

The Theory of the Law Creators' Circle: Re-Conceptualizing the Monism–Dualism–Pluralism Debate

By Lando Kirchmair*

Abstract

The aim of this Article is to re-conceptualize the debate about the (theoretical) relationship between international and national law, which has been debated for centuries. Generally, the floor is divided between dualism as developed by Heinrich Triepel and monism developed mainly by Hans Kelsen. In the light of new developments since their inception, I argue that these theories can no longer comprehensively explain the relationship between international or European Union (EU) and national law. Yet, the Article is based on the conviction that a common denominator of international and national law is elementary (i.e. here "the law creators' circle," in German, "Die Theorie des Rechtserzeugerkreises," in short "TREK") in order to solve possible norm conflicts between different but overlapping legal orders. Therefore, pluralism is also limited in my eyes because it does not offer a satisfying

* Lando Kirchmair, Dr. iur. (University of Salzburg, Austria, 2012); Mag. iur. and Mag. iur.rer.oec. (University of Innsbruck, Austria, 2009 & 2010), was, while writing this Article, a post-doctoral research and teaching fellow at the Hungarian Academy of Sciences: Centre for Social Sciences: Institute for Legal Studies and the National University of Public Services: Faculty of Administration: Institute of State and Social Theory in Budapest, Hungary. Currently he is *wissenschaftlicher Mitarbeiter* at the University of the Federal Armed Forces, Munich, Germany. Contact: lando.kirchmair@gmail.com.

This Article briefly outlines the core arguments developed in my Doctoral thesis and aims in the present form to propose a fresh theoretical argument for the interpretation of Article 50 Austrian Federal Constitutional Law ("B-VG") and Article Q Hungarian Fundamental Law ("HFL"). Different versions of this Article have been presented *inter alia* at special workshops at the 26th IVR World Congress of Philosophy of Law and Social Philosophy in Belo Horizonte, Brazil, at the 38 Austrian Day of Public International Law, the Université Paris 1 Panthéon-Sorbonne and the Institute for Legal Studies of the Hungarian Academy of Sciences, as well as at Andrassy University, Budapest. Obviously, there are many people to whom I owe a great deal of thanks for very constructive criticism and comments. However, I wish to especially thank my Hungarian colleagues András Jakab, Tamás Molnár, and Gábor Sulyok, who were particularly helpful with advice on the Hungarian discourse. Yet, of course, the usual disclaimer applies, and all errors remain mine alone. This Article does not quote passages from the doctoral thesis and provides just an overview of the "Theorie des Rechtserzeugerkreises" ("TREK"). The keen reader might be interested to learn that my doctoral thesis was published with Duncker & Humblot in fall 2013 under the title "*Die Theorie des Rechtserzeugerkreises—eine rechtstheoretische Untersuchung des Verhältnisses von Völkerrecht zu Staatsrecht am Beispiel der österreichischen Rechtsordnung.*"

prescriptive account. This common legal framework, however, must not be understood as the “constitutionalization” of international (or EU law) either, as this easily implies too many substantial values, which are not (yet) a common reality.

A. Prolegomena

The present Article aims to answer the following question: Is it up to national law to decide on the efficacy and validity of international law within the national legal order? This question concerning the complex and avidly discussed relationship between international and national law has elicited responses resulting in many diverging theories. The way I try to respond to this question does not follow monism, dualism, or—what is fashionable nowadays (but in fact not very different from dualism)—pluralism.

As a result of dualism’s and monism’s emergence almost a century ago, they must be understood against the background of the historical circumstances of their respective times. Current challenges, such as international or supranational organizations and the development of international law in general, overburden these out-dated theories. Thus, dualism—arguing for a complete separation between international and national law—faces serious difficulties in explaining the basis of international or supranational organizations because, according to dualism, they would have one international and as many as the existing member states’ national grounds of validity.¹ Similarly nonsensical was the concurrent assumption that international and national law per default cannot have the same content or addressees. While this is obvious for us today, it was not when dualism was emerging. Historically, dualism evinced progress as the separation of international and national law gave the former space to breath against the latter. Thus, dualism liberated international law from being understood as “external state law”² and was therefore even referred to as a “cleansing thunderstorm” by the monist Alfred Verdross.³

¹ See Stefan Griller, *Völkerrecht und Landesrecht*, in HANS Kelsen und das Völkerrecht – ERGEBNISSE EINES INTERNATIONALEN SYMPOSIUMS IN WIEN 83, 97 (Robert Walter et al. eds., 2004). For an attempt to save dualism, see Gaetano Arangio-Ruiz, *International law and Interindividual law*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 15, 22 (Janne Nijman & André Nollkaemper eds., 2007).

² For this term (in German “äußeres Staatsrecht”), see G. W. F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS §§ 330 *et seq.* (1821) (noting that § 547 can be also understood as the origin of the monistic view with primacy of national law); cf. Lando Kirchmair, *The “Janus Face” of the Court of Justice of the European Union: A theoretical appraisal of the EU legal order’s relationship with international and member state law*, 4 GÖTTINGEN J. INT’L L. 677, 688 (2012).

³ See ALFRED VERDROSS, DIE VÖLKERRECHTSWIDRIGE KRIEGSHANDLUNG UND DER STRAFANSPRUCH DER STAATEN 34 (1920) (“[R]einigendes Gewitter”).

Monism, on the other extreme, faces the critique of having a highly fictitious understanding of the world: Nothing less than the “unity of the legal world order” is proclaimed.⁴ Similarly problematic is the “chain of validity,” which holds together this unity. According to the idea that norms can only derive from other norms, the conclusion drawn is that any national law is derived from international law.⁵ This, however, is an argument, which does not reflect reality.⁶ Thus, a critical approach towards these grand, but also old and somehow out-of-fashion theories, is for this and other reasons now established mainstream.⁷ However, this does not mean that some elements of both theories cannot be applied in a meaningful way and thereby might still be useful tools to understand specific processes of the relationship.⁸

⁴ See generally ALFRED VERDROSS, *DIE EINHEIT DES RECHTLICHEN WELTBILDES AUF GRUNDLAGE DER VÖLKERRECHTSVERFASSUNG* (1923); see also HANS Kelsen, *REINE RECHTSLEHRE* 329 (1960); Arangio-Ruiz, *supra* note 1, at 18 (speaking of “the natural unity of human kind . . . [a]s a matter of pure speculation”).

⁵ See HANS Kelsen, *THE PURE THEORY OF LAW [REINE RECHTSLEHRE]* 193–215, 215 (M. Knight trans., 1978) (1960) (“A norm of general international law authorizes an individual or a group of individuals on the basis of an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm thus legitimates this coercive order for the territory of its actual effectiveness as a valid legal order and the community constituted by this coercive order as a ‘state’ in the sense of international law.”); see also ALFRED VERDROSS, *DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT* (1926) (arguing from the viewpoint of a(n) (international) basic norm from which also municipal law derives) “The freedom of states is nothing else than a margin of discretion depending on international law.” *Id.* at 35 (translated by the author). According to Verdross, the lawmakers of public international law are not States, but the international community, acting through an international organ with supranational power. *Id.* at 48 *et seq.* But see HUGO KRABBE, *DIE MODERNE STAATSIDEE* 305–09 (2d ed. 1919, reprinted in 1969).

⁶ For criticism against the other monistic concept with primacy of national law (which would consequently make international and supranational law to be governed by some almost 200 diverging national laws), see Kirchmair, *supra* note 2 at 681 n.12.

⁷ See, e.g., Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law*, 6 *INT’L J. CONST. L.* 397, 400 (2008) (denoting those theories “intellectual zombies”). For examples of criticism of both theories, see Kirchmair, *supra* note 2; Lando Kirchmair, *Is the EU legal order the tombstone of the dualistic and the monistic doctrine?*, in *LA RECHERCHE EN DROIT CONSTITUTIONNEL COMPARÉ* (Michael Thaler & Michel Verpeaux eds., 2014).

⁸ See Andrés Jakab, *Probleme der Stufenbaulehre—Das Scheitern des Ableitungsgedankens und die Aussichten der Reinen Rechtslehre*, 91 *ARCHIV FÜR RECHTS & SOZIALPHILOSOPHIE* 333 (2005) (“Some valuable parts of PTL [“Pure Theory of Law”] might be used in other legal theories, but these are nothing but transplanted organs from the dead body of PTL whossewhose heart—SL [“Stufenbaulehre”]—can no longer keep the body alive.”).

Legal pluralism, which could be understood as a sort of modern version of dualism, is also problematic. Although legal pluralism may provide for a coherent descriptive account of current legal developments, it lacks a satisfying common prescriptive account. Accordingly, claims (for how to solve or why not to solve norm conflicts) which solely rest on the description of pluralistic orders do not suffice as a basis for a normative account.⁹ Thus, if, in the end, approaches of legal pluralism resort to some sort of “meta norms or principles” to solve norm conflicts,¹⁰ they too will need to justify these principles and to give reasons for such common accounts. Constitutionalization of international law on the other hand is more interested in the substantial development of international law in form of constitutional norms or principles.¹¹ In short, this situation leaves room for new theories aimed at analyzing current challenges brought up by the relationship between international and national law in the era of globalization.

This Article proposes to re-conceptualize the debate about the (theoretical) relationship between international and national law. Therefore, I cannot agree with those who trivialize this discussion by saying it would be “unreal, artificial and strictly beside the point.”¹² The so-called “globalization of law”¹³ as framed in the famous “constitutionalization of

⁹ See Lando Kirchmair, *Descriptive vs. Prescriptive (Global) Legal Pluralism: A gentle reminder of David Hume’s is–ought divide* (paper in preparation) (on file with the author).

¹⁰ Compare Paul S. Berman, *Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism*, 20 IND. J. GLOBAL LEGAL STUDS. 665, 665–95 (2013), with MIREILLE DELMAS-MARTY, LES FORCES IMAGINANTES DU DROIT (II): LE PLURALISME ORDONNE (2006). See also MIREILLE DELMAS-MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD 44 (Naomi Norberg trans., 2009). With regards to constitutional pluralism, see Matthias Kumm, *The Moral Point of Constitutional Pluralism*, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 216, 220 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).

¹¹ As such, a demonstration is rather difficult. JAN KLABBERS, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009) (simply presuming it); THOMAS KLEINLEIN, KONSTITUTIONALISIERUNG IM VÖLKERRECHT (2012) (refraining from strong normative claims). For a critical overview of “world constitutionalism,” see Oliver Diggelmann & Tilmann Altwicker, *Is there something like a constitution of international law? A critical analysis of the debate on world constitutionalism*, 68 HEIDELBERG J. INT’L L. 623, 623–50 (2008).

¹² Gerald G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INT’L, 1, 71 (1957) (calling this discussion “unreal, artificial and strictly beside the point”). Likewise, Fitzmaurice argued that “[i]n the same way it would be idle to start a controversy about whether the English legal system was superior to or supreme over the French or vice-versa, because these systems do not pretend to have the same field of application.” See *id.* at 71–72. For a practical approach concerning the relationship between international and national law, see HELEN KELLER, REZEPTION DES VÖLKERRECHTS 6 (2003). This, however, has been criticized by Griller, *supra* note 1, at 84 n.3.

¹³ In relation to this designation, see Jean-Bernard Auby, *Globalisation et droit public*, 14 EUR. REV. PUB. L. 1219, 1219 (2002); Anne Peters, *The Globalization of State Constitutions*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 251 (Janne Nijman & Andre Nollkaemper eds., 2007); see also DAVID J. BEDERMAN, GLOBALIZATION AND INTERNATIONAL LAW (2008).

international law,"¹⁴ may be mentioned among other developments, to elucidate the ever-growing importance of international law, which subsequently increases the topicality and the ongoing importance of the debate on the effect and also the validity of international law within the domestic legal order.

The Article seeks first to explain the theoretical relationship between international and national law. One main objective is rooted in the conviction that a common denominator of international and national law—for example, here the law creators' circle—is necessary to analyze the effect and validity of the first within the latter.¹⁵ The theory of the law creators' circle, in short "TREK," shares the point of departure with most social contract theories: A hypothetical state imagined as a legal vacuum coined the "legal desert." However, in contrast to political philosophy (or the constitutionalization of international law), the hypothesis (*Denkmodell*) behind the law creators' circle aims at only elucidating the structural relationship between international and national law without saying anything or anticipating reasons how society should be organized—in a just (or any other ideological) way. Clarifying the theory behind this relationship is absolutely essential because otherwise there is no convincing theoretical argumentation to explain how it is structured; for instance, the often-argued freedom of national law to implement international law, which is a legacy of times of simple interstate law, is assumed to be true without a theoretical basis.¹⁶ Furthermore, the argument that the self-executing character

¹⁴ But see ALFRED VERDROSS, *DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT* (1926); KLABBERS, *supra* note 11; Diggelmann & Altwicker, *supra* note 11.

¹⁵ But see Griller, *supra* note 1, at 84 (arguing, roughly translated, that it is quintessential to analyze, the bases and validity of a norm in the context of its generation.) "Die [...] Annäherung zwischen den Theorien macht die Auseinandersetzung mit den Grundsatzfragen nicht überflüssig. Man entkommt ihnen nicht, indem man sie für obsolet oder praxisfern erklärt. Welche Norm *auf Grund welchen Rechtserzeugungszusammenhanges* in einer konkreten Situation verbindlich ist, ist eine in der Praxis vielleicht bisweilen vernachlässigte, aber im Grunde 'unentrinnbare allenfalls,' implizit beantwortete Frage." *Id.* (emphasis in original).

¹⁶ Compare Jost Delbrück, *Grundfragen der innerstaatlichen Geltung des Völkerrechts*, in *VÖLKERRECHT* 98, 101 (G. Dahm et al eds., 1988) (stating "Das Völkerrecht fordert nur, daß es, aber sagt nicht, wie es im inländischen Recht durchgesetzt werden soll"), with Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 *RECUEIL DES COURS* 317–21 (1992). See André Nollkaemper, *The direct effect of public international law*, in *DIRECT EFFECT—RETHINKING A CLASSIC OF EC LEGAL DOCTRINE* 179 (Jolande M. Prinssen & Antionette Schrauwen eds., 2002); see also WARD N. FERDINANDUSSE, *DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS* 137 (2006). However, Ferdinandusse acknowledges, "When the general rule of freedom comes into conflict with the basic principle that States must perform their international obligations in good faith (*pacta sunt servanda*), the latter must prevail." *Id.* at 135.

of international law is interpreted, or even decided, by national law lacks a theoretical foundation.¹⁷

The article then applies TREK to practice, demonstrating how a doctrinal analysis (*dogmatisch*) of constitutional provisions on the relationship of international and domestic law would look like on the basis of TREK. Even though the following illustration is restricted to the Austrian legal order and, in a cautious way, to the Hungarian legal order, I propose, as a thought experiment, that you test the theory on your own constitutional norms, which might also provide a fresh perspective.

B. The Underlying Understanding of Law

In order to analyze the relationship between international and domestic law properly, I established a working hypothesis: A common denominator of international and national law must be stipulated to enable a transparent and methodologically coherent analysis of the relationship. The legal concept underlying TREK, therefore, concentrates on those aspects especially relevant for the relationship between international and national law. Because international and national law are different legal fields to a certain extent, an abstract understanding of law is necessary in order to include both fields under one common denominator. The common denominator is vital, however, because it enables a comparison of those different fields.¹⁸

The definition of law—in other words, the origin of law—starts in the “legal desert.”¹⁹ In order to avoid using sociological, anthropological, psychological, or other reasoning embedded in natural sciences,²⁰ a hypothetical basis is assumed.²¹ Therefore, the legal

¹⁷ See ALBERT BLECKMANN, BEGRIFF UND KRITERIEN DER INNERSTAATLICHEN ANWENDBARKEIT VÖLKERRECHTLICHER VERTRÄGE – VERSUCH EINER THEORIE DES SELF-EXECUTING TREATY AUF RECHTSVERGLEICHENDER GRUNDLAGE 124 (1970) (referencing the Austrian and the Dutch doctrine in n.19–20); Nollkaemper, *supra* note 16, at 164; Karen Kaiser, *Treaties, direct applicability*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE EDITION [MPEPIL] para. 6 (R. Wolfrum ed., 2011); GABY BUCHS, DIE UNMITTELBARE ANWENDBARKEIT VÖLKERRECHTLICHER VERTRAGSBESTIMMUNGEN—AM BEISPIEL DER RECHTSPRECHUNG DER GERICHTE DEUTSCHLANDS, ÖSTERREICHS, DER SCHWEIZ UND DER VEREINIGTEN STAATEN VON AMERIKA 37, 43 (1993); Martin Franz, *Die unmittelbare Anwendbarkeit von TRIPS in Argentinien und Brasilien*, 12 GEWERBLICHER RECHTSSCHUTZ & URHEBERRECHT INTERNATIONALER TEIL 1001, 1004 (2002); Keller, *supra* note 12, at 14 n.40.

¹⁸ Yet, I would like to emphasize that I do not want to challenge or even improve already established general concepts of law, which work perfectly well in different contexts and with regards to other topics.

¹⁹ For a comparison of the theories of the social contract summarized, see PETER KOLLER, NEUE THEORIEN DES SOZIALKONTRAKTS (1987).

²⁰ See, e.g., JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 34 (2002) (“Legal theorists ordinarily have little business in trying to explain why states co-operate: such belongs to the social sciences properly. Moreover, the legal theorist is generally ill equipped to perform such a task: whenever lawyers engage in political analysis, more often than not the results fail to persuade professional political scientists.”).

desert shall be understood as a legal vacuum: A neutral, pre-legal state without any further specifications. Of course such a starting point provokes reflexive associations to social contract theories. The legal desert was considered empirically as an anarchic state in which everyone is at war with each other, famously expressed as the “state of nature” by Thomas Hobbes.²² Natural rights were conceived of to be already existing and just to be protected by a social contract by John Locke,²³ and Jean-Jacques Rousseau thought it to be necessary to discard everyone from one’s property in order to enable the formation of the “*volonté générale*,”²⁴ hence it is considered to be a prerequisite for the formation of common interests in the first place. All these were brilliant thoughts, which provoked many scholarly responses. As I do not focus on how a just society can be conceived of in this Article, this underlying assumption shall suffice: In the legal desert, a consensus (*Willensübereinkunft*) between two or more individuals is the sole possibility which allows the establishment of a binding legal rule to organize cohabitation.²⁵ Consensus thereby is understood to serve as a tool for objectification of individual interests.²⁶ However, as

²¹ See also FRITZ LOOS, ZUR WERT—UND RECHTSLEHRE WEBERS 111 (1970) (“Die logische Struktur der Rechtswissenschaft [von Kelsen] ist demgemäß dieselbe wie die der Sozialphilosophie i.S. Webers. Rechtswissenschaft und Sozialphilosophie suchen von hypothetischen vorausgesetzten Werten aus sinnhafte Konsequenzen zu entfalten, sind also in diesem Sinne normative Wissenschaften.” [footnotes omitted]). For the change from a real to a hypothetical contract (“hypothetische Konstruktion”), see KOLLER, *supra* note 19, at 14, (quoting Kant, *Über den Gemeinspruch: “Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis,”* as the first to express the fiction of a social contract).

²² See THOMAS HOBBS, LEVIATHAN 96 (J. Schlösser trans., 1996) (1651).

²³ See JOHN LOCKE, ZWEI ABHANDLUNGEN ÜBER DIE REGIERUNG [TWO TREATISES OF GOVERNMENT] 201 (H. J. Hoffmann trans., 1977) (1690).

²⁴ See JOHN-JACQUES ROUSSEAU, VOM GESELLSCHAFTSVERTRAG ODER GRUNDSÄTZE DES STAATSRECHTS [DU CONTRACT SOCIAL; OU PRINCIPES DU DROIT POLITIQUE] 17 (H. Brockard trans., 1986) (1762); compare KOLLER, *supra* note 19, at 25.

²⁵ See Weinberger’s argument aiming at disclosing natural law based theories, OTA WEINBERGER, NORM UND INSTITUTION—EINE EINFÜHRUNG IN DIE THEORIE DES RECHTS 72–73 (1988) (“Der Positivismus geht demgegenüber vom *Non-Kognitivismus* aus, demgemäß es keine Möglichkeit gibt, richtiges Recht zu erkennen und überhaupt Normen rein kognitiv—dh ohne willensmäßige Stellungnahme—zu begründen.”).

²⁶ To be precise, it should say “almost objective” because complete objectivity does not seem attainable via consensus. This thesis does not aim at changing this. The notion of objectivity therefore refers only to an approximation to objectivity. Comparing to discourse theory, see Robert Alexy, *Diskurstheorie und Menschenrechte*, in RECHT, VERNUNFT, DISKURS – STUDIEN ZUR RECHTSPHILOSOPHIE 127, 129 (Robert Alexy ed., 1995) (circumscribing discourse theory as “eine prozedurale Theorie der praktischen Richtigkeit [umschreibt]. Nach ihr ist eine Norm dann richtig und deshalb gültig, wenn sie das Ergebnis einer bestimmten Prozedur, nämlich der eines rationalen praktischen Diskurses, sein kann.”); JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN 299f (1997); JÜRGEN HABERMAS, DIE POSTNATIONALE KONSTELLATION 175 (1998); JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG—BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 138 (1992) (“[G]enau die Regelungen

briefly indicated above, this assumption does not aim to establish any values or tools that might indicate how a just society shall be organized. Whereas the point of departure is very similar to most social contract theories—a hypothetical state imagined as a legal vacuum coined the “legal desert”—the aim of this analysis contrasts sharply with the aim of political philosophy as the goal of this Article is much more moderate. The hypothesis (*Denkmodell*) behind the law creators’ circle aims at only elucidating the structural relationship between international and national law without saying how society or the State should be organized. Yet, it is not a descriptive theory basing the law on sociological facts. If the hypothetical legal desert is best understood by imagining a natural disaster or other events, is left to the reader’s imagination.

Analogous to the historical idea of social contract theory, the consensus element is based on the abstract principles of *pacta sunt servanda* and *pacta tertiis*.²⁷ Those principles apply due to pre-legal, reasonable reasons.²⁸ Being aware of the fact that these pre-legal principles must not be chosen arbitrarily and their origin needs to be disclosed, because the assumed fiction should not deviate from conceivable or even already scientifically proven pre-conditions, a very brief explanation follows. The pre-legal application of the *pacta sunt servanda* rule is based on the assumption that all individuals participating in a *Willensübereinkunft* must not deviate from the adopted compromise²⁹ in order not to violate the achieved compromise or endanger the successful adoption of a future compromise, which, for individuals, would be again positive.³⁰ This includes the

Legitimität beanspruchen dürfen, denen alle möglicherweise Betroffenen als Teilnehmer an rationalen Diskursen zustimmen könnten.”); see also Seyla Benhabib, *Another Universalism: On the Unity and Diversity of Human Rights*, in 81 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 7, 21 (2007).

²⁷ See KOLLER, *supra* note 19, at 12.

²⁸ See JOHN RAWLS, *POLITISCHER LIBERALISMUS* [POLITICAL LIBERALISM] 120 (Wilfried Hinsch trans., 1998).

²⁹ Compromise is understood as a consensus achieved by *Willensübereinkunft*. Irrespective of the difference between compromise and consensus (not every consensus must be a compromise), these notions are used as synonyms here. See NORBERT HOERSTER, *WAS IST RECHT? GRUNDFRAGEN DER RECHTSPHILOSOPHIE* 133 (2006) (“Die Bewertung des Rechts bzw. die Aufstellung normativer Anforderungen an das Recht ist in ihrer Begründung auf ethische Prämissen angewiesen. Nach der hier vertretenen Auffassung können diese Prämissen letztlich nur auf die Realisierung individueller Interessen bzw. eines Kompromisses solcher Interessen Bezug nehmen.”).

³⁰ See IMMANUEL KANT, *METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE* 100 (1797) (“Die Frage war: warum soll ich mein Versprechen halten? Denn daß ich es soll, begreift ein jeder von selbst . . . Es ist ein Postulat der reinen (von allen sinnlichen Bedingungen des Raumes und der Zeit, was den Rechtsbegriff betrifft, abstrahierenden) Vernunft . . .”). See also JAMES LESLIE BRIERLY, *BRIERLY’S THE LAW OF NATIONS* 56 (6th ed. 1963).

“The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.”

assumption that individuals have a reciprocal interest in forming legal rules to coordinate cohabitation and to act cooperatively.³¹ The compromise is thus based on the general assumption to create positive effects for all participating individuals. This assumption seems to be justified precisely because, without it, a binding consensus would be senseless. Contrary to social contract theories, however, these assumptions are not made in order to establish principles of justice³² or to legitimize specific forms of a societal organization.³³ Nor shall a time-independent definition of law be defended here. Without proposing a material content of *just* law, structural arguments regarding the connection of individuals through consensus—in other words, law—shall dominate the articulated understanding of law.

If not all individual interests are represented more or less equally by a consensus—specifically, a situation in which discrimination against an individual or a minority lacks

Id. See GEORG DAHM, VÖLKERRECHT 12 n.17 (1958) (“Der Mindestbestand der völkerrechtlichen Ordnung muß zunächst die Regel *pacta sunt servanda* umfassen, ein Gebot zwar nicht der Logik, aber der praktischen Vernunft.”); see also Jost Delbrück, *Begriff, Geltung u. Erscheinungsformen des Völkerrechts*, in VÖLKERRECHT 27, 37 (Georg Dahm et al. eds., 1989) (saying “Wer den Konsens als Quelle des verbindlichen Völkerrechts gelten läßt, setzt damit schon stillschweigend das Bestehen einer Rechtsordnung voraus, aus der sich die Verbindlichkeit des Konsenses ergibt, die also zum mindesten den Grundsatz *pacta sunt servanda* enthält”); *id.* at 41 (“Das Völkerrecht gilt, weil es notwendig ist.” “[S]ie [*pacta sunt servanda*] ist notwendiges Recht in dem Sinne, daß ohne dessen Geltung das internationale Leben dem Chaos und der Anarchie anheimfallen müßte.”); Jost Delbrück, *Verbindlichkeit und Geltungsbereich der Verträge*, in 1 VÖLKERRECHT 600 (Georg Dahm et al. eds., 2002) (stating that *pacta sunt servanda* and *pacta tertiis* are “selbstverständliches *ius necessarium*”); 4 Jules Basdevant, *Règles générales du droit de la paix*, 58 RECUEIL DES COURS 642 (1936); GEORGES SCHELLE, PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE, VOL. I INTRODUCTION, LE MILIEU INTERSOCIAL 31 (1932) (localizing the fundamental condition of validity of (international) law in the “fait social”). *Id.* See Hans Wehberg, *Pacta sunt servanda*, 53 AM. J. INT’L L. 775, 792 (1959); see also Kirsten Schmalenbach, *Article 26*, in VIENNA CONVENTION ON THE LAW OF TREATIES—A COMMENTARY, paras. 13–22 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

³¹ For an interesting analysis arguing that rules are a cognitive phenomenon based on an inborn (moral) competence similarly to the language faculty brought up by Chomsky, see generally MATTHIAS MAHLMANN, RATIONALISMUS IN DER PRAKTISCHEN THEORIE—NORMENTHEORIE UND PRAKTISCHE KOMPETENZ (2009). See also an overview of the current debate in evolutionary psychology given by Michael Tomasello & Amrisha Vaish, *Origins of Human Cooperation and Morality*, 64 ANN. REV. PSYCHOL. 231, 231–55 (2013).

³² See generally JOHN RAWLS, EINE THEORIE DER GERECHTIGKEIT [A THEORY OF JUSTICE] (Hermann Vetter trans., 1975); JOHN RAWLS, DAS RECHT DER VÖLKER [THE LAW OF PEOPLES] (Wilfried Hinsch trans., 2002).

³³ Compare KOLLER, *supra* note 19, at 17 (indicating that social contract theories have—on the one hand—to “akzeptablen Ausgangszustand bestimmen [müssen], von dem aus eine faire Übereinkunft aller Beteiligten über die Grundsätze ihres Zusammenlebens zustandekommen kann”) On the other hand these social contract theories aim to “zeigen, welche Grundsätze unter der Voraussetzung dieses Ausgangszustandes die vernünftige Zustimmung aller Beteiligten finden würde[n].” *Id.*

their acceptance—this situation is, by definition, no longer a consensus. The disadvantaged individual or minority has the *de facto* possibility of revolting against this imposed consensus as reflected in the pre-legal principle *pacta tertiis nec nocent nec prosunt*, which is analogous to the *pacta sunt servanda* principle, hold to be pre-legally valid. If these principles are also reflected in positive law, they become a declaratory regulation, which renews but does not establish their validity. However, it reinforces the importance of these principles and therefore strengthens the pre-legal assumptions made.

Another parallel to social contract theories is the assumed equality between all individuals. This assumption was based on Thomas Hobbes's argument of empirically equal human beings,³⁴ and John Locke presupposed equality among individuals as a natural right.³⁵ Jean Jacques Rousseau also acknowledged equality of people as a fundamental precondition for his version of the social contract,³⁶ as did John Rawls in his famous "veil of ignorance."³⁷

³⁴ Compare HOBBS, *supra* note 22, at 102.

"Die Natur hat die Menschen in den körperlichen und geistigen Fähigkeiten so gleich geschaffen, daß sich zwar zuweilen einer finden lassen mag, der offensichtlich von großer Körperkraft oder schnellerem Auffassungsvermögen ist als ein anderer; jedoch wenn man alles zusammenrechnet, ist der Unterschied zwischen Mensch und Mensch nicht so beträchtlich, daß ein Mensch daraufhin irgendeinen Vorteil für sich fordern kann, auf den ein anderer nicht so gut wie er Anspruch erheben könnte. Denn was die Körperkraft betrifft, so hat der Schwächste genügend Kraft, den Stärksten zu töten, entweder durch einen geheimen Anschlag oder durch ein Bündnis mit anderen, die sich in derselben Gefahr wie er befinden. Und was die geistigen Fähigkeiten betrifft [...], so finde ich noch eine größere Gleichheit unter den Menschen als hinsichtlich der Körperkraft."

Id. But see KOLLER, *supra* note 19, at 18.

³⁵ See LOCKE, *supra* note 23, at 203 ("Im *Naturzustand* herrscht ein natürliches Gesetz, das jeden verpflichtet. Und die Vernunft, der dieses Gesetz entspricht, lehrt die Menschheit, wenn sie sie nur befragen will, daß niemand einem anderen, da alle gleich und unabhängig sind, an seinem Leben und Besitz, seiner Gesundheit und Freiheit Schaden zufügen soll.").

³⁶ See ROUSSEAU, *supra* note 24, at 17 (arguing even for expropriation in order to achieve equality). "Diese Bestimmungen [des Gesellschaftsvertrages] lassen sich bei richtigem Verständnis sämtlich auf eine einzige zurückführen, nämlich die völlige Entäußerung jedes Mitglieds mit allen seinen Rechten an das Gemeinwesen als Ganzes." *Id.*

³⁷ See RAWLS, *supra* note 32, at 36. However, for a criticism of the idea of equality, see ROBERT NOZICK, *ANARCHIE, STAAT, UND UTOPIE* [ANARCHY, STATE, AND UTOPIA] 214 (Hermann Vetter trans., 1976). See JAMES M. BUCHANAN, *DIE GRENZEN DER FREIHEIT, ZWISCHEN ANARCHIE UND LEVIATHAN* [THE LIMITS OF LIBERTY, BETWEEN ANARCHY AND LEVIATHAN] 1 (1984) (designing his social contract theory without individual equality). Compare KOLLER, *supra* note 19, at 19, 188, with BUCHANAN, *supra* note 37, at 2.

Being aware of the importance of equality amongst individuals in order to organize society, this Article will assume that equality.

In order to analyze the relationship between international and national law, it is necessary to outline—albeit briefly—the underlying concept of law. Following the aforementioned conditions, law is—from an abstract point of view—simply defined as a binding consensus (*Willensübereinkunft*) of all participating individuals. The consensus element may be fulfilled by different actions, such as explicit, implied, or tacit acceptance. However, only consensus between two or more individuals may produce an objective i.e. common legal rule.³⁸ The consensus produces objectivity because it unifies the individual interests of the participants. The resulting overlapping interest, for example, a common rule to organize cohabitation, becomes objective through the binding consensus. Consensus is furthermore understood in an abstract way, with collective will being the central idea. How this common will is ascertained, however, shall not be analyzed. On the contrary, it will be assumed as a starting point. The conviction of the individuals concerned with whether they can establish a positive compromise is assumed to be a sufficiently stabilizing element for this legal concept and its binding character.³⁹ The pre-legal, reasonable *pacta sunt servanda* principle reflects this.

Im Gegensatz [zum elitären Kollektivist, von dem man erwartet, daß er die Ziele für die Gesellschaft näher bestimmt] muß der methodologische Individualist die Existenz seiner Mitmenschen und deren Wertvorstellungen anerkennen. Er würde von Anbeginn gegen seine Prinzipien verstoßen, wenn er Menschen unterschiedliches Gewicht verleihen würde. Auch wenn es noch so verlockend ist, er kann nicht einfach Gott spielen.

³⁸ See *supra* note 26 (regarding objectivity). *But see* WEINBERGER, *supra* note 25, at 73.

³⁹ The binding character is considered to be an implied element of the consensus. See Eugenio Bulygin, *Das Problem der Geltung bei Kelsen*, in HANS KELSEN—STAATSRECHTSLEHRER UND RECHTSTHEORETIKER DES 20. JAHRHUNDERTS 80, 88, 95 (Stanley L. Paulson & Michael Stolleis eds., 2004).

See MATTHIAS KNAUFF, *DER REGULINGSVERBUND: RECHT UND SOFT LAW IM MEHREBENENSYSTEM* 25 (2010) (speaking of a “weitgehend unangefochtene[m] Spezifikum des Rechts... as an ‘umfassender und unbedingter Verbindlichkeitsanspruch’, which ‘nicht auf rechtstheoretisch zwingenden Gründen [beruht], sondern... vor allem nützliche Konvention [ist]”).

C. The Law Creators' Circle

I. Definition

The law creators' circle is identified as *the circle of two or more individuals which originates in the creation of one single binding consensus*.

In other words, the law creators' circle originates through the creation of law, which rests upon the consensus of individuals.⁴⁰ If the very same individuals create another consensus, this is to be considered as a supplement to the same law creators' circle. As a consequence thereof individuals may only create a binding consensus for themselves.⁴¹ Accordingly, law creators are only individuals, who are simultaneously the creators and the addressees of the consensus.

In terms of their relationship to each other, individuals who do not share a single law creators' circle remain in the legal desert. Figure 1, below, illustrates two law creators' circles, which are constituted by wholly different individuals—for example, individuals A, B, and C on the one hand and D, E, and F on the other hand.

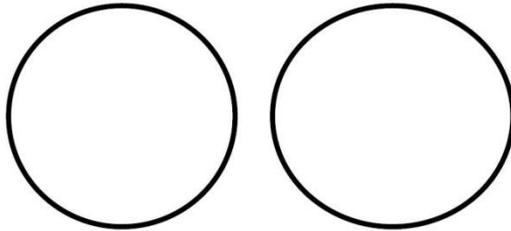


Figure 1

However, this does not imply any judgment of the legal desert. The legal desert is a neutral, pre-legal status. Furthermore, there is the need to stress once again: One single consensus on a specific matter suffices to constitute a law creator's circle between the participating individuals.

⁴⁰ If you, as the reader, do not support this definition of law, I would like to kindly invite you to replace this definition with your preferred definition and go ahead with the following arguments as a play of thoughts.

⁴¹ Recall the before mentioned pre-legal *pacta tertiis* principle. See discussion *supra* p.9.

II. Conflicts Between Different Law Creators' Circles

Individuals who do not share the same law creators' circle are in relation to each other in the legal desert (see Figure 2 below; the different colors illustrate that these two law creators' circles established rules with non-identical content). However, this is just theoretically relevant because *ius cogens* rules—even though in a very fundamental and limited sense—provide for universal fundamental rules by the largest possible law creators' circle. Naturally, the status of a legal desert regarding a specific subject matter lasts only until individuals join a law creators' circle and consent upon this specific subject matter.

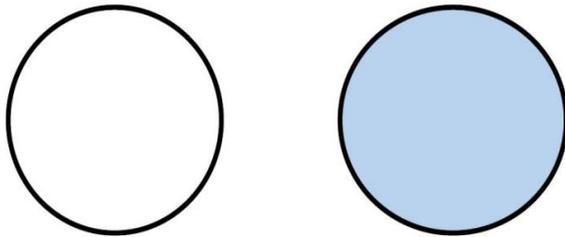


Figure 2

Different law creators' circles are less of a concern. Yet if they overlap, problems may arise. Law creators' circles overlap if an individual is, at the same time, a member of two different circles whose total members are not fully identical (see Figure 3 below). This would be the case, for instance, if the white circle includes individuals A, B, and C and the blue circle includes individuals C, D, and E. Recall that individuals participating in one law creators' circle are per definition creators and addressees of the consensus.

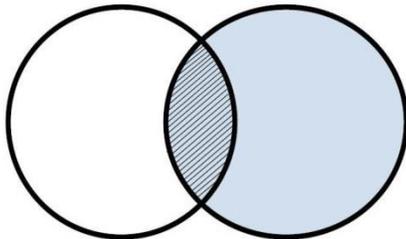


Figure 3

Overlapping circles are unproblematic if they include completely diverging subject matters (see the different colors of the circles in Figure 3 above, which indicate that the white and

the blue circles relate to different subject matters). However, if one or more individuals are at the same time members of different but partly overlapping law creators' circles regulating the same subject matter, they are possibly conflicting (see Figure 4 below).

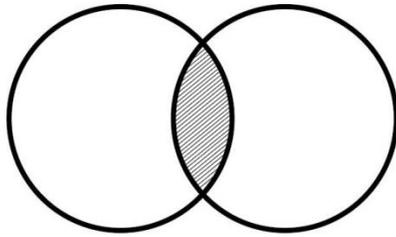


Figure 4

A norm conflict arises if the application of any right or duty in one circle is contradictory to any right or duty in the other circle of which the same individual is also a member (see Figure 4 above).⁴² Once a consensus has been established by a law creators' circle, it must not be infringed upon by a single individual, either by simply breaching the consensus without the acceptance of the other members of this law creators' circle, or by stating a conflicting consensus with other individuals (*pacta sunt servanda* as well as *pacta tertii*).⁴³ In other words, if A, B, and C agree that x is a forbidden action, B, C, and D must not allow x

⁴² See HANS Kelsen, *ALLGEMEINE THEORIE DER NORMEN* 99 (1979) ("Ein Konflikt zwischen zwei Normen liegt vor, wenn das, was die eine als gesollt setzt, mit dem, was die andere als gesollt setzt, unvereinbar ist, und daher die Befolgung oder Anwendung der einen Norm notwendiger-oder möglicherweise die Verletzung der anderen involviert."); Kelsen, *supra* note 4, at 209; see also Ewald Wiederin, *Was ist und welche Konsequenzen hat ein Normkonflikt*, 22 *RECHTSTHEORIE* 311, 318, 324 (1990) ("Ein Konflikt zwischen zwei Normen liegt nach einer verbesserten Version dann vor, wenn die Setzung des durch die erste Norm umschriebene, d.h. gebotene oder erlaubte Verhaltens dazu führt, daß die zweite Norm verletzt wird."). This also applies in cases of de facto inability ("faktischer Unmöglichkeit"). See *id.* at 316; see also Erich Vranes, *The Definition of "Norm Conflict" in International Law and Legal Theory*, 17 *EUR. J. INT'L L.* 395, 418 (2006) (arguing in favor of a broad definition of norm conflicts); Kiristen Schmalenbach, *Article 53*, in *VIENNA CONVENTION ON THE LAW OF TREATIES—A COMMENTARY* para. 54 (Oliver Dörr & Kirsten Schmalenbach eds., 2012). But see Karl Engisch, *Die Einheit der Rechtsordnung* 46 (Heidelberg: Winter 1935); Karl Engisch, *EINFÜHRUNG IN DAS JURISTISCHE DENKEN* 162 (1977). For him, legal norms conflict if "ein Verhalten in abstracto oder in concreto zugleich als geboten und nicht als geboten oder als verboten und nicht verboten oder gar als geboten und verboten [wird]." *Id.* at 162. See Thomas Zoglauer, *NORMENKONFLIKTE—ZUR LOGIK & RATIONALITÄT ETHISCHEN ARGUMENTIERENS* 125 (1998). For a more narrow definition, which is often used on the international level, see Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 *BRIT. Y.B. INT'L L.* 401, 426 (1953) ("A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties."); see also Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties*, 35 *J. WORLD TRADE* 1081, 1084 (2001).

⁴³ See Erich Vranes, *Lex superior, lex specialis, lex posterior—Rechtsnatur der 'Konfliktlösungsregeln*, 65 *HEIDELBERG J. INT'L L.* 391, 402 n.48 (2005).

either. However, regarding the solution of this conflict of norms, we remain in the legal desert. As far as different law creators' circles are concerned, the well-known norm conflict solution rules like the maxim *lex posterior* and *lex specialis* do not provide a solution. It is important to emphasize that these norm conflict solution rules may only provide for a solution within one and the same law creators' circle. This, however, does not prevent a norm conflict solution circle from being created which embraces both conflicting circles (see Figure 5 below).

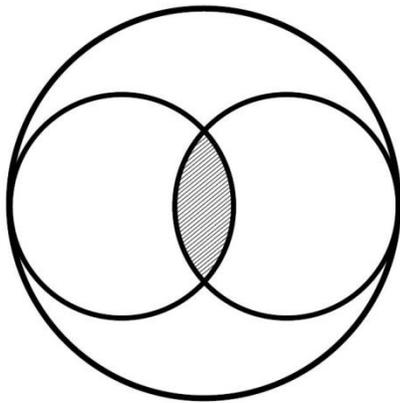


Figure 5

However, if there is no embracing conflict solving circle, those individuals remain in the norm conflict solving legal desert. Of course this does not mean that conflicts might not be solved peacefully and satisfactorily. But there is no legal norm conflict solution rule. The theory of the law creators' circle does not provide any solution for the constellation of partly overlapping and conflicting law creators' circles either.

III. *The Theory of the Larger Law Creators' Circle*

The theory of the larger law creators' circle is based on the aforementioned pre-legal assumptions, which are the principles *pacta sunt servanda* and *pacta tertiis*.⁴⁴ According to these pre-legal principles, TREK is fundamental for all agreed consensuses. If a legal rule has been created by a consensus, unilateral abrogation is no longer possible. The rule of the larger law creators' circle always prevails over the rule of the smaller circle, *if*—and this

⁴⁴ See also *supra* Section B.

is important—*all* members of the smaller circle are also members of the larger circle—which means that the smaller circle is absorbed by the larger circle. (See figure 6 below, which illustrates that A, B, and C constitute the smaller circle that is completely absorbed by the larger circle of A, B, C, D, and further individuals, so on and so forth).

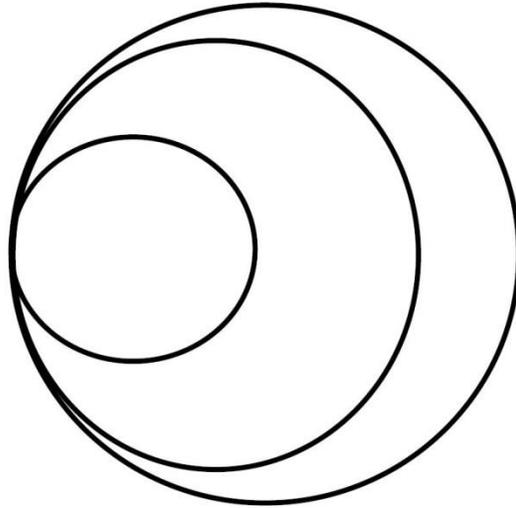


Figure 6

To illustrate this, I will discuss an example: If A, B, and C (the larger law creators' circle) ban smoking in their shared flat, then A and B alone (the smaller law creators' circle) may not re-instate smoking or smoke in their flat without C's acceptance. As a consequence thereof, the content of the agreed rule is decisive. The consensus of the larger law creators' circle must not be violated or hindered by a conflicting rule set up by the smaller law creators' circle. If the consensus would be violated by one or a few individuals, this would be a clear breach of the consensus of the larger circle and would violate thereby the pre-legal principle *pacta sunt servanda*. If the smaller circle does not break a rule of the larger circle, however, the smaller circle is free to agree on whatever rules its members would like. As a consequence, it may agree upon further, more specific rules so long as they do not conflict with a rule of the larger circle. In order to illustrate this, a second visit to the "smokers" introduced above might help: In this scenario, A, B, and C ban smoking again, not only in their flat but also in the pub they frequent. At first glance, it seems less likely that A and B should not be allowed to smoke a cigarette in the pub if they wish to do so when going out one evening without C. In order to shed some light on this example, it is important to take a close look at the consensus agreed upon between A, B, and C. It is essential to know whether they agreed to stop smoking in general or just when in each other's company. If the agreed consensus aims at preventing them from smoking in

general—regardless of the place and whose company they are in—it is only possible for all three of them together to change or end their agreed consensus.

The change of location from their flat to a public bar is intended to show that the content of the agreed consensus is crucial. It is much more likely that they would agree to a ban on smoking in their flat, even if for different reasons, than they would do so in general (also in the pub). Therefore, one might think that A and B are free to smoke in the bar if the consensus agreed upon by A, B, and C does not contain any specifications or any explicit command forbidding to deviate from this. But if it does include a specification or an explicit command and it is clear that the consensus is a general ban on smoking, they may only override or change it by all three acting together. The command not to deviate from the agreed consensus might, furthermore, be implicitly found in the smoking ban in relation to the shared flat. Without any further specification of the consensus, we can only assume that the command not to deviate from the agreed consensus originated from the consensus itself. In the pub example, an explicit command stating that a deviation from the agreed ban is or is not allowed might be seen as necessary in order to clarify that A or B, alone or together, might deviate from the ban. Without this explicit command, one could assume that A and/or B are allowed to smoke if C is not present. However, if an explicit command not to smoke in the pub, whether alone or with others, has been agreed on by all three, it is clear that, according to the theory of the larger law creators' circle, any agreement by A and/or B (the smaller circle) to allow smoking in the pub would violate the consensus of A, B, and C (the larger circle). Consequently, it is paramount to know whether the smaller circle has simply established a more specific rule, which does not conflict, or whether the smaller circle rule directly violates the consensus of the larger circle.

While a mere specification is not problematic, a norm conflict is. A norm conflict caused by the rule of the smaller circle with a rule of the larger circle contravenes the theory of TREK and the pre-legal, reasonable principle of *pacta sunt servanda* which it is based on. If the larger law creators' circle gives a material command, the smaller law creators' circle must obey this command. If the larger circle agrees on a certain consensus, this same consensus may only be changed or deviated from on the same level as it was agreed on (the larger circle). This also applies to legal consequences and effects of the consensus on the members of the smaller circle.

According to TREK, if the members of the different law creators' circles are not identical or fully included in a larger circle, it is not possible for the smaller law creators' circle to be overruled by the larger circle. This, larger circle is not related to the smaller circle because the members of the different circles are not identical (see Figure 7 below). Therefore, it does not matter if those circles include conflicting rules regarding their subject matters

because both apply the *pacta tertiis* principle. The circles are in relation to each other in the legal desert.

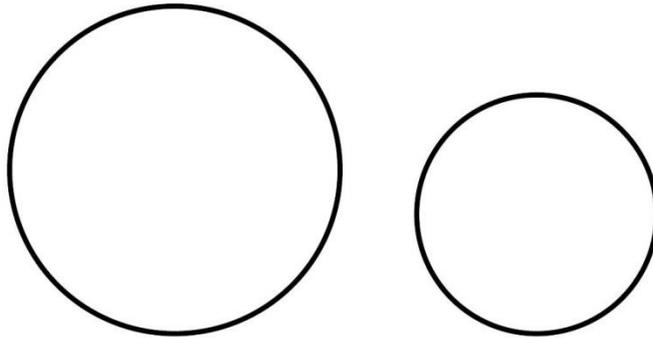


Figure 7

If some, but not all, of the members of both circles with conflicting subject matters are identical, the case is different (see Figure 8 below). The constellation of Figure 8 is very close to the constellation of Figure 4. The question is whether the size difference between constellation 4 and 8's conflicting circles is relevant. It is important to note that the Figure 8 constellation is impossible to exist with regards to the relationship between international and national law because the State (the smaller law creators' circle) participates in the making of law at the international sphere (larger law creators' circle) as a unity, acting on behalf of its individuals. Yet, theoretically speaking, it is important to note that the case of Figure 8 is not the primary application of the theory of the larger law creators' circle. The difference from the constellation illustrated in Figure 4 is too insignificant. Therefore, either a larger both-circles-embracing-circle governs the conflict (see Figure 5 above) or the respective individuals remain in the legal desert with regards to the solution of the norm conflict.

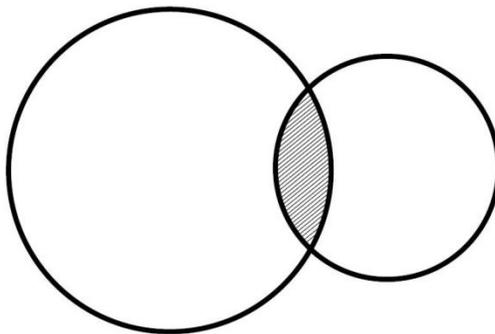


Figure 8

IV. Legal Consequences Resulting from a Violation of the Consensus of the Law Creators' Circle

In terms of the relationship between international and national law, TREK forces us to analyze the contents of the rulings of the larger, international law creators' circle. Contrary to prevailing theories on this relationship, there is no general, blanket legal consequence leading to an absolute or a non-existing legal consequence or effect of international law within the national legal order. Consequently, TREK does not stipulate one blanket, absolute legal consequence. Generally speaking, the smaller law creators' circle lacks the ability to create a rule that conflicts with any rule of the larger circle (*rechtliches Können*). The larger circle, however, is free to change this general situation. Using the relationship between international and national law as an example, national law (the smaller law creators' circle) lacks the ability to create rules conflicting with *ius cogens* norms. National rules conflicting with *ius cogens* are null and void *ex tunc*. The existence of *ius cogens*, however, suggests that the smaller law creators' circle (national law) has the ability to create national rules that conflict with general international law without *ius cogens* character (*rechtliches Können*), but lacks the authorization to do so (*rechtliches Dürfen*). This implies that the focus should be on the emergence of international law. More recent national law lacks the authorization to subsequently change—or even deviate from—international law by incorporating it into the national legal order via reception theories. Therefore, it becomes crucial to analyze the content of the international rulings of the larger law creators' circle. The consensus of the larger, international circle is decisive when the legal consequences or effects of international law are analyzed in relation to national law.

Having said this, it is important to note that most of the international rules do not stipulate a far-reaching effect on national law. (1) Solely applicable (*schlicht anwendbare*) international rules must, therefore, be differentiated from (2) directly applicable (*direkt anwendbare*) and (3) individualizing (*individualisierende*) rules.⁴⁵

1. Solely Applicable Rules

Solely applicable rules, also called inter-state laws, leave it up to the discretion of the national legal order to decide how to implement them domestically. Typical wording for such provisions is quite abstract, formulating only general obligations, which are then due to further specification by national laws. Even today, most of the international rules are

⁴⁵ For more detailed references and discussion, see *infra* notes 46–48.

still solely applicable, which means that they do not have direct effect within the national legal order. Therefore, further specification of the international rule, for instance by national acts, is necessary. The national act makes concrete and thereby “implements” the general (solely applicable) international rule. TREK does not challenge this. TREK is, thus, not an ideological project aiming at advancing international law of having more effect within national law.

2. *Directly Applicable Rules*

In contrast, directly applicable rules—in other words, self-executing rules—do not leave it up to the national legal order to decide how to implement them domestically. Directly applicable norms have effect within the national legal order without any national act except the ratification and, consequently, simply do not leave discretion to the national legal order.⁴⁶ In this case national law-applying organs—such as the courts—have to apply such a rule directly without any further national legislative act (except the original ratification and promulgation act creating the binding nature of the international rule).⁴⁷ If an international treaty or a provision of it is directly applicable, the smaller (national) circle has already accepted this effect by agreeing to the consensus at the international level. A subsequent unilateral national derogation of the deliberately consented direct applicability of the international treaty is opposed according to the TREK.

3. *Individualizing Rules*

A third category of international rules, which can be differentiated from solely and directly applicable rules, are individualizing rules. Individualizing rules are those international rules that directly address individuals, without the need for a national organ to enforce or apply them. They do bind or grant rights to individuals directly without a State intervening

⁴⁶ See ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT—THEORIE UND PRAXIS* 550 (3d ed 1984); STEFAN GRILLER, *DIE ÜBERTRAGUNG VON HOHEITSRECHTEN AUF ZWISCHENSTAATLICHE EINRICHTUNGEN* 355 (1989) (defining direct applicability [even related to the EU] as “die innerstaatliche Geltung der einzelnen Völkerrechtsnormen [...] ohne Dazwischentreten eines weiteren staatlichen Aktes’ mit ‘Durchgriffswirkung.’”); August Reinisch, *Zur unmittelbaren Anwendbarkeit von EWR-Recht*, in *ZEITSCHRIFT FÜR EUROPARECHT, INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG* 11, 15 (1993); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 *VIRGINIA J. OF INT’L L.* 627, 632 n.27 (1986); Buergenthal, *supra* note 16, at 317.

⁴⁷ Kaiser, *supra* note 17, at para. 1 (“A treaty is ‘self-executing’ or ‘directly applicable’ in domestic law, when its provisions will be applied by courts or executive agencies as provisions of domestic law without the need of further legislative or administrative measures.”). Even if Vasak subsumes two different things to the notion “self-executing,” he seems to share this notion. See K. Vasak, *Was bedeutet die Aussage, ein Staatsvertrag sei “self-executing”?*—*Zum Erkenntnis des Verfassungsgerichtshofs vom 27.6. 1960*, B 469/59, 24 *JURISTISCHE BLÄTTER* 352, 352 (1961).

(again, except the making of this international norm).⁴⁸ Individualizing international rules (for instance several international criminal law norms or also Article 34 of the European Convention on Human Rights as well as similar provisions) are rules not directed towards the State but directed towards the individual without using the State as a mediator. The individualizing international rule interacts directly with the individual without using any national authorities such as for instance national judges or politicians. In this case again, there is no need for any incorporation, adoption or transformation of the international rule into the national legal order.

V. Connection Between Law Creators' Circles⁴⁹

It goes along with what was stated above that the regulation density gets thinner the larger the law creators' circle—the number of individuals—gets. The consensus also tends to be more abstract and fundamental the larger a circle becomes. However, this is not a theoretical restriction on the regulatory possibility of the larger or even largest possible law creators' circle. Rather, this is a practical phenomenon that is understandable. The more individuals are involved, the more difficult it becomes to reach a consensus. But, theoretically, if all legal rules stemmed from the same largest conceivable law creators' circle embracing all individuals, no smaller law creators' circle would exist. Practically, this is not (yet) the case. Therefore, a lot of subject matters are not embraced by an international, or even a very large, law creators' circle. Hence, only the most fundamental rules are embraced by the largest possible law creators' circle. All but these rules are left to smaller law creators' circles at the next smaller level. This continues until the smallest possible level of two individuals. TREK's only condition is that the rules of the smaller law creators' circle must not conflict with a rule of the larger law creators' circle (to which all the individuals of the smaller circle are also members). In reading this, one might be tempted to compare the thoughts articulated here with the *Kelsenian* "chain of validity"⁵⁰ (in German, *Delegationszusammenhang*, on which the hierarchy of norms, *Stufenbau nach*

⁴⁸ Compare this to the enumeration made by Delbrück. Jost Delbrück, *Das Individuum im Völkerrecht*, in 1 VÖLKERRECHT 259, 263 (Georg Dahm et al. eds., 2002). See Griller, *supra* note 1, at 96, 98. See generally ANNE PETERS, *JENSEITS DER MENSCHENRECHTE: DIE RECHTSSTELLUNG DES INDIVIDUUMS IM VÖLKERRECHT* (2014).

⁴⁹ Of those circles of which the larger circle includes all members of the smaller circle, see *supra* Figure 6.

⁵⁰ The term "chain of validity" stems from J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 105 (2d ed. 1980). See generally J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRITISH YEARBOOK OF INT'L L. 66, 75 (1936); Catherine Richmond, *Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law*, 16 LAW & PHIL. 377, 388 (1997).

der rechtlichen Bedingtheit, is based).⁵¹ The main characteristic of this chain of validity is that a norm can derive its validity only from another norm.⁵² As a consequence of this conviction, monism with primacy of international law stipulates that all national law derives validity from the higher international law.⁵³ Besides other crucial differences between the “chain of validity” and TREK, it is especially important to emphasize that the connection between the larger and the smaller law creators’ circle according to TREK requires only that the smaller circle not infringe any rule of the larger circle. If a specific subject matter is not regulated by a consensus at the level of the larger law creators’ circle, the smaller circle is free to agree upon any consensus as its members wish. Consequently, the smaller law creators’ circle is not derived from the larger circle and the validity of the rule of the smaller circle does not stem—at least not theoretically—from the larger circle.

VI. Practical Application of the TREK to Austrian and Hungarian Constitutional Provisions on the Relationship of International and Domestic Law

1. Introduction

Now I would like to put the theory into practice. As an example, I will primarily use the relationship between international treaties and the Austrian and Hungarian national legal orders. However, before I proceed, I wish to clarify that my thesis does not intend to criticize either the historically grown Austrian or the very recent Hungarian Constitution, which are both based on strong legal arguments. Yet, I do wish to show a different perspective. When I reinterpret constitutional norms in the following, I understand my theory and its consequences as an alternative path. It then follows that TREK might, in some instances, even demand a change in current constitutional norms. If this is the case, it should be viewed as a proposal. Even though the following illustration is restricted to the Austrian—and in a cautious and slightly superficial way to the Hungarian—legal order, I

⁵¹ See Kelsen, *supra* note 4, at 196, 221–22.

⁵² See *id.* For a critical account of the *Stufenbaulehre*, see, e.g., A. Jakab, *Problems of the Stufenbaulehre: Kelsen’s Failure to Derive the Validity of a Norm from Another Norm*, 20 CANADIAN J. L. & JURIS. 35 (2007).

⁵³ See Kelsen, *supra* note 42, at 221; Verdross, *supra* note 14, at 35. Compare for criticism thereof (using the legal order of the EU as an example) Lando Kirchmair, *Die autonome Rechtsordnung der EU und die Grenzen von Monismus und Dualismus*, in *GRENZEN IM VÖLKERRECHT – GRENZEN DES VÖLKERRECHTS* 275 (Matthias C. Kettemann ed., 2013). Also, for a comparison to the “competence-theory” of Verdross, which understands State-Sovereignty as a competence derived from international law and thereby assumes the existence of an international constitution (“*völkerrechtliche Gesamtverfassung*”), see Verdross, *supra* note 4, at 31–35. This assumption of the “Kompetenz-Kompetenz,” located at the international sphere, becomes even more clear by Verdross’s other work. See Alfred Verdross, *Le fondement du droit international*, 16 RECUEIL DES COURS 247, 318 (1927). “Par conséquent, seule la compétence des États découle directement du droit international.” And “Cependant, si la compétence des États est limitée par le droit des gens, la compétence de la communauté internationale est juridiquement illimitée ; car la compétence de la compétence lui appartient.” *Id.* See generally ANKE BRODHERR, ALFRED VERDROSS’ THEORIE DES GEMÄßIGTEN MONISMUS 75 *et seq.* (2004) (discussing his “competence-theory”).

propose, as a thought experiment, that you test the theory on your own constitutional norms.

2. *The International Treaty*

The international treaty is a written agreement that is carried by a consensus between two or more subjects of international law. Subjects of international law are foremost States and international organizations.⁵⁴ The expression of will is left to State representatives expressing the will of the State-represented individuals. National law provides for the norms of authorization as a legal basis for the expression of the representatives.

These national norms of authorization are reflected at an international level in Article 46 of the Vienna Convention on the Law of Treaties ("VCLT").⁵⁵ Article 46 of the VCLT allows a State to "invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding the competence to conclude treaties as invalidating its consent" only if, cumulatively, "that violation was manifest and concerned a rule of its internal law of fundamental importance." In other words, Article 46 is restricted to violations of national law on the national *process* of expressing its will to be bound by an international treaty. A possible violation of the *content* of national law by an international treaty was excluded on purpose.⁵⁶ If Article 46 is not applicable, Article 27 of the VCLT is

⁵⁴ The Holy Sea, the Red Cross, and the Order of Malta are not treated here.

⁵⁵ Article 46 Provisions of internal law regarding competence to conclude treaties:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

⁵⁶ See Thilo Rensmann, *Article 46, in VIENNA CONVENTION ON THE LAW OF TREATIES – A COMMENTARY* para. 33 n.86 (Oliver Dörr & Kirsten Schmalenbach eds., 2012). See also Mark E. Villiger, *Article 46, in COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* para. 8 (Mark E. Villiger ed., 2009); Georg Ress, *Wechselwirkungen zwischen Völkerrecht und Verfassung bei der Auslegung völkerrechtlicher Verträge, in WECHSELWIRKUNGEN ZWISCHEN VÖLKERRECHT UND VERFASSUNG BEI DER AUSLEGUNG VÖLKERRECHTLICHER VERTRÄGE* 7, para. 23f n.7, 102f (Georg Ress & Christoph Schreuer eds., 1982). Also compare the commentary in the discussion of the presentation by Ress, by K. Zemanek. *Id.* at 101. Disputing, however, Bruno Simma. *Id.* at 110f. There is a reference to the "eistigen Vater [...] des ILC-Entwurfs." *Id.* See Special Rapporteur of the ILC to the VCLT, *Waldock*, YILC Bd. II, at 71, para. 6 (Mar. 19,

fully pertinent.⁵⁷ Article 27 stipulates that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” As a consequence thereof, no material violations of national law may be invoked based on Article 46 or Article 27 at the international level.⁵⁸

When international treaties deal with fundamental matters, the consent to be bound by a treaty is expressed by ratification. The international treaty is negotiated and then opened to signature. Then, national parliaments have to consent before a State representative can sign and ratify the treaty (Art. 14 VCLT).⁵⁹ In the following sections I will focus on this process.

1965). See LUZIUS WILDHABER, TREATY-MAKING POWER AND CONSTITUTION – AN INTERNATIONAL AND COMPARATIVE STUDY 347f (1971).

It is rightly feared that to make the validity of agreements depend on their accord with each and every norm of constitutional law, written or customary, notorious or obscure, would gravely endanger the security of international transactions. States would feel encouraged to invoke their constitutional law to get rid of undesirable agreements or to ‘internationalize’ conflicts between municipal state organs or interest groups.

Id.

⁵⁷ Article 27 Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46. See Kirsten Schmalenbach, *Article 27*, in THE VIENNA CONVENTION ON THE LAW OF TREATIES – A COMMENTARY, para. 2 (Oliver Dörr & Kirsten Schmalenbach eds., 2012); Thilo Rensmann, *Article 46*, in VIENNA CONVENTION ON THE LAW OF TREATIES – A COMMENTARY, para. 22 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

⁵⁸ See *supra* note 56.

⁵⁹ Article 14 Consent to be bound by a treaty expressed by ratification, acceptance, or approval.

1. The consent of a State to be bound by a treaty is expressed by ratification when:

(a) the treaty provides for such consent to be expressed by means of ratification; (b) it is otherwise established that the negotiating States were agreed that ratification should be required; (c) the representative of the State has signed the treaty subject to ratification; or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

3. *The International Treaty and the Austrian Federal Constitution ("B-VG")*

For historical reasons, the executive is in charge of a State's external relations.⁶⁰ As a consequence, the Austrian "Federal President represents the Republic internationally . . . and concludes state treaties" (Art. 65 § 1 B-VG).⁶¹ Article 50 of the B-VG states that "[p]olitical state treaties and state treaties the contents of which modify or complement existent laws . . . require the approval of the National Council."

3.1 *Interpretation and Critique of the Prevailing Doctrine in Austria*

The prevailing doctrine interprets Article 50 of the B-VG as a principle of adoption⁶² or as a general transformation.⁶³ Despite the different connotations, the underlying idea stays the same:⁶⁴ The "identity" of the international and national form of the legal rule (*Rechtssatzform*) of an international treaty in the Austrian legal order. This is nothing other than the "integration"⁶⁵ of the international treaty in the national legal order. This

See, e.g., Frank Hoffmeister, *Article 14, in VIENNA CONVENTION ON THE LAW OF TREATIES – A COMMENTARY* para. 14 *et seq.* (Oliver Dörr & Kirsten Schmalenbach eds., 2012). Consider the Austrian legal order (Art. 50 B-VG), which demands for all "politischen Staatsverträge und Staatsverträge, die gesetzesändernden oder gesetzesergänzenden Inhalt haben," the composed ratification process that involves the parliament ("*zusammengesetztes Verfahren*").

⁶⁰ *See generally* THEO ÖHLINGER, *DER VÖLKERRECHTLICHE VERTRAG IM STAATLICHEN RECHT – EINE THEORETISCHE, DOGMATISCHE UND VERGLEICHENDE UNTERSUCHUNG AM BEISPIEL ÖSTERREICHS* (1973). Focus particularly on 12f. *Id.* at 12f.

⁶¹ Even though the Austrian Constitution refers to "state contracts," this notion includes all international agreements. *See id.* at 103 (providing further references). Accordingly, the terms "state contract" and "international agreement" are used interchangeably.

⁶² *See* Theo Öhlinger, *Art. 50 B-VG, in 2 ÖSTERREICHISCHES BUNDESVERFASSUNGSRECHT: TEXTSAMMLUNG UND KOMMENTAR* para. 28 n.87 (Karl Korinek & Michael Holoubek eds., 2009); *supra* note 60 at 131 *et seq.*; Ignaz Seidl-Hohenfeldern, *Transformation or Adoption of International Law into Municipal Law*, 12 INT'L & COMP. L. Q. 88, 103 (1963); Karl Zemanek, *Das Völkervertragsrecht, in 1 ÖSTERREICHISCHES HANDBUCH DES VÖLKERRECHTS* 45, 61 (Hanspeter Neuhold et al. eds., 2004).

⁶³ *See, e.g.,* GRILLER, *supra* note 46, at 352; Philipp Lindermuth, *Das Recht der Staatsverträge nach der Verfassungsbereinigung – Eine verfassungsrechtliche Analyse der Neuregelung des Art. 50 B-VG durch die Novelle BGBl I 2/2008*, 64 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 299, 302 (2009).

⁶⁴ Öhlinger, *supra* note 62, at para. 27 n. 84.

⁶⁵ For a progressive analysis of the "identity" in former times, see Gunther Winkler, *Der Verfassungsrang von Staatsverträgen*, 10 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 514, 528f (1959/60); ORIENTIERUNGEN IM ÖFFENTLICHEN RECHT 51 *et seq.*, 57 (1979); ÖHLINGER, *supra* note 60, at 166–77. Both take as a decisive criterion for

synchronization of the international and national legal norm leads to the integration of the international treaty into the national hierarchy of norms, and its receipt into the rank of a simple state law (*einfaches Gesetz*) or regulation (*Verordnung*).

The “identity” of the form of the international and national legal norm (*Identität der Rechtssatzform*) is fictive. The integration does not fully respect the origin of the international treaty. Rather, it establishes a new source, even though identity is proclaimed. Giving the international treaty a certain rank in the national legal order leads to possible changes to the original norm of the larger, international law creators’ circle by the smaller, national circle. One possible result of this change is the application of the *lex posterior derogat legi priori* principle to the relationship between national acts and international treaties.⁶⁶ Current doctrines allow the smaller, national circle to subsequently change, or even abrogate, the consensus of the larger circle on a unilateral basis. TREK rejects this procedure.⁶⁷ This rejection rests on the fact that two different law creators’ circles are involved. A change or abrogation of international treaties is possible only at the international level by the larger international law creators’ circle.

3.2. Interpretation According to TREK

According to TREK, the international treaty remains what it is on a national level as well, namely, international law and thereby a consensus of a larger law creators’ circle. The prevailing doctrine regarding the relationship between international and national law interprets relevant national constitutional norms as so-called “reception norms” of international law, which aim to integrate international law in the national legal order. However, TREK questions this integration and the legal consequences that stem from the confrontation of international norms with the hierarchy of the national legal order.

the “identity” the quality of the organs involved and ignore or overlook the diverging size of the law creators’ circles involved.

⁶⁶ See Öhlinger, *supra* note 62, at para. 43 (acknowledging the primacy of application (“*Anwendungsvorrang*”) of a more recent national law which is on the same rank as or a higher rank than the “integrated” treaty) This is based on the “identity” of the international and the national legal form of the international agreement. *Id.* See also Rudolf Thienel, *Art. 48, 49 B-VG, in 2 ÖSTERREICHISCHES BUNDESVERFASSUNGSRECHT: TEXTSAMMLUNG UND KOMMENTAR*, para. 70 (Karl Korinek & Michael Holoubek eds., 1999); HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* 258 (1899) (“Denn der jüngere Rechtssatz hebt den älteren nur dann auf, wenn er derselben oder wenn er einer höheren Rechtssetzungsgewalt entspringt, die über die Gültigkeit des älteren entscheiden kann.”).

⁶⁷ For another critical view, see ADOLF J. MERKL, *ALLGEMEINES VERWALTUNGSRECHT* 113f (1927) (“[E]s mangelt jedoch umgekehrt zumindest dem einfachen Gesetze derogatorische Kraft gegenüber einem formellen Staatsvertrage, weil die zweiseitige Bindung nicht durch beliebigen einseitigen Akt aufgelöst werden kann.”).

Based on TREK, pertinent Austrian constitutional norms (in the case of international treaties, Article 50 of the B-VG above all) are interpreted as norms of *authorization*, thus allowing competent national organs to create international law. Following TREK, the legal consequences of public international law within the national legal sphere then have to be qualified according to the content of international law. Correspondingly, international law distinguishes between three kinds of norms: Solely applicable, directly applicable, and individualizing norms. Solely applicable norms—or, simply, inter-state law—allow states to choose how they wish to implement international treaties. However, directly applicable—self-executing—norms, which have effect within the national legal order without any national act except the ratification, simply don't.⁶⁸ As a direct consequence of this interpretation, a directly applicable international treaty has a direct effect on the national legal order without any further national action except the ratification.⁶⁹ If an international treaty or a provision of it is directly applicable, the smaller circle has already accepted this effect by agreeing to the consensus on the international level. The TREK opposes any subsequent unilateral national derogation of the deliberately consented direct applicability of the international treaty. Individualizing international norms bind or grant rights to individuals directly without an intervening State.⁷⁰

Article 140a of the B-VG stipulates that the Austrian Constitutional Court controls international treaties. If the Constitutional Court finds that a ratified international treaty violates the Austrian Constitution, it may declare the international treaty inapplicable within the Austrian legal order. Based on TREK, I propose to change this post-ratification

⁶⁸ See, e.g., VERDROSS & SIMMA *supra* note 46 at 550; GRILLER, *supra* note 46, at 355 (defining direct applicability [even related to the EU] as, “die innerstaatliche Geltung der einzelnen Völkerrechtsnormen [...] ohne Dazwischentreten eines weiteren staatlichen Aktes’ mit ‘Durchgriffswirkun’”); August Reinisch, *Zur Unmittelbaren Anwendbarkeit von EWR-Recht*, ZEITSCHRIFT FÜR EUROPARECHT, INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG 11, 15 n.40 (1993); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 632 n.27 (1986); Buergenthal, *supra* note 16, at 317.

⁶⁹ See Kaiser, *supra* note 17, at para. 1 (“A treaty is ‘self-executing’ or ‘directly applicable’ in domestic law, when its provisions will be applied by courts or executive agencies as provisions of domestic law without the need of further legislative or administrative measures.” (internal citations omitted)). Even if Vasak subsumes two different things to the notion “self-executing,” he seems to share this notion. K. Vasak, *Was bedeutet die Aussage, ein Staatsvertrag sei ‘self-executing’? – Zum Erkenntnis des Verfassungsgerichtshofs vom 27.6. 1960*, B 469/59, 24 JURISTISCHE BLÄTTER 352, 352 (1961).

⁷⁰ See Delbrück, *supra* note 48, at 263f; see also Griller, *supra* note 1 at 96 & 98 *et seq.*

control into a preventive control.⁷¹ This would prevent Austria from possibly violating international law due to a judgment by the Austrian Constitutional Court.

If the norms of the Austrian Constitution—which regulate the conclusion of international treaties—are interpreted under TREK as national norms of authorization, it is important to define the limits of this authorization: A national limit on the authorization to ratify international treaties is one of the most fundamental principles (*Baugesetze*) of the Austrian Constitution. Further limitations were introduced with the 2008 amendment to the Austrian Constitution.⁷² This amendment allows the ratification of international treaties only on matters that have the rank of simple state law (*einfache Gesetze*). If an international treaty is to enjoy the rank of a constitutional act (*Bundes-Verfassungsgesetz*), there must be a corresponding special authorization in the rank of a constitutional act before ratification of the treaty by the National Council.

4. TREK and Article Q of the Hungarian Fundamental Law (“HFL”): Attempting an Approximation

It is safe to say that Article Q of the HFL⁷³ favors neither monism nor dualism, at least not explicitly.⁷⁴ This conclusion can be drawn from Article Q’s text and the Constitutional

⁷¹ In fact, such a proposal has been discussed in the Austrian Convention (in German “Österreich Konvent”). A major project on constitutional reform, which started in 2003. An extensive report has been presented on 28 January 2005. However, Article 140a B-VG has not been subject to change. For more information on the Convention, see *The Austrian Convention and Constitutional Reform*, OSTERREICH KONVENT (Jan. 28, 2008), http://www.konvent.gv.at/K/EN/Welcome_Portal.shtml.

⁷² See BUNDESVERFASSUNGSGESETZ, MIT DEM DAS BUNDES-VERFASSUNGSGESETZ GEÄNDERT UND EIN ERSTES BUNDESVERFASSUNGSRECHTSBEREINIGUNGSGESETZ ERLASSEN WIRD (BGBl I 2008/2).

⁷³ If I refer to Article Q of the Hungarian Fundamental Law, I refer to the English translation of Article Q from the website of the Hungarian government. THE FUNDAMENTAL LAW OF HUNGARY 8 (Apr. 25, 2011), <http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>.

Article Q

- (1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.
- (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.
- (3) Hungary shall accept the generally recognized rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations.

Court's case law, neither of which *expressis verbis* refers to monism or dualism,⁷⁵ as well as by looking at the academic literature on the topic.⁷⁶ In fact, most of the constitutional provisions dealing with the relationship between international and national law refrain from directly supporting one of the grand old theories. A critical approach towards these grand, but also old and out-fashioned, theories supports this cautious behavior.

This Article aims to fill the space left by the outdated theories of dualism and monism. Above, I outlined TREK briefly and used the example of the Austrian legal order to test its applicability. As a next step, I would like to explore whether TREK might also offer a fresh way of thinking about the theoretical background of Article Q of the HFL. I am convinced that TREK and its experimental application in Hungary as proposed in this Article might support an interesting debate. It may even produce some reasonable theoretical explanations for the current relationship between international law and the HFL.

id.

⁷⁴ Even though regarding the previously applicable provision section 7 (1) of the Constitution of the Republic of Hungary, which was adopted by Act XXXI of 1989, and was in force from 23 October 1989 to 31 December 2011, see Nóra Chronowski et al., *Hungary*, in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS – INCORPORATION, TRANSFORMATION, AND PERSUASION 259, 261 (Dinah Shelton ed., 2011) (“Article 7(1) can only be understood and interpreted in conjunction with the decisions of the Constitutional Court.”). However, regarding treaties they understand (at least) section 7(1) as dualistic, see *id.* at 264. *But see* Peter Kovács, *International law in the Recent Jurisprudence of the Hungarian Constitutional Court: Opening of a New Tendency?*, in JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS – EFFECTS AND IMPLEMENTATION 251, 253 (Anja Seibert-Fohr & Mark E. Villiger eds., 2014) (“In Article Q of the Fundamental Law however, a rather clear ‘receptionist’ version of dualism can be read.”).

⁷⁵ Compare, for instance, the decisions 1053/E/2005 CC; 72/2006 CC; 32/2008 CC; 61/2008 CC; 143/2010 CC; However, the Hungarian Constitutional Court refers to notions such as “transformation system” and “adoption system,” which are likely to be equated with dualism and monism. This, however, is problematic because the specific reception technique does not represent or include all the theoretical assumptions that underlie dualism and monism. For an overview of the case law, see Tamás Molnár, *Relationship of international Law and the Hungarian Legal System 1985-2005*, in THE TRANSFORMATION OF THE HUNGARIAN LEGAL ORDER 1985-2005, 484 *et seq.* (András Jakab et al. eds., 2007) (pinpointing at various monistic or dualistic tones, but there is not yet one clear reference towards one theoretical monistic or dualistic background).

⁷⁶ *See, e.g.*, Molnár, *supra* note 75, at 484 *et seq.*; Gábor Sulyok, *Incorporation of International Law into Domestic Law under the Fundamental Law of Hungary*, in THE TRANSFORMATION OF THE HUNGARIAN LEGAL SYSTEM 2010 – 2013, 31 *et seq.* (Péter Smuk ed., 2013).

4.1 Interpretation and Critique of the Prevailing Doctrine Regarding “Generally Recognized Rules of International Law” Within the Hungarian Legal Order

Article Q, Paragraph (1) of the HFL outlines the reasons why and how Hungary shall act on the international sphere.⁷⁷ One could interpret this paragraph as stressing Hungary’s commitment to the international community and also as a means for understanding Paragraphs (2) and (3).

Paragraph (2) states the constitutional obligation to ensure Hungarian law’s conformity with Hungary’s international legal obligations. The key principle of this paragraph might be that no subsequent unilateral derogation from international obligations is possible. That means, according to TREK, that the derogation or modification of rules must always occur at the level of the law creators’ circle that generated the rule. This premise is supported by Article 12 of Act L of 2005.⁷⁸ By not mentioning the rank of international law within the national legal order, it could be inferred that the question of rank is an inappropriate way of thinking about the effect of international law within the national legal order.⁷⁹ Acknowledging the different origins of international and national rules, which stem from two different law creators’ circles, I suggest that the law of the larger circle needs to be respected by the smaller circle without transforming, incorporating, or adopting international law into national law and thereby ranking it. By analyzing the aim and content of the larger circle’s rule, different effects stem from solely or directly applicable and individualizing international rules.

Paragraph (3) subsequently acknowledges that sources of international law have a special law making process and wide ranging consequences. For scholars who understand this paragraph against the background of monism or dualism, it is understandably difficult to make sense of its abstract wording. The vague notion of “acceptance” of “generally recognized rules of international law” does not contain any clear statement regarding either monism or dualism. Therefore, interpretations can range from a dualistic view arguing that this phrase intends a “general transformation”⁸⁰ to a monistic interpretation

⁷⁷ See Decision 53/1993 CC (decided on the basis of the previously applicable provision section 7 (1) of the Constitution of the Republic of Hungary, which was adopted by Act XXXI of 1989, and was in force from 23 October 1989 to 31 December 2011) interpreting this phrase (which didn’t change in Article Q) as a “constitutional command.”

⁷⁸ International Law Act.

⁷⁹ This is also supported by the case law of the Constitutional Court 4/1997 (I.4), which ruled that even a (lower ranked) government decree, which was “promulgating” an international treaty might remain in force against a subsequent legislation of parliament. See Molnár, *supra* note 75, at 484 (criticizing the fact that the Constitutional Court ruled that it should remain within his discretion whether the “transformed” act shall prevail or not).

⁸⁰ See, e.g., Sulyok, *supra* note 76, at 31 *et seq.*

that refers to the “adoption” or “incorporation” of “generally recognized rules of international law.”⁸¹

4.2 Interpretation of “Generally Recognized Rules of International Law” Within the Hungarian Legal Order According to TREK

In contrast to mainstream interpretations of the relationship between international and national law basing theoretical arguments on either dualism or monism, TREK offers another view, which helps to better explain the reluctant reference to any theory or concrete reception process. Under TREK, I interpret Paragraph (1) as also including the general principle *authorizing* competent Hungarian authorities to participate in the international law making process. Using TREK, one could furthermore infer that Paragraph (3) is the result of Paragraph (1)'s general authorization, which is the acceptance of the effect of the agreed upon international rules (“shall accept”) within the Hungarian legal order.⁸² This has to be viewed in the context of Act L of 2005 and the detailed rules concerning the reception⁸³ of international law. The special treatment and the abstract notion stating the “acceptance” of “generally recognized rules of international law” is because the targeted sources are special. Customary international law and general principles—as well as to some extent *ius cogens*⁸⁴—each have a very special process for making law. These sources are mostly unwritten and have a “fluid character,” which makes it almost impossible to nail them down to one specific act or date to which a Hungarian national authority could expressly have consented. For instance, the genesis of customary international law, and its modification, cannot be reduced to one specific act or moment. Paragraph (3) acknowledges this fact by accepting the effect of customary international rules on the national legal order in a general, abstract way. Competent Hungarian authorities participate in the genesis of customary international law by, for instance, engaging in international activities and thereby expressing *opinio iuris* and establishing state practice. Once a new rule of customary international law develops, it becomes binding and has effect within the Hungarian legal order. To determine the effect of

⁸¹ See, e.g., Molnár, *supra* note 75, at 484 *et seq.*

⁸² Also highlighting the authorization, see Béla Pokol, *Értelmi konkretizálás: Az Alaptörvény alkotmánybírószági értelmezésének vitái*, 3 JOGELMÉLETI SZEMLE 71 *et seq.* (2013). I am grateful to Tamás Molnár for this reference.

⁸³ I use the term “reception” in a neutral understanding without referring to a specific theory such as monism or dualism.

⁸⁴ If *ius cogens* norms are to be understood as an independent source of international law, which is possible to argue—though not without controversy.

customary international law within the Hungarian legal order, TREK again stresses the differentiation between solely applicable (most of international customary law), directly applicable, and individualizing rules.⁸⁵ The same holds true for general principles and unilateral acts, which are even less likely than international customary law rules to be directly applicable or individualizing. However, in the very rare case that a “generally recognized rule of international law” is directly applicable, Hungarian authorities would have to apply these laws under TREK without any further legalizing act or decree.

4.3 Interpretation and Critique of the Prevailing Doctrine Regarding International Treaties Within the Hungarian Legal Order

The second sentence of Paragraph (3), in conjunction with Act L of 2005, addresses international treaties and unilateral acts in relation to treaties by stating that they “become part of the Hungarian legal system by promulgation in legal regulations.”⁸⁶ This phrase led scholars to argue that Paragraph (3) refers to a “dualistic” special transformation of international treaty norms into the Hungarian legal order.⁸⁷ With a dualistic transformation, however, there would be no link between the international treaty rule and the provision promulgated in Hungary. A radical and consequent dualistic interpretation would not even apply international treaty interpretation rules⁸⁸—for example, the Vienna Convention on the Law of Treaties—but rather would interpret the promulgated rules in terms of national law. Furthermore, if the Hungarian parliament were to adopt a subsequent act conflicting with the promulgated treaty provision, a dualist interpretation of Article Q would void the effect of the international treaty within the Hungarian legal order. This consequence is actually prevented by Article 12 of Act L of 2005,⁸⁹ which states: “The provisions of articles 4-11 [on the conclusion of an international treaty] shall apply in conformity to the modification, the termination, the denunciation of the treaty and the withdrawal from it.” This is further confirmed by the Constitutional Court, which ruled that even a lower ranked government decree, which “promulgated” an international agreement, cannot be derogated by a subsequent legislation of parliament.⁹⁰ Whereas in the case of a norm conflict between two “normal” national acts of parliament, the *lex posterior* rule applies and the subsequent act enjoys the primacy of applicability.

⁸⁵ See discussion *supra* Part C.IV.1–3.

⁸⁶ See Act L of 2005, art. 10(1), 12.

⁸⁷ See, e.g., Sulyok, *supra* note 76, at 31 *et seq.*

⁸⁸ But see Act L of 2005, art. 13; 53/1993 CC (X.13); 4/1997 CC (I.4).

⁸⁹ Act L of 2005 on the procedure regarding treaties.

⁹⁰ See *supra* note 79.

4.4 Interpretation of International Treaties Within the Hungarian Legal Order According to TREK

In contrast to this interpretation, under TREK, Article Q would be interpreted as a norm of *authorization* for the competent Hungarian organ to ratify the international treaty.⁹¹ The requirement or promulgation of the authentic text of the treaty in an act or decree fits well with TREK and the interpretation of the second sentence of Paragraph (3) of Article Q as a norm of authorization (and not transformation or adoption) because this promulgation needs to take place *before* the treaty is actually ratified. Furthermore, the entry into force of the treaty is linked to the (international) entry into force of the treaty for Hungary—either by referring to a specific date mentioned in the treaty or to a specific condition mentioned in the treaty.⁹² If authorized by the parliament, the President of the Republic—as the competent Hungarian authority according to Article 8 (1) of Act L of 2005—may express the Hungarian consent to be bound by the international treaty rule. The international treaty becomes binding for Hungary, and the legal effects and consequences under TREK follow directly from the treaty provision. This means that there is no need to deviate from the dualistic theory to explain why the treaty provision is interpreted according to international law, which already—at least occasionally—also exists in the Hungarian legal order. Additionally, applying TREK disables the possibility of subsequently unilaterally derogating from the treaty as the result of a subsequent conflicting national act in terms of *rechtliches Dürfen*. Under TREK, however, it is not legally impossible to deviate from the international treaty by a subsequent national act in terms of *rechtliches Können*—except for those acts conflicting with *jus cogens*.⁹³ This means that the TREK establishes a legal obligation to modify or terminate the binding international treaty to get rid of the treaty's effect in the Hungarian legal order. If there was a conflicting national act, this act would not be conceived of as legally non-existent as it would with radical monism. This line of reasoning also fits well with Article 8 (3) of Act L of 2005 and the examination of the treaty's constitutionality, which needs to take place *prior* to Hungary's ratification of the treaty. Once the treaty is ratified and binding on the level of the larger law creators' circle, the smaller circle cannot object to it by referring to national law.⁹⁴ Yet, this respect to the

⁹¹ For instance, the parliament in case of a “treaty of outstanding importance to the foreign relations of the Republic of Hungary” according to Article 7 (1)(a) Act L of 2005.

⁹² See Act L of 2005, art. 10 (3)–(4)

⁹³ See *supra* Part C.IV.

⁹⁴ See also Vienna Convention on the Law of Treaties, Art.26–27 (Vienna, May 23, 1969) (ratifying Articles 26 and 27 by Hungary on 19 June 1987).

larger circle conflicts with the Constitutional Court Act, which enjoys cardinal law status in Hungary.⁹⁵ While Section 23 Paragraph (3) of the Constitutional Court Act deals with the “preliminary norm control” of “certain provisions of international treaties”, Section 24 explicitly allows a “posterior norm control,” which is problematic because it might allow for a constitutionally guaranteed violation of international law if an international treaty is declared unconstitutional after its ratification. Similar to the Austrian Article 140a of the B-VG mentioned above,⁹⁶ I would suggest, based upon TREK, using this post-ratification control carefully.

D. Conclusion

In short, TREK aims to give consideration to the complex and divergent structures of international law. Consequently, it is important not to limit the scope of the theoretical background of the relationship between international and domestic law by pressing international law into too narrow a straitjacket of a certain, predetermined legal consequence. The relationship between international and national law does not follow a uniform (political) order—for example, one legal order—yet, nowadays, international and national law are not completely alien to each other.⁹⁷ This is an important difference that sets TREK apart from prevailing theories like monism and dualism. In contrast to legal pluralism, which was said to provide for a descriptively but not prescriptively satisfying account, TREK offers a theoretical explanation of the structural relationship between international and national law. Thus, it offers a theory-based argument for why and how norm conflicts between different legal orders should be solved based on a common denominator: TREK. Such a norm conflict is by most accounts of legal pluralism either said to be solved by non-legal means or lacking theoretical or ideological reasoning as to why and how it should be solved in a common way.⁹⁸ TREK, however, also sets off from the debate on the constitutionalization of international law. The latter is concerned with substantial value questions at the international level. TREK is not interested in such an endeavor. It simply focuses on the structural relationship between international and national law. Thus, TREK is not interested in analyzing or even changing the content of international law or dealing with such daring ventures as ideological-based arguments for

⁹⁵ Act CLI of 2011 on the Constitutional Court. For an English translation see ACT CLI OF 2011 ON THE CONSTITUTIONAL COURT (2011), <http://www.mkab.hu/download.php?d=64>.

⁹⁶ See *supra* Part C.VI.3.2.

⁹⁷ For a detailed argumentation of the original defect of both theories, see Kirchmair, *supra* note 53, at 281. For criticism of the territoriality of both theories, see Catherine Brölmann, *Deterritorialization in International Law: Moving Away from the Divide Between National and International Law*, in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 84 et seq.* (Janne Nijman & André Nollkaemper eds., 2007).

⁹⁸ See, e.g., Kirchmair, *supra* note 2.

how international law should be. TREK offers a theory-based argument that if, for instance, an international norm is directly applicable, it has to be applied by national law applying authorities. Thus, while the constitutionalization debate is—in the line of this example—about whether some norms or principles are so important that they are (or should be) directly applicable and thus self-executing in national legal orders, TREK provides for a theoretical argument that, if they are directly applicable, they should be directly applied by national law applying organs. Thus, it is important to point out that TREK is not interested in value debates or how a society or international law should be, and, therefore, TREK does not provide any arguments in this regard either.

Hence, TREK understands national constitutional provisions as rules of *authorization* for competent national authorities to consent to an international rule (instead of the common understanding as reception or integration norms). Once consent is given and the international rule became binding, the rule is valid and effective also in the national legal order. To understand the effect of the international rule within the national legal order, it is important to analyze the aim and content of the international rule. An incontrovertible aspect of the theory is that a consensus agreed upon by the larger, international law creators' circle may not be infringed on or subsequently disrespected by any State involved in the creation of such consensus (the smaller, national circle). This means, as illustrated above, that the larger law creators' circle prevails over the consensus of the smaller circle. However, how this "primacy" is being enforced—or even whether it is given its full effect—depends solely on the different norms of international law and their aims and content.