Kaarlo Tuori
Stellenbosch, May 2017
DRAFT

Six theses on the dialectic of unity and plurality in postnational law

The theses

Global law can no longer – if it ever could – be conceived of in terms of the black box model consisting of self-contained boxes of national (state) legal orders,[1] complemented with the box of international law. Instances of nonstate law both above the state – transnational law – and below the state – indigenous and religious law – have emerged (or been recognized) which do not fit the compartments of either national or international law. We live in an age of postnational law. State law may still be the dominant type, but it does not hold a monopoly over law, nor can the relations among the instances of law which make up the postnational plurality any longer be thought in accordance with the black box model. In order to make sense of the lawscape of our postnational age, we have to rethink both unity and plurality, as well their mutual relationship.

In this paper, which is related to the STIAS project *Postnationalism and the question of legal boundaries*, led by Hans K. Lindahl, I want to present and defend six theses about the dialectic of unity and plurality in postnational law:

1. The order in which we conceive of unity and plurality should be reversed: instead of examining how plurality emerges from unity we should explore how unity arises from plurality.
2. Even though we reverse the order of unity and plurality, in our reconstruction of the dialectic of unity and plurality we must still start from unity; from identifying the instances of law – possessing a certain unity – which make up the plurality of law in our postnational era. In turn, the unity and identity of the constitutive entities of legal plurality can be examined from three different starting-points, focusing on three different modes of existence of law: law as a

[1] Throughout this paper I use "national legal order" and "state legal order", as well as "national law" and "state law", synonymously.

normative legal order (an order of legal norms); law as it is realized in first-level socio-legal practices; and law as it is (re)produced in specialized second-level legal practices, such as adjudication, law-making, and legal scholarship.

3. Despite growing skepticism towards a general concept of law, I argue that we still need some basic general conceptual tools which facilitate identifying instances of law; drawing a boundary, however fuzzy and porous, between law and nonlaw; and separating, however tentatively and acknowledging fuzziness and porosity even here, state law and nonstate law. Yet such conceptual tools should be elaborated adhering to Weber's ideal type methodology. They are not meant to involve precise criteria allowing for clear-cut distinctions or comprehensive taxonomies, but to provide a tentative framework for launching the discussion of the present variety of law. Elaborating such ideal typical conceptual means from the distinctive features of (western) state law does not necessary entail falling in the eurocentristic trap and imposing parochial western categories on nonwestern (legal) cultures.
4. Inter-relations between the instances making up the postnational plurality of law are not only boundary-asserting but also boundary-crossing; not only conflictual but also consensual and dialogical, manifesting interlegality rather than simple diversity or radical pluralism. Moreover, postnational developments have altered the nature of both conflicts between legal regimes and relations of interlegality.
5. Postnational plurality has fundamentally affected the internal unity of instances of law, including state law regimes. The formal unity of the national legal order, so important to legal positivists and, as they argue, ultimately guaranteed by a Master Rule (such as Kelsen's *Grundnorm* or Hart's rule of recognition), is increasingly difficult to maintain, even when the legal order is reduced to its surface-level and the supporting legal cultural layers are ignored. The emphasis has shifted from formal to substantive (legal cultural) and discursive unity.
6. The exploration of the dialectic of unity and plurality also requires discussibg whether a second-level unity can be constructed from the plurality of instances of law. Evidently, second-level unity cannot rely on formal organizing principles, such as those constituting the unity of Kelsen's universal law, covering both all the national legal orders and international law. Under the conditions of postnational plurality, the unity can only be of discursive and substantive nature, building on deep cultural unities. Unities of varying reach can be reconstructed, and additional variation is brought about by the inevitable perspectivism of all reconstructions. In the dialectic of unity and plurality, plurality ultimately retains the upper hand.

1. *thesis: reversal of the hierarchy of unity and plurality*

Legal positivism was the dominant school in 20th century Western legal theory, and Hans Kelsen and H. L. A. Hart were its towering representatives, the former within the Continental European and the latter within the Anglo-American strand. Let me tentatively identify legal positivism through three basic tenets. First, all law is positive law, posited by explicit human acts; secondly, legal normativity and social facticity belong to two different domains of reality, i.e., the Ought (*Sollen*) and the Is (*Sein*); and thirdly, in the domain of the Ought, law is distinct from morals so that there is no necessary connection between law and morals.

Legal positivists are not blind to the plurality of law. Yet their clear emphasis is on unity. In the dialectic of unity and plurality, unity can be understood in two senses: first, as the unity of each of the instances making up the plurality of law, as intra-instance unity; or as inter-instance unity arising from the plurality of these entities, each possessing its internal unity. Legal positivists' focus has been on internal unity, although Kelsen showed remarkable conceptual dexterity in his effort to construct a unified universal law from the national legal orders and international law, all displaying an internal unity, too. For positivists, legal plurality is primarily plurality of distinct and self-contained national legal orders, possibly complemented by international law as inter-state law. National legal orders are supposed to be autonomous not only in respect of social facticity and nonlegal normativity but also in respect of other national legal orders. Only as such autonomous legal orders are they seen to participate in the plurality of law. Legal positivism approaches law from the perspective of a singular national legal order. The default assumption is that law is state law, and that state law is positive law, posited by legislative and judicial bodies. The state enjoys exclusive and universal legislative and judicial sovereignty in its territory, defining its legal space. Positivist legal centralism goes together with state sovereigntism.

Positivism tends to treat national legal orders as mutually closed normative entities, isolated in their respective compartments. They are supposed to exist in plurality, but plurality is understood as *simple diversity*; as the mere co-existence of self-contained national legal orders, without any hint at their interconnections, be they of conflictual or cooperative and dialogical character. In the relationship between unity and plurality, plurality is subordinated to unity. What matters for positivist legal theory is to reconstruct and explain the self-contained unity of a positive national legal order. This is legal plurality as solipsism or legal plurality in accordance with the black box model. Each state law regime is engaged only with

its own national legal order, and does not interfere with the exclusive and universal jurisdiction within their territorially defined legal spaces of other national legal orders.

The solipsist view is built on two problematic demarcations: first, the nonrecognition of nonstate law, such as indigenous and religious law, and secondly, the identification of the contents of the national legal order with their surface-level expressions. The Westphalian state's policy of legal centralism may have been successful in suppressing medieval legal pluralism and spontaneous customary law, although along with colonialism and empire-building major European states were soon confronted with a new type of pluralism and customary law. Moreover, what success the largely mythical Westphalian state had in the policy of centralization and state sovereigntism was limited to explicit law making and enforcement. What it did not achieve was national compartmentalization of the legal cultural underpinnings of the surface-level legal order, i.e. annulment of the legal cultural transnationalism which was a legacy of the late medieval reception of Roman law. No *Grundnorm* or rule of recognition can identify and delineate the principles, concepts, theories and methodological devices which provide surface level law with the necessary legal cultural support. Here the black box model with its solipsist implications has never been able to convey an accurate picture of the plurality of law. Legal cultural interchange and deep cultural commonalities, beginning with the basic legal vocabulary harking back to Roman law, have always balanced the diversification of national legal orders.

Little more than half a century has elapsed since the publication of the two major syntheses of positivist legal theory: the second edition of Kelsen's *Reine Rechtslehre* (1960) and Hart's *The Concept of Law* (1961). In a relatively short time, the state centralist positivist approach has lost its credibility even in the portrayal of the unity and plurality of surface-level law. State law can no longer claim monopoly and deny the existence of nonstate law, neither below nor above the state. Supported by international law, indigenous and religious legal regimes have waged at least partly victorious campaigns of recognition, and in some states also left their imprint on surface-level expressions of the state legal order. In tact with and as an epitome of general social denationalization and globalization, the significance of transnational normativity has expanded tremendously. Transnational law is a motley phenomenon, ranging from full-blown legal regimes to soft law normativity which is backed up by neither transnational nor national legal enforcement and which defies binary assessment in terms of valid / nonvalid or law / nonlaw. However, the impact of transnationational law on state law is indisputable. Even the most ingrained legal positivist would probably concede, say, EU law's intertwinement with and intrusion into the national legal orders of the Member

States. Yet, positivist theorists have but rarely openly confronted the consequences which this intertwinement entails for their treasured formal principles of unity and order. The horizontal relations among EU Member State legal regimes also manifest a new kind of reciprocal opening of national legal orders, exemplified by the principle of mutual recognition in internal market law and the former third-pillar field of the AFSJ (Area of Freedom, Security and Justice). And, of course, EU law is merely one, although arguably the most advanced, instance of transnational law. In a sense, although even EU law shakes the notion of hierarchically ordered legal order, it is still a relatively easy case to handle with the binary distinctions of legal positivism. Today, transnational normativity is a diversified and variegated field, defying the clear-cut distinctions of legal positivism – say, between law and nonlaw or between legal orders – and waiting for new (meta-)principles of ordering: model laws, soft law documents, global and regional standards … Transnational normativity even resists an unambiguous demarcation of state and nonstate law.

Not only has the rise of nonstate law enriched legal plurality with new instances of law. It has also proved the inadequacy of the blackboxist assumption of self-contained legal orders, subordinated to their respective Master Rules. Postnational plurality cannot be conceived of in terms of simple diversity, as a mere coexistence of distinct legal orders. Diversity has increasingly taken the guise of *legal pluralism*. In a situation of legal pluralism, diverse legal orders – or, to speak in broader terms – legal regimes raise overlapping and rival claims of authority. And due to the reciprocal opening of state law regimes, too, simple diversity, implicit in the black-boxism of legal positivism, conveys a distorted image of their plurality as well.

Unity and plurality are interconnected. The way we conceive of the unity of law affects the way we conceive of its plurality, and vice versa. If the unity of law is depicted, in accordance of the centralist and state-sovereigntist tenets of legal positivism, primarily as formal unity, plurality is seen primarily as simple diversity. If the occurrence of pluralist situations is in general conceded, they are portrayed as legally irresolvable confrontations of self-contained, solipsist legal orders. On the other hand, when plurality is presented in terms of simple diversity and radical pluralism, it leaves the formal unity of national legal orders intact. Yet, as I have already argued, we should be sensitive to the legal cultural overlaps and interchanges which have been part of law under the dominance of the Westphalian model, too. Moreover, we should incorporate the legal cultural layers in our recapitulation of the unity of national law; unity should not be reduced merely to the formal unity of surface-level law.

By so modifying our view of the unity of law, we can perceive that the solipsism of self-contained (national) legal orders has always misrepresented law's diversification.

In the era of postnational law, labelled by the rise of nonstate law both below and above the state, the defects of the solipsist view are more conspicuous than ever. The self-containment of legal orders has been punctured even at the surface level. Interlegality should substitute for state-sovereigntist solipsism as the main organizing principle of legal plurality, and plurality, seen primarily as interlegality, should assume the dominant position in the dialectic between unity and plurality. What I am proposing here is a reversal of the positivist subordination of plurality to unity. This reversal also implies a revision of legal positivism's notions of both plurality and unity. The emphasis in plurality shifts from simple diversity to pluralism and interlegality, and formal unity gives way to unity produced by substantive principles and discursive processes. I do not dispute the significance for legal theory of either unity or plurality, nor, for that matter, their interdependence. Postnational plurality does not negate either the unity or the autonomy of the legal regimes partaking in this plurality but does have a profound impact on how unity and autonomy should be conceived of. Sharp-cut distinctions, exclusive dichotomies and insurmountable borderlines do not help us to make our way in the postnational legal world.

In sum, in a legal theory of and for the postnational era the unity and autonomy of a particular instance of law must be recapitulated against the background of the plurality in which it partakes. Postnational plurality, which often enough amounts to a pluralism of overlapping and "rival" legal regimes and which should be conceived of in terms of interlegality than exclusive solipsism, constitutes the context in which the internal unity of instances of law should be examined. This holds even for national legal orders, which legal positivism has recognized – together with international law – as the only instances of law.

2. *thesis: the necessity to start from internal unity*

Even when adopting the reversal of the binary hierarchy of unity and plurality, we must start our discussion of the dialectic between the two from the pole of unity. The reason is simple: we cannot examine the plurality of law, if we do not have any idea of how to identify the instances which make up this plurality. As some leading legal positivists – Joseph Raz, for instance – have perceived, unity and identity are closely linked: to grasp the identity of an instance of law, you must be able to conceive of it as a unity. Raz is also right in claiming that

although identity presupposes unity, unity transcends identity. “Unity” is a wider concept than “identity”.

In their obsession with the unity of law, legal positivists not only subordinate plurality to unity; they also make two crucial reductive moves, which seriously truncate the caleidoscopic nature of the unity of law. First, positivists reduce law to its normative aspect, i.e. treat it merely as a normative legal order and ignore its social aspects: law as it appears in first-level social-legal practices, constituting the setting for law’s realization, and second-level, specialized legal practices, responsible for (re)producing the law and guaranteeing, where necessary, its realization. Second, within the normative dimension, legal positivists only acknowledge what I call surface-level law; law as it appears in explicit legal material, such as statutes, other regulation and precedents. What they ignore are the legal cultural layers which support surface-level law and through which the latter is interpreted and applied.

These two reductions do not really leave legal positivists other choice than to conceive of the unity and identity of law in terms of the formal unity of the (national) legal order; formal in the sense of transcending and ignoring the contents of the law. The notions of both formal and substantive unity imply avoidance of contradictions, but the noncontradictoriness they intimate is of a divergent nature. Positivists focusing on formal unity tend to define noncontradictoriness as logical consistency, while those embracing substantive unity aim at a more loosely defined coherence brought about by mutually compatible principles or values which individual legal norms manifest.

Analytically oriented legal positivists are inclined to disparage attempts at a substantive systematization. For Kelsen, there was nothing constant in the contents of the law and, consequently, both the unity and the identity of a legal order could only be grounded in its formal characteristics; to try to impose substantive unity was to fall into the natural law trap. Kelsen groups normative systems into static and dynamic. In a static system, such as natural law, “all norms follow from the basic norm, contained in it from the outset, derivable by a mere intellectual operation”. By contrast, in a dynamic system “its basic norm merely empowers a specific human will to create norms”. Kelsen appears to consider his pure theory of law with its dynamic (and formal) principle of unity and identity the only alternative to the static, substantive and, at the end of the day, natural law tainted conception.

In turn, for Raz the ground for the formal unity of a legal system, i.e. its identity, lies “in the criterion or set of criteria that determines which laws are part of the system and which are not”. All the examples Raz gives of proposed criteria are content-independent. They include Austin’s enactment by the sovereign, Kelsen’s authorization by the basic norm and

Hart's recognizability by the rule of recognition. As Raz sees it, "these three philosophers were not concerned with the material unity of legal systems"; "they did not think that the unity of the system depends on the content or spirit of its laws, or on the traditions and practices of its most important legal institutions".

Discussing the substantive unity of the legal order requires annulling the positivist reduction of the legal order to its surface-level manifestations and including the underlying legal cultural layers in the discussion. As I shall argue below, this can, *pace* Kelsen, be done without succumbing to natural law thinking or abandoning the positivist premise that all law results from conscious human actions. Kelsen's predecessors who aspired for the systematization of the legal order through law's divisions and the general doctrines (*Allgemeine Lehren*) of distinct fields of law considered themselves positivists and not adherents of natural law. Postnational developments have not quelled such aspirations for substantive unity, but have changed their objectives and scope.

Raz, for a positivist perhaps somewhat inconsequently, does not reject outright efforts to show the substantive unity of law. Yet he claims, first, that the identity of a legal order is equal to its formal unity and, second, that formal unity is primary to substantive: you have to identify a legal order by formal criteria before you can examine its substantive unity. Raz has a point: the identification of a legal order must start from the surface level and employ formal criteria, such as those codified in the prevailing doctrine of legal sources. Only at the surface level do legal orders attain a sufficiently distinct identity which allows for their reciprocal demarcation.

When discussing the unity and identity of law and producing what Niklas Luhmann, the legal sociologist, calls legal reflexion theories, legal theorists – and not only those of the positivist stripe – usually focus on the normative aspect of law, i.e. law as a normative legal order. However, law is not only about normative legal orders. It is also about first-level socio-legal practices where it is realized and specialized second-level practices where it is (re)produced and where disturbances in its realization are monitored; specialized practices such as law-making, adjudication and legal scholarship. A full-blown legal regime comprises law's all three modes of existence. These also provide alternative perspectives to exploring unity and plurality, including the identification of the instances making up the plurality.

Hans K. Lindahl's has been engaged in a phenomenologically oriented endeavour to build up the law's unity (and identity) from its realization in first-level socio-legal practices. His bold claim is that "law appears, from the practical perspective of those whose behaviour

it regulates, as a normative unity to the extent that it differentiates and interconnects who ought to do what, where, and when". He argues that "from this practical perspective, a legal order is not first and foremost the unity of a manifold of norms and only derivatively a spatial, temporal, subjective, and material unity", but "to the contrary: isolating legal norms as the object of the question about the unity of legal order comes second, as a historically late doctrinal and theoretical achievement". An earlier example is provided by Savigny's systematization of law, where legal institutions serve as the main building blocks. In Savigny's depiction of legal institutions legal relationships establish a connection to factual social relationships (*Lebensverhältnisse*), and legal institutions, such as family, possess a social (natural) foundation. Evidently, reconstructing the law's unity from the perspective of its realization, the starting point must lie in the social practices and "natural institutions" whose structuring normativity legal norms both manifest and contribute to.

But not only can law's unity and identity be reconstructed starting from its realization in first-level socio-legal practices. Second-level legal practices, specialized in (re)producing the law and reacting to disturbances in its *réalisation pacifique* in first-level socio-legal practices, also open a perspective to law's unity. Thus, the unity and identity of a modern state law regime can be reconstructed focussing on the legal speech acts which constitute the final phase of specialized legal practices, such as law-making, adjudication and legal scholarship. Legal speech acts are linked together in an ongoing legal discourse. They raise specific legal validity claims which are tested in subsequent legal speech acts which for their part again raise validity claims of their own. Legal discourse thus conceived is the connecting link between specialized legal practices. Legal discourse also determines the momentary, ever-changing contents of the law in force. In turn, the participants in this discourse and the respective weight of their interventions are determined by the prevailing doctrine of legal sources; an essential part of the legal culture.

Due to their institutional ties – in a state law regime, to the legislative, executive and judicial branches of the state as well as law faculties – specialized legal practices, and the legal discourse connecting them, provide a more reliable reference for identificatory purposes than diffuse first-level socio-legal practices. What Lindahl calls the concrete order of behaviour of particular socio-legal practices hardly adds up to a more comprehensive unity, facilitating the individuation of a distinct instance of law.

An intriguing question is whether one could attempt to reconstruct the comprehensive unity of a legal regime – a kaleidoscopic unity, we could perhaps call it – which would include all three modes of existence of law: not only law as a legal order but also law as it is realized

in first-level socio-legal practices and (re)produced in second-level specialized legal practices. Such an endeavour would seem to require an Archimedian point of view detached from and "above" the law's all three modes of existence. Theorists must enter the law through a specific gateway and the gateway they choose affects the way they are able to conceive of the law's unity. One tends to privilege one's chosen gateway, although the other aspects of law can never be wholly disregarded. Furthermore, the detached point of view would also require a reflexive distance to the socio-legal practice the very project of reconstruction epitomizes. To which degree such reflexivity is attainable remains an open question.

In focusing on law as it is present in first-level socio-legal practices, Lindahl makes an important legal theoretical contribution. Yet I would be careful in making absolute claims of primordiality for this mode of existence of law. What is primordial and what is derivative may simply depend on the perspective from which a theorist chooses to reconstruct the law. If the theorist opts for the viewpoint of a participant in second-level legal practices – say, a judge, a legislator or a legal scholar – the values of primordiality and derivativeness would probably be distributed differently from what Lindahl suggests. It is also important to perceive that, as I have argued above, whichever gateway into law is privileged, law's other modes of existence also call for attention. Lindahl is not able to reconstruct the law from the "we" perspective of ordinary social actors without hinting at objectified legal norms and second-level specialized legal practices, too: the concrete order of behaviour actualizes the possibilities created by abstract norms, and reference to authoritative monitoring (second-level practices) is needed to distinguish legal from other social normativity.

Let me conclude this section with some general remarks on the identity and identification of instances of law. First, the unity and identity of law can be reconstructed and instances of law identified on alternative grounds and adopting alternative perspectives, and the choices we make evidently depend on our research purposes. In this sense, unity and identity are something imposed by us and not something lying out there. Secondly, identification implies individuation and demarcation: when we identify an instance of law, we also demarcate it from other instances. This means that the initial identification of instances of law guides our understanding of the plurality of law. It also means that identity is related to autonomy. Indeed, for legal positivists, unity, identity and autonomy are largely overlapping. Thirdly, identity and autonomy are not merely labels attached by legal theorists but also legal claims addressed by instances of law to other instances. Thus, in their relations to EU law, the legal regimes of the Member States raise claims to not only autonomy (sovereignty) but also

(constitutional) identity. Yet for my part, I would leave open the possibility that in certain contexts, we treat a normative entity as an instance of law even if its claim to autonomy or identity does not find resonance among other instances or does not raise such a claim in the first place. Fourthly, recalling the primacy of plurality over unity, our initial portrayal of unity and identity, even the identification of instances of law, can only be of a tentative nature; it must leave sufficiently space for corrections and revisions, induced by insights gained from the examination of postnational plurality.

My above discussion of unity and identity has had an implicit focus on state law regimes. This brings me to my fifth and last general remark, which also constitutes a bridge to my following thesis. Significant differences in respect of unity and identity may exist between state law and nonstate law, as well as among instances of the latter. This raises the issue of the necessity of an ideal typical conceptual framework which allows us to make the initial distinctions and demarcations needed for a discussion of unity and plurality in postnational law.

3. *thesis: the need for an ideal typical general conceptual framework*

Acknowledging postnational plurality entails depriving state law of its monopolistic position: all law is not state law. Still, although states no longer hold a monopoly over law (if they ever did), state law is still the dominant type of law, and much of the functioning of nonstate law presupposes support from state law. Consequently, even if its monopolistic pretensions cannot be accepted, state law still deserves special attention.

Law is a profoundly historical phenomenon, although its historicity is not the same in all times and all places. Even the historicity of law is historical by nature. Jurists, including legal theorists, internalize the law's history through the legal culture which impregnates their *Vorverständnis*; the preconceptions through which they approach the law and tackle their legal tasks. Legal culture includes a legal language which enables dialogue not only between diverse legal practices – say, among (practicing) lawyers, judges, scholars and law-makers – but even across the borders of diverse legal regimes. Legal language has legal concepts as its vocabulary and patterns of legal argumentation as its grammar. The roots of the legal language which in the process of globalization has conquered ground with the same speed and efficacy as English as the global vernacular reach partly to Roman law and even further back in history. The centralization of law and the dominance gained by state law – developments on which

positivist legal theory has bestowed a theoretical expression – have left a deep imprint on legal language and modified premodern concepts to fit in the state-sovereigntist framework. Exploring postnational legal plurality requires conceptual innovations and recourse to concepts which have had no place in positivist legal theory. However, legal language, with all its specialized vocabulary and idioms, cannot be revised at a stroke. Conceptual innovators, too, are imprisoned in the legal language they have inherited and which imbues their legal *Vorverständnis*. And this language inevitably bears traces of a foregone era. So even a scholar trying to heed the call for a postnational legal theory must work with the inherited legal language, imbued with vestiges of legal centralism and state sovereigntism. This could be called the imposed legal centralism and state sovereigntism of postnational and postpositivist legal theory.

Postnational variety of law, together with the findings of legal historians and anthropologists of pluralist phenomena accompanying even the rise of the nation-state and legal centralization, have aroused scepticism as to the possibility of arriving at a general and a comprehensive concept of law or led to defining law simply as what the community concerned calls law. It may well be that a general concept of law is a chimera, not worth pursuing. Still, we need an ideal typical conceptual starting-point which serves us in clearing our way in the jungle of postnational legality – conceptual ladders which after use we might be able to throw away (to insert the obligatory Wittgenstein reference). In constructing such an ideal typical, tentative concept, the state tradition in legal theory may still have a legitimate task to perform. Arguably, state law is not only the dominant and most wide-spread but also the most developed instance of law. Such a characterization may arouse familiar suspicions of ethnocentrism and bias for western legal tradition. So let me briefly explain my point. As historically or sociologically oriented scholars from, say, Savigny, through Weber to Luhmann have emphasized, modern state law regimes have resulted from interrelated processes of differentiation. These include detachment of legal norms from socio-legal practices; specialized second-level legal practices, such as adjudication, law-making and legal scholarship, from everyday first-level socio-legal practices; and secondary, meta-level, rules from primary rules. Modern state law also facilitates insights into the multi-layered nature of law; i.e. into the inclusion in the normative legal order not only surface-level norms but also 'sub-surface', legal cultural layers. Due to its high degree of differentiation, state law can serve as a basis for elaborating an ideal typical concept of law which encompasses as many aspects as possible of the kaleidoscopic character of law, attending to both norms and practices; first- and second-level socio-legal practices; primary and secondary rules; and

surface-level law and legal culture. In sum, appraised by the yardstick of differentiation state law such as we know it in established western democracies is undoubtedly the most advanced instance of law. This provides a justification for employing it as a model against which the law-like features of nonstate normativity can be assessed; a justification which can ward off at least some of the usual accusations of ethnocentrism and cultural imperialism.

The legal *Vorverständnis* of those of us who have received our education and made our careers under the auspices of western state law is still impregnated by the state tradition, which still, especially in public law, colours our basic legal concepts. We can, to a certain degree, gain consciousness of the deep culture which we have internalized in our legal *Vorverständnis*. However, we can probably never wholly liberate ourselves from the concepts, principles, theories or methodologies of this *Vorverständnis* or change or modify these at will. So why not profit from this seeming misfortune and have recourse to the state tradition in forming the ideal typical concept of law which can assist us in orienting ourselves in the postnational lawscape and facilitate the necessary, though often merely provisional distinctions between law and nonlaw, state law and nonstate law, as well as among instances of nonstate law?

Legal positivism is a theory of modern state law – theoretical expression of the state tradition – and Kelsen and Hart are its Masters. However, in proposing elaboration of an ideal typical general concept of law from the characteristic features of modern state law I do not recommend purchasing the whole package of positivist legal theory, in its either Kelsenian or Hartian version. On the contrary, the ideal typical conceptual framework I have in mind should cancel the positivist reductions with regard to both the sociality of law and the cultural layers of legal normativity. *Pace* legal positivism, law does not consist merely of the normative legal order, such as it appears at its surface. Our ideal typical conceptual framework should include the differentiation of and interaction among the three modes of existence of law: namely, law as a normative legal order; law as it is embedded in first-level socio-legal practices; and law as it appears in second-level, specialized legal practices. And as concerns law as a normative legal order, the framework should be premised on the insight that legal cultural layers underlying surface-level normative manifestations should be treated as integral elements of the law.

In sum, the ideal typical general concept, based on the differentiations and interconnections labelling modern state law, would present a full blown legal regime where the surface level legal order is supported by legal cultural layers and where this legal order is primarily realized in first-level socio-legal practices and produced and reproduced in

specialized secondary legal practices. It would constitute the general conceptual background for the examination of particular state law regimes: the law in Finland, the Netherlands and so forth. It would also constitute – so I propose – the conceptual starting-point for exploring instances of nonstate law and for drawing distinctions between law and nonlaw; between state law and nonstate law; as well as among instances of nonstate law. It is obvious that not all instances of what has been identified as nonstate law meet all the characteristics of a full blown legal regime, gathered together in the ideal typical concept of law. Thus, differing from typical state law regimes, most instances of nonstate law probably lack legal scholarship as a differentiated and specialized second-level legal practice. It may also be that an instance of nonstate law below the state –indigenous or religious law –wants specialized law-making practices. Furthermore, it is possible that in securing implementation and realization of codified norms, instances of transnational law – say, standardization regimes – are parasitic on state law. Where, exactly, we draw the borderline between law and nonlaw – i.e. what characteristics of a full blown legal regime we require an instance of nonstate normativity display to deserve to be called law – is not only controversial; it is also, at least to a certain extent, dependent on our specific research purposes. Consequently, watertight distinctions and clear-cut taxonomies, valid for all purposes, are not possible and should not even be aimed at. However, I would argue that a minimum degree of differentiation – such as at least a rudimentary differentiation of norms from practices, and specialized second-level legal practices from first-level socio-legal practices – is necessary for transcending the threshold of law. What is often decisive is the existence of specialized dispute settling and / or sanction imposing mechanisms, guaranteeing the realization of the normativity at issue. Yet, even here gradations exist, and, as I have already noted, instances of transnational normativity may rely on the specialized law-making and judicial practices of state law to meet the need for implementation and enforcement. This is an example of blurred boundaries, so characteristic for postnational law. Other examples abound in the normative dimension: the concept of soft law, in frequent use in studies on transnational law, already signals the shaking of the wall separating legal from nonlegal normativity; a wall legal positivists tried to be construct so solid and impenetrable.

4. thesis: primacy of interlegality over simple diversity and radical pluralism

The black box model of the plurality of law, a model predating the recent rise of transnational law and the recognition of nonstate law below the state, treated legal orders as self-contained entities, with no intimation of either conflictual or consensual relations among them. Plurality was conceived of as simple diversity; i.e., as a mere coexistence of particular legal orders. Even in the heyday state centralism, the black box model delivered a misleading account of legal plurality. Even if it were possible to demarcate surface-level national legal orders sharply by means of criterial Master Rules, the positivist portrayal of plurality ignored the legal cultural linkages harking back to the reception of Roman law and the constitutional ideas of the Enlightenment. Interlegality, defined as normative overlaps and commonalities as well as reciprocal influences and discursive contacts among instances of law, is not a novel phenomenon brought about only by postnational developments. However, these developments have increased and intensified manifestations of interlegality.

In our postnational age, the plurality of law has taken decisive steps from simple diversity to *legal pluralism*. Not only has the rise of nonstate law enriched legal plurality with new instances of law. It has also provided additional proof of the inadequacy of the blackboxist assumption of self-contained legal orders, subordinated to their respective Master Rules. Post-national plurality cannot be depicted in terms of simple diversity, as a mere coexistence of distinct legal orders, even if we restrict our gaze to the surface level and shut our eyes from cultural interlegality. Legal diversity has increasingly taken the guise of pluralism. When Kelsen and Hart let off their owl of Minerva at the turn of the 1960s, legal plurality could still, at least in the parts of the legal world the Masters of positivism examined, be relatively credibly be portrayed in terms of simple diversity; provided, of course, that one accepted the reduction of the legal order to its surface level and the bracketing of legal cultural transnationalism. This moment has passed: post-national legal plurality is essentially pluralist by nature. In a situation of legal pluralism, diverse legal orders – or, to speak in broader terms – legal regimes raise overlapping and rival claims of jurisdiction. In assessing overlaps and rivalries of jurisdictional claims, all the four spheres of validity distinguished by Kelsen are relevant: not only spatial but also personal, material or substantive and temporal. Instances of law draw their boundaries in all spheres, but the emphasis they put on various spheres may differ. Accordingly, we can distinguish between territorial, substantive and personal principles of authority.

Even adherents of the black box model have reckoned with the possibility that legal issues have connections to more than one national legal regime and that, consequently, disputes over jurisdiction might arise. Yet such disputes were supposed to be exceptional and manageable with private international law (conflict of laws). What makes such disputes relatively easy to solve is the fact that state law regimes obey the same territorial principle of authority; the crucial sphere for their reciprocal border drawing is the spatial one. Private international law is considered part of the national legal order, but in this field sufficient inter-regime uniformity exists to facilitate consensual resolution of eventual border clashes between neighbouring state law regimes: bordering legal regimes can be expected to draw their mutual boundaries in approximately the same way.

Pluralist situations where instances of law raise overlapping and rival jurisdictional claims are more complex. They often involve instances falling under different types of law and obeying different principles of authority; i.e. emphasizing different validity spheres in the (auto-)definition of their jurisdiction. A conspicuous example is provided by the pluralist relations between EU law and Member State law: EU law defines its jurisdiction mainly in substantive (functional) terms, while Member State law adheres to the territorial principle of authority, specified, in state sovereigntist terms, by a claim to universal and exclusive jurisdiction within its territory. In turn, a central backdrop to the clashes between, on the one hand, indigenous or religious law and, on the other hand, national or transnational law, consists in the fact that the former follow primarily a personal principle of authority, distinct from the territorial or substantive principles of the latter. A pluralist constellation may also prevail between two instances of transnational law which both adhere to a substantive principle of authority but which specify this principle differently: between, say, EU law and European human rights law or EU law and WTO law. At issue in pluralist conflicts is no longer merely the exact course of the borderline but also, and even primarily, the mutual priority of different principles of authority. And, what is more, the pluralist clashes may also turn into what I would name *fundamental conflicts of authority*. In such conflicts, one of the parties tends to rebuff the other party's claim to either autonomy or identity; at least this is the reading of the latter party which thereby defines the situation as a *battle for recognition*.

The constitutional duelling between the European Court of Justice of the EU and Member State constitutional courts – primarily, the German Constitution Court as the *primus inter pares* – provides us with salient examples of fundamental conflicts of authority. The celebrated *Kompetenz – Kompetenz* question – whether the ultimate basis of the competence of EU institutions lies in EU or national law – is a case in point: for the ECJ, constitutional

courts' claim that EU institutions derive their competences from national constitutional law amounts to rejecting the autonomy of EU law. On the other hand, in exercising what it terms identity review of EU legal acts, the German constitutional court claims, not only that EU institutions recognize and respect German constitutional identity, but also that they recognize and respect it such as it is defined by the German side of the conflict.

Transnational law may challenge the authority not only of state law but also of (general) international law. A typical developmental path of some of the most prominent instances of transnational law has been their gradual disconnection from their original anchorage in international law. The landmark ECJ rulings from the early 1960s, *Van Gend en Loos* and *Costa v. Enel*, are to be read as Community law's declaration of independence in respect of not only the municipal law of the Member States but general) international law, as well. *Kadi* (2008) reaffirmed EU law's claim to independence from general international law and, moreover, questioned the superior authority of the latter.

The International Court of Justice (ICJ), with its general jurisdiction, has been the traditional guarantor of the unity of international law. A central backdrop to recent debates on fragmentation of international law consists of tribunals with a more restricted jurisdiction contesting the authority of ICJ precedents. At least in some cases, this can be interpreted as testifying to a movement of a regime of international law towards an instance of transnational law. Disputes of authority between general international law, in the *Kadi* case represented by UN Security Council Resolutions and precedents of the ICJ, and transnational or international tribunals with a restricted jurisdiction, bear some resemblance to the almost inevitable frictions which occur when the substantively limited claims of transnational law confront the territorially demarcated universal and exclusive pretentions of state law.

Introduction of the EU's own fundamental rights regime, where final jurisdiction lies with the ECJ, has led to an overlap with the claim to authority of the Strasbourg Human Rights Court, monitoring the European Convention on Human Right and holding itself competent to review EU law-related legal acts of the Signatory States, too. In Art. 52(3) of the European Union Charter of Fundamental Rights, the EU has seemingly acknowledged the interpretative authority of the Convention in situations of normative overlap: the Convention is stipulated to define the bottom line of protection for EU law. However, this does not exclude clashes of jurisdiction in single cases between the ECJ and the Human Rights Court. For its part, the Human Rights Court has assumed towards EU law a posture analogous to that of, for instance, the German Constitutional Court. The judgment of the Human Rights Court in *Bosphorus* reads like a variant of the *solange* doctrine. The Human Rights Court announces the

suspension – but mere suspension! – of its ultimate authority over application of the Convention to EU law-related legal acts of the Member States. Suspension is conditional on EU institutions providing equivalent protection, and the Court reserves to itself the right to revoke its authority. Thus, as overlaps in European human rights monitoring prove, the substantive scopes of two instances of transnational law can collide as well and even ignite fundamental conflicts of authority.[2]

If a state law regime has conceded indigenous or religious normativity, with its concomitant institutional practice – say, a tribal court –, a personally but possibly even territorially and substantially limited jurisdiction, disputes over its exact reach may arise. At issue, then, is a typical border skirmish, concerning the exact determination of the autonomous jurisdiction of nonstate law. But much more can be at stake in inter-regime conflicts involving instances of indigenous or religious law. First, state law regimes have in general been reluctant to recognize indigenous or religious law as autonomous instances of law, on a par with state law. Rather, state law regimes are inclined to recognize the legal significance of indigenous or religious law only on their own terms, employing legal devices which expressly deny the autonomy of nonstate normativity and subordinate it to state law; such as incorporation, deference or delegation (Michaels). Thus, on the side of indigenous or religious law, even what on its face looks like a mere border skirmish may turn into a fundamental conflict of authority: a battle for the recognition of legal autonomy.

Two principal approaches exist to post-national pluralism. Some discussants stress the inevitability of fundamental conflicts of authority and the lack of an overriding reconciling principle or a third-party, neutral arbiter. Other theorists, while conceding the ever-looming possibility of conflict, lay more stress on the resources for dialogue, cooperation and normatively compatible intra-regime solutions. *Radical pluralists* of the former strand are reborn black-boxists. They admit that legal plurality has turned into pluralism, entailing new kinds of jurisdictional conflict. However, for these theorists, legal orders remain shut in their boxes so that their spokesmen approach the contested issue – say, the *Kompetenz – Kompetenz* question – from diverse perspectives, without any common legal ground facilitating compatible assessments. Alongside Koskenniemian and other legal strategists, invoking

[2] Another example is provided by the ECJ's refusal to accept WTO law's claim of direct applicability within the EU. In turn, in the fragmentation discussion among international lawyers, a favourite illustration is the contest between the WTO and the international environmental law regime concerning jurisdiction over the whale trade.

irreconcilable strategic interests and institutional biases, latter-day Kelsenians have been well represented among radical pluralists. On the Kelsenian account, each of the contending authorities – say, the ECJ and a national constitutional court – adopts the point of view of the legal order under which it has been established and whose *Grundnorm* it presupposes as a precondition for legal cognition; say, the ECJ the perspective of EU law and the German Constitutional Court the perspective of the national German legal order. The contestants guard jealously the autonomy of their legal orders against each other's imperialist pretensions, not because of strategic interests or institutional biases but because of the transcendental separation of their *Grundnorms*. Reborn black-boxists only release legal orders from their self-enclosures to let them collide in a way which ultimately leaves their normative isolation and solipsism intact.

The other party to the debate on post-national legal pluralism, *dialogical pluralists*, points to doctrinal, institutional and procedural devices which have been developed to prevent and to defuse inter-regime conflicts of authority, especially in Europe. Let me only allude to the general principles addressing the relationship between transnational EU law and national Member State law, such as direct effect and primacy, developed by the ECJ but subsequently accepted – although not without reservations – by national constitutional courts, too; to the fact that Member State courts act simultaneously as courts of both national and EU law; and to the preliminary ruling procedure by which Member State courts may obtain from the ECJ an authoritative interpretation of EU law. By and large, EU law has succeeded in overcoming the repercussions of, not only such legal diversity among national legal orders which is deemed harmful to European integration, but also legal pluralism, threatening to lead to constitutional deadlocks with Member State law. The above-mentioned devices are conspicuous manifestations of interlegality. They establish both permanent and issue-specific contacts between EU and Member State law and rupture the self-containment of national legal regimes. Furthermore, as the principle of mutual recognition demonstrates, the reciprocal closure of national Member State legal regimes has been broken as well.

What is a significant for the purposes of my argument is that the devices construed to neutralize inter-regime conflicts draw on and are supported by legal cultural resources: overlapping and commonalities at the cultural levels of law where the black box model has never really worked. The doctrinal, institutional and procedural facilities expressly provided by EU law could never create inter-regime dialogue without the support of a unifying *legal deep culture*; i.e. without basic legal concepts, basic normative principles, legal theories and

legal methodologies, shared by both Member State legal regimes and EU law. Interlegality is first and foremost a legal cultural phenomenon.

EU law is arguably the most advanced instance of nonstate law above the state – "advanced" understood again in terms of differentiation – and in ECJ, it possesses a powerful institutional spokesman. Not all the insights gained in exploring the interrelations of transnational EU law and national Member State law can be transferred to an analysis of other pluralist constellations. Yet some of them evidently can. Fundamental conflicts of authority are not a specificity of EU law's relation to Member State legal systems, but can always – and are almost bound to – arise where the substantively or personally limited claims of nonstate law confront the territorially defined universal and exclusive pretensions of national law, particularly when the issues are endowed with the prestige of constitutional law. Furthermore, as we have seen, clashes can occur not only between nonstate law and state law, but also between nonstate law and international law, as well as between two instances of nonstate law. Yet, as is the case with conflicts between transnational EU law and national Member State law, most often the conflicts receive a peaceful, consensual solution compatible with both overlapping legal orders. And, again, this testifies to legal cultural interlegality, facilitating dialogue and cooperation among the legal regimes finding themselves in a pluralist constellation. To a large extent, transnational law is *Juristenrecht*, "jurists' law", using a common legal language and drawing from a transnational legal cultural fount.

Consensual and cooperative solutions may be more difficult to reach when the dispute involves an instance of indigenous or religious law, the other party being state law or transnational law. Nonstate law above the state, i.e. transnational law, is mostly instrumentally oriented, although here transnational human rights law constitutes a major exception. By contrast, indigenous and religious law are culturally deeply embedded and enmeshed with the daily life-world of the community, and address fields of comportment central to communal identity. Therefore, clashes with national or transnational law often touch on the very cultural identity of the community or – put in Lindahl's terms – the very normative point of indigenous or religious law. The boundaries which national or transnational law question may turn out to be fault lines the adjustment of which exceeds the practical possibilities of the community, again employing Lindahl's terms. Then, a legal solution to the dispute could only be possible through a concession of the other party, for whom the dispute does not probably possess equal significance.[3] Yet, prospects for consensual and dialogical outcomes may not be as bleak as

[3] Both in the battle for legal recognition and in the defence of its cultural identity, indigenous or religious law may be supported by transnational human rights regimes. Perhaps the most significant human rights instrument

they appear at first glance. Human rights discourses involving indigenous cultures, too, and adoption of indigenous legal concepts in the state law of some Latin American countries intimate that cultural resources for cross-border dialogue may exist here as well.

The possibility of a conflict transcending a mere border skirmish always looms over a pluralist constellation, and the perspectival approaches of the contending authorities always imply the possibility that the conflict turns out to be legally intractable. In emphasizing the conflictual aspect, radical pluralists do have a point. Yet they do not turn the coin and look to the flipside. In their exclusive perspectivism, they downplay the significance of both the expressly regulated means for inter-regime dialogue and the cultural interlegality which facilitates the successful functioning of these means. Contrary to what radical pluralists tend to claim, inter-regime relations are not only about boundary-asserting; they are also about boundary-crossing. Radical pluralists commit a mistake similar to the reductionism of the legal positivism of Kelsenian or Hartian strand: with an eye only for surface-level boundary-maintaining, they tend to ignore the cultural interlegality which disregard the boundaries of the Kelsenian validity spheres of surface level law.

Cultural interlegality not only facilitates *ex ante* and *ex post* defusing of jurisdictional disputes surface but manifests – so I would argue – the normal state of inter-relations among the instances of law making up the postnational plurality. Instead of simple diversity and potentially irresolvable pluralist conflicts, postnational plurality is labelled by cultural and discursive interlegality.

5. *thesis: the need to rethink internal unity under the impact of postnational plurality*

Postnational plurality has fundamentally affected the internal unity of its constituent entities, including state law regimes. Indeed, this is a direct consequence of what I have tried to argue when defending my precedent thesis, i.e. the primacy of interlegality. By the same token, it is a major justification for my first thesis, namely the need to reverse the hierarchy between unity and plurality. The internal unity of instances of law should from the very beginning be

---

which can be invoked in the defence of the legal autonomy of indigenous peoples is the United Nations Declaration of the Rights of Indigenous Peoples. Reference should also be made to the ILO Convention on Tribal and Indigenous Peoples (C169).

analyzed in the context of the plurality in which they partake. As I maintain in my second thesis, the discussion of postnational plurality must by necessity take off from a tentative reconstruction of internal unity; we cannot structure postnational plurality without a rough conception of the identity of its constituent entities. Yet, being consciously tentative, such a reconstruction must leave space for subsequent complements and corrections, necessitated by insights into postnational plurality and its characteristic interlegality. Here I shall restrict my observations of the effects of plurality on internal unity mainly to state law regimes.

The formal unity of the national legal order, cherished by legal positivists and, in their view, ultimately guaranteed by a criterial Master Rule (such as Kelsen's *Grundnorm* or Hart's rule of recognition), is increasingly difficult to maintain, even if the legal order is reduced to its surface-level and the supporting legal cultural layers are ignored. Kelsen is very explicit in assigning the basic norm a system building function. Thus, he argues that "an 'order' is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity", "and the reason for the validity of a normative order is a basic norm". Or, expressed somewhat differently: "(i)t is the basic norm that constitutes the unity in the multitude of norms by representing the reason for the validity of the norms that belong to this order". Raz, too, defines formal unity in terms of the criterion or criteria determining membership in a legal order (system).

But does merely bringing a multitude of legal norms together under a common basic norm – or, in Hartian terms, a rule of recognition – provide this multitude with such structure and organization as the notion of legal order or legal system appears to imply? Are not further organizing principles needed? A tentative answer lies in Kelsen's idea of the legal *Stufenbau*; i.e. the hierarchical structure of the legal order which ensues from his "dynamic" notion of validity. According to Kelsen, "the legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms", the unity of which "is brought about by the connection that results from the fact that the validity of a norm, created according to another norm, rest on that other norm, whose creation in turn, is determined by a third one". The basic norm is "the highest reason for the validity of the norms, one created in conformity with another, thus forming a legal order in its hierarchical structure". Thus, the hierarchically structured unity of the legal order is based on the principle of delegation or authorization: the norms of a legal order are interconnected through chains of validity and authorization.

For Kelsen, an additional criterion for the unity the legal order lies in noncontradictoriness. In some of his writings Kelsen even includes the requirement of noncontradictoriness in the basic norm itself and argues that the basic norm must facilitate the

comprehension of a legal order as a meaningful, that is, noncontradictory, whole. He concedes that the pure principle of delegation is not able to guarantee this, because "it bestows validity upon any content" and "justifies any norm, regardless of its content, on condition that it has been created by a certain procedure, even a norm with a self-contradictory content or two norms whose contents are logically incompatible". Even if norms themselves cannot stand in logical contradiction – on this issue Kelsen views wavered – propositions describing them can, so that the requirement of the noncontradictoriness of the legal order can be reformulated as a requirement of the noncontradictoriness of propositions about the norms included in the legal order. Over his long career, Kelsen kept returning to the question how contradictions could be eliminated from law and a legal order presented as a meaningful whole. In some contexts he puts his trust in juristic interpretation of legal texts. In *General Theory of Law and State*, he notes that since the legal material with which jurists deals is presented in linguistic expressions, it is possible that it contains contradictions. It is "the specific function of juristic interpretation … to eliminate these contradictions by showing that they are merely sham contradictions". Thus, "it is by juristic interpretation that the legal material is transformed into a legal system". Still, the possibility remains that contradictions cannot be effaced through interpretation. Then, if the contradiction involves two norms of the same hierarchical level, it should be resolved by means of the *lex posterior derogat priori* rule, which, according to Kelsen is implicit in the principle of authorization.[4] In case of contradiction between norms of different levels, the Kelsenian solution would seem even more evident: the higher norm prevails over the lower. Higher norms not only validate but invalidate as well.[5]

Even when enriched with the requirement of noncontradictoriness, the unity which Kelsen's basic norm can bring about in the legal order is of a very thin nature and its systemic quality is confined to hierarchical structuring. It is monistic unity which ignores the substantive divisions – starting for the distinction between public and private law – which, for precedent German *Rechtswissenschaft*, had been an initial but still essential phase in the systematization of the legal order. The only division Kelsen discusses in length is that between international and national law. This, however, is not a division internal to a legal order but distinguishes between two legal orders, although, as we shall see when discussing my last

[4] Kelsen argues that "since the norm-creating organ … is normally authorized to prescribe changeable and therefore abolishable norms, the principle … may be presumed to be included in the authorization", and that although "not ordinarily stated as a positive rule of law, (it) is taken for granted wherever a constitution provides for the possibility of legislative change".

[5] However, Kelsen concedes that if no institutionalized procedure of invalidation is available, the legal order may well remain afflicted by logical contradictions between the constitution and lower-level norms.

thesis, Kelsen throws a monistic veil over this division, too. Kelsen's aversion towards internal divisions derives from his endeavour to shut the normative contents of law outside his pure theory: for him, dividing a legal order into distinct branches is the first step on the road of static, substantive, systematization. In *Pure Theory of Law*, Kelsen also deals with what he calls the law's static aspect, discussing legal theoretical concepts such as "sanction", "delict", "obligation", "right", "legal capacity", "competence" and "legal subject". Yet his reformulation of these concepts does not aim at systematizing purposes. Faithful to his purifying mission, he tries to demonstrate that these concepts express particular nonsubstantive legal normativity, cleansed of any references to morals (other nonlegal normativity) or social facts. In their Kelsenian reformulation, they are meant to be formal concepts, allegedly devoid of substantive normative contents. Neither are they interlinked to constitute a unifying conceptual skeleton which would enhance the formal unity of the legal order, thus adding to the principles of delegation and noncontradictoriness.

In the Kelsenian framework, a legal order as the multitude of the legal norms gathered together under a common *Grundnorm* remains a rather loose whole, lacking internal organization beyond the hierarchical structure of the legal *Stufenbau*. Even such thin formal unity is threatened by the effects of postnational plurality which break the blackboxist self-containment also at the surface level of the legal order. Let me again use as my major example the relations between national Member State law and transnational EU law.

Legal regimes position themselves in respect of other legal regimes. Such positioning, the most fundamental of which takes place through the claim to autonomy (sovereignty), belongs to the basic functions of a constitution. There are, though, no guarantees that the positioning principles of neighbouring legal regimes coincide, although in a plurality governed by the principle of state sovereigntism this is largely the case. In a postnational plurality where pluralist constellations between state law and nonstate law, as well as among instances of nonstate law, are increasingly common, this can no longer be taken for granted. The central positioning principles of EU law in respect of Member State law comprise direct effect – for EU Regulations, direct applicability – and the accompanying claim to supremacy over national law. Over the decades, these positioning principles have been, by and large, accepted by national courts, including – though with some important qualifications – the national constitutional courts. These positioning principles entail not only that EU law intrudes into the national legal order, such as it for instance is applied in national courts. They also

presuppose that Member State law retreat from Kelsenian formal precision in its internal relations.

In Kelsen's hierarchical *Stufenbau*, the supremacy of higher-order norms is not reduced to primacy or *Anwendungsvorrang*, which presupposes setting aside contradictory lower-order norms in concrete cases, but also covers *Geltungsvorrang*, which implies invalidation of these norms as well. In addition, higher-order norms not only invalidate but validate, too: they establish the competence to issue lower-order norms. The supremacy of directly effective EU law with regard to national law only signifies *Anwendungsvorrang*. The EU law principle of supremacy dissects the three effects – *Anwendungsvorrang*, *Geltungsvorrang* and validation – which in Kelsen's *Stufenbau* go together. A further messing up of Kelsenian hierarchy ensues from the transposition of EU directives. Directives are EU law devices which, as a rule, require explicit transposition into state law by a national instrument; directives are only binding as to their purpose and effect. EU law endows the national legal instrument effectuating the transposition – say, a parliamentary statute – with legal consequences which set it apart from "purely" national instruments of the same hierarchical rank. The national instrument – whatever its hierarchical level in municipal law – participates in the supremacy of EU law. Thus, validation and *Geltungsvorrang* follow the hierarchy of municipal law, while *Anwendungsvorrang* is determined by criteria of EU law. By the same token, standards which in municipal law govern the relations between norms of one and the same hierarchical level – such as *lex posteriori* and *lex specialis* – are set out of effect. The principles with which EU law positions itself in respect of national law, principles grown out of policy considerations, pose a threat to both the formal unambiguity and the principle-based substantive coherence of the latter.

Again, too much should not be generalized from the example of EU law. EU law is exceptional in its wide- and deep-reaching impact on national law, touching even on national law's basic constitutional positioning principles, such as its claim to autonomy (sovereignty) and (constitutional) identity; this explains the dramatic character of some of the contestations between the ECJ and the German Constitutional Court. The relations between EU and Member State law are exceptional also in the sense that they have crystallized into distinct, although in some respects vague and contested, principles. This facilitates specifying the deviations from the hierarchical Kelsenian model which EU law entails within national law. In doctrinal respect, the origin of the principles of both direct effect and supremacy can be traced back to international law. Indeed, the relations between international and national law constitute another example where the reciprocal basic positioning principles may seem

relatively clear – such as the national constitutional choice between monism and dualism or international law's rejection of derogations derived from national law – but which in fact leaves quite wide space for perspectival interpretation.

Above, I have assumed that for a passing period the Kelsenian – Hartian hierarchical notion of state law and its formal unity has represented a relatively accurate view of national law, reduced to the surface level of the normative legal order. However, a more sceptical assessment can also be defended. Even in Continental Europe, national courts have probably always used legal sources which simply cannot be organized in a Kelsenian *Stufenbau*. Kelsen's *Stufenbau* – as well as Hart's analogous hierarchical notion – reflects a public lawyer's view of law: hierarchically arranged legal norms are explicitly posited by state organs which in turn constitute a hierarchically structured, unified, state organisation. Such a notion lay also behind Kelsen's predecessors' conception of a unitary State Will which state organs were supposed to articulate within their respective spheres of competence and which the law also reflected. Yet especially in private law, even where a comprehensive codification– such as *Bürgerliches Gesetzbuch* or the French Code Civil – exists, sources of the norms applied by the courts have presumably always included much else than just explicit legislative and judicial speech acts. On the European continent, positivist jurists and legal theorists have drawn up codified doctrines which have included even nonlegislative sources. What have often caused problems for such codification are the hierarchical relations among and within the latter sources, as well these hierarchies' relations to the Kelsenian hierarchy of legislative sources. It is also questionable whether norms derived from nonlegislative sources can ever have been identifiable by the Master Rules of legal positivism.

Be it as it may, the norm explosion by the postnational plurality of law has profoundly shaken whatever formal unity national legal orders may have possessed. As the concept of *polycentricity* seeks to intimate, norm sources have multiplied and attempts to bring them into a hierarchical order or even under a single *Grundnorm* or rule of recognition seem more futile and far-fetched than ever. Even the hierarchical unity of the state organization – and the credibility of the talk of a unified State Will – has yielded to what Anne-Marie Slaughter has fittingly called a *disaggregated state*. The executive branch of the state no longer constitutes such an integrated whole with its clear relations of competence and a seamless hierarchy as was assumed by German pre-Kelsenian state-law doctrine or Max Weber's contemporary theory of bureaucracy. Following models from the private sector, public administration has adopted new types of nonhierarchical organisational structure, as well as new means of nonlegal or soft-law management and control mechanisms (New Public Management). The

reforms have enhanced functional independence of administrative agencies, also as regards their norm-giving. It is probably more appropriate to portray present-day administrative agencies as representatives of their respective fields of action – e.g. healthcare, education, or the economy – rather than of a unitary State Will. In a disaggregated state the agencies' bonds of allegiance with, on the one hand, private organisations of their field and, on the other hand, with transnational or international bodies – say, in Europe with EU bodies and agencies of other Member States – may be stronger than their ties to other state agencies.

Employing techniques of incorporation or delegation, state law may have "domesticated" parts of the nonstate normativity which national courts rely on – and national, international or transnational law may even by oblige them to rely on. Through incorporation nonstate normativity is expressly made part of the national legal order. This is the case when, say, transnational standards or model laws are adopted through an explicit national legislative act; indeed, transposition of EU directives is a special case of incorporation. Incorporation does not affect the formal unity of national law, provided that the incorporated normativity does not, as EU law does, raise claims of supremacy. In turn, through delegation state law explicitly grants law-making power to nonstate actors; say, the social partners or a professional organization. Without clear positioning provisions included in the act of delegation, the location of delegated norms in the formal unity of state law may be ambiguous. But, and even more fatally for this unity, a great part of the normativity national courts take recourse to is not formally absorbed by either incorporation or delegation. This may be the case of, say, national or transnational codes of conduct, best practices and standards, or norms of indigenous or religious law. Often enough, such "wild" normativity displays a nonstate origin and attests to postnational plurality. In accordance with the general characteristics of nonstate normativity, it also tends to blur the sharp distinction between law and nonlaw; a distinction vital to both Kelsen's and Hart's positivism and which both the *Grundnorm* and the rule of recognition not only imply but are even supposed to establish and safeguard. It would be pointless to try to catch this nonstate normativity under a supra-constitutional Master Rule, crowning the supposedly hierarchical edifice of national law.

A main objective for pre-Kelsenian German *Rechtswissenschaft* consisted in transforming the legal order from an aggregate of norms (*Rechtssätze*) into a legal system. The divisions of law played an important systematizating role. The basic division between public and private law harked back to Roman law, as did the internal divisions of private law. By contrast, internal divisions of public law, such as (intra-)state law's differentiation into constitutional and administrative law were of more recent date. The divisions delineated not only distinct

fields of the legal order but also distinct disciplines of *Rechtswissenschaft*. In turn, fields of law were not loose collections of norms addressing more or less similar real life relationships (*Lebensverhältnisse*). They received their unity and identity through their general doctrines (*Allgemeine Lehren)*, consisting of legal theories, concepts, principles, theories and methodologies and articulated by the respective branch of *Rechtswissenschaft*. Taken together, the divisions of law and the internal systematic unity of each field of law were supposed to guarantee the overall unity of the legal order; a system-like coherence transcending mere logical noncontradictoriness. – In Anglo-Saxon legal cultures, divisions of law have probably never been of such a constitutive significance as in Continental Europe. They have, though, especially in the USA, played a certain role, as is proved by, say, the ingrained distinction between property, contract and tort, as well as the sporadically reviving classification debates.

Kelsen did not have much patience with his predecessors' systematization efforts. Yet, *pace* Kelsen, the traditional systematization through divisions of law proved to be rather long-lived and on the Continent dominated until a few decades ago, not only general presentations in text books and collections of statutes, but organization of law faculties and law teaching as well. It did, though, run into difficulties already in the first decades of the 20th century, due to increasing public regulation and social management, reaching out to domains previously preserved for private law, as well as subsequent welfare state policies; i.e. developments which reflect the growing instrumentalization of state law. Proponents of legal systematization have responded by amending traditional divisions with rather artificial additions, which manifest the growing blurring of even the main borderline separating public from private law. New compartments include special private law and special administrative law, the former comprising – depending on the current author – for instance labour law, economic law, competition law and environment law, and the latter, say, tax law or financial law. The growth of nonstate law and its intertwinement with state law have dealt an even more serious blow to the traditional, pre-Kelsenian, systematization. Indigenous or religious law, with perhaps the exception of the canon law of the Catholic Church, do not possess internal ordering principles which would correspond the traditional systematization of state law, and transnational law, too, tends to ignore them. This goes, conspicuously enough, for EU law. It does possess sub-fields, such as internal market law, competition law and anti-discrimination law, but these do not find correspondences in the traditional divisions of state law.

Postnational plurality has not quelled interest in the divisions of law, and grouping surface level legal material into distinct fields and elaborating field-specific general doctrines is

discussed as eagerly as ever. Indeed, we are witnessing a revival of classification debates. However, their focus has shifted, so that 19th-century discussants – or even those of, say, the first post-World War II decades – would have a hard time in orienting themselves in present debates on putative legal departments, such as social law, medical and bio-law, sports law, information law, or communications law. Recent interventions are no longer concerned with the law's overall systematization. When labour law, some decades ago, waged its battle for independence, it was, at least in continental Europe, still considered important to ponder its location with regard to the basic distinction between private and public law. Contemporary discussants do not seem keen to locate the new fields (and disciplines) they are advocating in the law's comprehensive system of. Instead of total or comprehensive coherence of the legal order, their aim is more modest: to create *local coherence* in a limited body of law. In a sense, the local coherence sought in contemporary debates stands in contradiction with the aspiration for total coherence. The putative new branches of law typically gather together normative material which, within the traditional divisions, would fall into several compartments and transcend even the basic boundary between public and private law. This was already the case with labour law and environmental law, which were among the first new fields to shake up the traditional system and to bring their battles for independence to a successful conclusion.

The 19th-century divisions were meant to classify the legal order of a sovereign nation state, although they in part relied on precedent legal tradition. By its origin, the regulative welfare state is a political project of the nation state, and the regulations which the traditionalists compartmentalized into special private law or special administrative law – including labour law and environmental law – were still attached to the monocentric perspective of the nation-state legislator. Current pretenders to the status of a distinct branch of law throw a more profound challenge to the traditional system. They are no longer tied to the nation-state legislator but attest to postnational legal plurality, muddling also the boundary between legal and other social norms. Medical and bio-law, information law, or sports law introduce breaches into the systematization based on the fundamental distinction between private and public law and gather together norms which, in traditional divisions, are dispersed across several fields. This is not all. Besides norms issued by the national legislator, they include EU norms, as well as other norms of international or transnational origin; this also goes for contemporary labour law and environmental law.

What summarizing conclusions should we draw from these developments with regard to the unity of the legal order? First, the contours of the national legal order seem increasingly fuzzy, even if we – in the vein legal positivists – restrict our gaze to its surface level. Kelsen's

and Hart's Master Rules are increasingly incapable of covering all the normative material which national courts rely on and drawing exact borderlines between law and nonlaw, as well as state and nonstate law. Formal unity even in its very thinnest sense, as subordination to the same *Grundnorm* or rule of recognition, is wavering. And, as our discussion of EU law's impact on national law has showed, further difficulties arise if we include in formal unity the requirement of noncontradictoriness – guaranteed by such standards as *lex superior*, *lex posterior* and *lex specialis* – and the idea of a hierarchical structure where higher norms possess both *Anwendungsvorrang* and *Geltungsvorrang* over lower norms and, moreover, validate these. Because of the problematization of formal unity, it would seem natural to look to substantive criteria in the reestablishment of the lost unity.

Kelsen was right in his observation that his predecessors' – and, as became clear – even successors' efforts to create unity through systematization by means of law's divisions involve substantive criteria. Diverse fields of law are demarcated primarily through their objects of regulation, i.e. the social relations they address, but they obtain their unity and identity through general doctrines, largely elaborated and articulated – at least on the European continent – by legal scholars. An integral part of these doctrines consists of field-specific principles – such as *nulla poena sine lege* in criminal law, *pacta sunt servanda* in contract law, proportionality in constitutional law or *détournement de pouvoir* principles in administrative law – and the legal concepts and theories, also constitutive of the general doctrines, are not normatively innocent, either. Where Kelsen erred was his claim that building unity on substantive principles, concepts and theories would necessarily entail embracing natural law premises. The general legal doctrines of various fields of law form an integral part of the professional legal culture which, so I claim, also belongs to the legal order but which legal positivism in both its Kelsenian and Hartian variants tends to overlook. This legal culture does not fall from heaven. Rather than having been deduced from universal natural law principles, as Kelsen's dichotomous caricature of the two exclusive alternatives of positivism and natural law thinking implies, the professional legal culture of a full-blown state law regime emerges through a process of sedimentation originating in explicit legal speech acts by legislators and law drafters, judges and legal scholars. In this sense, legal culture, too, meets the criterion of positive law.

Still, we have seen that systematization through the law's divisions has changed its character and can no longer create a comprehensive unity, which could, by the same token, be unambiguously demarcated from other legal orders. As new fields of law, such as, say, information law or medical law, conspicuously show, law's divisions tend to be boundary-

crossing rather than boundary-asserting. These fields comprise normative material from not only diverse sources – manifesting new kind of polycentricity – but even diverse legal orders. The coherence they aim at is of local and, at the same time, boundary-crossing rather than comprehensive but boundary-maintaining character. Distinct branches of law are not expected to add up to constitute a single and unified, self-contained legal order. Divisions of law are not static but in constant movement. Nor are they excluding but overlapping, so that a set of norms can be examined as belonging to more than one branch of law: for instance, provisions on patient insurance fall under both tort law and medical law. Divisions of law and the legal fields they imply are openly perspectival: they admit that other classifications, for other purposes and adopting another perspective, are both conceivable and justifiable.

In sum, systematization through the law's divisions is still a pertinent objective, not only for pedagogical purposes, but also for elaborating general doctrines and thus rationalizing legal argument. Still, in contrast to the objectives pursued by systems preceding contemporary legal plurality, the unity that postnational systematization can bring about is not of comprehensive but local; not boundary-asserting but boundary-crossing; not stable but shifting; and not valid for all purposes but openly perspectival. Current systematizing efforts demonstrate that under the conditions of postnational law, the unity there can be in the law's normative dimension can only be of a substantive character, deriving from unifying principles, as well as common legal concepts, theories and methodologies, also possessing normative implications. The supports of unity lie in the cultural, sub-surface layers of law which positivist theorists in their reductive normativism tend to overlook. And the cultural layers have always been – even in the heyday of state sovereigntism and legal centralism – the privileged site for interlegality where the black-boxist self-containment embraced by positivist theorists breaks down.

If formal unity shows signs of rupture under the pressure from postnational plurality and if the law's new divisions are boundary-transcending rather that boundary-maintaining, can we still in general talk about the unity of a legal order; say, a national legal order? As I have argued while discussing my second thesis, in a tentative identification of a national legal order, formal criteria, akin to positivist Master Rules and related to the institutional structure of the national legislative and judiciary, still play a role. We are wholly justified to talk about, say, the Finnish legal order and to invoke the statutes enacted by the Finnish Parliament, the by-laws issued by the Finnish Government and sub-ordinate administrative authorities, as well as the precedents of the Supreme Court and the Supreme Administrative Court. Still, as I hope has become clear, such an identification can only be tentative and cannot be based on

unequivocal and clear-cut demarcations. Nor does the hierarchical structure such a tentative identification implies achieve Kelsenian unambiguity or a unity extending much beyond an agglomerate of norms. If thicker unity is sought, one must look beyond the surface level, to the law's cultural layers. For all cultural interlegality and the testimony of cross-boundary branches of law and legal scholarship, it is still plausible to presume that national legal cultures, supporting national surface-level law, have retained their characteristic mixtures and particularities which impregnate the *Vorverständnis* of national legal actors. If this presumption holds, national legal orders may possess a thicker unity, produced by a unifying national legal culture. As Member State legal regimes have asserted in their relations to EU law, this legal culture may also include a particular constitutional identity; a particular interpretation of the universalist values, allegedly common to the EU and its Member States.

In the above discussion, my focus has been on the unity of state law as a legal order. However, unity is an issue of, not only the law's normative aspect, but also its social modes of existence; i.e. law such as it is (re)produced in specialized legal practices and realized in first-order socio-legal practices. In the halcyon days of state law, specialized legal practices were delineated by relatively unambiguous institutional criteria. The exclusive sites of legislation and adjudication consisted of state institutions, ultimately established and empowered by the national constitution: Parliament, Government and subordinate administrative authorities, as well as the hierarchically organized national judiciary. Although law faculties of national universities did not possess an analogous constitutionally guaranteed monopoly, legal scholarship was widely considered a national enterprise. Consequently, the legal discourse which created the unity of specialized legal practices was a national discourse, the participants of which consisted of national legislators, national judges and national legal scholars. Postnational interlegality implies, not merely normative overlapping and porousness, but also cross-boundary legal practices and legal discourse. Let me again use the intertwinement of Member State law and EU law as my example. Here the institutional intertwinement is most pronounced in judicial practices. National courts act also as EU law courts, and through the preliminary ruling procedure, the ECJ intervenes in national judicial processes. Because of EU law's positioning principles in respect of Member State law – such as direct effect, direct applicability and supremacy – specialized legal practices which determine the contents of EU law are also entwined with national legal discourses which define the law applied in state law courts. This concerns not only the ECJ but the EU legislator and EU law scholars as well.

The intertwinement of transnational EU law and national Member State law offers perhaps the most salient epitome of ruptures in the national self-containment of specialized legal practices and legal discourse. Parallel to EU law's normative intrusion into national legal orders, EU legal-institutional speech acts play a legally defined role in national legal discourse, too. More generally, nonstate law's normative influences usually imply opening of the national legal discourse to outside interventions. In addition, discursive contacts among state law regimes have also become denser than before. Legal arguments cross boundaries, and both judicial and scholarly discourses have broken their national isolation. Constitutional and other national courts refer to each other's rulings, and law has ceased to be a pronouncedly national branch of academic scholarship. Legal practices have opened not only to nonstate law but other state law regimes as well. However, analogously to the core identity of the normative legal order, the kernel of national legal practices, demarcated from other legal regimes, is still identifiable. If there were no boundaries at all, they could not be transcended or blurred, either. So borders there are, though they are more porous and the borderlands more difficult to track than ever.

What about, then, the first-level socio-legal practices where the law is primarily realized? A line should be drawn between, on the one hand, general lifeworld practices and, on the other hand, specialized practices with a restricted scope and a restricted membership, such as banking, accounting, doctoring, lawyering and so on. Law addresses both types of practice, and they both constitute sites for law's realization. The general trend is from tradition to expertise, and, differing from tradition, expertise knows no local or Fatherland. Correspondingly, specialized expert practices are increasingly transnational and boundary-transcending by nature, as are the communities of experts which participants of these practices form. By contrast, general lifeworld practices tend still to be immersed in bounded cultures, and it is still justified to talk of national communities, participating in nationally delineated socio-legal practices. Yet multiculturalism even in the previously relatively homogenous European societies is rapidly changing the situation; the "thick" relations of family, friendship or religion (Margalis) are increasingly transnational, too. And this is also the case with the virtual communities engendered by internet practices, which often enough lie closer to general lifeworld practices than specialized expert practices. All in all, postnational developments have broken the national seclusion of the socio-legal practices where the law is realized.

Thus, the unity of national legal regimes can be approached from diverse angles, treating the law as a legal order or as realized in first-level socio-legal practices and (re)produced in

specialized legal practices. Again, an ideal type can be constructed from characteristic features of state law regimes; an ideal type which facilitates examining the specificities of nonstate law. Varieties of nonstate law exist, and, correspondingly, construction of their unity varies as well. In nonstate law below the state, the emphasis often lies on the social aspects. This holds particularly for such indigenous or religious law where no codification or extraction of norms from practices has occurred; the law of the Religions of the Book necessitates a different analysis. The integrity of culturally embedded socio-legal practices, as well as the normative and judicial autonomy indigenous and religious law have managed – or even strived – to retain, also shows great variation. As EU law demonstrates, instances of transnational law tend to be intertwined with and dependent on state law regimes, especially in the implementation and realization of transnational norms. In transnational regimes of standardization, for example, only production of norms – mostly of a soft law character – and the norms themselves have detached from state law regimes, while their implementation and realization fall on the latter.

6. *thesis: from universal law to the plurality of discursive-cultural unities*

Unity of law is a two-level issue. It can – and should – be examined both at the level of instances of law – the constituent entities of postnational plurality – and at the level of the plurality of these instances; i.e. as internal and inter-instance unity. These two levels obviously interact, so that insights gained on the impact of the postnational condition on the internal unity of state law regimes are relevant also for a discussion of inter-instance unity. Thus, the fracturing of the formal unity supposedly guaranteed by a Kelsenian or Hartian Master Rule also affects the way the unity of the law's plurality can be conceived of.

In his obsession with formal unity, Kelsen was not content with reconstructing the internal unity of national legal orders and international law. His ambitious objective was to demonstrate the unity of all law; universal law, consisting of all national legal orders and international law. He argued that, ultimately, international law defines the validity of national law and that, consequently, all law constitutes a unity. On Kelsen's account, international law determines the territorial and personal reach of states, and, correspondingly, the territorial and personal spheres of validity of national legal orders. International law accomplishes this essential function through the principle of effectiveness, which lays down that "a coercive order of human behavior is valid law, and the community constituted by it, a state in the sense

of international law, for that territory and population with regard to which the coercive order is permanently efficacious". Moreover, through the same principle of effectiveness international law also determines the temporal sphere of validity of the national legal order, as well as the emergence and demise of the state, as "a coercive order remains valid, and the community constituted by it remains a state, only as long as the coercive order is efficacious". Finally, international law may also bear on the material sphere of validity of the national legal order. This is due to the fact that international law, in particular norms established by international treaties, can regulate any substantive issues, including those that can also be regulated by national law, and thus restrict the latter's material sphere of validity.[6] So we arrive at the juristic definition of the national legal order and – or, which comes to the same thing – the state: "The national legal order, that is, an order which constitutes a State, can thus be defined as a relatively centralized coercive order whose territorial, personal, and temporal spheres of validity are determined by international law and whose material sphere of validity is limited by international law only." The plurality of national legal orders, would not be possible without international law, or as Kelsen recapitulates, "the coexistence of the national legal orders in space and their succession in time is … made legally possible by international law".

In a Kelsenian discussion of a distinct national legal order, we can stop at the respective basic norm. When heeding to the plurality of national legal orders and the fact that their territorial and personal spheres of validity border each other, this does not suffice but international law must be drawn in. And when including international law, we notice that it not only demarcates the territorial, personal and temporal spheres of validity of national legal orders but provides the reason for their validity as well. The hypothetical and transcendental basic norm which qualifies the "Fathers of the Constitution" as a law-creating authority can be taken for the ultimate reason for validity only when examining the national legal order in isolation and ignoring the plurality of law, constituted by other national legal orders and international law. Indeed, the supposedly hypothetical and transcendental *Grundnorm* of the national legal order derives – so Kelsen argues – from a positive norm of the international legal order; namely, the principle of effectiveness. The "Fathers of the Constitution" earn their legal title only because the coercive order based on the historically first constitution is efficacious as a whole. By this argument, Kelsen has transformed efficacy from an extra-

[6] In his discussion of the material scope of international law, Kelsen is not wholly consistent. In another context, he emphasizes that in distinction from national legal orders international law regulates inter-state relations, which is why in personal respect it needs to be complemented by national law.

normative, factual, *condition* for the validity of national law into a legal principle and, as such, a *reason* for validity. Efficacy turns out to possess two aspects, factual and normative. This may seem somewhat surprising in a "pure" theory for which the separation of *Sein* and *Sollen* is a given, axiomatic premise..

Two legal theoretical readings exist of the relations between national and international law: pluralist and monist. Kelsen mounts a devastating critique at the former: a plurality of national legal orders and international law there is but ultimately all the legal orders are a monistically joined in total or universal law. In Kelsen's pure theory, this is the ultimate manifestation of unity; a unity which overcomes plurality by moulding it into universal law, comprising both international law and all national legal orders.

Pluralists do not accept the reasoning which derives the basic norms of national legal orders from the international law principle of efficiency. In the black box model they embrace, not only national legal orders in their mutual relations but even national legal orders and international law are independent of each other, all possessing their particular validity bases. For Kelsen this is logically impossible: one cannot serve two masters at the same time. In legal cognition – in, for instance, a legal theoretical reconstruction of law – one must make a choice between the perspectives of national and international legal order. The situation is analogous to the necessity of choosing between the legal and moral orders (or legal and moral cognition). So, "just as the jurist ignores morality, and the moralist law, so the international jurist would have to ignore national, and the national jurist international law". In Kelsen's view pluralists are inconsistent in treating national and international law as simultaneously valid legal orders.

For Kelsen, two ways exist to (re)construct the monist edifice of universal law, covering international law and all the national legal orders: either one proceeds from international law and derives from there the validity of national legal orders or one proceeds from one particular national legal order and derives from there the validity of, not only international law, but all the other national legal orders as well. In the first alternative, all national legal orders not only find in international law the determination of their respective territorial, personal and temporal spheres of validity, but also, in the principle of efficiency, the reason for their validity. Consequently, the ultimate reason for the validity of universal law lies in the basic norm of international law. Due to the position of customary law in international law, the basic norm must authorize custom as a norm-creating fact and can, according to Kelsen, be formulated as follows: "The states ought to behave as they have customarily behaved." Not a very thrilling

summation of the ultimate foundation of all law to someone versed in, say, Tomist or Kantian natural law philosophy!

If one opts for the perspective of national law, reconstructing the structure of universal law is more complicated. First, one must specify the national legal order which serves as one's point of reference. The next step is to derive the validity of international law from the referential national legal order. Usually, recourse is taken to recognition: international law is explained to owe its validity to its explicit or tacit recognition by the national legal order. In Kelsen's view, this entails that international law is subsumed under the referential national legal order, made part of it. What about, then, the other national legal orders? What is the basis of their validity? Kelsen argues that through the principle of efficiency, international law, even if part of the referential national legal order, provides the reason for the validity of the other national legal orders. Consequently, through international law, the referential national legal order grounds the validity of all the other national legal orders. It is no wonder that Kelsen, allowing himself politico-ideological remarks rare in his legal theoretical oeuvre, detects not only state solipsist but also nationalist, even imperialist, implications in the version of monism premised on the primacy of national law. The true universal law appears to be the referential national legal order, which is superior to not only international law but all the other national legal orders as well: as Kelsen puts it, "the national legal order, which is the starting point of the construction, becomes, in virtue of the international law which is part of it, a universal legal order delegating all other national legal orders". The epistemological mission has been accomplished and "the cognitive unity of all valid law" achieved.[7]

Kelsen does not hide his preference for the primacy of international law; for internationalism over nationalism and state solipsism, for peace through law over imperialism. In disclosing where his sympathies lie, Kelsen acknowledges overstepping the legitimate boundaries of objective scholarship. Yet, he shuns the position assuming the primacy of national law also because of the perspectivism of the available referential national legal orders; the cognitive unity the monist position aspires for is attained at the high price of a new

[7] Kelsen's legal theoretical acrobatics culminates in the claim that in the monist account premised on the primacy of national law, the validity of even the referential national legal order is based on the international law principle of efficiency. But how is this possible? If the validity of international law is based on a particular national legal order and if the validity of the latter is – in accordance with all the other national legal orders – in turn based on international law, are we not moving in a circle? Kelsen tries to break out of the circle by suggesting that we speak of the referential national legal order in two senses, wide and narrow. It is the referential national legal order in the wide sense which grounds the validity of international law and which through recognition includes the latter in its system. In turn, it is the referential national legal order in the narrow sense – i.e. not including international law – which derives its validity from the international law principle of efficiency. This may not sound very convincing.

cognitive plurality. Kelsen notes that it is "logically possible that different theorists interpret the world of law by proceeding from the sovereignty of different States" and that "each theorist may presuppose the sovereignty of his own State, that is to say, he may accept the hypothesis of the primacy of his own national legal order". Then each theorist considers "the international law which establishes the relation to the legal orders of the other states and these national legal orders as part of the legal order of his own state, conceived as a universal legal order". Such perspectivism entails that "the picture of the world of law would vary according to what State is made the basis of the interpretation". This is not a very attractive vision for a legal theorist for whom cognitive unity is a high- if not the highest-ranking epistemological value!

Kelsen's recapitulation of universal law is elegant, although for some critics perhaps dangerously close to conceptual acrobatics. Even today, his account may still provide in particular international lawyers with valuable insights and inspiration. Yet, in our postnational era, it can hardly convince as a portrayal of the unity of global law. Kelsen's universal law does not recognize nonstate law at all, and, as we have seen, national legal orders can no longer – if they ever could – be depicted in terms of a hierarchical normative *Stufenbau*, crowned by a *Grundnorm*, or in the international law version of universal law, the international law principle of efficacy and, ultimately, the *Grundnorm* of international law. Although in his discussion of the interdependence of international and national law Kelsen is no hardcore blackboxist, his account is a version of state sovereigntism which can no longer serve as the Master Principle bringing order to the disorder of global law. However, Kelsen's account includes an important message even to someone who tackles the unity of postnational plurality from other premises: the perspectival character of all reconstructions of the unity of plurality.

Instead of Kelsenian formal unity, inter-regime unity of postnational law must be conceived of in discursive and cultural terms, keeping in mind that in addition to its normative aspect law also consists of socio-legal practices, including legal discourses, and that the normative aspect involves "sub-surface", cultural layers, too. Here I can refer to what I have said above about the opening of state law as both a multi-layered legal order and legal practices, and about conceiving of inter-regime relations not only in terms of conflicts but also – and even primarily – in terms of interlegality. What unity there is is primarily produced through cross-boundary discourses which, in turn, would not be possible without legal cultural overlaps, commonalities and boundary-transcending influences. I have found it fruitful to

speak of a common *deep culture* which is shared by diverse legal orders and which facilitates inter-regime discourses. Thus, for instance, the sufficiently uniform application of EU law or European integration as legal integration in general would hardly been possible without such a deep culture, common to the national legal orders of the Member States, as well as EU law.

As I have already, in the wake of Klaus Günther (2001), remarked, transnational law – i.e. nonstate law above the state – consists largely of lawyers' law (*Juristenrecht*). In a globalizing world, the legal culture, which shapes lawyers' professional *Vorverständnis,* the language of law, is also globalizing. Günther talks about a *universal legal code* which allows for discursive links between legal regimes .The concept of legal code brings to mind Luhmann's sociological theory of law, according to which the legal system, in line with other social sub-systems, is differentiated on the basis of its distinct binary code. However, the code Günther has in mind is not reduced to the Luhmannian distinction between law and nonlaw or legal and illegal (*Recht* / *Unrecht*) – a strict binary distinction which postnational developments in fact have questioned – but constitutes a richer legal cultural package with normative, conceptual, and methodological elements. On Günther's suggestion, the code involves, for instance, the concepts of rights, duties, and legal subjectivity; the distinction between primary and secondary norms; the principles of strict liability and liability presupposing *culpa*; the requirement of predictability of liability and sanction; principles guiding division of the burden of proof; institutionalisation of the role of the neutral *tertius*; the principle of *audiatur et altera pars*, and so on. Günther claims that this legal code's attachment to state law has been a historically contingent fact; globalization and increasing legal plurality have liberated it from its previous spatial bonds and transformed it into a "universal code of legality". Its concepts and principles were originally developed in particular western legal cultures: the Continental European Romano-Germanic and the Anglo-American common-law cultures. Subsequently, so Günther argues, they have severed their ties with their cultural seedbed and undergone a process of formalisation; consequently, they can now be specified and substantiated with diverse culturally-determined contents.

It is neither possible nor necessary to engage here in a detailed examination of the ingredients Günther suggests be included in the universal code of legality. What is important to me to note the similarities between Günther's code and my notion of legal deep culture. We could contend that at its core, globalization of law amounts to globalization of a common legal deep culture or – to put it in Günther's terms – the formation and spread of a universal legal code. This code would facilitate inter-regime discourse and be the major cause for what

unity the plurality of law can display at the global level. Yet, such a contention must be accompanied by at least three vital qualifications.

First, we should be careful with universalist terms and pretensions, and not equal globalization with universalization.[8] How wide-spread the deep culture is is an empirical question. The answer evidently depends on how thick terms we use in defining the contents of this deep culture. The more we enrich the normative contents the more controversial universalist claims become. This also means that it is possible to speak of legal deep cultures with wider and narrower reaches. Even when abandoning universalist pretensions, it may still make sense to talk of European legal deep culture. And, to narrow the scope, the Nordic legal deep culture, common to the national legal orders of the Nordic states, may be given a thicker definition than the European one. This entails – and this is my second qualification – that there exists a plurality of unities, constructed at different levels and with different extensions.

The lesson of perspectivism we can learn from Kelsen leaves us with a similar conclusion; and this constitutes my third qualification. For a legal theorist, no bird's-eye-view from above and outside all differentiated legal cultures exists: legal theorists always engage in reconstructing both the unity and the plurality of law carrying with them the legal cultural package they have internalized in their legal *Vorverständnis*. For those of us who are pupils of Western legal culture(s) there is no escape from a certain imposed legal cultural Eurocentricism. Yet among us, too, culturally determined perspectives vary, producing variety in our legal theoretical reconstructions.

So, plurality of unities there is, and in the dialectic of unity and plurality it is plurality which finally gains the upper hand.

Sorry to say, dear Kelsen.

[8] Because of the universalist connotations, "denationalization" is often a more recommendable term than "globalization"