Beyond the *Grundnorm*: static and dynamic legitimacies of international norms

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Abstract: This contribution aims to add arguments to the hypothesis that the basic norm of Hans Kelsen's Pure Theory of Law is inapplicable as the sole foundation of the legitimacy of international law. Legitimacy is understood here as the property of the norm to attract international actors (Subjects of International Law) toward fulfilling the normative command. The basic norm of Hans Kelsen's Pure Theory of Law can be seen as a static element of the legitimacy of norms of international law. The fragmentation and interdependence between norms of international law can be seen as dynamic legitimacy elements. These arguments make up a theoretical set that seeks to explain why and how subjects of international law obey rules of law at the international level. The methodology of this contribution consists of qualitative theoretical research using primary sources referring to the issue of legitimacy in international law.

Keywords: legitimacy; international law; fragmentation; interdependence; basic norm.

Para além da Norma Fundamental: legitimidade estática e dinâmica de normas internacionais

Resumo: O propósito desta contribuição é acrescentar argumentos à hipótese que a norma fundamental da teoria pura do Direito de Hans Kelsen é inaplicável enquanto único fundamento de legitimidade do direito internacional. Legitimidade aqui entendida como a propriedade da norma de atrair atores internacionais em direção ao cumprimento do comando normativo. A norma fundamental da teoria pura do direito de Hans Kelsen pode ser tida como elemento estático de legitimidade de normas de direito internacional. A fragmentação e interdependência entre normas de direito internacional podem ser tidas como elementos dinâmicos de legitimidade. Estes argumentos compõem um conjunto teórico que procura explicar por que e como sujeitos de direito internacional obedecem a normas de direito no plano internacional. A metodologia da presente contribuição consiste em pesquisa teórica qualitativa com recurso a fontes primárias referentes a questão da legitimidade no direito internacional.

Palavras-chave: legitimidade; direito internacional; fragmentação; interdependência; norma fundamental.

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INTRODUCTION

The theoretical approaches outlined in this contribution were born out of disagreement with the argument commonly expressed in terms of *pacta sunt servanda* being the foundation of international law. This argument, in different ways, was reaffirmed by legal scholars and that, supposedly, would be related to the Preamble and Art. 26 of the 1969 Vienna Convention on the Law of Treaties. In what sense is the principle of *pacta sunt servanda* a foundation? In the sense of purely legal consent? In the sense of being an efficient cause for mandatory normative commands? In the sense of generating the behavior of subjects of international law? Moreover, ultimately, what is the relationship between foundation and legitimacy in international law?

This paper seeks to add arguments to the hypothesis that the basic norm of the Kelsen's Pure Theory of Law is inapplicable as the sole foundation of the legitimacy of international law. There is a reference to inapplicability in terms of an incomplete argumentative set to explain the functioning of a system of norms, in this case, a system of norms at the international level. The argument of this paper can be summarized in the following terms: if there is a place for legitimacy in the Kelsen's Pure Theory of Law, this place is occupied by the basic norm, although this does not fully respond to the perception of the legitimacy of international norms. It is then proposed that the fragmentation of norms (as commands endowed with effectiveness) and the interdependence between them function inseparably as dynamic elements of the legitimacy of a system of international norms. The methodology of this contribution consists of qualitative theoretical research using predominantly primary sources referring to the issue of legitimacy in international law.

1. STATIC LEGITIMACY OF INTERNATIONAL NORMS

The basic norm (Grundnorm) in Hans Kelsen's Pure Theory of Law can be seen as the foundation of the legitimacy of international law insofar as, through the principle of recognition (Anerkennungsprinzip), it is possible to identify the existence of norms at the international level based on mutual recognition of States as political units capable of establishing legal relationships among themselves (KELSEN, 1976, p. 222). The Kelsenian notion of international law was shaped by its approximation with the lessons of neo-Kantian epistemology in following the logical necessity of *a priori* considerations (JAKAB, 2004, pp. 1045-1057). Despite Kelsenian Theory's recognized commitment to purity, which means "knowing your object for what it is and then answering the question of what the law is and, not what it should be, or could be doing"(KELSEN, 2008, p. 01), the notion of the basic norm - a tribute to the recognition of the effectiveness of a legal order - recognizes that, without power, the law cannot exist. On the other hand, the law is also not identical to power. In the sense of Kelsen's Pure Theory, the law is a determinate order or organization of power (KELSEN, 2008, p. 81).

Both the question about the basic norm and the notion of legitimacy in Hans Kelsen refer to discussions in the field of constitutional dogmatics of his time. In this case, the legitimacy problem in the Pure Theory of Law is found in the lessons on the transition of the constitutional

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order and, therefore, as a solution of continuity related to the rupture of the constitutional legal order (KELSEN, 1976, p. 212). In these terms, the legal use of legality is in line with the principle of legitimacy in the first theories of international law on the birth of States (CHEN, 1951, pp. 105ss). Both doctrinal fields have in common the reference to the transition and transmission of power in a hereditary way consolidated in political practice in the Middle Ages, particularly in Europe. The hereditary continuity of power as legitimate continuity is at the origin of the principle of constitutional continuity (LEISNER, 2002, pp. 65 e 86).

The basic norm in the Pure Theory of Law is not simply a justification, closure, or completion of the theoretical system (*Rechtsfertigung*). The Kelsenian formulation clearly refers to the principle of the effectiveness of norms. Kelsen assumes that there are power relations in society and that effective norms shade these power relations. Therefore, the legitimacy of a legal order depends on its effectiveness (KELSEN, 1976, p. 215). It is possible to infer from the notion of legitimacy in Kelsen's Pure Theory that the theme is related to the question of the conditions for the existence of a legal order, even though the principle of legitimacy concerns, in Kelsen, the constitutional level. It is also possible to establish a relationship between legitimacy and consensus from the theoretical contribution of Hans Kelsen on democracy, from the moment in which, for Kelsen, international law will be as democratic as the political procedures within States are democratic since norms of international law ultimately affect individuals represented by the State[2].

The basic norm is not the principle of *pacta sunt servanda*. The basic norm is the *a priori* recognition of the existence of a legal order and of subjects with legal capacity which act in it. The feature of prior recognition may have initially motivated Hans Kelsen to formulate the basic norm as a hypothesis, and the impossibility of proving the hypothesis, in terms of praxis, motivated the theoretical correction as pure fiction. The *pacta sunt servanda* is observed in history and is not formed by history, which would be an empty statement. The *pacta sunt servanda* is not a right formed by custom but a prerequisite for the existence of legal norms and subjects capable of making these norms effective. Other assumptions of the Pure Theory of Law, such as the unity of the legal order, the primacy of international law, and the issue of validity, are logical consequences of the theoretical formulation of the basic norm.

From the examination of history, it is possible to identify that international law arises insofar as there are rules recognized as valid by political actors, whether natural persons, such as kings or tribal chiefs, or legal hypostatizations in the form of personalization of States, International Organizations. Therefore, there is no consensus on determining the unequivocal origin of international law in terms of a historical moment. From the elements of the basic norm, it is possible to identify, on a historical level, the constituent elements of Kelsen's theorization, including the concept of person, legal norms, and the foundation (basis) of a given system of law (valid norms). The examination of the gradual fragmentation of the Carolingian empire and the transitional processes until the consolidation of the modern system of European States offers many

2 This reasoning is not evident in Kelsen's work because democracy is not a requirement, a criterion for the legal capacity of the State. Kelsen breaks with German tradition and clearly distinguishes between popular sovereignty and democracy. However, it can be said that international law will be more democratic the more democratic States are, which, in Kelsen's view, is a mixture of scientific assertion and political opinion. In this regard, see JESTAEDT; LEPSIUS, 2006, p. XIX.

elements of analysis for applying the principle of recognition as carried out in the Pure Theory of Law. Carl Schmitt made a significant contribution with his studies of Political Theology in the sense of concluding and explaining that several concepts of modern theories of the State are secularizations of theological concepts and, in particular, the study of the transition from dogmatic categories in the Eusebius-Augustinus confrontation to the State in Hobbes (SCHMITT, 2009. pp. 43-54ss).

Several approaches to these themes can be found in the contemporary debate on legitimacy. The plurality of elements that could be mentioned can be grouped in terms of classifications that indicate points of convergence in the theoretical debate, namely, condition of existence, consensus, consent, status quo, solution of continuity for the problem of the rupture of constitutional order, perceived properties/qualities of the norms and values (MOREIRA, 2012). If there is a place for legitimacy in the Pure Theory of Law, that place is occupied by the basic norm. This occurs because the elements of the theoretical formulation of the basic norm respond to the question of the conditions of existence of international norms, the question of the solution of constitutional continuity, and the question of the organization of power. It responds to the question of consensus and consent insofar as the content of the basic norm is the mutual recognition of the legal capacity of subjects of international law, and, finally, it offers an answer to the perception of the norm as legitimate based on the vertical property, of belonging (MOREIRA, 2012, p. 41).

Hans Kelsen's starting point is the recognition of the international legal order. This recognition is based on the objectivity of reason that subjects regard norms as valid. The validity of norms is not based on the recognition of the norms by the subjects but on the recognition of their facticity and efficiency (KELSEN, 1920, p. 215). The question about the legitimacy of international norms is not answered solely by the basic norm, insofar as the recognition of the existence of norms and the mutual recognition of subjects of law at the international level does not answer all the questions posed by legitimacy. There are factors that interfere with the attribution of legitimacy to international norms that go beyond the theoretical formulation of the basic norm in the Pure Theory of Law.

What would Hans Kelsen say today about the practical implications of *Grundnorm* theorization through the principle of recognition? Would Hans Kelsen recognize the existence of valid commands between subjects other than States and International Organizations as valid norms of international law? Regardless of the answer, at the beginning of the 21st century, is it - or would it be - possible to promote – legitimate – global governance through the instruments (sources and institutions) of Public International Law?

The theoretical debates brought about by the contributions of legal pluralism, and the debate on the constitutionalization of international law intensified the questions about the concept of norms of international law and the legitimacy requirements of international norms. Much more than the possibility of the constitutionalization of international law seems to be at stake, what are valid norms of international law, and who are the subjects of international law?

Christian Walter, in the paper 'Constitutionalizing (inter)national Governance', poses the constitutionalization of global law as a problem of international law insofar as there is an intention to promote global governance. In this context, it can be suggested that there are three

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political candidates for the promotion of global governance: the United Nations, international law, and transnational administrative norms. Each of these candidates plays a recognized role in the coexistence of States. However, it seems that the concept of global governance proposed by the 'Commission on Global Governance' does not give any candidate priority in the dispute:

> "Governance is the sum of many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest." (WALTER, 2001, p. 175).

Walter's article argues that the notion of the Constitution needs to be separated from its traditional context within the nation-state to be transferred to international law. Concerning legitimacy, Walter problematizes the constitutionalization from the disaggregation of the State as a public authority, which he evaluates as a growing consensus about the fall of the Westphalian pillars. He exemplifies this change in the international political structure based on the semantical option of the International Law Commission in the draft articles on state responsibility adopted at the 53rd Session on July 26, 2001, where the reference to 'international community of states' known from article 53 of the Convention of Vienna on the Law of Treaties was replaced by a reference to the 'international community', without reference to States (WALTER, 2001, p. 172.).

K. C. Wellens offers another contribution to the debate in the article "Diversity in secondary rules and the unity of international law: some reflections on current trends" (WELLENS, 1995, pp. 3-38), where the author seeks to make a contemporary reading of secondary rules based on Hart's positivist theory, applying the basic norm for contemporary legal relations. Hart's theory raises many points about the dynamics of norms in the international system. However, the question about the sources, the consequences for international responsibility, and, especially, the unity, coherence, and effectiveness of international norms make the author formulate some questions that deserve reference.

> "Are the limits and constraints of classical or general international law stretched or even strained by the way the secondary rules have been operating within the special fields? Has the compartmentalization of international law reached a level at or beyond which the international legal order runs the risk of fatal disintegration?" (WELLENS, 1995, p. 4)

Wellens concludes that non-state actors of different types and categories – international organizations, individuals, companies, entities, and NGOs – have become more involved in creating primary norms. These actors also increasingly become subject to the rule of primary norms, which confer rights on them or impose obligations of conduct or abstention. Wellens dedicates his final remarks to the role of the United Nations and the need for the organization to adapt gradually to the 'prevailing circumstances' of the international community, mainly regarding the secondary rule of article 27 of the Charter (3), which establishes the conditions for decisions by the Security Council.

From the reading of the theoretical texts that face the issue of legitimacy in international law, it is possible to verify the presence of recurrent themes such as the constitutionalization

of international law, the flexibility of the concept of valid legal norms and primary norms, as well as subjects of international law and global governance. The treatment of these issues so comprehensively raises the question of to what extent they belong (these issues) to the field of public international law. In the theoretical debate, these different perceptions are visible in the dialogue between the dogmatics of international law and other theoretical Fields (ONUF, 1989; ONUF, 1982). A notorious example is Jürgem Habermas, who accepts Luhmann's postulates about a global society but does not identify transnational rules between private actors as international legal norms (SKORDAS; ZUMBANSEN, 2009, p. 02). This question, which has as its backdrop the relationship between global governance and Public International Law, can only be partially answered insofar as legitimacy is analyzed from a legal perspective.

In November 2003, the Max Planck Institute in Heidelberg held a Seminar on 'International Law in Treaty Making' as part of a European-American dialogue on different perceptions of international law and, in particular, the issue of legitimacy took on particular intensity in the debates which generated a Seminar solely on the topic of legitimacy in international law, in which several scholars participated, including Rüdiger Wolfrum, Alain Pellet, Robert Keohane, and Georges Abi Saab. Wolfrum's article "Legitimacy in International Law from a Legal Perspective: some introductory considerations" (WOLFRUM, 2008, pp. 01-24) mentioned some of the main concerns on the subject.

Wolfrum's text is markedly technical and accentuated by restricting the study of legitimacy to the field of public international law. He first acknowledges the existence of several schools of thought on the issue of legitimacy. Firstly, he mentions those who argue that international law lacks legitimacy, at least compared to national democratic governments. According to Wolfrum, this is a school that rescues the internationalist thought of Carl Schmitt, state-centrist, where international law is perceived as directly controlled by individual States. The second school is a consequence of globalization and argues that global institutions must be reshaped to establish their legitimacy based on global challenges. This school suggests replacing or complementing governments with democratically legitimized world institutions. Another school is concerned with adapting traditional means of developing norms to the globalized world. Others are hybrid forms, such as accentuating parliamentary influence in international relations (WOLFRUM, 2008, pp. 03-05).

In the theoretical content of the concept of legitimacy assembled by Wolfrum, he mentions the role of justification of authority, consensus, adequacy, and justice brought about by the issue of legitimacy in international law. From the perspective of democracy, he mentions that the lack of democracy within the States calls into question the implementation of an Agreement in that State but not the Agreement itself and, recalling the contribution of G. Tunkin if the custom is understood as a tacit agreement between States then their ultimate source is the consent of States (WOLFRUM, 2008, pp. 06-08). Although Wolfrum resorts to custom and pacta sunt servanda, curiously enough, he does not mention Hans Kelsen.

Two issues mentioned by Wolfrum deserve further mention: the recognition of static and dynamic elements related to legitimacy and the recognition of norms that, although technically not international legal norms, constitute or interfere with the obligations of States.

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Regarding static and dynamic factors, it starts from the issue of consent. The consent of States must have a specific and static meaning referring to a particular obligation and a general and dynamic meaning referring to the establishment of a governance system or regime which develops legal life in itself by formulating other obligations (WOLFRUM, 2008, p. 09). Wolfrum seeks to speak of general Public International Law, not specific small-scale (bilateral or regional) Agreements. The difference between Wolfrum's contribution and the conclusions of this paper is that - for Wolfrum - the static meaning is the norm itself, which means that the foundation of the obligation is the norm or the Agreement. Hans Kelsen's basic norm in the perspective of static legitimacy is the a priori necessary recognition for this norm to be established and, included in this recognition, is the capacity of a subject to understand the norm and be able to be bound by it and recognize in the other party the same attributes. These considerations lead Wolfrum to question whether consent would legitimize international law and develop his idea about the dynamic meaning of international law decisions that affect individuals (WOLFRUM, 2008, pp. 10 e 12).

Wolfrum highlights the recognition of norms that, although not of a technical nature, constitute obligations for States or even individuals and corporations or that accelerate the implementation of already contracted obligations. He exemplifies the role of decisions by international agencies, in particular regarding the implementation of the Montreal Protocol on substances that affect the ozone layer and, in particular, the majority votes on complementary norms that enforce compliance with a given Treaty (WOLFRUM, 2008, p. 14). The role that Wolfrum attributes to international agencies (Secretariats) that administer multilateral Treaties and international corporations is quite similar to that mentioned by Paul Kajer concerning conglomerates of specialists (KJAER, 2009, p. 05) and to what Gunther Teubner attributes to transnational private actors (TEUBNER; KORTH, 2009).

What Wolfrum understands by the dynamic sense of consensus boils down to administrative decisions taken within the International Regimes and systems of international law that do not depend on the consensus of the States, but that generate or interfere with the obligations of the States. The argument is that consensus and consent do not generate legitimacy by themselves, as there are obligations assumed by States that do not depart from this static sense but are anchored in it. Wolfrum's notion, in a certain sense, is more of an argument as to the inapplicability of the basic norm as the sole basis for the legitimacy of international norms

Other contributions in the field of legal theories also identify the role of the relationship between international legal norms and other types of commands and directives that reinforce or interfere with the obligations of States. In this regard, Anne Marie Slaughter's work 'Governing the Global Economy through Government networks', in which she cites the growth of “Memoranda of Understanding”, reflects on the growing recognition of the general advantages of informal agreements between government regulatory agencies (SLAUGHTER, 2000, pp. 177-205). Slaughter's argument reveals the concern among internationalists mentioned by Brigitte Stern about how it is possible to regulate globalization based on international law since formal norms are insuficiente (STERN, 2000, p. 252). Hellen Keller's extensive research on codes of conduct from the perspective of the legitimacy of international law is enlightening insofar as it questions the effectiveness and legitimacy of the diversity of regulations which differ in terms of origin,

scope, and degree of institutionalization. Keller questions the legitimacy of these codes of conduct that imply a departure from traditional models of legitimacy, just as private codes are disconnected from the States (KELLER, 2008, pp. 236 e 296).

It is necessary to emphasize that the reference to Helen Keller's research is due to the accurate study regarding the existence and effectiveness of norms of conduct – regulations – which, although of a private nature, fulfill a public function. Keller's emphasis is on the problem of the legitimacy of these norms and their acceptability. The argument of this paper follows a different path that takes advantage of some of the results of the aforementioned research: the existence of rules created at different levels – as norms of conduct also exist in multilateral relations – which reinforce consensus, determination, and guidance for compliance with norms valid under international law[3].

2. DYNAMIC LEGITIMACY OF INTERNATIONAL NORMS

Elements beyond the theoretical formulation of the basic norm interfere with the question of legitimacy. These elements go beyond the static characteristic of the recognition of rules based on the mutual recognition of legal capacities. The basic norm is the starting point of international law subjects' behavior, just as legality is the starting point of legitimacy. On a legal level, a norm may have little legitimacy, but if there is no norm, there is nothing to speak of legitimacy. Legality follows the licit/illicit binomial, and legitimacy follows a perception gradient of degrees of legitimacy. The legal norm is black or white, and legitimacy is shades of gray.

Legitimacy in international law can suffer interference from several factors that are part of the perception of the legitimacy of legal norms. As an example of these factors, one can speak of consensus, ritualization, determination, and values[4]. These perceptions acquire more significant or lesser subjectivity in the criteria suggested by legal theories according to the cultural, regional, and historical contexts in which the norms operate. It is possible to find in history different ways of influencing the legitimation of rules, even though the elements of Kelsen's basic norm seem to have remained static since the first manifestations of international law.

The fragmentation of international law has different interpretative approaches that largely depend on the theoretical perspective of who explains it. In this regard, the International Law Commission Report on the Fragmentation of International Law, the role of decisions in international law, decisionism in Carl Schmitt, and legal pluralism as developed by Kennedy and Teubner. From these perspectives, it is possible to identify factors that dynamically legitimize international norms. The first dynamic factor is a movement of disorderly production of norms at the international level, which, while being an efficient cause for clashes between international regimes, gives determination to norms within their respective systems insofar as it specifies more and more the content of commands applied to different situations. This production of norms is

3 Helen Keller cites examples of codes of conduct created by private actors but informing international norms. In this sense, the voluntary codes of conduct relating to labor law is an Agreement between NGOs and trade unions that serve as 'benchmarks' for the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO 1977). (KELLER, 2008, p. 243).

4 These are the legitimacy criteria developed by Thomas Franck and discussed in MOREIRA, 2012, pp. 275ss.

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verified in the International Regimes related to the environment, human rights, and international trade. It is also possible to identify that the fragmentation of international law, in the form of the production of norms, increases the cohesion of the legal system as a horizontal criterion of legitimacy. This is also observed from the perspective of regimes and regional systems of norms, for instance, the law of European Union or regional systems of human rights.

Interdependence in international law can also be seen in the very relationship between norms of international law, where it is possible to perceive more clearly which norms are interdependent and the extent of their interdependence in the system. Examples of this case are general multilateral Treaties and additional Protocols or accessory norms to these international legal commitments. The greater the scope of interdependence between norms, the greater the determination[5] of these norms due to the expansion of normative references and the consolidation of norms in the system. This relationship of interdependence as a set of fragmented normative and decision-making compounds of a given system of norms also increases the cohesion of the norms in a given normative system.

Decisions confer cohesion and determination to valid legal norms of international law in the sense that interpretation and practical application are given to normative content. To this extent, fragmentation and interdependence in international law must be understood as parts of an argumentative organicity and not in the sense of legal rationalities with defined, watertight borders. The interdependence between legal systems makes it possible to bring together fragmented elements in the conception of a single legal system, whether international, regional, or transnational. The fact that the praxis of international law depends on the interdependence between fragmented norms is one of the elements of Koskenniemi's argument regarding the quality of a legal argument in international law: a competent legal argument seeks to connect norms at different levels of abstraction (KOSKENNIEMI, 2005, p. 566). The Finnish jurist's argument makes it possible to perceive that the inclination towards obedience in the sense of the connectivity of norms can also occur at the argumentative, descriptive level.

The international legal system is not a complex of norms that promotes its objectives in the system in a static way. International law constitutes a legal system devoid of a unified system of sanctions, compared to the state system, which raises the question of legitimacy in the sense of attraction to compliance in an environment devoid of coercion. It is possible to perceive that there are international norms in the sense of facticity and effectiveness. However, subjects of international law comply with norms due to elements beyond consent.

Treaties and customs as prevailing sources of international law provide the framework for decision-making instances and the content of legal arguments. The administration of international regimes and systems in the form of secretariats and decision-making bodies streamline the contents of Treaties (Agreements and other species of international commitments), and, therefore, it is possible to understand which subjects of international law are attracted to compliance due to the dynamics of international law itself. In the same vein as Martti Koskenniemi's argument about competence in international law, Malcolm Shaw also places the justification of the legal argument

5 Norm determination is the text's ability to convey a clear message and to be transparent to the point that meaning can be arrived at through language. The rationale is that rules with a clear meaning are understood more efficiently and have greater potential to be fulfilled since they express the behavior expected from the Subjects of International Law with greater precision (MOREIRA, 2012, 34).

at a central level in the practice of international law:

> "It is the legal quality of international law that is the first question to be posed. Each side to an international dispute will doubtless claim legal justification for its actions and within the international system there is no independent institution able to determine the issue and give a final decision." (SHAW, 1997, p. 02)

Kelsen's Pure Theory of Law sought to study the object of legal sciences, that is, law, purifying it of other elements such as morality, ethics, values, politics, and ideology. The scientific rigor intended by legal positivism made it possible to verify with a more significant margin of accuracy that the norm and its validity criteria are the results of choices, options, and decisions. The product of the aseptic process of maximum reductionism that science can confer on the norm is not the norm but the decision, and what allows this decision to be characterized, transubstantiated into a legal norm is also a decision, which generates a fictional attribution.

On a legal level, legitimacy depends on the existence of legality. Therefore legitimacy is also fictional since legitimacy is also based on the assumption of mutual recognition of legal capacities. Legitimacy, as well as the basic norm, is the fiction of fictions, as it constitutes the *a priori* condition for the existence of legality. Going back in this post-Kantian reasoning would be to recognize specific values as foundations of law. Even if they are, the ultimate legal foundation of the legitimacy of a legal order is the decision that gives these values a legal nature. The use of fiction also makes it possible to understand how different cultural or historical contexts can modify the perception of the legitimacy of international norms.

In the field of international law, legitimacy, from the point of view of values, belongs to the field of high human ideals that, despite not existing in reality, allow for 'civilizing' progress in theory and legal practice. Based on the notions of freedom and justice, it is a foundation of fictional legitimacy, psychologically necessary for the human societal Project (VAIHINGER, 1986, pp. 59ss). Legitimacy based on criteria other than morality does not escape fictional characterization either since it depends on the notion of attribution of personality necessary to obtain consensus and conscious consent to the content of the norm. Based on these arguments, it is also possible to recognize that the basic norm partially exercises the legitimating function of international law because, while presenting itself as pure fiction, it denies the interference of subjective moral values.

The 1979 version of the 'General Theory of Norms' indicates that the basic norm cannot be conceived scientifically without resorting to fiction as an act of thought. Much has been written about the 'deadly mystery' of Kelsen's change of heart in the 1979 version, and on this point, Duxbury seems right: norms are hardwired to the human will: "the basic norm shares with a positive legal norm the quality of being the meaning of an act of will, except that in the case of the basic norm the act of will is imagined." (DUXBURY, 2007, p. 09). This paper seeks to add arguments to the hypothesis that the basic norm of the Kelsen's Pure Theory of Law is inapplicable as the sole foundation of the legitimacy of international law. The various arguments that form this conviction reside in recognizing that static and dynamic fictional factors are immanent in legal systems, and legitimacy is no exception to this rule. If international relations are observed, at any time in history, the content of the basic norm remains unchanged, and this content is the axis of the definition of the concept of legitimacy.

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CONCLUSIONS

The *pacta sunt servanda* is a common expression of recognition of a legal order. In this regard, the expression. *Ubi societas, ibi jus* is consecrated, although it is more a legal aphorism than a scientific statement. Where there is society, it is possible to identify some commands, not necessarily legal ones. There seems to be a reason to theorize that secondary rules – in Hart's sense – will recognize whether norms are legal; before that moment of consensus, all Indians are chiefs. The basic norm in Hans Kelsen concerns this order of phenomena: it is possible to recognize legal rules in contemporary societies. This is only possible if there is the possibility of self-obligation—something evident in international society, as States mutually recognize each other in their spheres of power.

Although one cannot recognize the prevalence of an explanatory theory regarding the foundation of the legitimacy of international law, it is proposed that the assumptions based on the principle of *pacta sunt servanda* or the hypothetical basic norm can be improved in order to reduce the distances between an argument theoretical and practical dynamics of norms in international relations.

One of the main arguments of the theoretical contribution of this article resides in the response of the Pure Theory of Law to the question of legitimacy. In the content of these arguments, the formulation of the basic norm stands out: from the principle of recognition, by an act of thought, a fundamental norm is assumed that justifies and gives unity to the international legal order. The elements of this basic norm are perceived in recognition of the existence of norms since subjects of law, who behave according to these norms, mutually recognize their legal capacity to commit themselves to them. The theorization of the basic norm in terms of the history of ideas is a formulation aimed at solving the problem of the validity of norms in the universal sense and not just the validity of norms (re)known as national and international. In this sense, the fundamental norm is the static factor of legitimacy of international law, as it brings together the basic assumptions for the condition of existence of norms, for consensus, consent, and other factors capable of generating legitimacy.

The possibility of change in the perception of legitimacy, verified from observing the behavior of norms and subjects of international law, indicates that legitimacy, as a property of the norm, has dynamic characteristics. It has been argued in this article that it is possible to research these dynamic characteristics from a legal perspective. The possibility of distinguishing between static and dynamic factors suggests that there is scientific evidence that international norms have greater legitimacy due to factors that go beyond the elements of the basic norm of Hans Kelsen's legal positivism. Therefore, the basic norm is inapplicable as the sole basis for the legitimacy of international law.

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