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Five Theses on the Dialectic of Unity and Plurality in Postnational Law

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

Introduction

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, complemented with the box of international law.¹ 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 as their mutual relationship. In this chapter, I shall present and defend five 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. 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.
3. 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.
4. Postnational plurality has fundamentally affected the internal unity of instances of law, including state law regimes. While formal unity of the national legal order is increasingly difficult to maintain, the emphasis has shifted from formal to substantive (legal cultural) and discursive unity.

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¹ ‘Black box model’ is a term coined by William Twining in his *Globalisation and Legal Theory* (Northwestern University Press, 2000).

5. Under the conditions of postnational plurality, a second-level unity of law can only be of a discursive and substantive nature, building on deep cultural affinities.

The theses I shall defend do not directly bear on the issue of legitimacy. Yet, indirectly they do. If the legal positivist notion of the law as hierarchically structured and self-contained state law is increasingly irrelevant, the reach of the legitimacy produced by state law's legislative practices and formal unity also diminishes. If our future - and to a great extent even present - lawscape is dominated by interlegality traversing the boundaries of national legal regimes, as well as by shifting legal cultural and discursive unities, legitimacy must also be increasingly based on corresponding substantive principles and discursive processes.

1. Thesis 1: Reversal of the hierarchy of unity and plurality

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. Such a 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. What success the largely mythical Westphalian state had in the policy of legal 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.

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).² 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, with EU law as its most conspicuous epitome.

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. 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 evident 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.

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² Hans Kelsen: *Reine Rechtslehre* (2. Auflage, Mohr Siebeck 1960); H. L. A. Hart: *The Concept of Law* (Clarendon Press 1961)

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 2: The need of 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 are to be rejected, state law still deserves special attention.

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.³ 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.

State law is not only the dominant and most widespread 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

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³ See, e.g., Brian Z. Tamanaha: *A General Jurisprudence of Law and Society* (Oxford University Press 2001).

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 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 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 construct so solid and impenetrable.

3. *Thesis 3: Primacy of interlegality over simple diversity and radical pluralism*

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 legal 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. 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 in his pure theory 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. 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 telling 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.⁴

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

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⁴ The OMT case is the latest but will not be the last episode instance in the pluralist bickering between the German Constitutional Court and the ECJ. The contributions of the German Constitutional Court are Beschluss vom 06. Juli 2014 - 2 BvR 2728/13 and Urteil vom 21. Juni 2016 - 2 BvR 2728/13, and the ECJ interventions Opinion of Advocate General Cruz Villalón delivered on 14 January 2015, C-62/14 - *Gauweiler and Others* and C-62/14 - *Gauweiler and Others*

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 Koskenniemi and other legal strategists, invoking 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 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. Furthermore, 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. Thus, as *Kadi* and *Bosphorus* testify, EU law has been engaged in fundamental conflicts of authority also with international law, as well as European human rights law as another instance of nonstate law.⁵ 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

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⁵ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351; *Bosphorus Hava Yollari Turizm v Ireland* App No 45036/98 (ECHR, 30 June 2005).

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. 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, to employ Hans K. Lindahl's terms.⁶ 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. Yet, prospects for consensual and dialogical outcomes may not be as bleak as 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.

4. *Thesis 4: The need to rethink internal unity*

The internal unity of instances of law should from the very beginning be analyzed in the context of the plurality in which they partake. Yet, 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

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⁶ Hans K. Lindahl: *Fault Lines of Globalization* (Oxford University Press 2013).

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 the internal unity of national legal orders.

The formal unity of these legal orders, 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. In Kelsen's pure theory of law, the formal unity is guaranteed by the subordination of the hierarchically structured legal order to a common basic norm. 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.

In the legal positivist understanding, formal unity was also supposed to guarantee the autonomy of distinct national legal orders. As the example of EU law's impact on Member State law shows, the contours of national legal orders 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. 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' efforts to create unity through systematization by means of law's divisions – classification, as it was called in the US – involve substantive criteria, which for him were an anathema. Where Kelsen erred in his criticism was his claim that building unity on substantive principles, concepts and theories, which were an essential part of the classification project, would necessarily entail embracing natural law premises. *Pace* Kelsen, 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. But 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. Now law's divisions tend to be boundary-crossing rather than boundary-asserting. New putative fields of law 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 a

comprehensive but a local character; 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 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.

5. *Thesis 5: 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. In our postnational era, Kelsen's recapitulation of universal law can hardly convince as a portrayal of the unity of global law, although it may still provide in particular international lawyers with valuable insights and inspiration. 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*.

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. The unity 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 make assumptions of a common deep culture which is shared by diverse legal orders and which facilitates inter-regime discourses.⁷ 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.

Klaus Günther talks about a *universal legal code* which allows for discursive links between legal regimes. This code 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.⁸ 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 is 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.⁹ 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

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⁷ Kaarlo Tuori: *Critical Legal Positivism* (Ashgate 2002); Kaarlo Tuori: *Ratio and Voluntas* (Ashgate 2011).

⁸ Klaus Günther: Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretischer Problem, in *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit*, edited by Luc Wingert and Klaus Günther (Suhrkamp 2001) 539–567.

⁹ Because of the universalist connotations, “denationalization” is often a more recommendable term than “globalization”

definition than the European one. This entails – and this is my second qualification – that we can talk of a plurality of unities, constructed at different levels and with different extensions.

My third qualification is related to the lesson of perspectivism which can learn from Kelsen's discussion of universal law. 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.

Conclusion

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