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HANS KELSEN AND THE BINDINGNESS OF SUPRA-NATIONAL LEGAL NORMS

by

RICHARD LATTA

Under the Direction of Professor Andrew Altman

ABSTRACT

The pure theory of law is a positivist legal theory put forward by Hans Kelsen. Recently there have been two attempts to understand democracy as a source for the normativity that the pure theory assigns to law. Lars Vinx seeks to understand the pure theory as a theory of political legitimacy, in which the normativity that the pure theory assigns to the laws of a state depends on the state's adoption of certain legitimacy enhancing features, including being democratic. Uta Bindreiter argues that, in the case of European Community law, an additional criterion of democracy must be added to the criteria that the pure theory normally requires of legal systems before the pure theory can presuppose the normativity of European Community law. This thesis will argue that neither of these two accounts succeeds in demonstrating that the normativity of the pure theory can be understood to depend on democracy.

INDEX WORDS: Philosophy of law, Legal positivism, Hans Kelsen, Uta Bindreiter, Lars Vinx, Legal normativity, Basic norm, Pure theory of law, European community law, Grundnorm, Democracy

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RICHARD LATTA

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2012

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RICHARD LATTA

Committee Chair: Andrew Altman

Committee: William A. Edmundson

George Rainbolt

Electronic Version Approved:

Office of Graduate Studies

College of Arts and Sciences

Georgia State University

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1 INTRODUCTION

The pure theory of law is a legal theory developed by Hans Kelsen in order to carve out space in which the law can be cognized in an objective and exact manner. The pure theory attempts to cognize law as free from a dependence on values advocated by political ideologies (such as conceptions of justice), while not denying to law its normativity. The pure theory of law is distinguished from other scientific studies of law, especially the sociology of law, because the pure theory of law takes seriously the normativity of law. Rather than seeing the practice of law as a series of empirical correlations between written statutes and specific actions by individuals or a descriptive account of people entering capitol buildings and lifting their hands or pressing buttons at certain intervals (voting on laws, etc.), the pure theory sees laws as providing an 'ought,' or a reason for an individual to act in a certain way. The pure theory of law is distinguished from systems of morality and political ideology, because the normativity of the law is a special normativity. The normativity of law is not derived, by the pure theory, from a moral norm. Instead, a law receives its normativity from being created in a certain way. Each law is normative because of its relation to another legal norm that governs its creation. Kelsen refers to this process as validation. A law is validated by, receives its normativity by virtue of, being posited in accordance with a higher level norm of that legal system. This creates a *Stufenbau*, a hierarchy of valid norms. Each norm of the legal system is validated by being posited in accordance with a higher level norm of that system. This regress ends with the presupposition of a basic norm, or *Grundnorm*, which acts as a source of the bindingness of the posited norms of the legal system. For Kelsen, the law is also distinguished from other normative orders, such as morality or those found in a religion, by virtue of being coercive.

Recently, two theorists, Lars Vinx and Uta Bindreiter, have sought to understand Kelsen's pure theory as requiring, or at least being compatible with, reading certain political requirements into the

normativity of law.¹ Specifically, these theorists have sought to read the pure theory as requiring democratic principles or institutions. This thesis will critically examine such a reading. Section II of this thesis will lay out an exegesis of the pure theory of law focusing on its account of international law and the relationship between international law and the laws of the various municipal (state) legal systems. Section III will consider Vinx's argument that the pure theory should be understood as a theory of democratic political legitimacy. Section IV will consider Bindreiter's effort to ground the legal system of the European Community in a "conditional" basic norm having democratic content. Section V will conclude and explain the correct understanding of the relationship between the pure theory and democracy or politics.

2 KELSEN'S POSITIVISM

The pure theory of law is a positivist legal theory, insisting on a separation between law and morality. As Kelsen states: "The Pure Theory of Law is the theory of legal positivism."² For Kelsen, a norm counts as a legal norm, a law of a legal system, not because of a certain relationship to morality, but because it has been posited in a certain way. Kelsen uses the term "validity" to describe the normativity that the pure theory ascribes to laws.

2.1 The Stufenbau

For Kelsen, the law is a unitary system of valid norms that are binding on the individuals to whom the norms are addressed. Each norm in the legal system derives its normativity from another, higher norm. The higher authorizing norm, in turn, gets its validity from a still higher level norm that itself is valid because of another, higher, norm than it. This hierarchically structured system of norms is

1 The Two texts that this paper will focus on are: Vinx, Lars *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy*, Oxford: Oxford University Press, 2007; and Bindreiter, Uta *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine*, by Uta The Hague: Kluwer Law International, 2002.

2 Kelsen, Hans [Introduction to the Problems of Legal Theory](#). Trans. Bonnie Litschewski Paulson and Stanley L. Paulson. Oxford: Clarendon Press, 1992. p. 36 (hereinafter LT)

a Stufenbau. For example, a federal statute in the United States is normative in so far as it is passed in accordance with the requirements laid out by the Constitution of the United States of America. This system, eventually, needs to stop in order to avoid an infinite regress of norms, each of which is the reason for the validity of a lower norm in the system, and each of which derives its own validity from a higher norm in the chain. For the pure theory, this regress ends with the presupposition of the basic norm. The basic norm is not a positive norm of the legal system, i.e. does not derive its validity from being created under an authority and limitation derived from a still higher norm. Instead, the basic norm is presupposed by legal science as the source of the validity of the norms of the legal system. The relationship between the basic norm and the positive laws that it validates is one of logical rather than temporal priority. Kelsen uses the following example to illustrate this structure of validity (see Graph A).³

If we begin with one individual depriving another of his life by hanging, we might then ask what makes this action legal? A legal act is an act by means of which a legal norm is issued, such as the passage of a new statute or the decision of a judge, provided that this issuance is in accordance with the higher level norms of the legal system. A legal act is the act of positing law.⁴ According to Kelsen, this act of taking another's life can only be legal if it is prescribed by an individual legal norm, a norm that is issued by judicial decision. The question then arises, why ought this judicial order to be applied? The answer is that the judicial order was created in applying criminal law, which contains a general norm according to which the death penalty ought to be applied under the circumstances present in the trial. The criminal law itself is valid because it was created by a legislature that is authorized by a constitution to create general legal norms. Therefore, the validity of the act prescribed by the judicial decision is traced back to the validity of the constitution. But what of the validity of the constitution? It is possible that the constitution was created in accordance with an earlier constitution. Kelsen states: "If we ask for

³Kelsen, Hans. *Pure Theory of Law*. Trans. Max Knight. Los Angeles: University of California Press, Berkeley, 1967. § 34(c) p. 199 – 201. [hereinafter PTL]

⁴ Kelsen, Hans. "What is a Legal Act?" *The American Journal of Jurisprudence*. trans. Bonnie Paulson and Stanley L. Paulson. Vol. 29 (1984) 200.

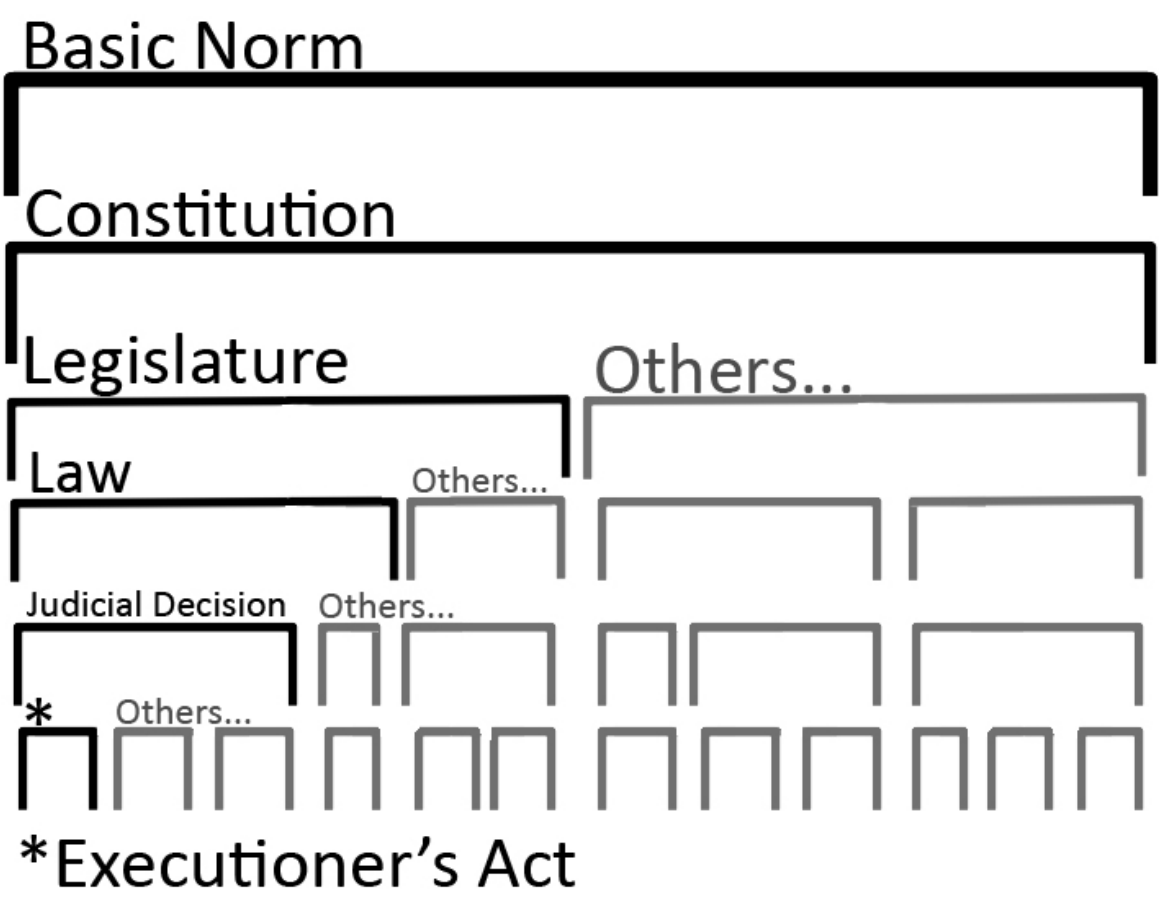
the reason of the validity of the constitution... we may, perhaps, discover an older constitution.”⁵ This change might have been accomplished through an amendment, made in conformity to the rules of the earlier constitution. Here, the current constitution can be said to derive its validity from being posited in conformity with the earlier constitution. In this way, we trace our way back to the historically first constitution. This is the constitution that is the source of the validity of the laws of the legal system, but for which there is no positive source for its validity.

The question then arises, what is it that authorized the historically first constitution, such that the validity of the historically first constitution might be a reason for the validity of the norms of the legal system? What makes the historically first constitution of a state legal system valid? If we are looking from the perspective only of the legal system of a specific state, then the validity of the constitution of that state is grounded in a presupposed basic norm, which entails that the historically first constitution of a state legal system is valid. As Kelsen states: “What is to be valid as norm is whatever the framers of the first constitution have expressed as their will – this is the basic presupposition of all cognition of the legal system resting on this constitution.”⁶ This is the basic norm of a given state. When we take the perspective of the law from the point of view of a specific state, i.e. a specific municipal legal system, the constitution of that municipal legal system becomes the highest valid positive norm.

5 PTL 200

6 LT § 28 p. 57

Table 1 Graph A



The inverted brackets are used to illustrate that the higher level norms prescribe boundaries for the content of the norms they validate. A norm that exceeds the prescribed boundaries is said, by the pure theory, to be “invalidatable” by a “designated authority”, such as a court.⁷ However, within these boundaries there are multiple legal norms that can be legislated.

Kelsen also offers a basic norm for international law, which will be discussed in more detail later in this thesis. Briefly, the hierarchy of the international legal system terminates with international customary law as the highest level of positive international legal norms. In the same way that the historically first constitution in the earlier example existed at a level for which there was no positive law validating it, here, customary international law plays the same role for the international legal system. It validates all the other laws of the international legal system, such as international treaties, but there is no positive norm of international law that it is validated by. Therefore, the legal scientist applying the pure theory of law can presuppose a basic norm of international law, prescribing that customary law be followed. This basic norm of international law validates customary international law, and customary international law is the source for all the other lower laws of the system of international law.

In the pure theory of law all law, including both international law and the laws of the various municipal legal systems, constitute one unified system. This means that there can only be one basic norm. All other legal norms will be posited. This means that, with the exception of the one basic norm of the unified system of all laws, what might be thought of as the basic norms of the various municipal legal systems will show up as higher order positive laws of the unified system. For example, if we look to the constitutions of the United States and Canada and ask, "What validates each of these constitutions?", the answer will not be two basic norms, one for each system. At most, there can only ever be one basic norm. It can be that both of these constitutions are validated by higher positive norms of international law, such as by a customary law of the international legal system. I say "can," because, according to Kelsen, the pure theory can be coherently described, without having any effect on any of the positive laws of the unified system, from either of two perspectives. The pure theory can be coherently described with the basic norm of international law at its apex, as the one basic norm that provides for the validity of all of the norms of the unified legal system. The pure theory can also be described with

the basic norm of any one, but only one, municipal legal system at its apex. This phenomenon of the pure theory will be discussed in more detail below in the section entitled “the choice hypothesis.”

2.2 The Necessary Unity of the law

In proposing the unity of all law, the pure theory is at odds with what Kelsen refers to as the “traditional” view. According to the traditional view, international law and the laws of a municipal legal system are distinct, having two distinct sources of validity, one for the municipal legal system, and one for the system of international law. This “dualistic” (or “pluralistic” as there are multiple municipal legal systems) view of the law is untenable under the pure theory, according to Kelsen.⁸ The pure theory is designed to be a science of the law. Kelsen states: “Here it suffices to note that legal scholarship becomes a science to the extent that it fulfills the postulate of the unity of its knowledge, that it succeeds in conceiving of the law as a unitary whole.”⁹

Kelsen calls the unity of all law an “epistemological postulate.”¹⁰ As Kelsen states: “legal cognition sets the very same task for itself that natural law [as in the domain of cognition of the natural sciences] sets for itself: to represent its object as a unity”¹¹ To the extent that both international law and state law are seen as law (as binding, coercive norms whose validity is derived from the method of their creation) it is an epistemological requirement that these norms be treated by the legal theorist as parts of the same unity, the unity of all law.¹² Given the unity of all law into one hierarchical system, each law derives its validity from being posited in accordance with a higher order norm of the system.

8 LT 111

9 Kelsen, Hans. Problem der Souveranetaet. 152

10 LT § 50(a) p. 111

11 LT § 50(a) p. 111 - 112

12 Ibid § 50(a) p. 111; Kelsen, Hans. General Theory of Law and the State. Trans. Anders Wedberg. Cambridge: Harvard University Press, 1945. p.373 (hereinafter GLTS). In GLTS, Kelsen states: “A jurist who accepts both [national and international law] as sets of valid norms must try to comprehend them as parts of one harmonious system.”

2.3 The Choice Hypothesis

For Kelsen, the normativity of all law is grounded in a single basic norm. However, it is still possible to conceive of such a system in one of two ways. We can conceive of all law as a unified system having the constitution of one specific municipal legal system as the highest positive law (see Graph B), or, alternatively, as having customary international law as the highest positive law (see Graph C). The basic norm of all law will then be decided based on which hierarchical arrangement is chosen by the legal theorist.

Table 2 Graph B

Basic Norm of International Law

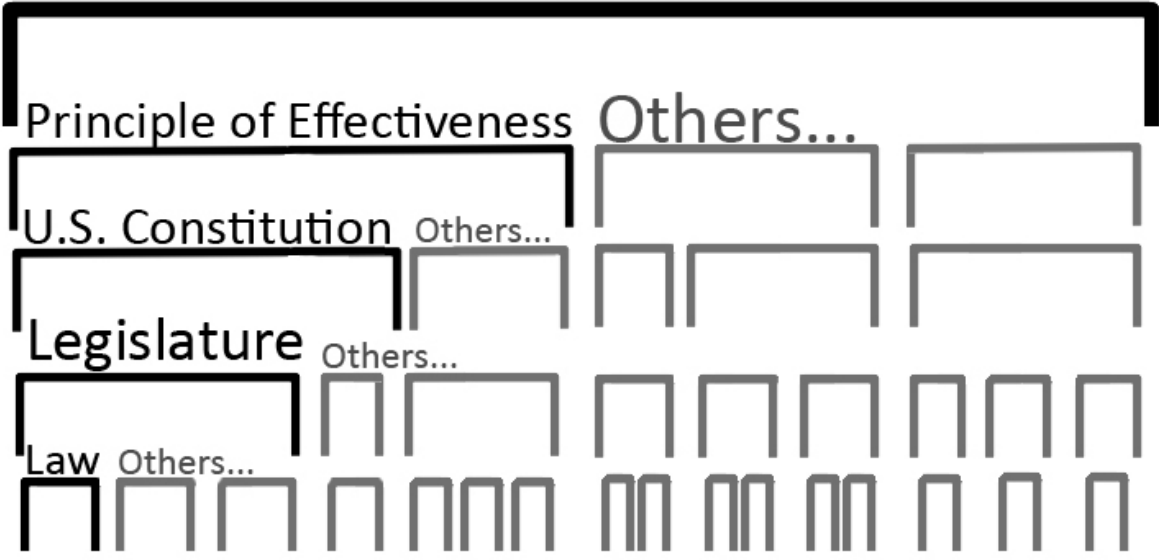
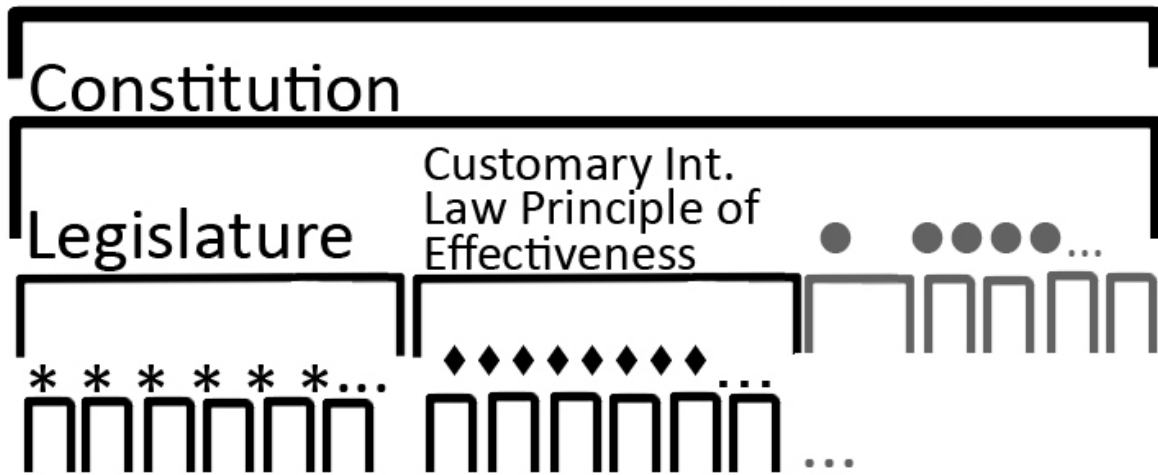


Table 3 Graph C

Basic Norm of a Country (U.S.A.)



*States

◆Foreign Constitutions

●Other Customary International Law, Judiciary, Executive

... More brackets than shown can exist

The question of how to determine which basic norm will survive as the basic norm of the unified legal system is, for Kelsen, not answerable from within the pure theory of law. It is possible to coherently describe the unified system of law with either the basic norm of international law or with the basic norm of a state legal system. If we take the basic norm of a state legal system, then the national legal system delegates, grounds the validity of, international law by recognizing international law as binding. The legal systems of all other states derive their validity from their recognition by this state legal system through its recognition of international law.¹³ Similarly, if we take the international legal system to be supra-ordinate to the legal systems of the states, then the laws of each legal system will be valid insofar as they can be traced back, through posited customary international law, to the basic norm of the international legal system.

Because both of these views of the unitary legal system are coherent and mutually exclusive any choice between the two views of unified law must be, broadly speaking, political in nature.¹⁴ Either way, to the extent that international law is seen as binding together with the state legal system, the pure theory holds that they are each parts of one monistic hierarchy of law. Insofar as both the system of international law and the legal order of a state are considered to be simultaneously valid, the pure theory holds that they are to be comprehended as parts of one system of laws.¹⁵ If we conceive of all law as belonging to one unified system, a single hierarchy of legal norms (Stufenbau), then the basic norm of the system becomes the basis of validity for all legal norms, including the norms of lower-order systems. In this way, all of law gets its validity through derivation from one basic norm.¹⁶

13 LT § 50(d) 114 - 116

14 PTL § 43 (c) & (d) p. 332 - 344

15 Ibid § 43 (c) p. 332

16 LT § 50(a) p. 113

2.4 The Basic Norm of International Law and Its Place When Conceived of as Primary

International law, for Kelsen, exhibits the same characteristics as national law. Specifically, it is a coercive system of norms. In the international legal system, the coercive act, or specific consequence of an unlawful act, is reprisal or war.¹⁷ However, international law is a primitive legal system. The primitive nature of international law is disclosed by its decentralization and its lack of division of labor through specialized organs (organs of legislation and adjudication, for instance). Being primitive does not preclude it from being conceived of as part of unified law. The question then arises, what is the basic norm of international law? In order to answer this question, Kelsen suggests that we should start with the most concrete examples of international law and follow their validity back through the chain of international law to find the most general example of positive international law. It will be to this level of international law that the basic norm of international law will provide validity.¹⁸

The most concrete level of norms in the international legal system are found in the decisions of international courts. If we ask, from where do these norms derive their validity, we find our way to the international treaty that acts as the foundation for the court. The source of the validity of the treaty is derived from customary international law, according to which the treaty is binding on its signatories. Customary international law is the final level of positive international law. There is no constitution of international law. Therefore, the basic norm of international law picks out international customary law and asserts that international customary law is binding on those to whom it is directed. As Kelsen describes the basic norm of international law: "The states ought to behave as they have customarily behaved."¹⁹

The ground of each municipal state legal system, then, is found in customary international law, in Kelsen's view. What was earlier described as the basic norm of a specific municipal legal system, that

17 Ibid.

18 GTLS 369

19 Ibid

the historically first constitution is valid (also expressible as authorizing those who created the historically first constitution to legislate a binding constitution), becomes the norm of international customary law that Kelsen refers to as the “principle of effectiveness.”²⁰ The principle of effectiveness recognizes coercive hierarchies of norms (states) that are by-and-large effective as binding. This requirement of effectiveness is the source of the validity of the norms found in the state legal system. The effectiveness does not have to be perfect conformity on the part of every individual within the state. If a state had perfect conformity, then there would be no need for a hierarchy of coercive norms. The positive customary law also acts to limit the jurisdiction of the state legal system. The jurisdiction of the state legal system is defined by the time, place and persons over which it is effective.

The ground of each municipal state legal system, then, is found in customary international law, which requires by-and-large effectiveness for the historically first constitution of a state legal system to be valid, and so forth down to the most concrete norms generated by the judicial decisions of a given state. As Kelsen states: “The basic norm of international law, then, and thus of state legal systems, too, whose powers are delegated to them by international law, must be a norm that establishes custom – the reciprocal behavior of the states – as a law-creating material fact.”²¹ This priority is a logical, not necessarily temporal, priority. The rules of families and small communities likely predate the constitutions of many modern states. Still, we would say that the validity of the norms of those states is derived from the subsequently created constitution. “One must not confuse historical sequence with the logical relation between norms.”²²

2.5 States and the Law, the Identity Thesis

According to the pure theory of law, states and their legal systems are identical. This is known as the identity thesis. In every state legal system, there are a series of legal norms and legal organs. An

20 LT 120

21 LT § 49(a) p.108

22 Ibid

organ is an individual, or group of individuals, who performs a function that can be attributed to the community.²³ Here, the organs that are being considered are legislating organs. The legal organs are authorized by norms of the legal system to create new, lower, more concrete legal norms. This process of legislation creates new valid norms of the legal system, and is itself authorized, validated, by higher legal norms of the system that were themselves created by organs of the legal system. A chain is created with organs legislating new norms for the system, based on authorization granted by higher norms that were themselves created by authorized organs. This chain, according to the pure theory of law, ends with the presupposed norm of the legal system.²⁴ Every legislative act is authorized by a norm of the legal system, including the historically first constitution. It is the presupposed basic norm that authorizes the legislating of the historically first constitution. The bindingness of all state acts is derived from a norm of the legal system. In this way, the pure theory rejects the view that separates the state into a political and a legal function. Under the pure theory, there is only one hierarchy, with the political act of legislating being always subordinate to and authorized by legal norms.²⁵

3 VINX

For Vinx, the pure theory is best understood as a theory of political legitimacy.²⁶ Vinx seeks to understand the pure theory of law as providing a reason for the addressees of a legal system to act in accordance with the norms of that legal system, even in the face of practical considerations speaking against the act prescribed by those norms. As Vinx states: “The pure theory of law, once it is read in the

23 PTL § 30 (c) p. 199 - 201

24 Ibid § 41 (a) p.

25 For a competing conception see Carl Schmitt's concept of the exception. For Schmitt, it is possible for a state to act, legally, outside of the state's legal system, which Schmitt refers to as the “exception.” The “exception” suggests that it is possible for the state and the legal system to come apart. See Schmitt, Carl. Political Theology: Four Chapters on the Concept of Sovereignty. George D. Schwab, trans. Chicago: University of Chicago Press University of Chicago, 2004.

26 Vinx 59 - 61

light of Kelsen's political theory, can be understood as a theory of political legitimacy."²⁷ One can, for Vinx, point to the "legality" of a political decision to justify, to some degree, the claim of the "state or legal system" to the obedience of its citizens.²⁸ The normativity that Vinx sees the pure theory of law as attributing to the laws of "a legal system can be interpreted as a form of de jure legitimacy which [Vinx calls] 'legal legitimacy.'"²⁹ De jure legitimacy exists when a reasonable person ought to view the political decisions of a system as providing "some degree of exclusionary force" in their decision making (Vinx draws his use of "exclusionary" from Raz, however he seeks to understand exclusionary force as a matter of weight).³⁰ This is to say, when an addressee of a norm considers the norm, they ought, provided they are reasonable, to see the norm as having some weight when taken together with other reasons proscribing the act that the norm prescribes. As Vinx states: "Belief in legal legitimacy, according to Kelsen, is the only reasonable form of acceptance of claims to political legitimacy because it is the only form of belief in political legitimacy that does not depend on ideology."³¹ Kelsen never uses the term "legitimacy" to describe the normativity that the pure theory assigns to law.³² Although the quote above might be read to suggest that "legal legitimacy" is, for Vinx, a distinct form of legitimacy from "political" legitimacy, I think it is better to understand "legal legitimacy," for Vinx, as a specific form, or species, of political legitimacy. Legal legitimacy being distinguished, for Vinx, from other forms by its lack of reliance on "ideology."³³

This legitimacy, for Vinx, is categorically distinct from concerns over the substantive justice of the norms that make up a legal system. To say that a political decision, a norm, within a legal system is legitimate does not necessarily entail approval of its substantive merits. As Vinx states: "The core intui-

27 Vinx 61

28 Ibid

29 Ibid

30 Vinx 60; "This picture of the relation between legitimate law and individual decisions rejects Raz's view that valid reasons with exclusionary force must invariably prevail over the reasons they replace." Vinx 74 – 75 footnote 104.

31 Vinx 61

32 Vinx 59

33 Vinx 61

tion guiding my use of [legitimacy] is the idea that a political decision can be legitimate, in virtue of its pedigree, without being or being accepted as substantively just.”³⁴

Vinx is not arguing that the pure theory is merely compatible with his account of political legitimacy. Instead, Vinx is arguing that the pure theory itself accounts for the source of the political legitimacy that he is seeking to describe. Vinx states that according to the pure theory, “legality is not just a necessary condition of political legitimacy. It is also the only valid source of de jure legitimacy.”³⁵ It is “valid” as a source of legitimacy because it “does not depend on ideology.”³⁶

Each state, according to Vinx, no matter how far from its ideal, possesses some degree of legal legitimacy, even if not enough in certain legal systems to give a reasonable person reason to exclude other reasons for acting contrary to the prescription of the legal norm.³⁷ Every legal order possesses, at least, some minimum of legitimacy “due to the fact that all its acts are filtered through a legal hierarchy.”³⁸ Being filtered through a legal hierarchy invests the norms of any legal system with a minimum of exclusionary force, for Vinx, because “someone who is not willing to give any exclusionary force whatsoever, in his practical deliberations, to the fact that a political decision he is expected to defer to has been filtered through legal order is acting in a morally blameworthy fashion since he expresses a principled unwillingness to subject his normative conflicts with others to legal arbitration.”³⁹ The degree of normativity, or exclusionary force, that we ought to “give to the state’s decisions is dependent on the degree to which the system approximates a utopia of legality,” for Vinx.⁴⁰

34 Vinx 59

35 Vinx 61

36 Ibid

37 Vinx 72 - 74

38 Vinx 72

39 Vinx 74

40 Ibid

For Vinx, the normativity that the pure theory assigns to laws ought to be understood as having more or less weight for those whose actions the law seeks to instruct.⁴¹ This is in addition to the base line of legitimacy that all legal systems have in virtue of their hierarchical structure. Vinx's approach ties the normativity that the pure theory assigns to laws to a legal system's proximal relationship to an ideal legal system. He argues: "whether the legality of a political decision is a strong enough reason of legitimacy to justify the state's unconditional demand for conformity with that decision will depend on how well the state in question approximates the constitutional ideal of a utopia of legality."⁴² That justificatory force is a "matter of degree."⁴³ As a state more closely approximates this ideal legal system, the greater the normativity of its laws. And conversely, the further the state is from the ideal, the less legitimate its laws, that is, the less likely that the law's existence is sufficient reason to outweigh practical considerations that tend against conformity with a law. Vinx states: "[The ideal of the utopia of legality] is an attempt to outline the conditions under which acceptance of the general claim to obedience made by a legally organized state can take the form of genuine law abidingness. In a utopia of legality... exercises of political power that exhibit full legality will typically possess a legitimacy strong enough to motivate reasonable deference, regardless of how those who are legally authorized to take political decisions choose to exercise their powers."⁴⁴

A state that closely approximates the ideal of legality will have laws with sufficient exclusionary force to defeat practical considerations tending away from compliance with the act prescribed by the law. In a state that has fully developed the legitimacy enhancing features so that it perfectly approximates the ideal of legality, the legitimacy of the norms of the system will be sufficiently strong so that the addressees of the norms of the state legal system will always be able to "live with" the norms, or take them to be preemptive, "because the legal legitimacy of these decisions will be strong enough to

41 Vinx 60, especially footnote 83; 74 - 75, especially footnote 105

42 Vinx 61

43 Vinx 61

44 Vinx 76

motivate reasonable deference to these decisions.”⁴⁵ “In a utopia of legality legal legitimacy can always step in for other reasons for conformity with the state's demands, for example belief in the substantive rightness of the decisions, trust in the moral integrity and practical expertise of the rulers, or a shared conception of good governance, should these latter motivations prove unavailable. And insofar as legal legitimacy can step in for such reasons, it will make possible the peaceful coexistence between morally divided groups in a pluralist society.”⁴⁶

For Vinx, an actual legal system's close proximal relationship to an ideal legal system confers on the actual system sufficient legitimacy to “justify a general duty to obey the law.”⁴⁷ He identifies three legitimacy enhancing features whose possession allows a state to more closely approximate the ideal, and therefore, be more “legitimate.”⁴⁸

The three legitimacy enhancing features that Vinx identifies are (1) the impartial administration of law, (2) the democratic creation of general legal norms, and (3) a formal constitution to protect the interests of the individual and of minority groups. All municipal legal systems, according to Vinx, share the same “utopia of legality,” the distance from which measures the normative force of that municipal legal system's laws. The system of international law, however, does not share the same “utopia” as that shared by the municipal legal systems. For the system of international law, there is a different ideal legal system, which is called the *civitas maxima*, the distance from which measures the normative strength of the norms of international law. Because of this, there is a separate set of legitimacy enhancing features that are available to strengthen the normative power of international laws.⁴⁹ In order to achieve

45 Vinx 74

46 Ibid

47 Vinx 66 - 67

48 Vinx 59

49 Vinx 194 - 200

this civitas maxima, “legally unauthorized use of force” must be prohibited by international law, and possible conflicts among states must be subject to “compulsory adjudication.”⁵⁰

3.1 A Problem for Vinx

Vinx states: “whether the legality of a political decision is a strong enough reason of legitimacy to justify the state’s unconditional demand for conformity with that decision will depend on how well the state in question approximates the constitutional ideal of a utopia of legality.”⁵¹ The level of legitimacy of international law, for Vinx, also depends on the relative closeness of international law to its ideal of civitas maxima. In both cases, the norms of each system possess their respective levels of legitimacy in virtue of a presupposed basic norm.

The unified system of law has only one basic norm. This basic norm, for Vinx, legitimizes the laws of the legal system and atop the unified system. If we take as our starting point the conception of the unified system with international law as the positive legal system at the top, then the basic norm for the unified system will be the basic norm of international law. For Vinx, this basic norm “makes a general attribution” of legitimacy to all of the norms of international law based on the relative closeness of international law to its ideal.⁵² Each of the positive norms of international law will possess the legitimacy conferred on it by the basic norm. The municipal legal systems derive their legitimacy from customary international law, which is positive law of the system of international law. So, with this conception of the unified system, all legal norms will share the level of legitimacy which stems from the relative closeness of international law to its ideal. However, given the choice hypothesis, it is possible to conceive of any one of the municipal legal systems as inhabiting the position that international law inhabits above. Further, it is not the case that every municipal legal system shares the same level of legitimacy. Some municipal legal systems are democratic, some are not. Some municipal legal systems have formal

50 Vinx 199

51 Vinx 61

52 Vinx 65

constitutions that protect the rights of minorities and individuals, some do not. Differences in the extent to which different municipal legal systems have adopted Vinx's three legitimizing features mean differences in the levels of legitimacy these municipal legal systems will possess, for Vinx. Therefore, given the choice hypothesis and the unity of the law, the level of legitimacy for any law of the unified system is left indefinite. Depending on how one conceives of the unity of the law, the level of legitimacy for all of the laws of the unified system will change, and, as Kelsen recognized, there is nothing in the pure theory to prefer one conception to another.

Vinx also cannot hold, from within the pure theory, that the level of legitimacy of each legal system is derived from that legal system's proximity to its ideal. The principle of effectiveness of customary international law is, according to Kelsen, a positive norm of international law. It is also the source of the legitimacy of the municipal legal systems under the unified system, or all of the municipal legal systems with the exception of one in the case of that one being the source for the validity of all law in the unified system under the choice hypothesis. If we determine the level of legitimacy of one of the municipal legal systems and try to assign that level to the customary international law that is the source, under the pure theory, of the legitimacy of that municipal legal system, then we will have a norm of a legal system (here, a norm of customary international law) that does not derive its level of legitimacy from the relative closeness of its legal system to that legal system's ideal. However, Vinx's point was that each legal system derives its level of legitimacy from its system's proximal relation to its own ideal.

If, on the other hand, because each legal system derives its level of legitimacy from its proximal relation to its ideal, we hold that customary international law has that level of legitimacy that is common to all international law, then we collapse back into the first situation, whereby each legal system within the unified system shares the same level of legitimacy as the system at the top of the unified system. This is because those municipal legal systems for whom customary international law is the source of their legitimacy will share the legitimacy of the customary international law. This holds also under

the choice hypothesis. If we conceive of the unified legal system as having the basic norm of a municipal legal system as its source of legitimacy, then the source for the legitimacy of international law, according to the pure theory, will be a positive law of the municipal legal system at the top of the unified system.

3.2 The Basic Norm Left Without a Purpose

For the pure theory, it is the presupposition of the basic norm that is the source for the normativity of all law. If the legitimacy, or special normativity, of the law comes from the relative closeness of a legal system to its ideal, then it is no longer the presupposition of the basic norm that is supplying normativity to law. Fundamentally, we are left with no reason to continue presupposing the basic norm. Vinx's reading of the pure theory thus proves to be untenable.

4 BINDREITER

For Bindreiter, we are today faced with a “plurality of complex legal systems.”⁵³ As “state sovereignty,” has been “transcended” new legal systems have developed.⁵⁴ There are new legal systems that include supra-national elements that seemingly cannot be accounted for by legal positivism, according to Bindreiter. One such example is the legal system of the European Community (hereinafter EC). Although it has grown from treaties between the member states, it has come to possess characteristics that go beyond many treaty organizations, characteristics that are state-like. An example is the EC law's claim of primacy with respect to the laws of the member states. Still, the EC legal system fails to possess many of the characteristics that other states possess, such as a clearly defined constitution, clearly defined limits on the scope of power that is exercised by the EC to the exclusion of the legal systems of the member states, etc. Because of the nature of the EC, Bindreiter is concerned with how legal

53 Bindreiter 215

54 Ibid

positivism can account for the “peculiar attributes of EC law.”⁵⁵ As Bindreiter states: “For a legal positivist, there is nothing in support of the EC claim to primacy,” for instance.⁵⁶

Bindreiter tries to find a way to allow legal positivism, specifically Kelsen's pure theory, to account for EC law and its relationship to its member states. In finding a way to allow legal positivism to account for the EC legal system, Bindreiter sees a need for legitimation, through democratic legitimacy. Specifically, Bindreiter argues that the EC can sustain a special kind of “conditional” basic norm within the pure theory. This “conditional” basic norm exceeds Kelsen's understanding of the basic norm by adding a criterion of democracy to Kelsen's own criteria for presupposing a basic norm.

4.1 Integration and Independence

Bindreiter is concerned with the EC law's claim to be “integrated” into the national legal systems of the member states, while also being a legal system “independent” of those same municipal legal orders.⁵⁷ The relationship between the legal system of the EC and the legal systems of the municipal legal systems, for Bindreiter, is not describable either as merely the relationship between the member states and their ratified treaties, nor can the EC legal system be described as a state. Although the EC is not a federal state, it is a “distinctly federative organization.”⁵⁸ The EC lacks a constitution, though it is in the midst of “a process of constitutionalization.”⁵⁹ The question becomes, can EC law be grounded in the presupposition of a basic norm, and thereby be accurately accounted for by legal positivism, specifically Kelsen's pure theory?⁶⁰ For Bindreiter, the answer is yes, with the use of a “conditional” basic norm for the EC (which will be discussed in more detail below).⁶¹

55 Bindreiter 130

56 Bindreiter 216

57 Bindreiter 187

58 Bindreiter 156

59 Bindreiter 159

60 Bindreiter 220

61 *ibid*

4.2 EC Law as Distinguished from Ordinary Treaty Organizations

Three “constitutional principles” have been elaborated by the European Court of Justice, ECJ, beginning in the 1960s. These principles are the principles of the “autonomy,” “precedence” and “direct applicability” of EC law within the legal systems of the member states. Through the adoption of these principles in the decisions of the ECJ, EC law has, according to Bindreiter, grown beyond its treaty organization roots and become something more.⁶²

The autonomy principle declares the legal order of the EC and the legal order of any one of the member states to be “two separate and distinct legal orders.”⁶³ This principle first appeared in the “Bosch” case. This case originated in a Dutch court of law. A lower Dutch court requested a preliminary ruling on a question of EC law from the ECJ. Before the ECJ rendered its preliminary ruling, the Dutch court's decision to request the preliminary ruling was appealed to the Dutch Supreme Court. The question that the ECJ faced was whether it must wait for the ruling of the Dutch Supreme Court on the appeal before handing down its preliminary ruling. The ECJ held that it did not have to wait for the ruling of the Dutch Supreme Court on the procedural correctness, according to Dutch law, of the requested preliminary ruling of the ECJ in the first place. The ECJ stated: “that the municipal law of any Member State, whose courts request a preliminary ruling from this court, and Community Law constitute two separate and distinct legal orders.”⁶⁴ In a later case, the “Van Gend en Loos” case, the ECJ grounded the autonomous nature of EC law in the transfer of “sovereignty” from the Member states to the EC.⁶⁵ The ECJ looked to the “preamble” and “introductory provisions” and “concluded that [the Rome Treaty, one of the founding treaties of the EC] was not a question of an ordinary international treaty.”⁶⁶ In its deci-

62 Bindreiter 157 - 158

63 Bindreiter 159

64 Case 13/61, De Geus/Uitenborgerd v. Bosch en Van Rijn, [1962] ECR 45 (in E/S p. 118 f.); <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61961CJ0013:EN:PDF> p. 49 – 50.

65 Bindreiter 159 – 160.

66 Bindreiter 160.

sion, the court stated that the Rome Treaty had created institutions “endowed with sovereign rights, the exercise of which effects Member States and also their citizens.”⁶⁷

This transfer of sovereignty to the EC had not only created an independent legal system of EC law, it also limited the rights of the member states when it came to legislation and interpretation.⁶⁸ The precedence principle states that if there is a conflict between a rule of the EC and a rule found in the legal system of a member state, the EC rule takes precedence. It does not matter on what level of the norm hierarchy the rule of the municipal legal system is found or when it was created, if it conflicts with any EC law, it is immediately made inapplicable.

In “Costa,” the ECJ held that provisions of EC law found in Article 5 of the Rome Treaty took precedence over a later enacted Italian statute. The court stated that the Rome Treaty was an independent “source of law” that “on entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.” The court held that because the member states had transferred some of their sovereignty to the EC, EC law took precedence in those areas.⁶⁹ In a later case, the “InternationaleHandelsgesellschaft” case⁷⁰, the ECJ showed just how far this precedence extended. InternationaleHandelsgesellschaft had been required by a regulation of the EC legal system to leave a deposit in order to obtain a license to sell wheat. If InternationaleHandelsgesellschaft failed to meet its quota, it would forfeit the deposit. When it failed to meet its quota, InternationaleHandelsgesellschaft sued claiming that the required deposit violated its fundamental right to proportionality under the German constitution. The ECJ held that fundamental rights are already sufficiently protected under EC Law, and that one cannot use national law to review the validity or constitutionality

67 Ibid

68 Ibid

69 Bindreiter 161 – 162.

70 Case 11/70, InternationaleHandelsgesellschaftm.b.H. v. Einfuhr – und VorratstelleFuerGetreide und Futtermittel, [1970] ECR 1125.

ty of EC law. Here, the ECJ held that an EC regulation took precedence over the fundamental rights of the German constitution.⁷¹

The third “constitutional principle” handed down by the ECJ is the principle of Direct Applicability. In “EEC Commission v. Italy,” The ECJ held that EC regulations are “directly applicable in all Member States and come into force by virtue of their publication in the official journal of the Community.” Further, the ECJ held that EC regulations must be applied in their original EC form by Member States, and that “all methods of implementation [implementation being the codification of those regulations into the codes of a Member States] are contrary to the Treaty.”⁷² The effect of not allowing the member nations to codify EC regulations into their own legal systems makes clear that the regulations of the EC do not derive their validity from being posited in a certain way within the legal systems of the member states. Instead, those regulations derive their validity from membership in the legal system of the EC. It also has the effect of not situating those regulations within the procedures of the member states.

In “Simmenthal II,” Italy had enacted a fee for the inspection of meat imported from other European countries. This additional fee was contrary to the Rome Treaty and two EC regulations. Simmenthal, an importer of meat into Italy, filed suit for repayment. In Italy, the court of first impression, lower court, was forbidden from considering the constitutionality of legislation, so it could not strike down the Italian law. The ECJ considered two questions: whether the lower court had to apply the Italian law until it could be overturned by the Italian Constitutional Court, and whether the Italian law must prevail because enacted later in time to the EC regulations. The ECJ held that every national court must apply EC laws and regulations as soon as they enter into force for as long as they remain in force. The ECJ also held that as soon as the EC law or regulation entered into force, any conflicting national law be-

71 Bindreiter 163

72 Bindreiter 164 footnote 61.

comes inapplicable, so there is no need to wait for the Italian Constitutional Court to enter judgment on the Italian statute.⁷³

The “Van Gend en Loos” case concerned Article 12 of the Rome Treaty, which prohibits new import and export duties levied mutually by the member states of the EC. The Netherlands changed the classification of a type of formaldehyde, causing an increase in its import duty. An importer of this formaldehyde sued. The question before the ECJ was whether Article 12 was directly applicable and whether an individual could directly invoke the Article in a national court. The ECJ held both that the Article is directly applicable, because it is “clear and unconditional” and does not call for implementing measures, and that individuals can invoke this EC rule in a national court, because the preamble to the Rome treaty talks of both nations and “peoples.”⁷⁴ Following this case, in the “Van Duyn” case, the ECJ held that even Council Directives of the EC can be invoked by individuals. In that case, the ECJ held that Council Directive 64/221 on the movement and residence of foreign nationals, protecting the right of citizens of member states to move between states, was directly applicable when a Dutch woman was refused entry into the UK to work as a secretary for the Church of Scientology.⁷⁵

The EC legal system is now independent of the legal systems of the member states. Its independence is illustrated in what the ECJ has termed a transfer of “sovereignty” from the member states to the EC. As well as being independent, the laws of the EC also take precedence over the laws of the member states and must be applied by the courts of the member states, whether or not the court being asked to apply the EC law was created with the jurisdiction, or competence, to resolve conflicts between EC law and the laws of its own state. Finally, use of the laws of the EC is not restricted to the member states who are the actual signatories to the treaties, but can also be directly appealed to by the citizens

73 Bindreiter 165 - 166

74 Bindreiter 167

75 Bindreiter 168 – 169.

of those states to resolve conflicts. For these reasons, according to Bindreiter, the European Community is not a mere treaty organization.

4.3 Supra-National EC law as Distinct from States; Problematized EC “Constitution”

For Bindreiter, although the EC is more than a mere treaty organization, it is not a federal state. Claims of the EC to possess a “constitution” are “highly controversial,” if not just false, according to Bindreiter.⁷⁶ Thus, she prefers to refer to the EC as being in a process of “constitutionalizing.”⁷⁷

In support of this position, Bindreiter points to the concept of a constitution being “traditionally tied to the concept of a state.”⁷⁸ The European Community is “not even near to being a state,” because of a “remarkable lack of solidarity” among the citizens of the European Community concerning the Union. Also, there was no “political act of will” on the part of the citizens of the European Community that could give rise to a “genuine” constitution of the European Community.⁷⁹ Although the EC is a “legal personality and in command of treaty-making power” at the international level, the EC is not, according to Bindreiter, a “sovereign body.” Rather, the member states are “sovereign” and capable of deciding to leave the Union “in principle.”⁸⁰

Additionally, Bindreiter offers four reasons for “calling into doubt” the use of “constitution” when referring to the EC. First, the treaties underlying the EC contain a number of rules that are not commonly found in constitutions. The ECJ has “abstained” from distinguishing between the rules found in the treaties and those not so found, leaving the rules which might be called “constitutional” in nature on the same level as other rules that are not typically found in constitutions, such as rules on agriculture

76 Bindreiter 174

77 Bindreiter 157

78 *ibid*

79 *ibid*

80 Bindreiter 155

or environmental protection.⁸¹ Second, Bindreiter points to the “vague nature” of the treaties of the EC (there have been, to date, more than 20 treaties between the member nations – including the treaties of Rome and the Maastricht treaty). This includes a concern that the objectives of the treaties are too vaguely expressed. Recently, this concern has also been expressed by Germany. In the “Maastricht Judgment,” the Federal Constitutional Court of Germany, Bundesverfassungsgericht, over concerns about the lack of clear limitations on the growth of EC jurisdiction, held that it must be clear “at the outset, to which extent the national legislator agreed to a transferral of sovereign powers.” In the “Maastricht Judgment,” the German Constitutional Court referenced Article 38(1) of the German constitution, which grants to Germany’s citizens the right to be represented in the German legislature through direct elections. This provision would be left empty, “entleert,” if there is no limit to the growth of the jurisdiction of EC law, law which is directly applicable in German courts and takes precedence over any conflicting German law.⁸² Third, any “EU Constitution” cannot be said to be an “expression” of the political will of the citizens of the European Union. At best, any claim to a constitution must be taken from discrete sentences of treaties and from decisions of the ECJ. Fourth, there is a lack of unequivocal delimitation in the powers conferred on the institutions of the European Union.⁸³ Even if not able to constitute a federal state, Bindreiter argues that: “the European Union emerges in fact as a distinctly federative organization thanks to the (binding) preliminary rulings of the ECJ.”⁸⁴

In addition to the EU not being “grounded in a written constitution,”⁸⁵ there are other reasons why the EC and the member states fail to constitute a federation, for Bindreiter. As Bindreiter points out, although the European Union has the power to enter into treaties with foreign nations, treaties binding on the entire EU, the EU lacks a “sovereignty” that one expects with the federal level of a feder-

81 Bindreiter 176

82 “Urteil des Zweiten Senat vom 12. Oktober 1993 (2BvR 2134/92 and 2159/92); on the constitutionality of the Law on the Treaty on European Union; English translation in [1994] 1 CMLR 57.

83 Bindreiter 176 - 177

84 Bindreiter 156

85 Bindreiter 155

ation. Specifically, the member states are themselves considered “sovereign” and capable, in principle, of leaving the Union “should they want to do so. If they were part of a federation this would be impossible.”⁸⁶ Additionally, compared with federal constitutional courts, the powers of the ECJ are limited. Generally, the decisions of constitutional courts, or supreme courts, of federations are binding on both the federal and state level. However, the ECJ lacks the power to “annul” or “even interpret” national rules that “diverge from Community provisions.”⁸⁷ Instead, laws at the level of the member states that conflict with EC laws are said to be inapplicable, but remain otherwise good law. However, in practice this means that EC law decides whenever there is a conflict between an EC law and the law of a member state.

4.3.1 EC Law, Dualism and Monism

The claim of EC law to take precedence over national law is not, according to Bindreiter, explainable under either a monistic or dualistic perspective. For the dualist, the laws of a nation and any other legal systems are distinct. Therefore, no law that is part of an external legal system can be valid, applicable, etc., unless it has been recognized by the legal system of that nation. For the dualist, EC law cannot be binding unless it has been expressly incorporated through legal enactment. Otherwise, the norms of distinct legal systems are simply two ships passing in the night. Each is valid and applicable within its own system's jurisdiction, competence, but no further.⁸⁸ Therefore, EC law cannot be seen as applicable within a member state in the absence of express legislation on the part of a particular nation. This is at odds with the direct applicability of EC law. In the “EEC Commission v. Italy” case above, the ECJ not only held that member states did not need to implement EC law within their own legal systems, it held that member states are not to take such steps of implementation, and that all EC law becomes

86 Bindreiter 154

87 Bindreiter 156

88 Bindreiter 196 – 202.

directly applicable within each member state as soon as it is published in the “official journal of the Community.”⁸⁹

Additionally, there is no room in a dualist view as described above for a law from outside a state to take precedence over a norm of the constitution of a state, because any law of that state that picked out the external legal norm as applicable within the state would have been enacted pursuant to that constitution. Under the rule of *lex superior derogat legi inferiori* the norm found in the constitution would take precedence over the external legal norm. However, in “International Handelsgesellschaft” above, the ECJ held that EC law took precedence over even questions of whether an EC regulation violates the basic right of proportionality under the German constitution.⁹⁰

Bindreiter lays out two alternatives for the monistic perspective. The first perspective, Alternative 1, perceives law from the perspective of the primacy of national law. With this perspective, EC law gets its primacy over state law from the constitution of the state. Bindreiter uses the example of the “Ramel” case.⁹¹ In the “Ramel” case, a French wine merchant imported some wine from Italy. It was determined by the French government that the wine failed to have the required proportions of alcohol and sugar. Ramel fought the decision by claiming that the French law conflicted with EC regulations. The French court held that the EC regulations overruled the French law, but held so based on the French constitution. Therefore, according to the French court, which was taking the monistic view of the law with their own constitution as primary, the precedence of EC law is grounded not in a principle of precedence found in EC law, but in a clause of the French constitution. Bindreiter expresses this as EC law being applied on false grounds from the perspective of the EC. From the perspective of the EC, the precedence of EC law does not stem from the constitution of a member state, but from the transference of sovereignty from the member states to the EC.

89 Bindreiter 163

90 Ibid.

91 Case Administration des Contributions indirectes et Comité Interprofessionnel des vins doux naturels v. P. Ramel (E/S pp. 206 – 208). [get better cite for this]

The second alternative of legal monism holds that the norms of international law are superior to the norms of national law. The validity of all law is delegated from the basic norm of international law. Under this understanding, international law stays international law, binding against the nation but not within it, until it is transformed into municipal law through an enactment of the state.⁹² However, EC law is directly applicable within member states, and can be appealed to by both member states and citizens of those states, without being first codified into the legal systems of those states. Because, according to Bindreiter, neither of the traditional theories, monism and dualism, are able to account for the direct applicability of EC law within the member nations of the EC, Bindreiter looks to a new source to account for the applicability of the EC laws. The European Community lacks many of the features that we normally find in a state. At the same time, the European Community can no longer be reduced simply to its founding treaties.

4.4 Bindreiter's Solution

Bindreiter looks to the pure theory of law and proposes to ground the EC's claim to autonomy and precedence with a conditional basic norm for the EC. Bindreiter states: "for supra-national law to be considered as an autonomous, valid and binding legal system it requires, juridico-theoretically, that an EU-equivalent to Kelsen's basic norm be presupposed or assumed."⁹³ However, Bindreiter argues that the EC is not capable of sustaining a basic norm in the way that other states do under the pure theory. There is no "clearly outlined top (or constitutional core),"⁹⁴ and therefore no historically first constitution to be validated by a basic norm of EC law. Though the EC lacks a constitution, it is in the midst of "a process of constitutionalization" through the preliminary rulings of the ECJ.⁹⁵ These decisions have

92 PTL 337

93 Bindreiter 202

94 Bindreiter 203

95 Bindreiter 159

had the effect of turning the EC into a “distinctly federative organization.”⁹⁶ Because of the “constitutionalizing” principles outlined above, EC law is not reducible to a treaty organization of international law, according to Bindreiter. Bindreiter aims to resolve this difficulty of accounting for EC law using legal positivism by proposing a “conditional” basic norm for the EC. This “conditional” basic norm is importantly distinct from other basic norms under the pure theory, and will allow the EC to fit into the pure theory in a way similar to that of a municipal legal system.

For Bindreiter, the claim to autonomy and precedence requires “a wholly new type of ultimate criterion of validity.”⁹⁷ This criterion of validity will go beyond the criteria that Kelsen laid out for presupposing a basic norm. For Bindreiter, presupposing a basic norm for the EC will require a criterion of legitimacy in addition to considerations of the coercive nature of a set of norms, their hierarchical structure and their by-and-large effectiveness. This added criterion goes beyond “the boundaries of pure positivism.”⁹⁸ Instead, Bindreiter argues that by including the “non-juridical” criterion of democracy, her positivism is “inclusive.” As Bindreiter states: “The positivism suggested here is 'inclusive' in the sense that it comprises the element of democracy.”⁹⁹

One reason for the necessity of the criterion of democracy, for Bindreiter, is competing claims to jurisdiction between the EC and its member states. As Bindreiter states: “The fields of application of [member state and Community] norms can overlap in so far as several 'legal systems' claim to bind the same persons in the same issues. In short: the need for legitimation is obvious.”¹⁰⁰ For Bindreiter, this

96 Bindreiter 156

97 Ibid

98 Bindreiter 218

99 Ibid. It is not clear that the requirement of democracy as a ground for the normativity of EC law is an example of inclusive, or “soft,” legal positivism. For Bindreiter, it is not that the EC does in fact include a democratic requirement in its positive law, or even that it may, but that a criterion of democracy is necessary for the normativity of EC law (necessary for the presupposition of a basic norm for the EC). Inclusive legal positivism takes the position that there is no necessary moral content to a rule of law, but that moral content may be included in a given legal system by choice. Waluchow, W. J. “The Many Faces of Legal Positivism.” University of Toronto Law Journal 48, 1998: 395.

100 Bindreiter 215

legitimacy will allow the theoretical tensions that exist for legal positivism between EC law and its member states to be relaxed, and allow this “distinctly federative system” to fit within the pure theory of law.

4.4.1 *Democratic Legitimacy*

Legitimacy is defined by Bindreiter as “acceptance... on the part of the norm addressees, of the norms, the institutions and the decisions taken by the legal organs.”¹⁰¹ Legal rules can be legitimated in two different ways. The rules of a legal hierarchy can be legitimated from “within the framework of a given norm system.”¹⁰² This is a legitimation that is internal to the legal system, wherein the legal rules’ “validity” is “established *within* the framework of a given norm system,” according to Bindreiter.¹⁰³

Legal rules can also be legitimate by being “justified” from outside the framework of a given norm system.¹⁰⁴ Justification, in this sense, comes from a point of view “different from the internal, legal point of view mentioned above.”¹⁰⁵ One such justification, for Bindreiter, is the “principle of democracy.”¹⁰⁶

Bindreiter argues that democratic legitimacy ought to have more “weight than other kinds of legitimacy.”¹⁰⁷ In support of her claim, Bindreiter points out that democratic legitimacy is relatively uncontroversial. Bindreiter asks rhetorically: “is there... at all an acceptable alternative to the principle of democracy?”¹⁰⁸

101 Bindreiter 5
 102 *Ibid*
 103 *Ibid.*
 104 *Ibid.*
 105 *Ibid.*
 106 *Ibid.*
 107 Bindreiter 205
 108 *Ibid.*

4.4.2 Democratic Legitimacy Cannot Resolve Overlapping Jurisdictions

Bindreiter argues that the need for legitimation is “obvious” because of overlapping jurisdiction between EC and member state law.¹⁰⁹ However, she fails to see that democratic legitimacy cannot answer this concern. If the EC meets the condition of being democratic, so do the member states. To the extent that the EC and its member states are similarly situated with regard to democracy, they each possess democratic legitimacy. Therefore, appeals to the democratic legitimacy of each will not distinguish between the competing claims to jurisdiction over the same persons, time, and subject matter.

4.4.3 A Conditional Basic Norm for the EC

Bindreiter proposes grounding EC law in a “conditional” basic norm.¹¹⁰ “Conditional basic norms” are adopted by Bindreiter from Aleksander Peczenik.¹¹¹ For Peczenik, the conditional basic norm is a way to allow the laws of a system to continue to be recognized as valid after the basic norm for the system has been “problematized.”¹¹² According to the pure theory, the basic norm for a municipal legal system states that “whatever the framers of the first constitution have expressed as their will” is “valid.”¹¹³ This can also be expressed as whatever the framers of the first constitution express as their will ought to be obeyed. When questions are raised as to whether the constitution ought to be obeyed, then, according to Bindreiter, the basic norm of the municipal legal system is problematized, called into doubt. Bindreiter gives the example of a constitution being called into doubt when a series of laws are enacted that are sufficiently “unjust” as to raise questions about whether they ought to be observed. “Further questions” may be raised about “whether the constitution [that validated these laws], as such, ought to be observed.”¹¹⁴ This conflicts with Kelsen's basic norm as stated above. For Peczenik, when a basic norm is problematized, it is shown to be a weak ground for validity. In situations where the consti-

109 Bindreiter 215

110 Bindreiter 215 - 217

111 Bindreiter 216

112 Bindreiter 216

113 LT 57

114 Bindreiter 216

tution of a nation is called into doubt, and the basic norm for that nation becomes “problematized,” a conditional basic norm may be applied.

Bindreiter states: “According to Peczenik's theory, the jurist's answer [to a problematized basic norm]... implies a 'hidden' inference.”¹¹⁵ According to Bindreiter, the “rational reconstruction” of this inference of a conditional basic norm, as laid out by Peczenik, is as follows:

The first premise - “premise 1” - consists of theoretical sentences. These sentences describe the general structure of the system [whose basic norm has been problematized], and what is more: they contain criteria for the system for being considered, by officials and citizens alike, as a valid legal system. “Premise 1”, then, contains inter alia sentences to the effect that the norm–system in question

- (a) contains norms that claim to be correct, monopolize coercion, to have higher rank compared with the other norms of the system, and to regulate all aspects of life;
- (b) is made up of various levels
- (c) contains different types of norms, inter alia norms of action that almost always are applied by officials;
- (d) is based on (lawful) coercion; and
- (e) is not extremely immoral (that is, unjust) nor extremely cruel vis–a–vis the population.¹¹⁶

Given “premise 1,” the jurist tacitly infers the conclusion that the “basic laws of the system are valid law and 'ought to' be observed (that is are binding).”¹¹⁷ However, the conclusion that the laws of the system are valid does not follow logically from the sentences in “premise 1,” because the relationship between the premises and the conclusion is incomplete. Therefore, the inference to the conclusion that the laws are valid is said, by Bindreiter, to be “‘jumped to' spontaneously and intuitively.”¹¹⁸ The “theoretical” sentences (a) through (e) above are the criteria that Peczenik requires for presupposing a conditional basic norm in instances when Kelsen's basic norm becomes problematized.

For Bindreiter, Peczenik's description of the inference to the conditional basic norm in instances where Kelsen's basic norm has become problematized “is – excepting one important difference – the

115 Ibid

116 Bindreiter 216 - 217

117 Bindreiter 217

118 Bindreiter 216

same as” the arrival at a conditional basic norm for the EC.¹¹⁹ Moral criteria will not be included in “arriving at” a basic norm for the EC, as “[fundamental rights] have already been taken care of by the European Court of Justice.”¹²⁰ Instead, the criteria of the conditional basic norm will include, in addition to the “purely formal criteria” found in Kelsen, “the requirements of democracy.”¹²¹ “The kind of basic norm I have in mind is conditional in the following sense. The binding force of the (directly applicable) rules and norms of EC law is made to depend, via a hypothetical basic norm, on certain law-creating facts – facts that would comprise the element of democracy on all levels of the norm structure of the system. The 'ground' of legitimacy – in Kelsenian parlance: the 'Geltungsgrund' [basis of validity] of European law – would be democracy.”¹²²

4.4.4 A Problem for Bindreiter's Criteria

It is not clear what criteria must be met to presuppose a conditional basic norm for the EC. Bindreiter claims that Peczenik's moral criterion, that the legal system not be too unjust, is not a criterion for a conditional basic norm of the EC because the ECJ has “already taken care of” the issue of fundamental rights for the citizens of the EC.¹²³ However, this confuses satisfying a criterion with not having a criterion. Saying that a conditional basic norm for the EC does not include a criterion that the laws not be “extremely immoral” does not mean that the laws are already protected against being too unjust. Rather, saying that there need not be such a criterion means that EC law could still be legitimated by a presupposed basic norm even if the EC did nothing to protect the fundamental rights of its citizens. This raises the question of what other criteria are also necessary for presupposing this conditional basic norm for the EC.

119 Bindreiter 216
 120 Bindreiter 218
 121 Bindreiter 220
 122 ibid
 123 Bindreiter 218

4.4.5 *A Problem for Bindreiter's Account of Legitimacy*

It is not clear whether legitimacy is, for Bindreiter, a factual or normative matter. Bindreiter defines legitimacy as “acceptance” of the norms, institutions and decisions of a legal system by the addressees of those norms.¹²⁴ This sounds as though legitimacy is a factual matter. However, as Kelsen points out: “we are not in a position to say anything with exactitude about the motivating power which men's idea of law may possess.”¹²⁵ A norm addressee's actions may conform to the norm because he is motivated by the norm, or it may conform because the addressee holds certain moral beliefs that call for the same action. There are many motivations that one might have for conforming their actions to the law. As an objective matter, we can only determine whether people conform in their actions to the law. That the individuals of a system conform in their actions to the norms of the system is efficacy. Therefore, if legitimacy is taken to be a requirement that the addressees of the norms of a system “accept” as a factual matter the norms of the system, then legitimacy collapses into efficacy. Bindreiter argues that efficacy, together with being coercive and having a hierarchical structure, is not sufficient for allowing the presupposition of a basic norm for the EC. So, if legitimacy is a factual matter of the norm addressees' accepting the norms of the system, then we are moved no closer to presupposing a basic norm for the EC.

Bindreiter refers to democracy as the basis of validity, or “Geltungsgrund,” of EC law.¹²⁶ Bindreiter also equates “legitimacy” with “validity” when describing legal rules that are legitimized from “the internal, legal point of view.”¹²⁷ For the pure theory, the validity of law is its normativity. She goes on to describe democratic legitimacy as “justifying” law.¹²⁸ This suggests that legitimacy is, for Bindreiter, a normative matter; that legitimacy means that one ought to follow the laws.

124 Bindreiter 5
 125 GTLS 40
 126 Bindreiter 220
 127 Bindreiter 5
 128 Ibid

The criteria that Kelsen lays out for presupposing a basic norm (coerciveness, having a hierarchical structure and by-and-large effectiveness) are all factual. But, law itself is normative. The “ought,” or normativity, of the law comes, for the pure theory, from presupposing the basic norm. If democratic legitimacy is understood to be grounding the normativity of the law (providing the ought of the law), then it is no longer the presupposition of the basic norm that is providing the normativity of the law, and we are left with out a reason to presuppose the a basic norm.

4.4.6 A Kelsenian Basic Norm for the EC

In support of her claim that the pure theory cannot presuppose a basic norm for the EC, Bindreiter points to the differences between the EC and both treaty organizations of international law and constitutional states. However, Bindreiter does not argue that the EC isn't by-and-largely effective. Nor does Bindreiter argue that the laws of the EC are not coercive or that the EC lacks a hierarchical structure. These are the criteria for presupposing a basic norm. Instead, Bindreiter argues that the EC lacks a “constitutional core” and a “clearly outlined top.”¹²⁹

For the pure theory, there is a continuum between centralization and decentralization. Total centralization exists when all the norms of a system are valid across the whole territory. Total decentralization exists when the norms of a system are “valid only for different parts of the territory.”¹³⁰ These extremes are only “ideal,” according to Kelsen. Every legal system exists somewhere on the continuum between total centralization and total decentralization. Closest to the extreme of total decentralization are “primitive pre-state legal communities.” An example of a primitive legal system is international law. International law is “a primitive legal system...marked by wide ranging decentralization.”¹³¹ In fact, the EC is more centralized than international law. The EC has the ECJ to apply its norms, while international law lacks a central court to determine whether there has been an “unlawful

129 Bindreiter 203

130 GLTS 306

131 LT 108

act” according to international law.¹³² Additionally, international law lacks a special legislative organ.

The EC has a parliament.

International law has a hierarchical structure, it is coercive, and it is by-and-large effective. Like the EC, international law lacks a core constitution and defined top. Bindreiter argues that the EC lacks a constitution in part because the norms of the treaties are undifferentiated. Those that might be considered constitutional are treated as being on the same level by the ECJ as norms regarding agriculture, for instance. However, this is also true of the highest positive level of norms of international law. Customary law includes everything from distinguishing states from non-states, to outlawing piracy and protecting the rights of ambassadors.¹³³ The pure theory presupposes a basic norm of international law which validates each of the customary laws. It is similarly possible for the pure theory to presuppose a basic norm for the EC that validates the treaties of the EC. Additionally, because the EC is by-and-large effective, the principle of effectiveness of customary international law can validate the treaties of the EC when the EC is not being viewed as the highest positive law of the unified legal system.

Not only is it possible for the pure theory to ground EC law in a presupposed basic norm and account for EC law within the positivist pure theory, there is some inductive evidence that it is already happening. As Bindreiter states: “Jurists simply have to presuppose a basic norm whenever they speak of 'valid law' or the legal 'ought' – that is, if they wish to figure as jurists.”¹³⁴ The preliminary rulings of the ECJ are being treated as valid within the member states of the EC. Lower courts in Italy are treating EC laws and regulations as applicable, and conflicting Italian law as inapplicable, for instance. EC law is being recognized as valid. This suggests that not only can a basic norm be presupposed for the EC, it is likely already being presupposed.

132 LT 109

133 For a discussion of the customary international law against piracy and the customary international law against “infringement of the rights of ambassadors” and the U.S. legal system see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

134 Bindreiter 218

5 CONCLUSION

Both Vinx and Bindreiter attempt to read political requirements into the normativity that the pure theory attributes to law. For Vinx, the normativity of law, or as he calls it the legitimacy of law, is determined by the relative proximity of a legal system to its ideal. Principles of legitimacy, including the principle of democracy, allow a legal system, on Vinx's account, to draw closer to its ideal and thereby increase its legitimacy. For Bindreiter, the presupposition of a basic norm for the European Community is conditioned on the EC being democratic.

The pure theory of law is not able to support Vinx's account of political legitimacy. The unity of all law under the pure theory together with the choice hypothesis will not allow the normativity of the laws of each municipal legal system, together with the system of international law, to be determined by the relative closeness of the individual systems to their respective ideal systems. More fundamentally, if the source for the normativity of law is its proximal relation to an ideal, then the pure theory's own source of legal normativity, the presupposition of a basic norm, is left without a purpose. For the pure theory, it is the presupposition of the basic norm that is the source of the normativity of all law.

Bindreiter's account runs into a similar issue. Bindreiter's argument that the EC legal system cannot be accounted for by legal positivism generally (excluding her own attempt at an "inclusive" positivist account) leads her to argue that a special kind of basic norm needs to be presupposed for the EC. For Bindreiter, resolution of the overlapping claims to jurisdiction made by the EC and its member states calls for legitimation. This special basic norm is conditioned on the EC being democratic. Democracy, and the democratic legitimacy that comes with it, will allow the "federative" EC to support a conditional basic norm.

We are left with questions about just what criteria are required by Bindreiter for this conditional basic norm and whether the requirement of democratic legitimacy can answer concerns about overlapping jurisdictional claims between the EC and its member states. More fundamentally, it is unclear

whether democratic legitimacy is a factual or normative matter for Bindreiter. If legitimacy really is just a factual matter of “acceptance” of the norms by the norm addressees, then legitimacy collapses back into Kelsen's criterion of by-and-large effectiveness. If, instead, legitimacy is normative, i.e. a legitimate law is a law that ought to be obeyed, then we are left without a reason to presuppose a basic norm, just as we are with Vinx. In fact, in contrast to Bindreiter's claim, it is not only possible to presuppose a basic norm for the EC, there is evidence that jurists are already making such a presupposition.

Although it is possible that tensions over the democratic nature of the EC might pose a long term issue for the by-and-large effectiveness of the legal system, this is a political concern and not a concern of the pure theory. Similarly, questions over the best form of a legal system are also outside of the domain of the pure theory. In Introduction to the Problems of Legal Theory, the English translation of the first edition of ReineRechtslehre, Kelsen states: “The Pure Theory denies in particular that it can be the task of legal science to justify anything whatever.”¹³⁵ The pure theory is an attempt to describe the law, and the special normativity that jurists and legal theorists assign to law, in an objective manner. It accomplishes this through the presupposition of a basic norm as the source of the normativity of law. The content of the legal norms of a municipal legal system is a political question. As Kelsen states: “The Pure Theory denies only that legal science has the capacity to justify the state by way of the law.”¹³⁶ The value in the pure theory is in recognizing, because of its recognition of the identity of law and the state, that one cannot reduce a political argument to a discussion of the law.

135 LT 106

136 Ibid

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