparatus. Forms are not entirely constituted by the subject, but are coloured by 'the subject's own corporally mediated apprehension of objects.'<sup>89</sup> In other words, subjects cannot be reduced to *pure, transcendental consciousness*. Rather, subjects are also human; they are socially-situated, material objects:

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<sup>85</sup> Adorno [1956] 2013, 151.

<sup>86</sup> *Ibid.*, 152.

<sup>87</sup> Jarvis 1998, 162.

<sup>88</sup> Adorno [1959] 2002, 234.

<sup>89</sup> Cook 2014, 39.

if subjects have an objective core, if the subject is thus something other than a geometrical location in space, then this will be due to just those qualities which it shares with objects that have traditionally been designated as merely subjective.<sup>90</sup>

Given that all human subjects and the concepts they employ are infused with objectivity in this way, Kant's project of radically separating the two fails.

If the object has priority as Adorno claims, then the intellectual conditions presented by Kant as universal and invariant are in fact *variable*. Kant's conditions of knowledge actually reflect a *particular* socio-historical mode of understanding. By transforming something variable into an invariant to which all thought must correspond, Kant engaged in the very dogmatism he sought to overcome. His presentation of contradiction as coherence results in an unworkable epistemology that nonetheless expresses a certain 'truth-content'.<sup>91</sup> In other words, much like a Freudian slip, the false coherence presented by Kantian idealism unintentionally reveals a 'truth' concerning the material/social conditions under which this mode of thought gained prominence.<sup>92</sup> References to these truths are 'part and parcel of even apparently "purely" logical or epistemological concepts themselves... Immanent critique seeks to make explicit the reference to social experience already sedimented within philosophical concepts.'<sup>93</sup> Thus, the novelty of Adorno's materialism is that it is accessed *negatively*. Adorno did not posit access to objects in their unmediated form.<sup>94</sup> Nor did he posit as immutable the material world that conditions our modes of perception. Rather, he sought to uncover references to the material conditions in which we are situated *within* our prevailing modes of thought. He encouraged reflection 'at every historical and cognitive stage, both upon what at the time is presented as subject and object as well as upon their mediation.'<sup>95</sup>

The dependence of subjective concepts on material conditions points to an emancipatory potential. It speaks to the capacity to alter the objective conditions on which our conceptuality is founded, rather than dogmatically forcing thought to yield to 'invariant' conditions.<sup>96</sup> Yet, Adorno did not romanticise previous socio-historical arrangements.<sup>97</sup> All modes of thinking to date have engaged in 'identity-thinking', subsuming objects under concepts that cannot capture their particularity. 'It is not that capitalism invents mystification but that in capitalism mystification presents itself, to an unprecedented extent, as

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<sup>90</sup> Bernstein 2002, 230.

<sup>91</sup> Adorno 1973, 141.

<sup>92</sup> Buck-Morss 1979, 80.

<sup>93</sup> Jarvis 1998, 153; O'Connor 2004, 59–60.

<sup>94</sup> Adorno 2005, 249.

<sup>95</sup> *Ibid.*, 253.

<sup>96</sup> This perspective is in tension with the social idealism of Philip Allott, an approach stressing the constitutive role of ideas in human reality, as well as their seemingly unconstrained transformative potential: Allott 2001, xxii; Allott 2016, 186.

<sup>97</sup> Adorno 1973, 191.

*demythification*.<sup>98</sup> Thus, the most problematic characteristic of idealism (including Kelsen's brand) is that it claims its concepts, and the *historically-specific* conditions that colour them, are *necessary* presuppositions of human experience. To treat the object as it appears in thought as all that is relevant, all that is *possible*, is to equate the subjectively-constituted object with a thing-in-itself. Such a claim *conceals* the possibility for change in both *thought* and *society*.

This tendency in Kant and Kelsen's work expresses a reference to material, socio-economic conditions.<sup>99</sup> Indeed, Adorno's epistemological analysis shares many parallels with Marx's critique of commodity fetishism.<sup>100</sup> Marx highlighted the way in which particular products of labour assume an 'equivalence' via the universal category of 'exchange-value'.<sup>101</sup> The same occurs when 'labour-power' is treated as identical to all other commodities, overlooking its 'peculiar' capacity to produce 'surplus-value'.<sup>102</sup> Similar too is the equivalence expressed in the labour contract between bourgeois buyers and proletarian sellers of labour-power, despite the power disparity in their relationship.<sup>103</sup> For Adorno, 'when consciousness reflects upon itself, it necessarily arrives at a concept of rationality that corresponds to the rationality of the labour process.'<sup>104</sup> Thus, the identity-thinking inherent within idealism points to the socio-economic relations in capitalist exchange societies, which characterize as equivalent (identical) that which is non-equivalent (non-identical).<sup>105</sup> Such societies *obscure*, rather than *respect*, the priority of the *non-identical*. This logic, which underlies empty formalist jurisprudence, is plainly in tension with the stated goals of the business and human rights movement.

Kelsen's formalism is a prime example of identity-thinking. His work is premised on a set of binaries: is/ought, fact/norm, validity/efficacy. Legal knowledge is that which falls under his conception of 'legal normativity'. All that is relevant to legal study pertains to the normative realm (*ought*). The empirical reality (*is*) that gives rise to law and provides it with its content is presupposed, but is written off as irrelevant, much like Kant's thing-in-itself.<sup>106</sup> In constraining legal knowledge to the normative realm as constituted by the jurist/subject, Kelsen overlooks important, non-identical features that are in fact vital *conditions of*

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<sup>98</sup> Jarvis 2004, 93–94.

<sup>99</sup> Adorno 1973, 146–148.

<sup>100</sup> Marx [1867] 1976, 163–177.

<sup>101</sup> *Ibid.*, 166–169.

<sup>102</sup> *Ibid.*, 292, 300–302.

<sup>103</sup> *Ibid.*, 271; Adorno 1976, 25.

<sup>104</sup> Adorno [1959] 2002, 172.

<sup>105</sup> Horkheimer and Adorno [1944] 1997, 7.

<sup>106</sup> Chimni 1993, 219.

*possibility* for normative legal knowledge.<sup>107</sup> Thus, Kelsen is able to remark that the practical effectiveness of the legal order is *a condition*, but not *the reason* for its validity.<sup>108</sup>

Yet, it is precisely this position that may prove comforting to the activist-reformer. From the business and human rights perspective, it permits law to accommodate *any content*. This provides scope for the extension of direct obligations to corporate non-State actors. This might occur via the creation of new multilateral human rights treaties, reform to bilateral investment treaties, or via customary human rights standards invoked in domestic litigation.<sup>109</sup> In the alternative, it also permits international law to facilitate greater access to domestic remedies for victims of adverse corporate activity.<sup>110</sup> Such is the strategy employed in the current draft business and human rights treaty, which seeks to remove jurisdictional barriers to domestic litigation in the ‘home States’ of parent corporations. The hope is that this will work in tandem with soft law efforts to embed human rights due diligence into corporate supply chains, thereby improving compliance with human rights, and establishing tortious duties of care on behalf of parent companies where abuses take place at the hands of their foreign subsidiaries.<sup>111</sup> Again, nothing in the *form* of law precludes these ‘advances’ in *content*, so the activist-reformer argument goes. To the empty formalist, obstacles to ‘progress’ are largely externalized.<sup>112</sup> An assessment of the likelihood of these measures coming to pass is simply resigned to ‘separate’ theories of political or social obligation on States and corporate actors to realize such initiatives in practice.

To his credit, Kelsen was not blind to this tendency, but like Kant, wrote off these ‘external’ considerations no sooner than they were posited:

Nor let it be said that the jurist may not also undertake sociological, psychological, or historical studies... These are necessary; except that the jurist... must never incorporate the results of his explanatory examination into his construction of normative concepts.<sup>113</sup>

An expanded reflection on the material conditions underlying Kelsen’s normativity follows below. For now, it suffices to highlight the structural proximity of empty formalist logic to material conditions in capitalist economies. The abuses facilitated under such conditions are precisely what the business and human rights movement seeks to mitigate. Moreover, the neo-Kantian basis of Kelsen’s theory makes it all the more problematic. Kammerhofer’s notion of

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<sup>107</sup> Ibid., 218–219.

<sup>108</sup> Kelsen 1967, 11; *ibid.*, 219–220.

<sup>109</sup> Krajewski 2020; *Nevsun Resources Ltd. v. Araya* [2020] SCC 5.

<sup>110</sup> OHCHR, Revised Draft Treaty on Business and Human Rights (16/07/2019) available at:

[https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBL.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBL.pdf) accessed 26 May 2020.

<sup>111</sup> Van Dam and Gregor 2017, 119.

<sup>112</sup> Suganami 2007, 526–528.

<sup>113</sup> Kelsen 1923, 42; Bernstorff 2011, 45–46.



a ‘choice of dogmas’ underscores this perfectly.<sup>114</sup> So-called ‘normative science’ cannot even claim access to the immediate ‘givens’ of empirical reality. It is thus premised on an acutely arbitrary, variable concept to which its object of knowledge is simply forced to conform. In Adorno’s words:

Neo-Kantianism... which laboured strenuously to gain the content of reality from logical categories, has indeed preserved its self-contained form as a system, but has thereby renounced every right over reality and has withdrawn into a formal region in which every determination of content is condemned to virtually the farthest point of an unending process.<sup>115</sup>

This insight points to a structural affinity between empty formalism and a particular economic mode. Framed dialectically, Kelsen’s definitive definition of what law *is* ultimately implies that the social relations that underlie it *ought* to persist. It presents as identical that which is non-identical, treating *variable* conceptual forms, and the material conditions that colour them, as *invariable*.<sup>116</sup> Yet, these considerations alone may not entirely undermine the empty formalist stance behind much business and human rights discourse. After all, this jurisprudence still admits of the *possibility* of accommodating legal developments that push against the socio-economic status quo, despite its inability to address realist factors concerning the political will to realize such agendas in practice.<sup>117</sup> Accordingly, the foregoing merely cautions that empty formalism, taken to its extreme, may provide only an illusion of emancipation. Acknowledgment of this position underlines the importance of a degree of interdisciplinarity and realism already in vogue in international legal scholarship. Yet it does not dispute the utility of legal strategies in effecting social transformation. Law remains a component and potential agent of emancipation. Whether this residual faith in legal strategy is well-founded is explored below.

### III. Legal Strategy at an Impasse – Law as ‘Identity-thinking’

It has been established that empty formalist accounts of law do not consider directly the social processes that give content to legal norms and represent the *real* operation of legal systems. It is to those material conditions, and their relationship with the *form* and *content* of international law, that this section turns. Part A begins with a discussion of the place of ‘the material’ in Kelsen’s work, before elaborating a materialist theory of legal form. These insights are then extrapolated to the field of international law in Part B. The section concludes with a

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<sup>114</sup> Kammerhofer 2011, 260–261.

<sup>115</sup> Adorno 1977, 120–121.

<sup>116</sup> Buck-Morss 1979, 70; Cook 2014, 69–70; Held 2004, 213.

<sup>117</sup> Bull 1986, 330.

reflection on whether these material conditions, and the materially-situated character of international lawyers and legal activists, fundamentally impede the pursuit of social transformation through international law.

#### A. *Materialism and the Legal Form*

Material reality occupies a curious position in Kelsen's work. As mentioned above, his formalism presupposes a 'minimally efficacious' legal order. This provides the material *conditions* under which legal normativity may arise, without providing *the reason* for legal validity:<sup>118</sup>

efficacy is a condition of validity; a condition, not a reason of validity. A norm is not valid because it is efficacious; it is valid if the order to which it belongs is, on the whole, efficacious.<sup>119</sup>

This characterization is peculiar on first reading. Ebenstein suggests that some minimal degree of 'tension' between normative prescription and social reality is necessary to sustain Kelsen's jurisprudence. If reality were to correspond in all aspects with a legal norm, the *ought* would collapse into the *is*. The 'norm' would not be *prescriptive*, but *descriptive*.<sup>120</sup> The reverse poses similar problems; it would be problematic to speak of a legal order if its norms were entirely unobserved.<sup>121</sup>

This curious aspect of Kelsen's formalism results from the radical separations on which it is premised. Yet, it is also the reason for its potential utility to the legal activist. Just as the validity of norms is not grounded by their social efficacy, nor is it affected by the *content* prescribed by law-makers in social reality.<sup>122</sup> Legal norms can accommodate any content, so long as the prescribed procedures are followed and there is an absence of blatantly contradictory norms.<sup>123</sup> Thus, Kelsen elaborates a theory of legal *form*. Nothing in the 'form' of law (law *qua* norms) precludes the achievement of the stated goals of the business and human rights movement.<sup>124</sup> But with the opportunities provided by this framing come its inability to account for socio-economic conditions impeding their realization. The Pure Theory of Law can ambivalently accommodate such agendas, but no more. There is, however, a deeper question prompted by Adorno's critique of Kantian epistemology. It concerns whether empty

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<sup>118</sup> Kelsen 1949, 39.

<sup>119</sup> *Ibid.*, 42.

<sup>120</sup> Ebenstein 1971, 641–642.

<sup>121</sup> *Ibid.*

<sup>122</sup> Pashukanis [1924] 1983, 47–53.

<sup>123</sup> Kelsen 1949, 373–376.

<sup>124</sup> McConnell 2017.

formalist theories can legitimately claim a radical separation between form and content in a manner that at least maintains the possibility of effecting radical change through law.

A branch of Marxist scholarship has expressed a ‘scepticism that international law can be used to systematically improve the world’.<sup>125</sup> In an analysis that often echoes Adorno’s critique of idealism, China Miéville claims that rule-based formalist theories of law are thin, self-recursive and fail to provide a robust account of the specificity of the legal form.<sup>126</sup>

The rules of international behaviour are taken as given... Inasmuch as they are law... this is simply because we say they are law, rather than because of their form or essence. Rules, here, are deemed central: their “law-ness” is epiphenomenal.<sup>127</sup>

Here, Miéville exposes a problem addressed indirectly among Kelsen scholars.<sup>128</sup> Kelsen arguably violates his own validity/efficacy divide by adhering to the ‘coercive order paradigm’ associated with John Austin.<sup>129</sup> Some development on this point is necessary.

For Austin, law consisted of a system of sovereign commands enforced by sanctions. Consequently, he famously denied international law status as law ‘properly so called’.<sup>130</sup> Kelsen agreed with Austin as regards the uniquely coercive character of legal norms, but concluded that the international community fulfilled this criterion in a decentralized manner via war and reprisals.<sup>131</sup> The international legal order is said to hold a monopoly on force, which is only permitted as a sanction in response to a breach.<sup>132</sup> For Kelsen, denial of the monopoly of force held by the legal order would ‘den[y] international law *in toto* as a legal order’.<sup>133</sup> Kelsen must adopt this position owing to a problem of his own making. His conception of law as a normative sphere disconnected from social reality makes it difficult to distinguish *legal norms* from norms belonging to other spheres (e.g. morality). In order to differentiate legal norms, Kelsen must point to coercion as a distinguishing characteristic.<sup>134</sup> Yet, this poses a problem:

To make law’s existence dependent on coercive elements – which are designed to guarantee its effectiveness – in effect means... making the validity of a legal system dependent on (not equivalent to!) its continued effectiveness.<sup>135</sup>

Thus, in making coercion and efficacy integral to his theory, Kelsen seemingly violates his self-imposed *is/ought* divide by suggesting that there is an irreducible materialist component to

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<sup>125</sup> Miéville 2004, 17.

<sup>126</sup> Ibid., 11.

<sup>127</sup> Ibid., 14.

<sup>128</sup> Kammerhofer 2009, 239–240.

<sup>129</sup> Somek 2007, 434.

<sup>130</sup> Austin [1832] 2001, 20.

<sup>131</sup> Kelsen 1949, 328–330.

<sup>132</sup> Ibid., 331–336.

<sup>133</sup> Ibid.

<sup>134</sup> Kammerhofer 2009, 227.

<sup>135</sup> Ibid., 239–240.

the legal form. If this coercive element were removed, only the notion of *pure normativity* would remain.<sup>136</sup> Kelsen would fail to account for the particularity, the ‘law-ness’, of law.

Kammerhofer provides a compelling defence of Kelsen’s methodology, such that the coercive order paradigm may be discarded without destroying the possibility of cognising law as a discrete system. For Kammerhofer, the primary problem is one invented by traditional positivism, which seeks to identify one ‘true’ body of law as elevated above all other normative orders.<sup>137</sup> By removing the coercive element, law simply lies in a continuum with all other normative orders. What gives law or any other normative system its *specific* sphere of validity is not coercion, but a *choice* undertaken by the *subject*:

there is no objective criterion to cognize the coherence of a normative order. This is a problem of Kelsenian theory, a problem merely hidden behind the veil of the coercive order paradigm... We must realize what Kelsen had taken on from Kant, namely that one's epistemological position influences the world we perceive, that the world is only what we perceive.<sup>138</sup>

The quality of Kammerhofer’s work in lending greater consistency to Kelsen is not disputed. Yet, in the present context, Kammerhofer proves Miéville’s point. Without coercion, all that remains is pure normativity and a *subjective choice*. Kelsen discovers nothing uniquely legal.<sup>139</sup>

This insight can be pushed further in light of Adorno’s work. Kammerhofer’s attempt to separate more radically the spheres of *is* and *ought* magnifies the social antagonisms Kelsen sought to conceal. The products of arbitrary conceptual choices originating in the subject are treated as equivalent to the object of knowledge. This mode of thinking fails to capture the object in its *particularity*; it fails to acknowledge and respect the object’s *non-identity*. By treating law *qua* norms, Kelsen claims to subsume the object of knowledge under an abstract concept without remainder. Yet, there obviously *is* a surplus that falls outside the concept of normativity: the material conditions that make possible the conception of law as a body of norms in the first place. All Kelsen’s theory can perceive is a by-product; the result of presupposed and apparently invariant social relations. While his ‘science’ defines law’s essence in its normativity and aims to provide a neutral account of the object of knowledge, it actually presents a partial picture by simply defining the non-identical out of view. His theory ‘explains nothing, and turns its back from the outset on the facts of reality’.<sup>140</sup> In failing to acknowledge the particular social relations that fall outside and colour his concept, he treats

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<sup>136</sup> Ibid., 241.

<sup>137</sup> Ibid., 244.

<sup>138</sup> Ibid., 243.

<sup>139</sup> Pashukanis [1924] 1983, 52–53; Miéville 2004, 36.

<sup>140</sup> Pashukanis [1924] 1983, 52.

these material conditions as immutable. He conceals the dependence of his theory on social reality, denying its direct relevance to the jurist.

Analogously, Adorno argued that sociology was unable to claim full disciplinary autonomy,<sup>141</sup> given that the conceptual apparatus by which the discipline makes this claim is pre-formed, self-constituting, and mediated by material conditions.<sup>142</sup>

‘[I]ndividual intellectual disciplines such as jurisprudence or sociology... follow their own delusively self-grounding methodologies rather than the historically varying material itself... The illusory autonomy of individual disciplines... is inseparable from the fate of consciousness in a society universally structured by the commodity form.’<sup>143</sup>

This proximity between Adorno’s identity-thinking and Marx’s critique of commodity fetishism is particularly pertinent.

For Miéville, empty formalism fails to capture the *uniquely legal* aspect of law.<sup>144</sup> He finds a resolution to this problem in the work of the Soviet theorist, Evgeny Pashukanis. In an analysis close to that of Adorno, Pashukanis characterized branches of legal theory as being

at pains to transfer the object of analysis into the realm of subjective areas of consciousness... and fail[ing] to see that the ordering of the corresponding abstract categories expresses the logical structure of social relations which are concealed behind individuals and which transcend the bounds of human consciousness.<sup>145</sup>

Pashukanis saw the conceptual jurisprudence employed by legal theorists, including Kelsen, as capable of expressing oblique references to the material conditions in which such theories arose.<sup>146</sup> He sought to discover whether ‘the categories of law are objective forms of thought (objective for the historically given society) corresponding to objective social relations.’<sup>147</sup> In other words, he sought a materialist theory of legal form that respected ‘non-identity’.

For Pashukanis, law represented ‘the mystified form of a specific social relation’.<sup>148</sup> The social relations that give rise to law are revealed in Marx’s analysis of the commodity, an analysis that Adorno ‘ranked with the finest analyses of classical German Philosophy’.<sup>149</sup> Accordingly, Pashukanis took the view that ‘the existence of the legal form is contingent upon the integration of the different products of labour according to the principle of equivalent exchange.’<sup>150</sup> Miéville offers a concise distillation:

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<sup>141</sup> Adorno [1968] 2000, 127–136.

<sup>142</sup> Adorno 1976, 5.

<sup>143</sup> Jarvis 1998, 47.

<sup>144</sup> Miéville 2004, 43.

<sup>145</sup> Pashukanis [1924] 1983, 69–70.

<sup>146</sup> Ibid; Marx 1973, 105; Ryan 1982, 62.

<sup>147</sup> Pashukanis [1924] 1983, 74.

<sup>148</sup> Ibid., 79.

<sup>149</sup> Jarvis 2004, 96.

<sup>150</sup> Pashukanis [1924] 1983, 63.

[I]n commodity exchange, each commodity must be the private property of its owner, freely given in return for the other. In their fundamental form, commodities exchange at a rate determined by their exchange value, not because of some external reason or because one party demands it. Therefore, each agent in exchange must be i) an owner of property, and ii) formally equal to the other agent(s). Without these conditions, what occurred would not be commodity exchange. The legal form is the *necessary form* taken by the relation between these formally equal owners of exchange value.<sup>151</sup>

Thus, law serves as a particular conceptual lens through which exchange relations can be perceived and preserved. Law is a deceptive device through which the subject is able to perceive as formally equivalent that which is not equivalent.<sup>152</sup> The formal equality established by the legal contract misrepresents the relationship between parties, concealing their non-identity.<sup>153</sup> Law is a form of identity-thinking; a mode of thought that reaches its peak in capitalist exchange economies. Empty formalism concentrates this position by denying the direct relevance of these insights to jurists.<sup>154</sup> Adorno captures this perfectly:

In law the formal principle of equivalence becomes the norm... An equality in which differences perish secretly serves to promote inequality... For the sake of an unbroken systematic, the legal norms cut short what is not covered, every specific experience that has not been shaped in advance, and then they raise the instrumental rationality to the rank of a second legality *sui generis*. The total legal realm is one of definitions.<sup>155</sup>

Moreover, Adorno's work is capable of supplementing and strengthening the Pashukanite view against several significant critiques. First, Pashukanis has been accused of basing his theory on the *circulation* of commodities rather than their historically specific mode of *production*.<sup>156</sup> If, as Marx acknowledged, commodity exchange is not peculiar to capitalism, then surely neither is the legal form.<sup>157</sup> Yet, this does not necessarily undermine Pashukanis's central analysis.<sup>158</sup> Rather, it suggests that law existed in an 'embryonic' form prior to the emergence of capitalist class relations and the universalization of capitalist commodity production and exchange.<sup>159</sup> The term 'embryonic' is somewhat problematic, in that it suggests a certain primitiveness or imperfection – that law will inevitably assume its 'final form' under capitalism. From Adorno's perspective, it is perhaps better to speak of historicising the form assumed and role performed by law in particular socio-historical circumstances. Nonetheless, there is a parallel in Adorno's claim that identity-thinking is not a *product* of capitalism, but

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<sup>151</sup> Miéville 2004, 79.

<sup>152</sup> Pashukanis [1924] 1983, 113.

<sup>153</sup> Ibid., 114.

<sup>154</sup> Adorno 1973, 307.

<sup>155</sup> Ibid., 309.

<sup>156</sup> Warrington 1980; Head 2008, 215–218.

<sup>157</sup> Marx [1894] 1991, 442; Miéville 2004, 90–93.

<sup>158</sup> Jessop 1990, 59.

<sup>159</sup> Pashukanis [1924] 1983, 45, 136; Miéville 2004, 100.

simply becomes entrenched, obscured and universalized therein. Where all production is geared toward exchange, exchange-value entirely eclipses use-value; identity eclipses non-identity.<sup>160</sup> In a similar way, the universalization of commodity exchange under capitalism results in the universalization of the legal form, itself a mode of identity-thinking.<sup>161</sup>

Second, Kelsen dedicates a chapter in *The Communist Theory of Law* to Pashukanis.<sup>162</sup> There is a certain irony in Kelsen's claim that '[b]y pretending to be morally indifferent, objective science, Marxian socialism tries to veil the highly subjective character of the value judgement which is at its basis'.<sup>163</sup> Exchange 'Marxian socialism' for 'the Pure Theory of Law' and the reader is presented with a distillation of the conclusions drawn from Adorno above. To his credit, Kelsen disputes the capability of the Marxist method to present a more objective account of law, since 'the very statement that the social existence determines the consciousness of men must claim to be... [an] objective theory of human consciousness, not determined by the social existence of the one who makes this statement.'<sup>164</sup> Again, this critique can be dismissed via Adorno's work.<sup>165</sup> Contrary to Kelsen, 'there is no unequivocally true consciousness... Instead truth is glimpsed in the determinate negation of what is false.'<sup>166</sup> Adorno exposes the *partiality* of the subject's conceptual apparatus, rather than claiming unmediated access to the object of knowledge.<sup>167</sup> The compatibility of Adorno's reading of Marxist methodology with Pashukanis is evident in their common emphasis on Marx's critique of commodity fetishism.

#### B. *Consequences for the 'Activist' International Lawyer*

It is necessary to briefly sketch the operation of the commodity-form theory at the international level before spelling out the implications of this analysis for activist movements. Miéville argues that the emergence of the legal form among private individuals cannot be radically separated from the emergence of the centralized State's public order.<sup>168</sup> To maintain the façade of formal equality/impartiality, dispute resolution cannot be left to individual contracting parties. If this were so, the legal system would manifest its arbitrariness – its fundamental relation to violent coercion. Instead, dispute resolution 'has to appear... as

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<sup>160</sup> Adorno 1973, 307; Jarvis 2004, 93–94.

<sup>161</sup> Miéville 2004, 97; Koen 2011, 144–147.

<sup>162</sup> Kelsen 1955, 89–111.

<sup>163</sup> *Ibid.*, 44.

<sup>164</sup> *Ibid.*, 5.

<sup>165</sup> Jarvis 1998, 184.

<sup>166</sup> *Ibid.*, 51–52.

<sup>167</sup> Cook 2014, 33–34.

<sup>168</sup> Miéville 2004, 122–128; Pashukanis [1924] 1983, 89–93; Jessop 1990, 52.

coercion emanating from an abstract collective person, exercised... in the interests of all parties to legal transactions'.<sup>169</sup> As such, the universalization of exchange has led

to the abstraction of the State as a 'third force' to stabilize relations. Thus politics and economics have been separated. *In the same moment*, the flipside of that separation and the creation of a public political body was the investiture of that body – the State – as subject of those legal relations which had long inhered between political entities, and has now become international law.<sup>170</sup>

The operation of the commodity-form theory in international law is essentially simpler than the domestic context. In the place of individual contracting parties are States: the 'High Contracting Parties'.<sup>171</sup> Each is characterized in its claim to territory, with concomitant rights and duties attaching to it.<sup>172</sup> States are presented as formally equal in law,<sup>173</sup> despite obvious disparities in their economic and political power.<sup>174</sup> In this decentralized system, 'self-help' prevails.<sup>175</sup> This factor prompts the 'collapse of the distinction between politics and economics' that emerged in the domestic context.<sup>176</sup> From this, Miéville derives his central thesis, modelled on Marx's aphorism: 'between equal rights, force decides'.<sup>177</sup> Material inequalities in power between States are concealed by empty formalism, but are likely to produce real effects in terms of the interpretation of extant international law and the formulation of new instruments. For Miéville, this is a decisive factor in the struggle for interpretive dominance in the international legal order, one that undermines international law's progressive potential.

The malleability of international law at the hands of the powerful speaks to the indeterminacy thesis adopted by much New Stream and Critical Legal Studies (CLS) scholarship.<sup>178</sup> It is interesting that contemporary Pashukanite scholars embrace this view, it having previously been used to critique the commodity-form theory of law. In the 1980s, Duncan Kennedy derided its potential reliance on a *deductive formalist* trope; the widely-discredited, deterministic view that the rich content of law can be deduced logically from abstract principles derived from the economic base.<sup>179</sup> Such principles are seemingly integral to Pashukanis's theory. For Kennedy,

the problem is that the legacy of legal realism... is loss of faith that either the idea of property... or that of free contract, is enough to generate a unique legal regime. Most

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<sup>169</sup> Pashukanis [1924] 1983, 143.

<sup>170</sup> Miéville 2004, 140–141.

<sup>171</sup> *Ibid.*, 191.

<sup>172</sup> *Ibid.*, 128.

<sup>173</sup> Charter of the United Nations (26 June 1945) 1 UNTS XVI, Article 2(1).

<sup>174</sup> Pashukanis 1980, 178.

<sup>175</sup> Pashukanis [1924] 1983, 134.

<sup>176</sup> Miéville 2004, 141.

<sup>177</sup> Marx [1867] 1976, 344.

<sup>178</sup> Koskenniemi 2006, 140–141; Purvis 1991, 113.

<sup>179</sup> Kennedy 1985, 999.



theorists believe that there are many possible specifications of a commodity (private property) regime and many possible specifications of a contract regime based on the idea of freedom.<sup>180</sup>

Here, Kennedy highlights the complex, contradictory and often indeterminate content of law. This indeterminacy suggests that law may be used as a tool of the right or left; its content is a site of struggle. Again, we see a certain empty formalism common to the activist-reformer stance. Adorno's work potentially supplement's Kennedy's view, highlighting that legal concepts are not necessarily static and unchangeable, but dynamic and responsive to material forces. While extant law may privilege particular conceptions of property and contract and in doing so facilitate the identity-thinking integral to capitalist exchange, this is not to say that these are immutable properties of law in general. On this reading, Miéville's pessimism regarding the socially-transformative potential of law is arguably misplaced, vindicating the resistance to powerful economic actors through law championed by the business and human rights movement.

Yet advocates of the commodity-form theory now expressly adopt a comparable indeterminacy thesis drawn from Martti Koskenniemi. For Koskenniemi, the contradictions between individual liberty and social order inherent within liberal political doctrine manifest in international law, rendering it structurally indeterminate.<sup>181</sup> Virtually any course of action can be defended 'by professionally impeccable legal arguments' on a utopian basis, prioritising world order, or an apologetic basis, prioritising sovereign will.<sup>182</sup> Interestingly, Koskenniemi also advances a 'culture of formalism' through which he seeks to make use of 'international law's professional vocabulary for critical or emancipatory causes.'<sup>183</sup> For Koskenniemi, 'nothing has undermined formalism as a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it.'<sup>184</sup>

Consequently, Koskenniemi embraces a version of empty formalism, albeit via novel reasoning. In exposing international law's structural indeterminacy, he calls for international lawyers to move 'beyond objectivism'; to abandon the view that a definitive interpretive decision can be reached via a process internal to legal argumentation itself, or by reference to some stable external ground.<sup>185</sup> Instead, he calls on the profession to acknowledge the inescapable moment of politics in any interpretation or application of legal doctrine.<sup>186</sup> This technique frees the content of international law, while retaining some semblance of form that

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<sup>180</sup> Ibid., 961.

<sup>181</sup> Koskenniemi 2006, 67, 71.

<sup>182</sup> Ibid., 591.

<sup>183</sup> Ibid., 589.

<sup>184</sup> Koskenniemi 2001, 500.

<sup>185</sup> Koskenniemi 2006, 519–521.

<sup>186</sup> Ibid., 602.

separates it from pure politics.<sup>187</sup> Koskenniemi is incredibly close to Kelsen in separating form and content in this way.<sup>188</sup> As established above, such a position enables movements such as business and human rights to see hope in international law for progressive projects that seek to restrain the harmful practices of powerful economic actors.

Adorno's theoretical orientation permits us to navigate the connections and tensions between all three stances on law and emancipation: Koskenniemi's cautious optimism, Miéville's pessimism, and Kelsen's purported indifference. Indeed, the philosophical foundations of Koskenniemi's argument align substantially with those of Adorno. Citing the work of Ernesto Laclau, Koskenniemi treats international law as a language: a form of signification or *identification*.<sup>189</sup> Much like Adorno, Laclau saw all such systems as contingent and incapable of representing objects of knowledge without remainder. For Laclau, any attempt to delimit a system of signification implies that something lies beyond the boundaries of signification.<sup>190</sup> This 'beyond' is excluded by the system, but must be presupposed, otherwise it would be unnecessary to establish formal limits in the first place. Thus, the very possibility of constituting an identity is necessarily dependent on the exclusion of the non-identical. This is very close to Adorno's critique of identity-thinking.<sup>191</sup> This 'non-identical space' functions as a quasi-transcendental condition of possibility for any system of signification, but has no positively defined content.<sup>192</sup> It is an undefinable negative; an absence of identification. It is an expression of an underlying contingency; a horizon of possibility in which particular systems of signification are necessarily situated.<sup>193</sup>

Through Laclau, Koskenniemi seeks to provoke a reflexive stance that enables legal professionals to use international law as a system of signification, while acknowledging its partiality and thus respecting non-identity. This stance is made possible by the system's indeterminacy. As Laclau suggests:

...if undecidability lies in the structure as such, then any decision developing one of its possibilities will be contingent, that is external to the structure, in the sense that it is not determined by that particular structure, even though it may be made possible by it.<sup>194</sup>

In bringing this indeterminacy to light and stressing the essential political moment in any legal act or decision, Koskenniemi alerts legal professionals to the non-identical, negative 'space'

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<sup>187</sup> Ibid., 513

<sup>188</sup> Kelsen 2000, 77.

<sup>189</sup> Koskenniemi 2006, 568; Koskenniemi 2001, 504.

<sup>190</sup> Laclau 2007.

<sup>191</sup> Devenney 2004, 63.

<sup>192</sup> Laclau 1997, 17.

<sup>193</sup> Laclau 1990, 220.

<sup>194</sup> Ibid., 30.

that both makes possible the discipline's autonomy as a system of signification, and undermines its claim to totality.

Yet, any claim regarding international law's uniquely emancipatory character is surely undermined once it is situated alongside other systems of signification which might seek (but necessarily fail) to give comprehensive expression to their object of study. Indeed, it implicitly concedes that international law 'may not be the most emancipatory, or democratic, or transgressive' of all possible mediums.<sup>195</sup> Moreover, Koskenniemi acknowledges that a culture of formalism 'cannot be permanently associated with any of the substantive outcomes' it facilitates, and that it 'may occasionally have supported good, occasionally evil policies'.<sup>196</sup> He recognises that 'out of a number of "possible" choices, some choices – typically conservative or status quo oriented choices are *methodologically privileged* in the relevant institutions.'<sup>197</sup> These admissions speak to Miéville's pessimism. While international law may be indeterminate, particular interpretive decisions must be made within particular institutional settings in order for the system to function.<sup>198</sup> While these may be open to revision or 'dislocation', Laclau suggested that any decision will rely on the hegemonic exclusion of other interpretive claims, however temporarily.<sup>199</sup> Similarly for Derrida, even 'in the most reassuring and disarming discussion and persuasion, force and violence are present'.<sup>200</sup> But, Derrida continues, '[n]onetheless I think that there is, in the opening of a context of argumentation and discussion, a reference – unknown and indeterminate but nonetheless thinkable – to disarmament.'<sup>201</sup> Thus, while the necessary presence of coercion in reaching any interpretive decision or the fixing of any legal position is recognized, a shred of emancipatory potential lies behind any attempt to mount a claim through the language of international law. While Koskenniemi seems to share Derrida's position, for Miéville, the prospects for positive social transformation through international law are incredibly limited. Although doctrinal indeterminacy does not of necessity hand free-reign to powerful elites,<sup>202</sup> it is the power to fix a particular hegemonic interpretation that will prove decisive.<sup>203</sup> Thus, he claims that '[t]he *international legal form assumes juridical inequality and unequal violence*.'<sup>204</sup>

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<sup>195</sup> Golder 2016, 696–697.

<sup>196</sup> Koskenniemi 2001, 503.

<sup>197</sup> Koskenniemi 2006, 610.

<sup>198</sup> Similarly, d'Aspremont accepts some necessary indeterminacy in both the form and content of international law, while emphasising that formal indeterminacy may be reduced with reference to the social conventions and social practices of international lawyers and law-applying authorities. As discussed below, such social actors are inescapably situated within, and partially shaped by, particular material, social and institutional settings: d'Aspremont 2011, 138–147.

<sup>199</sup> Laclau 1990, 32; Laclau and Mouffe 1985, 142–143.

<sup>200</sup> Derrida 1996, 85.

<sup>201</sup> Ibid.

<sup>202</sup> Marks 2003, 144–145.

<sup>203</sup> Knox 2009, 417.

<sup>204</sup> Miéville 2004, 292.

While in broad agreement with Miéville, Knox notes the ‘complex interrelation of, *inter alia*, violence, ideology and economics... In widening and complicating the types of “coercion” that resolve legal disputes, it becomes much more difficult to argue that these will almost always be won by imperialist States.’<sup>205</sup> This contribution retains some cautious optimism by acknowledging the rise of progressive non-State actors.<sup>206</sup> Nonetheless, for Knox

the transformative power of this struggle is limited by the legal form... pursuing a legal strategy can break up collective solidarity, and render progressive forces unable to address the systemic causes of social problems. Indeed to mount a legal strategy is to risk legitimating the structures of global capitalism.<sup>207</sup>

These insights undermine the radical separation between the legal form and its content posited by most empty formalist accounts. It is this element of ‘identity-thinking’, a mode of thought entrenched in societies in which exchange has become universalized, that undermines the agenda of the activist-reformer. There is a failure to respect that which falls outside and conditions the ‘empty’ system of legal norms. Thus, despite nothing logically precluding the use of international law to challenge the adverse effects of corporate conduct, whether that be through the imposition of direct obligations or the facilitation of access to domestic remedies, such initiatives are beholden to political and economic restraints to which formalist logic often blinds itself. Indeed, while the prospects of small victories in the legal sphere cannot be denied,<sup>208</sup> the uncritical pursuit of the reform via formalist logic arguably obscures the deeper structural affinities between legal form, content, coercion and economy.

These considerations prompt questions concerning the adoption of legal strategies by movements aimed at challenging corporate power. Law cannot be taken uncritically as an empty vessel to be filled with progressive content.<sup>209</sup> Taken at face value, seemingly neutral and indifferent formalist theories such as Kelsen’s are perhaps guilty of something more insidious. The question is whether Adorno’s call to respect *non-identity* offers a glimmer of hope – whether the reflexivity of international lawyers and activist movements as to the uses and limits of law offers something salvageable. Immersed in CLS arguments surrounding legal indeterminacy and instability, Williams nonetheless acknowledges the difficulty in seeing ‘the idealistic or symbolic importance of rights being diminished with reference to the disenfranchised, who experience and express their disempowerment as nothing more or less than the denial of rights.’<sup>210</sup> Knowledge of the problems with legal strategies must be taken in

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<sup>205</sup> Knox 2009, 426.

<sup>206</sup> *Ibid.*, 420–423.

<sup>207</sup> *Ibid.*, 433.

<sup>208</sup> *Ibid.*, 427; Marks 2003, 144; Chimni 1993, 208.

<sup>209</sup> Miéville 2004, 119

<sup>210</sup> Williams 1987, 405.

hand with knowledge of the real-world benefits legal rights produce for subaltern communities.<sup>211</sup> Such a call also echoes through much of David Kennedy's work.<sup>212</sup>

For his part, Koskenniemi highlights the institutional biases and unequal power dynamics lying behind international law, while retaining a belief that these material circumstances are not necessarily determinative either.<sup>213</sup> In doing so, Koskenniemi denies that international law has any objectively progressive or emancipatory character, and instead shifts any optimism to an ethic of responsibility inculcated within a reflexive subject.<sup>214</sup>

[N]othing of our ability to challenge the bias is grounded in the law itself. The choice will be just that – a “choice”... The decision is made, and its consequences are thus attributable, not to some impersonal logic or structure but *to ourselves*.<sup>215</sup>

This suggests that a subject aware of the contingency of a given system is ‘more ready to transform the field that is posited by the nature of [its] decision – given that the field, together with its frontiers, is the result of a decision and not the representation of a preceding “real”.’<sup>216</sup> But such a manoeuvre posits a subject who is ‘able to stand *above* and *separate* from his object of analysis... able to detach himself from the world he finds himself in and *able to conduct his diagnosis in a space that is not occupied by the very objects he wishes to analyse*.’<sup>217</sup> Such a subject is the mirror image of Koskenniemi's professionally-situated ‘managerialist’ who cannot see beyond the self-imposed limits of legal doctrine.<sup>218</sup> The characteristically liberal antinomies of the subject emerging from Koskenniemi's work prompt Singh to question whether the subjects that emerge from Koskenniemi's work are ‘capable of realising the politics of critical thought’.<sup>219</sup>

For Miéville, reflexivity represents a ‘typically unsatisfactory, postmodern sleight of hand, a suggestion that an impossible manoeuvre can be made simply by being made aware of its impossibility’.<sup>220</sup> Adorno could be accused of the same; stressing the importance of critical thinking whilst acknowledging thought's inability to positively define the path to a better world.<sup>221</sup> There is no ‘right living’ in a fundamentally ‘wrong world’.<sup>222</sup> It is only possible to glimpse the falsity of the existing world immanently through determinate negation of its

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<sup>211</sup> Ibid., 410.

<sup>212</sup> Kennedy 2002, 102; Charlesworth 2002, 127.

<sup>213</sup> Koskenniemi 2006, 598.

<sup>214</sup> Ibid., 536.

<sup>215</sup> Ibid., 615.

<sup>216</sup> Beardsworth 1996, 12.

<sup>217</sup> Singh 2016, 705–706.

<sup>218</sup> Koskenniemi 2009, 15; Ibid., 717.

<sup>219</sup> Singh 2016, 700; Hoffmann 2009, 243.

<sup>220</sup> Miéville 2004, 59.

<sup>221</sup> Adorno 1973, 352.

<sup>222</sup> Adorno [1951] 2005, 39; Freyenhagen 2013, 52.

concepts.<sup>223</sup> Such is the connection with the positionality of this article outlined in the introduction. For Adorno, ‘critical negation of the existing states of affairs... discloses something equally negative: that which exists is not yet what it ought to be, and that what ought to be does not yet exist.’<sup>224</sup> Adorno could hardly be accused of radical idealism. He was deeply aware that changes in ideas will not necessarily precipitate ‘changes in the fundamental nature of the world.’<sup>225</sup>

Adorno’s reticence to place hope in a subject situated in the material circumstances of late-capitalism is well documented.<sup>226</sup> On this reading, any scope for the activist-reformer to adopt an *enlightened* empty formalism is always threatened by the alluring pull of identity-thinking in a world structured by the logic of the commodity-form. Any victories in the legal sphere ‘will be predicated on legal forms that not only make the categories ripe for counter-appropriation, but that can only be actualized in the coercive interpretations of the very States and other bodies whose interpretation and actions the radical lawyer is critiquing.’<sup>227</sup> Yet these realizations need not prompt the wholesale abandonment of law by activists and scholars. As with Koskenniemi and Laclau, Adorno clearly saw *some* utopian potentiality, however small, in the Sisyphean struggle of critical thought; ‘the thinking that conceives the difference from what exists’.<sup>228</sup> International law, as with any system of signification, will always do violence to non-identity. But as Adorno repeatedly emphasised, the conceptual mediation between the subject and object cannot be overcome. Adorno’s critical orientation seems to strive for ‘a “lesser violence” in a general economy of violence.’<sup>229</sup> Indeed, the absence of resistance through critical engagement in the legal sphere will not, on its own, lead to social transformation. Rather it risks losing any ground ceded. In this sense, law is a reality that must be lived with and harnessed, so far as possible, while striving to remain alive to its inherent limitations.

#### IV. Conclusion

A number of insights concerning the role of law in activist efforts to effect social change can be drawn from the above. First, it is evident that empty formalism could conceivably serve *some* useful purpose. This is apparent in the field of business and human rights, where formalist logic may be employed in efforts to overcome longstanding doctrinal anxieties concerning the imposition of direct international obligations to corporate actors. By

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<sup>223</sup> Prichard 2004, 301–306.

<sup>224</sup> Cook 2014, 80.

<sup>225</sup> Miéville 2004, 59; Linarelli, Salomon and Sornarajah 2018, 240.

<sup>226</sup> Buck-Morss 1979, 24–25.

<sup>227</sup> Miéville 2004, 304.

<sup>228</sup> Adorno 1973, 313; *Ibid.*, 89–90.

<sup>229</sup> Beardsworth 1996, 219.

transcending the contractarian elision between law-maker and addressee, Kelsen's framing allows business and human rights advocates to glimpse the doctrinal potential for international law to directly constrain adverse corporate conduct. Koskenniemi's attempt to liberate the content of international law while retaining some semblance of disciplinary autonomy provides similar scope for the activist-reformer to pursue emancipatory projects. Such a stance entreats the subject-lawyer to think beyond seemingly rigid doctrinal and institutional constraints in a fashion common to business and human rights scholarship.

Yet, deeper issues with the adoption of an empty formalist stance are exposed by Adorno's critique of idealist epistemology. Its tendency to treat a subjectively-constituted conception of law as exhaustive serves to obstruct reflection on the material conditions which colour this mode of thought. This is most prominent in Kelsen's formalist framing, which implicitly and uncritically accepts as immutable the underlying social conditions of which it is a product, collapsing the radical separation between *is* and *ought* on which it is apparently founded. Yet, for all its flaws, Kelsen's thought is in a sense *right*. His formalism truthfully, if unthinkingly, mirrors dominant modes of thought in late-capitalism. It adopts the 'rules of the game' with an extreme rigour. This factor renders it vulnerable to Adorno's critique, but may also permit it to be taken seriously as part of an enlightened argumentative strategy advancing the progressive interpretation or elaboration of international instruments. The question is whether appeals to the logic of a society built on obfuscation - on the failure to respect the *non-identical* - can meaningfully challenge that very social order or will instead lead to its strengthening. The foregoing leads to a conclusion that falls somewhere between these polarities - between *opportunity* and *impasse*.

In reaching this conclusion, Adorno's critique of identity-thinking serves a dual function. First, it permits a novel critique of formalist jurisprudence, illuminating its subservience to material conditions and undermining its claim to invariance. Yet combined with the scholarship of Pashukanis and Miéville, Adorno's work facilitates a second, bolder claim. *Law itself* is characterized as a fundamentally identitarian enterprise. Law is presented as integral to the establishment and preservation of stable exchange relationships. Law is a crucial component of capitalist exchange, permitting the formal equivalence of materially non-equivalent parties to be conceptualized. This insight, coupled with the indeterminacy of legal doctrine, characterises law as a deceptive mirage through which social domination is preserved - a supposedly egalitarian and impartial phenomenon that is ultimately subservient to socio-economic power. Formalist jurisprudence may propagate this position, but its eschewal will not resolve the deeper problems with law, namely, the intimate relation between law and the underlying power disparities that permit even the most progressive content to be co-opted and distorted.

Yet, the possibility of ‘taking international law seriously, while refusing to see in it hope for progressive politics’ is acknowledged.<sup>230</sup> Thus, there may be scope for ‘a “principled opportunism”, where... international law is consciously used as a mere tool, to be discarded when not useful.’<sup>231</sup> In a similar vein, Adorno’s insights demonstrate that *thought* can be used to move beyond dogmatic idealist accounts of law which serve to conceal the material factors that shape the legal form and its content. While unquestionably difficult to obtain, a reflexive stance of this type might permit advocacy groups to use law – including formalist argument – to the extent that it may be exploited for real-world benefits, while acknowledging its susceptibility to counter-appropriation. Despite Adorno’s acknowledgment that all thought is mediated by existing material conditions, and thus unable to offer a definite path to emancipation, it at least offers a point of resistance that admits the *possibility* of a different world. So too, it remains viable to take seriously the *opportunity* for progressive interpretation of international law, while maintaining a critical awareness of a more fundamental *impasse* – its inability to transcend the material conditions of which it is in part a product, and the residual danger inherent in the employment of legal strategies.

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<sup>230</sup> Miéville 2004, 60.

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