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ARTICLE

The Federal Constitution of Malaysia: A Kelsenian Perspective

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Abstract

This article examines the Federal Constitution of Malaysia through the lens of Hans Kelsen's Pure Theory of Law. It first demonstrates the utility of the *Grundnorm* in explaining the supremacy of the Federal Constitution within the Malaysian legal system. In particular, this article establishes that despite Malaysia's colonial past, the Federal Constitution is the Kelsenian 'historically first constitution' of the present Malaysian legal system because of the Kelsenian 'revolution' that had occurred when the Federation of Malaya attained independence from the British in 1957, as well as the absence of a Kelsenian 'revolution' during the formation of Malaysia in 1963. The *Grundnorm* of the Malaysian legal system can thus be expressed as 'one ought to obey the prescriptions of the Federal Constitution'. However, this article also argues, using the example of the basic structure doctrine controversy in Malaysia, that while the Pure Theory succeeds in elucidating a measure of legal validity for legal norms, it fails to provide any helpful insight when a constitutional dispute relates to the content of a norm rather than the interaction between hierarchically distinct norms.

In a country that often struggles to reconcile the diverse outlooks of its pluralist society, few things have been able to claim the monopoly wielded by the Federal Constitution over the Malaysian psyche. Arguments from authority invoking the Federal Constitution as a 'trump card' – '*A* is wrong because it violates the Federal Constitution' or 'I am entitled to *B* because the Federal Constitution states so' – are commonplace. The notion that one has to obey the Federal Constitution is often taken for granted, and justifications for the constitutional supremacy of the Federal Constitution rarely go beyond a circular affirmation of supremacy as enshrined in Article 4(1) of the Federal Constitution.[2]

Using Kelsen's Pure Theory of Law (hereinafter 'Pure Theory'), and in particular, the concept of the *Grundnorm* or basic norm, this article seeks to elucidate how and why the Federal Constitution is able to claim its supreme status within the Malaysian legal system. Kelsen's Pure Theory is at its core a positivistic theory, which is to say that Kelsen viewed law as 'independent of morality and similar norm systems'.[3] However, *contra* Bentham and Austin, Kelsen rejected the view that the law can be reduced to facts about 'power and obedience'.[4] For Kelsen, it is possible for the law to be *both* devoid of political or moral ideology *and* normative (in the sense of being 'justified'

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[2]Federal Constitution, art 4(1): 'This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'.

[3]Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, 3rd edn, Harvard University Press 1949) 114.

[4]NE Simmonds, 'Philosophy of Law', in Nicholas Bunnin & EP Tsui-James (eds), *The Blackwell Companion to Philosophy* (2nd edn, Blackwell Publishing 2003) 411.

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or ‘a valid reason for action’).[5] At the heart of Kelsen’s Pure Theory is the device of the *Grundnorm*, using which Kelsen explained why the obligations prescribed by a legal norm (such as a legislation or constitutional document) are valid and binding.

This article will first sketch the concept of the *Grundnorm* in the context of the Federal Constitution by explaining why it is incorrect to characterise the Federal Constitution as being one and the same as the *Grundnorm*. Next, it goes on to explore the question of whether the *Grundnorm* of the Malaysian legal system can in fact be expressed as ‘one ought to obey the prescriptions of the Federal Constitution’ in the light of Malaysia’s colonial past, as well as of the historical events leading up to the independence of Malaya in 1957 and the formation of Malaysia in 1963. In doing so, it demonstrates the utility of Kelsen’s Pure Theory in the ascertainment of the legal validity of rules. At the same time, this article will also examine the Pure Theory’s deficiencies in serving as the jurisprudential foundation of the Malaysian legal system. Using the example of the controversy surrounding the basic structure doctrine in Malaysia, it argues that the Pure Theory’s strict adherence to legal ‘purity’ and its conditional normativity fails to provide useful guidance for the resolution of constitutional conflicts involving the meaning and content of a legal norm. This article concludes with the view that the limitations of the Pure Theory evince a need for wider efforts to be made in order to expound a legal theory that can holistically account for the various features of the Malaysian legal system.

The Nature of the *Grundnorm*

The supremacy of the Federal Constitution of Malaysia[6] within the Malaysian legal order is widely acknowledged and undisputed. This legal reality is commonly attributed to the concept of the *Grundnorm*,[7] the central device of Hans Kelsen’s Pure Theory. The Pure Theory purports to be a methodologically ‘pure’ legal science that explains ‘what and how the law is’ rather than how the law ‘ought to be’ without any recourse to the extra-legal input of disciplines such as psychology, sociology, or moral and political theory.[8] Central to the Pure Theory is the notion that norms are held together in a vertical hierarchy, and such a hierarchy is maintained through the regulation, creation and validation of a lower norm by a higher norm.[9] Because this process of norm interaction occurs iteratively along a chain of norms, a stopping point is needed to avoid an infinite regress.[10] That ultimate stopping point, which lies at the apex of the chain of norms and upon which the

[5]Andrei Marmor, ‘The Pure Theory of Law’, in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/archives/spr2016/entries/lawphil-theory/> accessed 5 Jun 2021.

[6]For ease of reference, the term ‘Federal Constitution’ will be used to denote the Federal Constitution of Malaysia which is currently in force.

[7]See *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan* [2021] 3 MLJ 759 para 72; *Hassan bin Abdul Karim v Perdana Menteri, Tan Sri Dato’ Hj Mahiaddin bin Md Yasin & Anor* [2021] MLJU 815 para 32; *Thamilharasan a/l Narasimulu v Timbalan Menteri Dalam Negeri* [2021] MLJU 925 para 19. See also Lim Heng Seng, ‘Malaysia: The Federal Constitution, Islamisation And The Malaysian Legal Order’ (Mondaq, 16 Jun 2016) <https://www.mondaq.com/constitutional-administrative-law/500882/the-federal-constitution-islamisation-and-the-malaysian-legal-order#:~:text=The%20Federal%20Constitution%20of%20Malaya,supreme%20law%20of%20the%20nation.&text=The%20basic%20pillars%20which%20undergirded,for%20the%20enlarged%20Malaysian%20nation> accessed 2 Feb 2021; Dato’ Dr Cyrus V Das, “Life’ Under Article 5: What Should It Be?’ (2002) XXXI(4) The Journal of the Malaysian Bar, 68 <https://www.malaysianbar.org.my/cms/upload_files/document/INSAF%202002%20Vol.%204.pdf> accessed 12 Jul 2022; Roger Tan, ‘No room for hudud law’ (The Star, 5 Jun 2016); HRH Sultan Azlan Shah, ‘Evolving a Malaysian Nation’, in Visu Sinnadurai (ed), *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches* (Professional Law Books and Sweet & Maxwell Asia 2004) 331; Shad Saleem Faruqi, *The Bedrock of Our Nation: Our Constitution* (Zubedy Ideahouse Sdn Bhd 2012) 6.

[8]Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 1. However, as will be seen in the subsequent discussion on the normativity of the Pure Theory, this does not mean that the Pure Theory is a purely descriptive theory with no normative leanings.

[9]ibid 221.

[10]ibid 194.

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entire legal order hangs,[11] is the *Grundnorm*. A lower norm is valid if it is derived from a higher norm in the prescribed form and manner, and the *Grundnorm* is the ultimate validity-bestowing authority. In stipulating the *Grundnorm* – rather than social facts[12] or moral principles – as the common source and foundation of positive laws,[13] the legal system can be seen as self-contained[14] and logically closed.[15]

In constitutional discourse generally, the Federal Constitution is often described as 'the *Grundnorm* of the Malaysian legal order',[16] or is said to '[constitute] the *Grundnorm* … to which all the other laws are subject'.[17] Such language signifies the tendency to treat the Federal Constitution as synonymous with the *Grundnorm*. The confluence of a supreme *positive* norm with the *Grundnorm* is similarly present in accounts of other legal systems. For example, Gu describes the 1997 handover of Hong Kong to China as resulting in a 'shift' of the *Grundnorm* of the Hong Kong legal system from the constitutional foundation established by the British Letters Patent and Royal Instructions of 1843 to the Constitution of the People's Republic of China (PRC).[18] HLA Hart himself saw the *Grundnorm* and a constitution[19] as occupying the same functional role within the legal order, and considered the former a 'needless reduplication' of the latter.[20]

The Distinct Nature of the Grundnorm and the Federal Constitution

The equation of the Federal Constitution to the *Grundnorm* implies that the *Grundnorm* is *positive* and *legal* in nature, just as the Federal Constitution is. This contradicts Kelsen's depiction of the *Grundnorm* as a product of thought.[21] The Federal Constitution is a concrete norm whose content is readily identifiable from its body of text. It comes into being as a result of its promulgator's 'act of will', and expresses the promulgator's will through legal language.[22] On the other hand, the *Grundnorm* is not 'real', in the sense that it 'does not really exist except in our thinking'.[23] Unlike the Federal Constitution, the *Grundnorm* does not result from an *act* of creation, but from a *conjuration* of the mind. Before the differences between the *Grundnorm* and the Federal Constitution are more fully fleshed out, it is important to first have a clear idea of what exactly the *Grundnorm* is.

The Grundnorm as a presupposition or fiction

Between the publication of *The Pure Theory of Law* and Kelsen's final writings, the *Grundnorm* underwent an evolution of identity from a 'presupposed condition of all lawmaking'[24] to a 'genuine

[11]ibid 194–195.

[12]See HLA Hart's social fact thesis in Scott J Shapiro, 'What is the Rule of Recognition (And Does It Exist)?', in Matthew Adler & Kenneth Einar Himma (eds), *The Rule of Recognition and the U.S. Constitution* (Oxford University Press 2009) 239.

[13]Paul Gragl, 'The Pure Theory of Law and Legal Monism – Epistemological Truth and Empirical Plausibility' (2015) 70 Zeitschrift für öffentliches Recht 665, 671.

[14]Ryan Mitchell, 'International Law as a Coercive Order: Hans Kelsen and the Transformations of Sanction' (2019) 29 Indiana International & Comparative Law Review 245.

[15]Stanley L Paulson, 'The Weak Reading of Authority in Hans Kelsen's Pure Theory of Law' (2000) 19 Law and Philosophy 131, 160.

[16]Lim (n 7).

[17]HRH Sultan Azlan Shah (n 7). For further examples of how the Federal Constitution and the *Grundnorm* have been used interchangeably, see the cases and sources cited in (n 7).

[18]Gu Yu, *Hong Kong's Legislature under China's Sovereignty: 1998–2013* (Brill Nijhoff 2015) 1. The current de facto constitution of Hong Kong, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter 'The Basic Law of Hong Kong'), was enacted by the national legislature of the PRC pursuant to the Constitution of the PRC (see The Basic Law of Hong Kong, Preamble).

[19]The use of a small letter 'constitution' in this article refers generally to the highest positive legal norm of any legal system.

[20]HLA Hart, *The Concept of Law* (Penelope A Bullock & Joseph Raz eds, 2nd edn, Oxford University Press 1994) 293.

[21]Kelsen, *Pure Theory of Law* (n 8) 203.

[22]See William Conklin, 'Hans Kelsen on Norm and Language' (2006) 19 Ratio Juris 101, 106.

[23]ibid 102.

[24]Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Bonnie Litschewski Paulson & Stanley L Paulson tr, Oxford University Press 1997) 58.

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fiction'.[25] A presupposition is a prelude to a proposition, and in this case, the *Grundnorm* is the indispensable conceptual precursor to the factual supremacy of the Federal Constitution. This can be contrasted with Kelsen's later depiction of the *Grundnorm* as a 'Vaihingerian fiction',[26] which characterised the *Grundnorm* as a posited fictional norm that not only contradicts reality but also itself.[27] The reformulation of the *Grundnorm* into a *norm* resulting from a fictional act of will has not found favour with commentators of Kelsen's work,[28] and therefore this article will not delve further into the distinction between the *Grundnorm* as a presupposition and as a fictional norm. Instead, the terms 'presupposition' and 'fiction' or 'fictional norm' will be used interchangeably to refer to the character of the *Grundnorm* seeing as the instrumental function of the *Grundnorm*, which is the concern of this article, remains unaffected by the distinction.

In essence, the *Grundnorm* is an aid to thinking[29] or a 'cognitive device'[30] that allows one to determine which norms of any particular legal order are valid and binding. In the spirit of Kantian transcendental idealism which posits that things in themselves are different from and independent of things as experienced by perceivers,[31] Kelsen viewed norms as 'interpretative schemes' that possess no objective reality. Rather, it is only through the attribution of meaning to norms via 'acts of interpretation' that we are able to construct a coherent system of norms.[32] The role of the *Grundnorm* within this interpretative endeavour is twofold. First, it serves the epistemological function of affirming the Federal Constitution's legal fiat on the matter of the creation, validation, and regulation of norms.[33] Secondly, the *Grundnorm*'s focus on form rather than substance serves the methodological function of clarifying how positive law can be cognised as well as the type of knowledge derivable from a system of legal norms.[34]

Differences between the Grundnorm and the Federal Constitution

It follows from the above that the *Grundnorm* differs from the Federal Constitution in terms of its position within the legal order and the nature of its content. The *Grundnorm* is the hierarchically supreme 'norm' if *all types of norms* are considered, whereas the Federal Constitution is the supreme *positive or legal norm* which is still subject to the authorisation of the non-positive

[25]Hans Kelsen, 'The Function of a Constitution', in Richard Tur & William L Twining (eds), *Essays on Kelsen* (Iain Stewart tr, Oxford University Press 1986) 117.

[26]For Vaihinger, '"pretending" that certain things are true … can greatly aid our aim of prediction', even when the fiction is 'radically false', and this is particularly true where the objects which are deliberately overlooked or where the assumptions which are falsely made only have a 'negligible influence' on the object of study: Timothy Stoll, 'Hans Vaihinger', in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/entries/vaihinger/> accessed 9 Jun 2021. This would be analogous to how the assumption of *ceteris paribus* in economics allows for the simplification of the study of economic phenomena.

[27]Neil Duxbury, 'The Basic Norm: An Unsolved Murder Mystery' (LSE Law, Society and Economy Working Papers 17/2007) 6 <https://www.lse.ac.uk/law/working-paper-series/2007-08/WPS17-2007Duxbury.pdf> accessed 12 Jul 2022. This genuinely fictional norm contradicts reality because the *Grundnorm* does not exist as a material object. On the other hand, it contradicts itself because the notion that the *Grundnorm* is a fictional 'norm' dabbles in the logical contradiction that this fictional norm does not require higher validation even though, by Kelsenian rules, norms are valid only if they have been authorised by a higher norm. See ibid; Kelsen, *Introduction to the Problems of Legal Theory* (n 24). In short, it is a norm only in name but not in essence.

[28]See Duxbury (n 27) 4.

[29]Iain Stewart, 'The Critical Legal Science of Hans Kelsen' (1990) 17 Journal of Law and Society 273.

[30]Duxbury (n 27) 7.

[31]Jill Vance Buroker, *Space and Incongruence: The Origin of Kant's Idealism* (Springer 1981) 1.

[32]Reut Yael Paz, *A Gateway Between a Distant God and a Cruel World: The Contribution of Jewish German-Speaking Scholars to International Law* (Martinus Nijhoff 2012) 225.

[33]Håkan Gustafsson, 'Fiction of Law' (2010) 41 Rechtstheorie 319, 323.

[34]ibid 322. Although these elucidations were provided by Kelsen in the context of the *Grundnorm* as a presupposition, they are similarly applicable vis-à-vis the *Grundnorm* as a fiction. Note that most commentators also vary between referring to the *Grundnorm* as a presupposition or as a 'thought norm'. See Gustafsson (n 33) 323, 336–337.

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Grundnorm.[35] If, as Kelsen explained, the *Grundnorm* is the reason of validity for the supreme positive norm,[36] it would be logically incorrect to consider the Federal Constitution interchangeably with the Malaysian *Grundnorm*. This is why even though the Pure Theory rejects the view that legal norms such as laws and regulations can be created via human cognition,[37] it nevertheless conceives of the act of presupposing the *Grundnorm* as an act of cognition.[38]

The non-positive nature of the *Grundnorm* is discernible from the *Grundnorm*'s lack of substantive content. Unlike the Federal Constitution's embodiment of specific legal content charting the architectural foundations of Malaysia,[39] the *Grundnorm*'s content goes no further than highly condensed and abstracted prescriptions.[40] In *The Pure Theory of Law*, the formula of the *Grundnorm* is expressed as 'Coercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first constitution',[41] which is to say that 'one ought to obey the prescriptions of the historically first constitution'.[42] In Malaysia, assuming that the Federal Constitution is the current 'historically first constitution', the *Grundnorm* would be the presupposition or fictional norm that states 'one ought to obey the prescriptions of the Federal Constitution'. Whether this assumption is in fact correct will be explored shortly.

Is the Grundnorm *a Secure Constitutional Foundation for the Malaysian Legal System?*

One might have difficulty reconciling the empirically and logically false nature of the *Grundnorm* with the venerated position of the Federal Constitution on the Malaysian constitutional altar. After all, can the Federal Constitution be meaningfully said to possess a 'peremptory'[43] character or to be 'the most vital working document which [Malaysians] created and possess'[44] if its validity is ultimately derived from a presupposition or fiction?

Any concern that the entire Malaysian legal system is built on a house of cards for want of a 'proper' foundation is ultimately misguided. The law, when understood as comprising of the legal system, legal rules, legal concepts,[45] and legal philosophy, is a human construct.[46] In other

[35]The distinction between a positive norm and 'formal norm' ie, a norm which does not affect the content of the norm being authorised, is also made by Hopton: TC Hopton, 'Grundnorm and Constitution: The Legitimacy of Politics' (1978) 24 McGill Law Journal 72, 84.

[36]Kelsen, *Pure Theory of Law* (n 8) 200.

[37]Hans Kelsen, 'On the Theory of Interpretation' (1990) 10 Legal Studies 127.

[38]Torben Spaak, 'Kelsen and Hart on the Normativity of Law', in Peter Wahlgren (ed), *Perspectives on Jurisprudence: Essays in Honor of Jes Bjarup* (Stockholm Institute for Scandinavian Law 2005) 405.

[39]For example, by establishing state organs, providing for the form and manner of law creation and regulating the distribution of powers between state organs: Faruqi (n 7) 1–5.

[40]As Bindreiter explains, the *Grundnorm* merely indicates the 'highest norm-creating authority' without indicating 'the content of the issued norms': Uta Bindreiter, *Why Grundnorm?: A Treatise on the Implications of Kelsen's Doctrine* (Kluwer Law International 2002) 35.

[41]Kelsen, Pure Theory of Law (n 8) 50. While Kelsen conceived of the law as a coercive order which forcibly deprives one of fundamental values of life and freedom in the face of disobedience, he did not see coercion as the only motivator for compliance with legal directives: see Kelsen, *Pure Theory of Law* (n 8) 35. See cf John Austin, *Lectures on Jurisprudence: Or, The Philosophy of Positive Law, Volume 1* (Robert Campbell ed, 4th edn, London 1873) 89: 'A command is distinguished from other significations of desire … the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded'.

[42]Stewart (n 29) 296.

[43]*Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 5 MLJ 145 para 49.

[44]Zaidi bin Kanapiah, para 75.

[45]See Jane Stapleton, *Three Essays on Torts* (Oxford University Press 2021) 1 (for the notion that tort law is a human construct); Sonia Waisman, Bruce A Wagman & Pamela D Frasch, *Animal Law: Cases and Materials* (Carolina Academic Press 2006) 66 (for the notion that property laws are a human construct).

[46]George W Rainbolt, 'Book Review: International Law as Social Construct: The Struggle for Global Justice' (Notre Dame Philosophical Reviews, 20 Jun 2013) <https://ndpr.nd.edu/news/international-law-as-social-construct-the-struggle-for-global-justice/> accessed 5 Mar 2021. See also William A Edmonson, 'Why Legal Theory Is Political Philosophy' (2013) 19 Legal Theory 331, 332 ('law doubtlessly is an artifact, a human device or family of devices that is meant to serve and is thought to

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words, it is a product of 'human social interactions'[47] created and maintained by its participants for certain shared or compatible objectives,[48] albeit to varying degrees. Unlike fields of knowledge that deal with natural events such as natural science,[49] in which human will and purpose have no sway on the workings of nature,[50] the law is malleable to the purpose which it has been created to serve. This 'purpose' can be widely varied– ranging from a promotion of human flourishing,[51] the political ideal of 'integrity' or moral coherence,[52] human survival[53] to human sociality.[54]

For Kelsen, the purpose of the law is to 'bring about certain mutual behaviour of individuals'[55] via the 'specific social technique of the coercive order' of the law.[56] Thus, legal norms as well as the *Grundnorm* are coercive in that they command, permit, or authorise the use of force against people by way of sanctions.[57] *Contra* Austin,[58] Kelsen's focus was not on the *consequences* of the coercion, but on the *source* of the coercion, *viz* the authorising norm. As the stalwart constitutional kingpin of a legal order, the *Grundnorm* authorises the legal participant's interpretation of a command, permission or authorisation, which is manifested and applied by way of coercive enforcement.[59]

In short, the relative ontological barrenness of the *Grundnorm* becomes less significant when one considers the instrumental value that it brings. The Pure Theory conceptualises the individual components of a legal order as a unified totality resting on the foundation of the *Grundnorm*, and facilitates the expeditious determination of whether x counts as a valid and binding legal rule within a particular legal order.

The Historically First Constitution

Using Kelsen's formula that the *Grundnorm* appoints the historically first constitution to prescribe the manner in which legal norms are created, the expression of 'one ought to obey the prescriptions of the Federal Constitution' implies that the Federal Constitution is the historically first constitution of the current Malaysian legal system. A 'historically first' constitution, also known as the 'first accepted constitution',[60] is a constitution whose creation has *not* been authorised by the former constitution.[61]

Not all constitutions are by default historically first constitutions: the validity of a constitution that is currently in use might have been legally derived from an earlier constitution, whose validity

serve a kaleidoscopic variety of human purposes'). Note that this is different from saying that law is a *social* construct in the sense that law consists only of social facts: see Dan Priel, 'Law as a Social Construction and Conceptual Legal Theory' (2019) 38 Law and Philosophy 267. The notion of law as a human construct makes a claim not on the *content* of law, but on its epistemological origins, *viz* whether law is discoverable by observation or if it is an object to be formulated. This is undisputed even by natural law theorists: see Duncan Spiers, *Jurisprudence Essentials* (Edinburgh University Press 2011) 5.

[47]Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford University Press 2012) 35.

[48]Christopher J Peters, 'Book Review: The Vantage of Law: Its Role in Thinking about Law, Judging and Bills of Rights by James Allan' (2013) 32 Law and Philosophy 339.

[49]Stephen F Leduox, 'Defining Natural Sciences' (2002) 5 Behaviorology Today 34.

[50]For example, however much one wishes for water to boil at room temperature and pressure, this will not change the reality that water will only ever boil at a temperature of 100 degree Celsius at an atmospheric pressure of 1 atm.

[51]John Finnis, *Human Rights and Common Good: Collected Essays Volume III* (Oxford University Press 2011) 1.

[52]Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 176.

[53]Hart (n 20) 193.

[54]Kari Saastamoinen (ed), *The Law of Nations and Natural Law 1625–1800* (Brill 2019) ch 5.

[55]Amin George Forji, 'The Correlation Between Law and Behaviour as Pillars of Human Society' (2010) 6 International Journal of Punishment and Sentencing 84, 85.

[56]Hans Kelsen, 'The Law as a Specific Social Technique' (1941) 9 University of Chicago Law Review 75, 79.

[57]JW Harris, 'When and Why Does the Grundnorm Change?' (1971) 29 Cambridge Law Journal 103, 108.

[58]Matthew H Kramer, 'John Austin on Punishment', in Leslie Green & Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 2* (Oxford University Press 2013) 103.

[59]Harris (n 57) 106.

[60]James Penner et al, *McCoubrey & White's Textbook on Jurisprudence* (4th edn, Oxford University Press 2008) 53.

[61]Kelsen, *Pure Theory of Law* (n 8) 200.

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was in turn derived from the constitution that preceded it, and this process continues until one reaches the historically first constitution.[62] A supreme legal norm is considered 'historically first' when it comes into existence in a way that forsakes the 'old' *Grundnorm* in favour of establishing a 'new' one. A historically first constitution is not necessarily the temporally oldest constitution of a territory. For example, after the theocratic-monarchic ancient Egypt[63] evolved into a presidential republic[64] and subsequently into a constitutional republic,[65] the prescription that 'one ought to obey the commands of the God-king' would no longer be the *Grundnorm* of the Egyptian legal system, not least because the present supreme positive norm of the Egyptian legal system is the Constitution of the Arab Republic of Egypt.

The Historically First Constitution – An Unauthorised Constitution

Not every change to the supreme legal norm automatically produces a historically first constitution and results in a change in the *Grundnorm*. Under the Pure Theory, a change in the *Grundnorm* can only occur in a 'revolutionary' manner. This might not necessarily mean a violent upheaval or a *coup d'état*, but can also entail a peaceful and effective constitutional change that occurs in an unauthorised manner, specifically by way of a 'breach of a former constitution'.[66] For such a breach to occur, the new constitution must have been promulgated in a manner not envisioned by the former constitution, such that it breaks the continuity of the former constitutional order.

The reason for this is simple. For any legal chain of norms to remain internally coherent and consistent, the *Grundnorm* must be able to account for the validity of *all* legal norms contained in the entire hierarchy at any point in time.[67] The implication of this is that the prescription of a *Grundnorm* is inductively inferred and 'distilled'[68] from the individual legal norms in a legal system, both written and unwritten.[69] In other words, because the prescriptions of the *Grundnorm* are derivative and constructive in nature, the presuppositional content of the *Grundnorm* is directly dependent on all the positive norms in the legal chain.[70] When a breach of the former constitution occurs, new laws might be promulgated in a new way that is incompatible with the criteria of validity prescribed in the former constitution, thus resulting in a mass of new subsidiary norms whose validity is not traceable to the former constitution. When the new norms, including norms which are 'saved' or retained from the previous constitutional order, are arranged into a new working legal order, a new formulation of the *Grundnorm* is needed to represent the latest constitutional reality.

This explains why a lack of authorisation by the former constitution is crucial in ascertaining whether there has been a change in the *Grundnorm* of a legal system. Had the new norms been created in a manner *authorised* by the former constitution, the presupposition distilled from these new norms would have been the same as the previous *Grundnorm*.[71]

[62] András Jakab, *European Constitutional Language* (Cambridge University Press 2016) 328.

[63] University College London, 'Law in ancient Egypt' (Digital Egypt for Universities, 2003) <https://www.ucl.ac.uk/museums-static/digitalegypt/administration/law.html> accessed 10 Mar 2021; Kathleen Kuiper, *Ancient Egypt: From Prehistory to the Islamic Conquest* (Britannica Educational Publishing 2011) 37. See also Nicolaas J van Blerk, 'The emergence of law in ancient Egypt: The role of *Maat*' (2018) 24 Fundamina 69.

[64] Constitution of the Arab Republic of Egypt 1971, art 73.

[65] Constitution of The Arab Republic of Egypt 2014, art 4.

[66] Kelsen, *Pure Theory of Law* (n 8) 200, 209.

[67] After all, as pointed out by Cohen, the *Grundnorm* is the 'single synthesizing principle from which discrete judgments can be logically deduced': Julius Cohen, 'The Political Element in Legal Theory: A Look at Kelsen's Pure Theory' (1978) 88 The Yale Law Journal 1, 12.

[68] ibid.

[69] As pointed out by Spagnolo, these individual legal norms are 'the most important set of legal materials' determining the what the *Grundnorm* is: Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Bloomsbury Publishing 2015) 102.

[70] Harris (n 57) 118.

[71] Spagnolo (n 69) 103.

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Application to Malaysia

It is tempting to assume that because Article 4(1) of the Federal Constitution provides for the supremacy of the Federal Constitution within the Malaysian legal order, one can assert *without more* that the Malaysian *Grundnorm* is that 'one ought to obey the prescriptions of the Federal Constitution'. Yet, doing so glosses over the assessment of whether the Federal Constitution is *in fact* the historically first constitution of Malaysia, and overlooks the complex legal events occurring between 1948 and 1963. If 'independence does not necessarily imply a legal break',[72] and the independence of Malaya in 1957 and the formation of Malaysia in 1963 had moreover occurred in a non-violent manner, can the *Grundnorm* of Malaysia truly be said to have undergone a 'revolution' in 1957 or 1963? Or is the source of validity of the Malaysian legal order still rooted in the British constitutional system?[73]

The Federal Constitution was first introduced in 1957 when the Federation of Malaya achieved independence from the British. Since then, it has undergone several changes, some more distinctive and controversial than others. The following discussions will demonstrate that although a Kelsenian 'revolution' had occurred with the establishment of the Federal Constitution of Malaya in 1957, this was not the case with the establishment of the Federal Constitution of Malaysia in 1963, at least where Peninsular Malaysia was concerned, as the latter was simply an authorised amendment of the former. However, where Sarawak and Sabah (then North Borneo) were concerned, the creation of the Federal Constitution of 1963 did effect a change in their respective *Grundnorms*.

The pre-independence period

In the period approaching 1957, the influence of British colonial power in Malaya had long been consolidated, especially after the creation of the Federation of Malaya in 1948 (hereinafter '1948 Federation'). The 1948 Federation was established on the basis of the Federation of Malaya Agreement 1948 (hereinafter 'FMA 1948'),[74] and at the same time, agreements were signed between the British Crown and the Malay Rulers (hereinafter 'State Agreements').[75]

Although the FMA 1948 was officially a treaty between the British Crown and the Malay Rulers,[76] it was in effect the Constitution of the Federation of Malaya.[77] Within the territorial confines of the 1948 Federation, the FMA 1948 was for all intents and purposes the highest positive legal norm in the Malayan legal chain. However, because of the 1948 Federation's colonial status, the chain of legal norms of the 1948 Federation extended beyond the Federation's parochial confines and formed a direct link with the British constitutional chain:[78] the 1948 Federation was established via the promulgation of the Federation of Malaya Order in Council 1948 (hereinafter 'FM Order in

[72]See Anthony Dillon, 'A Turtle by Any Other Name: The Legal Basis of the Australian Constitution' (2001) 29 Federal Law Review 241.

[73]For example, see Simeon CR McIntosh, *Kelsen in the 'Grenada Court': Essays on Revolutionary Legality* (Ian Randle Publishers 2008) 79. McIntosh pointed out that Pakistan, as a former member of the British Empire, was previously subject to the British constitutional principle of 'what the Crown in Parliament enact is law'.

[74]Halsbury's Laws of Malaysia, *Constitutional Law (Volume 3(3))* (LexisNexis Malaysia 2021) para 100.003.

[75]The Federation of Malaya Order in Council 1948, Preamble.

[76]ibid.

[77]RH Hicking, 'Preface – The Malayan Constitution' *Unannotated Statutes of Malaysia - Subsidiary Legislations* (Kuala Lumpur 17 June 1958). In *ex p Tan Kheng Long* [1958] 3 MC 205, Article 124(1)(b) of the FMA 1948 was juxtaposed with and assessed in relation to Article 9 of the Federal Constitution of Malaya of 1957, implying that the FMA 1948 was considered to have a status equivalent to the Federal Constitution of Malaya before 1957. The fact that the original Schedule 12 of the Federal Constitution of Malaya 1957, which was nonetheless later repealed by the Constitution (Amendment) Act 1963 (Act No 25 of 1963), contained a list of provisions of the FMA 1948 applicable to the Legislative Council after Merdeka Day further indicates that the FMA 1948 was the hierarchically supreme legal norm within the 1948 Federation, the content of which was subsequently transposed to its successor.

[78]Owing to the lack of a centralised, written constitution in the British legal system, a distinction should be made between the British Parliament or the British Crown being the legally superior norm of the United Kingdom legal order. As will be seen shortly, this will depend on the type of legal instrument used to promulgate a local law.

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Council'),[79] which affirmed the power of the British Crown to 'hold, exercise and enjoy' jurisdiction in the Federation of Malaya and the Malay States in a manner 'ordered' in the FMA 1948 and the State Agreements.[80] The status of the FM Order in Council thus hierarchically preceded the FMA 1948.

To clarify, two types of Orders in Council exist under English law: those made pursuant to legislation and to the Royal Prerogative.[81] In the case of the FM Order in Council, it was created pursuant to the *Foreign Jurisdiction Act 1890* (FJA).[82] As the British legal system did not (and still does not) have a written constitution as its highest law, and instead abided by the constitutional principle that whatever the Crown in Parliament enacts is supreme,[83] its corresponding *Grundnorm* has generally been said to be 'one ought to obey whatever the Crown in Parliament enacts'.[84]

It would not be a stretch to postulate that a similar formulation of the *Grundnorm* applied to the 1948 Federation. Significantly, because the *Grundnorm* is apolitical in nature, it was irrelevant whether more legislative or executive power rested with British officials in Malaya, the Malay Rulers or local officials,[85] since any power exercised by these parties (however significant or insignificant) could be traced back to the supremacy of the British Parliament. The same reasoning extends to the type of laws applicable in the 1948 Federation: as long as British Parliamentary enactments were the most hierarchically superior positive norm, the 'content' of the *Grundnorm* remained unaffected by issues of when or to what extent English law was applied, formally or informally, in the Malay States. Indeed, the *Grundnorm* would remain unchanged even if legislation were passed by the British Parliament ordering the complete disapplication of English law in the 1948 Federation, leaving local legislations to be the only governing laws.

Using the same reasoning, one might be inclined to assume that this was still the case even after the 1948 Federation achieved independence from the British in 1957. There is a general view that the Federal Constitution came into operation through the promulgation of the Federation of Malaya Independence Order in Council 1957 (hereinafter 'FMI Order in Council').[86] Under this view, since the British Parliament was the source of authority for the FMI Order in Council, it follows that there was still constitutional continuity between the post-independence Federation of Malaya and the United Kingdom. This was a conundrum that similarly afflicted other territories formerly belonging to the British Empire.[87]

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[79] Halsbury's Laws of Malaysia (n 74).

[80] FM Order in Council (n 75).

[81] Richard Moules, 'Judicial Review of Prerogative Orders in Council: Recognizing the Constitutional Reality of Executive Legislation' (2008) 67 The Cambridge Law Journal 12, 12–13.

[82] See FM Order in Council (n 75), Preamble. Under section 11 of the FJA, Orders in Council which were made pursuant to the FJA did not have to be passed by the British Parliament and only needed to be put before it for them to 'have effect as if [they] were enacted in [the FJA]'.

[83] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41. Since the discussion relates to events occurring before the United Kingdom's ascension into the European Union in 1972, the issue of whether the national legal norms of the United Kingdom can be disapplied by European legal norms is not relevant.

[84] George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends', in Charles JG Sampford & Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (The Federation Press 1996) 136.

[85] For example, although the FMA 1948 provided that all three of the Colonial High Commissioner, the Secretary of State for the Colonies in the United Kingdom and the Conference of Rulers comprising of the Malay Rulers had veto power where legislation was concerned, the powers of the Conference of Rulers were limited as it did not play an important role in the formulation of federal policy. See Martin Rudner, 'The Structure of Government in the Colonial Federation of Malay' (1976) 13 South East Asian Studies 495, 503.

[86] See Karl Zemanek, 'State Succession After Decolonization', in Académie de Droit International de la Ha (ed), *Recueil Des Cours, Collected Courses Volume 116* (Brill 1968) 192; Charles Parkinson, *Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas* Territories (Oxford University Press 2007) 99; Zelman Cowan, 'The Emergence of a New Federation in Malaya' (1958) 1 Tasmanian University Law Review 46, 49.

[87] Examples include Pakistan (see McIntosh (n 73)), Kenya (JO Rachuonyo, 'Kelsen's Grundnorm in modern Constitution-Making: The Kenya Case' (1987) 20 Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia

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Fortunately, such a view turns out to be premature when one scrutinises the backdrop against which the Federal Constitution was established. The constitutional position that Malaya occupied in 1957 was a midway between the positions of Australia in 1901[88] and India in 1949.[89] The status of Australia as an autonomous but not autochthonous nation[90] stemmed from the fact that it was the British Parliament which enacted the Australian Constitution, and that the provisions of the Australian Constitution can be identified exhaustively by reference to the enactments of the British Parliament.[91] Australia is therefore an example of a constitutional system which did not experience a Kelsenian legal 'revolution', yet is nevertheless a 'completely independent sovereign nation' by virtue of the *political* acceptance of the constitution by its people.[92]

At the other end of the spectrum, the establishment of the Indian Constitution can be said to have severed all ties between the Indian and British constitutional systems. The Indian Constituent Assembly which was tasked with drafting the Indian Constitution made sure that India's independence could not be traced to the *Indian Independence Act 1947* (hereinafter 'IIA')[93] by refusing to put the drafted constitution to the British Parliament to be approved, and by repealing the IIA through Article 395 of the Indian Constitution.[94]

The Federation of Malaya of 1957 did not undergo the radicalism adopted by the Indian Constituent Assembly, but neither was it linked to the British Parliament the way the Australian Constitution is. While there was indeed a British Act of Parliament, an agreement between the Malay Rulers and the British Crown as well as a British Order in Council which were 'devised to bring the [Federal Constitution] into force',[95] neither of those played a *constitutive* role in the creation of the Federal Constitution.

Both the *Federation of Malaya Independence Act 1957* (hereinafter '1957 Act') and the *Federation of Malaya Agreement 1957* (hereinafter 'FMA 1957') provided for the establishment of an independent and sovereign Federation,[96] but stopped short of actively giving legal effect to the Federal Constitution. Instead, both merely *acknowledged* that it was for the Federal Legislative Council

and Latin America 416), Southern Rhodesia (JM Eekelaar, 'Splitting the *Gunrdnorm*' (1967) 30 The Modern Law Review 156), Canada (ibid 157), Uganda (Hopton (n 35) 72) and Australia (Dillon (n 72)).

[88]Parliamentary Education Office & Australian Government Solicitor, *Australia's Constitution: With Overview and Notes by the Australian Government Solicitor* (7th edn, Department of the Senate 2010).

[89]Legislative Department, *The Constitution of India* (5th Pocket Size edn, Ministry of Law and Justice 2022) <https://legislative.gov.in/sites/default/files/COI_English.pdf> accessed 15 Aug 2022.

[90]Although there are those who have 'expressed interest in finding an autochthonous source for the Australian constitutional system' (Nicholas Aroney, 'A Public Choice? Federalism and the Prospects of a Republican Preamble' (1999) 20 University of Queensland Law Journal 262, 284), the more convincing view is that the *legal* source of the Constitution is the United Kingdom Parliament, because Australia's constitutional arrangements are still legally derived from, *but not subordinate to*, the United Kingdom Parliament which enacted the Constitution as part of (not merely a schedule to) one of its statutes (Dillon (n 72)).

[91]See Dillon (n 72). This is a predicament which was prevalent among 'nations whose constitutions are the product of continuous legal devolution from the constitution imposed by the parent nation' (Aishwarya S Bagchi, 'Exploring constitutional legitimacy' (2015) 2 Public Interest Law Journal of New Zealand 165, 165; 169; 173), such as New Zealand (ibid) and Canada (Sebastian Schmid, 'The Retransfer of Legislative Competences by the UK Parliament' (2014) 74 Heidelberg Journal of International Law 223, 235).

[92]ibid. For the distinction between a 'legal' and 'political' revolution, see Michael S Green, 'Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order' (2005) 83 North Carolina Law Review 331, 333.

[93]Despite the fact that the IIA contained a provision empowering the Constituent Assembly to create the Indian Constitution: see IIA, s 8(1).

[94]Anupama Roy & Michael Becker, 'Dimensions of Constitutional Democracy', in Anupama Roy & Michael Becker (eds), *Dimensions of Constitutional Democracy: India and Germany* (Springer 2020) 10.

[95]Cyrus Vimalakumar Das, 'Emergency Powers and Parliamentary Government in Malaysia: Constitutionalism in a New Democracy' (PhD thesis, Brunel University 1994) 71.

[96]The 1957 Act, Preamble; FMA 1957, s 3.

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and Councils of State to approve the forthcoming Federal Constitution.[97] On the other hand, although section 2 of the FMI Order in Council did provide for the Federal Constitution to have the force of law, the effect was at best *declaratory*,[98] for any such declaration was still subject to the Federal Legislative Council and the Malay States' approval of the Federal Constitution.[99]

The real turning point that brought about a change in the *Grundnorm* occurred when the *Federal Constitution Ordinance 1957* (hereinafter 'FC Ordinance') and the relevant State Enactments were passed by the Federal Legislative Council and the Malay States, respectively. Unlike the 1957 Act and FMA 1957, the FC Ordinance had the particular object of 'approv[ing] the *Federal Constitution* set out in the [FMA 1957]' and of bestowing the Federal Constitution with 'the force of law throughout the Federation'.[100] Unlike the FMI Order in Council *vis-à-vis* the local legislatures, the promulgation of the FC Ordinance and State Enactments was not conditional on any legal act of the British Parliament.

But this still begs the question: assuming that the FC Ordinance and State Enactments were passed in accordance with the procedural requirements[101] provided under the FMA 1948, would this not mean that any act of the Federal Legislative Council or the Councils of State was ultimately attributable to the British Parliament?

There are grounds for arguing that in promulgating the FC Ordinance, the Federal Legislative Council had acted *ultra vires* of its constituent constitution.[102] At first glance, it might seem that the Federal Legislative Council's implementation of the FMA 1957 was authorised under the FMA 1948, as it involved 'the implementing of … agreements with other countries', in this case, the FMA 1957.[103] However, this analysis may prove superficial when one distinguishes between the external and internal sovereignty of the 1948 Federation.[104] While the Federal Legislative Council's approval of the Federal Constitution was implemented through the establishment of an *external* legal arrangement with a foreign power, *viz* the FMA 1957, the approval in fact masked the ancillary effect of bringing about a structural change to the Federation's *internal* constitutional arrangements, *viz* by making the Federal Constitution rather than a British enactment the supreme

[97]The 1957, s 3; FMA 1957, s 6. Notwithstanding that the prohibition on the Malay Rulers from entering into 'any negotiation relating to the cession or surrender of the State' under the pre-independence state constitutions of the Malay states was amended in time to render the revocation of the FMA 1948 and the State Agreements lawful (Ahmad Ibrahim, *Malaysian Legal History* (Faculty of Economics & Administration, University of Malaya 1970) 151), because the FMA 1957 did not authorise the creation of the Federal Constitution, it cannot be said that a there was any legal continuity between the pre-independence state constitutions and the present-day Federal Constitution. It follows that when the Federal Constitution took its place as the new supreme legal norm, the Malay Rulers' source of constitutional authority changed accordingly. That the Malay Rulers' residual powers and sovereignty under the Federal Constitution were entirely derived from and subject to the Federal Constitution can be seen from the caveat in Article 181(1) of the Federal Constitution of 'Subject to the provisions of this Constitution'.

[98]This is analogous to how, during the French Revolution, the legal validity of the Declaration of the Rights of the Man and of the Citizen of 1789 did not depend on King Louis XVI's acceptance and recognition; rather, it stemmed from the authority of the French National Constituent Assembly, which 'no longer depended upon the royal will' (Green (n 92)). King Louis XVI's recognition therefore 'merely acknowledged an established legal fact', ie, the legal revolution brought about by the National Constituent Assembly (ibid).

[99]FMI Order in Council, Preamble.

[100]ibid, Preamble; s 2 (emphasis added).

[101]FMA 1948, pt V.

[102]See JM Eekelaar, 'Splitting the Grundnorm' (1967) 30 Modern Law Review 156, 168: 'a lawful authority acting *ultra vires* is equally a usurper'. See also Dato' Seri Mohd Hishamudin Yunus et al, *MP Jain's Administrative Law of Malaysia* (LexisNexis 2020) 96: 'If power is conferred to legislate only with respect to certain topics, or for certain purposes, or in certain circumstances, the limits of the power must not be crossed.'

[103]FMA 1948, s 48, para 1(2)(a) of the Second Schedule.

[104]Briefly, 'internal sovereignty' relates to the state's 'authority over all internal persons and entities' whereas 'external sovereignty' refers to the state's relationship with 'external powers': Christopher W Morris, *An Essay on the Modern State* (Cambridge University Press 1998) 174. See also Andrew J Williams, Amelia Hadfield & J Simon Rofe, *International History and International Relations* (Routledge 2012) 113.

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legal norm. The power to effect such a change was *not* provided for under the Second Schedule of the FMA 1948, and therefore fell outside the bounds of the Federal Legislative Council's powers.[105] A legal revolution – even if an unassuming one – had therefore occurred.

Since the legal validity of the Federal Constitution was dependent on the validity of *both* the FC Ordinance *and* the State Enactments, it matters not that the preceding analysis does not apply to the Enactments of the Malay States.[106] That the FC Ordinance's subject matter – the creation of an internally supreme constitutional authority in the form of the Federal Constitution – was not authorised by the FMA 1948 was sufficient to establish that the validity of the Federal Constitution was no longer traceable to the hitherto reigning *Grundnorm* of 'one ought to obey whatever the Crown in Parliament enacts'.

Also of aid here is Kelsen's stipulation of 'by and large' effectiveness as a necessary but insufficient factor in determining a legal system's *Grundnorm*.[107] Briefly, 'effectiveness' is assessed via factors such as the extent to which the legal order is obeyed and is considered to be 'valid and binding by the citizenry'; and whether the citizens of the system consider their relationships to be governed by 'legal duties, legal rights, and legal responsibilities' rather than 'power relations'.[108] While the effectiveness of a legal order is not the sole criterion for ascertaining the source of authority of a legal system,[109] it is nonetheless important because a legal order that ceases to be effective would no longer be considered valid.[110] In this case, no participant of the Malaysian legal system subscribes to the presupposition that 'one ought to obey the prescriptions of the Crown in Parliament'. Anyone wishing to argue that no clean 'break' from the British constitutional system occurred in 1957 would have difficulty proving that an effective legal order could result from such a presupposition, seeing as the British Parliament is evidently not recognised as a source of legal legitimacy in Malaysia post-Independence.

The Malay states:[111] The comparisons made between enactments of the British Parliament and the Federal Constitution in the preceding analysis are premised on the assumption that there had been a Kelsenian 'revolution' during the British colonial rule in Malaya. Otherwise, the prescription of the Malayan *Grundnorm* before 1957 would have stipulated that one ought to obey the prescriptions of the superior legal norm which had been in place before the British arrived.[112] Surprisingly perhaps, when examined from Kelsenian lens, the real turning point for when the *Grundnorm* changed was not the point when the system of 'indirect rule' was implemented via the introduction of Residents and British Advisors in the Federated and Unfederated Malay States (hereinafter 'FMS' and 'UMS'),[113] respectively, but when the Malayan Union was created in 1946 via the Malayan Union Order in Council (hereinafter 'MU Order in Council').

[105]Note that because the FMA 1957, as explained above, did not have the object of giving legal effect to the Federal Constitution, the Federal Legislative Council could not leverage on paragraph 1(2)(a) of the Second Schedule of the FMA 1948 in conjunction with the FMA 1957 to implement a change to the Federation's internal sovereignty.

[106]Under section 100(1)(a) of the FMA 1948, the Councils of State had the power to pass laws on 'any subject' other than those over which the Federal Legislative Council had power.

[107]Kelsen, *Pure Theory of Law* (n 8) 208, 211.

[108]Cohen (n 67) 12.

[109]This distinguishes Kelsen from legal positivists such as Hart or Austin whose legal theories are premised on and derived from observations of social phenomena: Jules L Coleman, 'Rules and Social Facts' (1991) 13 Harvard Journal of Law & Public Policy 703.

[110]Kelsen, *Pure Theory of Law* (n 8) 212.

[111]In referring to the monarchic heads of the Malay states, the term 'Malay Ruler' will be used, which for the purpose of this article includes a reference to Negeri Sembilan's Yang di-Pertuan Besar.

[112]Owing to constraints on the discussion space, it is not possible to carry out an *ad infinitum* backward-tracing exercise. Instead, the start of the British colonisation period is chosen as the stopping point, and it will be presumed that prior to the relocation of the Malayan supreme legal norm to the British Parliament, supreme legal power resided locally. The period of Japanese occupation (1941–1945) will also not be examined, because the omission does not affect the analysis that a change in the *Grundnorm* occurred when the Malayan Union Order in Council was promulgated.

[113]See Barbara Watson Andaya & Leonard Y Andaya, *A History of Malaysia* (MacMillan Education Ltd 1982) 172; Jim Baker, *A Popular History of Malaysia and Singapore* (Marshall Cavendish International (Asia) Private Limited 2008) 147.

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Prior to the creation of the Malayan Union, the supreme legal norm of the Malay States was either the state constitution (Johor and Terengganu) or the autocracy of the Malay Ruler.[114] This had remained unchanged throughout events such as the signing of the treaties between the Malay Rulers and the British, or the introduction of a Federal Council in the FMS via the Federal Council Agreement 1909, seeing as all these acts were authorised by the Malay Rulers or the state constitutions.[115] By contrast, the relocation of the supreme legal norm to the British Parliament in 1946 was unauthorised because (a) the MU Order in Council was authorised by the FJA[116] rather than the MacMichael Treaties signed between the Malay Rulers and Sir Harold MacMichael on behalf of the British Crown;[117] and (b) the Malay Rulers' act of entering into the treaties contradicted the prevailing supreme legal norm:[118] the handing over of state sovereignty to a foreign power *and* doing so without the approval of the State Council violated both the state constitutions[119] and the autocratic Malay Rulers' axiomatic set of powers that characterised their supreme status.[120]

Penang and Malacca: Penang experienced a constitutional 'revolution' when the Charter of Justice of 1807 (hereinafter 'First Charter'), which was created by way of the Letters Patent of 25 March 1807,[121] introduced English law to Penang.[122] This view is applicable regardless of whether one considers Penang to be a *terra nullius* or a territory subject to the Malay laws of Kedah prior to the enactment of the First Charter.[123] Letters Patent were, and still are, issued by the British Crown under the Royal Prerogative,[124] specifically under its prerogative executive powers.[125]

[114]For states other than Johor and Terengganu (which had established their state constitutions in 1895 and 1911 respectively), the state constitutions were introduced only in 1948 upon the creation of the 1948 Federation: Cheah Boon Kheng, *Malaysia: The Making of a Nation* (Institute of Southeast Asian Studies 2002) 18. Moreover, a clear distinction needs to be made between the hierarchically supreme legal norm and the other subsidiary norms which existed along the legal chain (such as Islamic laws and the local Malay customs). As the supreme legal norms of the Malay states changed (for example, from the autocratic decisions of the Malay Rulers to British Parliamentary enactments), so would the source of legal validity of these subsidiary norms.

[115]See generally Hasbollah Mat Saad, *A Brief History of Malaysia: Texts and Materials* (2nd edn, Pena Hijrah Resources 2018) 62–85.

[116]MU Order in Council, Preamble

[117]See HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford University Press 2017) 6.

[118]See Cheah, *Malaysia: The Making of a Nation* (n 114) 16.

[119]Cheah Boon Kheng, 'The Erosion of Ideological Hegemony and Royal Power and the Rise of Postwar Malay Nationalism, 1945–46' (1988) 19 Journal of Southeast Asian Studies 1, 23.

[120]Whether an autocratic ruler's self-imposed limitation on their powers amount to an unauthorised change depends on the *extent* of the limitation. As Green ((n 92) 383) points out, when the limitation is so great such that it 'chang[es] the very axiom that gives it authority', then a revolution would have occurred. This is why the limitation of the Malay Rulers' powers during the period of British indirect rule could be distinguished from the Malay Rulers' surrender of sovereignty under the Malayan Union. When the Malay Rulers agreed to accept or be guided by the advice of the Residents or British Advisors, or indeed to accept the formation of State and Federal Councils which limited the practical lawmaking role of the FMS Malay Rulers, these did not involve a complete negation of their sovereignty; practically speaking, the Malay Rulers must have had 'some authority to self-limit [their] lawmaking powers' (ibid 388). However, under the Malayan Union, in allowing the British Crown to claim 'full power and jurisdiction' over the Malay States (MU Order in Council (n 116), Preamble), save for matters relating to the 'Muhammadan religion' (ibid, s 75), the Malay Rulers were effectively using '[their] authority to change the axiom itself' (Green (n 92) 388), the very axiom which was the Malay Rulers' source of authority in the first place. This would, in Green's view (ibid), amount to a legal revolution.

[121]First Charter, Preamble.

[122]*In the goods of Abdullah* [1835] 2 Ky Ecc 8; Sir Walter J Napier, 'An Introduction to the Study of the Law Administered in the Colony of the Straits Settlement' (1974) 16 Malaya Law Review 4, 25.

[123]See *R v Willans* [1858] 3 Ky 16 para 22.

[124]Leander Beinlich, 'Royal Prerogative' in Rainer Grote, Frauke Lachenmann & Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press 2019) <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e773> accessed 10 Mar 2021. For example, the Charter of Justice of 1807 was issued pursuant to the Letters Patent of 25 Mar 1807, 47 Geo III, whereas the Charter of Justice of 1826 was issued pursuant to the Letters Patent of 27 Nov 1826, 7 Geo IV: Kevin YL Tan, 'International Law in the Courts of the Straits Settlements' (2010) 16 Asian Yearbook of International Law 65.

[125]Gail Bartlett & Michael Everett, *The Royal Prerogative* (Briefing Paper, No 03861, 17 Aug 2017) 5.

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However, a change in *Grundnorm* occurred in the period of 1825–1826 when the Charter of Justice of 1826 (hereinafter 'Second Charter') was enacted to create the Straits Settlement.[126] Unlike the First Charter, the Second Charter was issued pursuant to a parliamentary act, *Act 6, Geo IV, c 85, s 21*,[127] which granted the Crown the power to make arrangements for the legal administration of the Straits Settlement by the Letters Patent of 27 November 1826.[128] For Penang, the *Grundnorm* was no longer 'one ought to obey the prescriptions of the *Royal Prerogative*' but 'one ought to obey the prescriptions of laws enacted by the *Crown in Parliament*'.[129] For Malacca, this was one of the many changes in *Grundnorm* that it had experienced at the time, as a result of its having been colonised by the Portuguese and the Dutch[130] prior to the arrival of the British.

Subsequently, this *Grundnorm* had remained unchanged across events such as the transformation of Penang and Malacca into Crown Colonies[131] when the governance of the Straits Settlement was transferred from the Bengal Presidency in Fort William to the British Colonial Office in 1867,[132] the abolition of the Straits Settlement in 1946,[133] and the induction of Penang and Malacca into the FMA 1948.

Sabah and Sarawak: In the case of Sabah (then known as North Borneo), prior to the involvement of the British Government, the control of North Borneo changed hands frequently, from the Brunei Malay Rulerate to the Sulu Malay Rulerate, the British East India Company,[134] an American Consul, the American Trading Company of Borneo, an Austro-Hungarian Consul, the British North Borneo Company and to the Japanese during its brief period of occupation.[135] The change in the *Grundnorm* of the North Borneon legal system to 'one ought to obey the prescriptions of the Royal Prerogative' occurred with the issuance of the North Borneo Cession Order in Council 1946, which provided for the annexation of North Borneo to the United Kingdom;[136] and of the North Borneo Letters Patent 1946, which provided for the establishment of an Executive Council and a Legislative Council.[137]

In the case of Sarawak, the supreme legal norm of the Sarawak legal system became located with the British Crown[138] when Sarawak became a Crown Colony in 1946 as a result of the Sarawak

[126]Sheila Ramalingam, Johan Shamsuddin Hj Sabaruddin & Saroja Dhanapal, 'The Reception and Application of English Law in Malaysia' (2018) 1 Legal Network Series 1, 3.

[127]Second Charter, Preamble.

[128]MB Hooker, 'The East India Company and the Crown' (1969) 11 Malaya Law Review 1, 28.

[129]A distinction should be made between both since the Royal Prerogative is 'the remaining portion of the Crown's *original* authority' (emphasis added) and the 'residue of discretionary power' exercisable by the Crown: AV Dicey, *The Law of the Constitution* (JWF Allison ed, Oxford University Press 2013) 189.

[130]PP Buss-Tjen, 'Malay Law' (1958) 7 American Journal of Comparative 248, 251.

[131]Tan (n 124).

[132]This transfer was effected by the Straits Settlements Act 1866, 29 & 30 Victoria Cap 115 (hereinafter '1866 Act'), and the Order in Council of 28 Dec 1866 (hereinafter '1866 Order in Council'), which was enacted under the authority of the 1866 Act: AF Madden et al, *The Dependent Empire and Ireland, 1840–1900: Advance and Retreat in Representative Self-Government* (Greenwood Press 1991) 529–530.

[133]The Straits Settlement was abolished by the Straits Settlements Repeal Act 1946, and Penang and Malacca were inducted into the Malayan Union via the MU Order in Council, which was made by the British Crown pursuant to the FJA: MU Order in Council (n 116), Preamble.

[134]This occurred in 1769 (Geoffrey Marston, 'International Law and the Sabah Dispute' (1967) Australian Yearbook of International Law 108), which was before the British East India Company was nationalised and taken over by the British Government (Nick Robins, *The Corporation That Changed the World: How the East India Company Shaped the Modern Multinational* (2nd edn, Pluto Press 2012) 6).

[135]Ooi Keat Gin, *The Japanese Occupation of Borneo, 1941–1945* (Routledge 2011).

[136]The North Borneo Cession Order in Council 1946, art 2. Unlike the FM Order in Council and MU Order in Council, the North Borneo Cession Order in Council 1946 made no mention of any enabling legislative provision, and therefore can be considered to have been issued solely under the British Crown's Royal Prerogative, in the light of the residual nature of prerogative powers: Beinlich (n 124).

[137]HM Stationery Office, *North Borneo 1955* (Colonial Reports 1956) 144.

[138]This assumes that there had been a 'revolution' when Sarawak was handed over to the British by the last Rajah of Sarawak, Charles Vyner Brooke. The Rajahs of Sarawak, who took over Sarawak from the Malay Ruler of Brunei in 1841,

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Cession Order in Council 1946.[139] Subsequently, the Sarawak (Constitution) Order in Council 1956 established its Executive and Legislative Councils.[140]

The post-independence period

For both North Borneo and Sarawak, their joining of the Federation of Malaya to form Malaysia in 1963 resulted in yet another change of their *Grundnorm*. The formation of Malaysia was effected locally via an amendment of the Federal Constitution of Malaya through *the Federation of Malaya Act of Parliament No 26/1963* (hereinafter 'Malaysia Act'). With regard to North Borneo and Sarawak, because no provision on independence was provided in the Letters Patent and Orders in Council for North Borneo and Sarawak, and the Malaysia Act had not been authorised by either of those instruments, the establishment of the Federal Constitution of Malaysia can be said to constitute a 'revolution' that breached the Royal Prerogative.

On the other hand, from the point of view of the Federation of Malaya, the replacement of the Federal Constitution of Malaya with the Federal Constitution of Malaysia in 1963 was not a 'revolution' because the promulgation of the Malaysia Act was authorised under the Federal Constitution of Malaya. While it technically follows that the present *Grundnorm* of the Malaysian legal system should be expressed as 'one ought to obey the Federal Constitution of Malaya', this formulation is unnecessarily confusing, not to mention politically misleading and incendiary, as it can distort what is in essence a semantic technicality into divisive propaganda. Since the Federal Constitution of Malaysia is an iteration of the Federal Constitution of Malaya, it would not be wrong to refer to both generally as the 'Federal Constitution', such that the *Grundnorm* of present-day Malaysia can be expressed as 'one ought to obey the prescriptions of the Federal Constitution'.

Significance of the Grundnorm

The above sketch demonstrates how the *Grundnorm* enables the legal scientist to canvass the landscape of Malaysian legal history for important constitutional turning points which bear on legal norm validity. The abstracted and schematic way in which Kelsen's Pure Theory conceptualises legal validity as well as elucidates the nature of the interaction of norms in the Malaysian legal system allows the legal scientist to efficiently identify the structure of the legal hierarchy at any given point in time. This is especially useful when the constitutional developments and changes are subtle rather than overt.

However, because the application of these criteria is apolitical and amoral, caution should be exercised in any attempt to divine extralegal insights from the *Grundnorm*. The labelling of historically first constitutions as the supreme positive norm of the legal order sheds no light on how democratic the system is,[141] nor on where the real allegiance of the people lies. Other limits of Kelsen's Pure Theory will be further examined next.

Normativity in the Pure Theory

While the utility of Kelsen's Pure Theory in ascertaining the legal validity of any particular rule at any particular point in time cannot be denied, reservations should be had on the ability of the Pure

were the sovereign of Sarawak since there was no legislative council or body which enacted or advised upon legislation and all orders were enacted by the Rajahs alone (T Stirling Boyd, 'The Law and Constitution of Sarawak' (1936) 18 Journal of Comparative Legislation and International Law 60, 65). Even if one argues that owing to Vyner Brooke's active and willing participation in the handover, and the new supreme legal norm (the Royal Prerogative) was authorised by Vyner Brooke, thus making the Rajah of Sarawak's autocratic orders the real former historically first constitution, nonetheless this still does not alter the fact that there had been a change in the *Grundnorm* in 1946.

[139]*The London Gazette* (The Court at Buckingham Palace, 2 Jul 1947) 3394.

[140]Mat Saad (n 115) 105.

[141]See Andreas Kalyvas, 'The basic norm and democracy in Hans Kelsen's legal and political theory' (2006) 32 Philosophy & Social Criticism 573.

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Theory to provide genuine normative guidance on constitutional questions involving the *meaning and content* of legal norms.

The casual observer, in pronouncing that one 'ought to' comply with the prescriptions of the constitution, attributes to the Federal Constitution a moralising role that colours the workings of the constitutional machinery.[142] Such a view of the Federal Constitution is neither completely correct nor entirely false when assessed through the lens of the Pure Theory. From the perspective of legal purity, obligations are not valid by virtue of their moral impetus since validity is determined by legal authorisation. However, this does not mean that the Pure Theory conceptualises legal norms as descriptive objects that lack normative force. Rather, the Pure Theory embodies what can be called a 'conditional normativity', under which justified binding obligations can be created provided that a certain attitude is adopted. This form of normativity, however, falls short in providing useful insights when it is the individual legal norm rather than the legal order that is being scrutinised. In other words, the Pure Theory cannot help shed light on conflicts involving the 'essence and meaning' of the Federal Constitution.[143]

What Normativity Is and Is Not in the Pure Theory

It is easy to mistake the Pure Theory's lack of an ontological explanation for the legitimacy of the Federal Constitution for normative deficiency. Bindreiter, for example, blithely summarises the presuppositional logic of the *Grundnorm* as 'because the basic norm says so'.[144] In Kelsen's own example, the notion that a child ought to obey their parents is justified by the notion that God has commanded 'Obey Your Parents', which in turn relies on the presupposition that 'one ought to obey the commands of God'. Yet, no further justification is provided for why the commands of God should be obeyed. The *Grundnorm* in effect rules by fiat since it cannot be questioned.

However, to adopt such a view is to misunderstand how normativity features in Kelsen's theory. For Kelsen, it is only when one accepts and endorses the point of view prescribed by a *Grundnorm* that a legal norm deriving from the *Grundnorm* gains a reason-giving character, thereby generating an 'ought' obligation.[145] Whether a norm (legal, religious or otherwise) is normative in the Kelsenian sense of being 'a justified demand on practical deliberation'[146] is therefore conditional upon the *kind* of *Grundnorm* presupposed by the legal actor (if at all).[147] The *Grundnorm* acts as a calibration tool that structures the point of view from which positive norms are interpreted,[148] and helps distinguish the point of view of the legal actor[149] from that of, for example, a priest.[150]

As such, the *Grundnorm*'s normativity takes the form of a methodological,[151] Archimedean clarification of the manner in which norm validity is contingent on the chosen point of view. In the context of the Federal Constitution, if the participants of the Malaysian legal system wish for the content of the Federal Constitution to generate valid and binding legal obligations for which coercive force will be imposed for non-compliance, then it is a 'transcendental-logical condition'[152] that the presupposition 'one ought to obey the prescriptions of the Federal Constitution' must be

[142]This is especially since the Federal Constitution contains a minimum standard of protection to safeguard democratic rights and liberties. See Federal Constitution, pt 2.

[143]Andrew Harding, *Constitutionalism beyond Liberalism* (Cambridge University Press 2017) 256.

[144]Bindreiter (n 40) 16.

[145]Marmor (n 5).

[146]ibid. See also Joseph Raz, 'Kelsen's Theory of the Basic Norm' (1974) 19 American Journal of Jurisprudence 94, 107.

[147]See ibid (Raz's explanation of the distinction between the 'personal point of view' and 'point of view of legal science').

[148]For example, the difference between legal and moral normativity lies in 'the relevant vantage point that is determined by their different basic norms': Marmor (n 5).

[149]Who presupposes a *Grundnorm* prescribing a positive legal norm as the supreme norm of the legal order.

[150]Who presupposes a *Grundnorm* prescribing God's commands as the supreme norm of the religious order.

[151]For the difference between ontological and methodological positivism, see Mario Patrono, 'Hans Kelsen: A Peacemaker Through Law' (2014) 45 Victoria University of Wellington Law Review 647, 657.

[152]Kelsen, *Pure Theory of Law* (n 8) 218.

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accepted by those participants. Questions such as whether the Federal Constitution *should* create binding obligations or what kind of content *should* the Federal Constitution have are a function of 'ethical-political'[153] theory and therefore have no place in the Pure Theory. As will be further elaborated next, a strict subscription to this form of legal purity could have the undesirable effect of restricting the interpretation of norm content by the courts.

What Kelsenian Normativity Fails to Do

The Pure Theory succeeds in introducing scientific rigour and discipline into the law, but fails to provide much-needed guidance where logical tracing and reasoning alone yield no illuminating outcome. Yet, it is precisely this kind of guidance that is required in the contentious debate on whether there is a place for the 'basic structure' doctrine in Malaysian constitutional law.

The basic structure doctrine provides that those features of a constitution which are central to the 'identity of the Constitution'[154] – for example the provisions on human rights – are so fundamental such that these features cannot be abrogated even by way of an amendment procedure provided in the constitution itself.[155] The doctrine implicitly imposes a limitation on the subject matter that can be done away with, notwithstanding that the constitution itself is entirely silent on the matter. The basic structure doctrine generally suffers from a greater degree of controversy because unlike the explicit entrenchment provisions of the constitution, the implicitly entrenched constitutional principles are 'judicially derived from the constitutional text and structure'.[156]

In the past decade, the Malaysian judiciary has been embarking on a steady pro-basic structure doctrine trajectory, gradually fleshing out the role of the basic structure doctrine as a vanguard against legislative and executive dominance. These arguments often turn on an interpretation of Article 121 (1) of the Federal Constitution that reads down an attempted circumscription of judicial autonomy via a legal amendment to the Federal Constitution in 1988.[157] While in the last decade the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*,[158] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak*[159] and *Alma Nudo Atenza v Public Prosecutor*[160] adopted a non-literal understanding of the provision by invoking the basic structure doctrine and by citing the importance of preserving a constitutional separation of powers, that momentum was to some extent derailed by the Federal Court's judgements in *Maria Chin Abdullah v Ketua Pengarah Imigresen*,[161] *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah*[162] and *Zaidi bin Kanapiah*.[163] In the latter cases, the Federal Court rejected the applicability of the basic structure doctrine and declared Article 121(1) of the Federal Constitution to have the effect of subordinating the powers and jurisdiction of the judiciary to the laws enacted by the legislature.[164]

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[153]ibid.

[154]Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 43.

[155]Jaclyn L Neo, 'A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia' (2020) 15 Asian Journal of Comparative Law 69, 69–70.

[156]ibid 70.

[157]Article 121(1) of the Federal Constitution originally stated that 'The judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law'. After the amendment via the Constitution (Amendment) Act 1988, the current Article 121(1) reads: '…the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.'

[158][2017] 3 MLJ 561 paras 75–86.

[159][2018] 1 MLJ 545 para 42.

[160][2019] 4 MLJ 1 paras 72–73.

[161][2021] MLJU 12.

[162][2021] MLJU 195.

[163][2021] 3 MLJ 759.

[164]While some commentators take the view that these recent cases did not completely displace the basic structure doctrine from Malaysian constitutional jurisprudence (see Tan Kian Leong & Shukri Shahizam, 'O Bitter Pill to Swallow: Separating

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Conditions of legal validity

Because of the Pure Theory's preoccupation with conditional normativity, when the basic structure doctrine controversy is pixelated into its core constituent components, it is the aspect of the legal validity of the post-amendment Article 121(1) that the Pure Theory is most concerned with. From a Kelsenian perspective, the post-amendment Article 121(1) would be unauthorised – and thus invalid – if its creation was tainted with procedural or substantive *ultra vires*.[165] Proponents of the basic structure doctrine would argue that constitutional amendments effected through legal norms that violate the basic structure of the Federal Constitution (such as the *Constitution (Amendment) Act 1988* (hereinafter 'Act A704')) exceed the scope of authorisation of the Federal Constitution and therefore lack validity. On the other hand, also by using the Pure Theory, opponents of the basic structure doctrine can argue that the amended Article 121(1) was constitutionally valid because the relevant amending legislation – Act A704 – was correctly derived from the Federal Constitution in the prescribed 'manner and form'.[166]

However, it is this very neutrality that renders the Pure Theory inadequate in helping us resolve the basic structure doctrine controversy. For one, the Pure Theory does not consider invalid amendments as inherently 'bad' or problematic.[167] Rather, this unauthorised new norm, for example the principle of parliamentary supremacy,[168] would dethrone the Federal Constitution from the apex of the Malaysian legal system's chain of legal norms and create a new legal reality where the supreme legal norm is no longer the Federal Constitution but the enactments of the Malaysian Parliament. Under this view, the 1988 amendment would, in effect, amount to a legal *coup*. The basic structure doctrine's *blasé* attitude towards constitutional revolutions is inherently at odds with the judiciary's attempt to resolve the controversy without sacrificing the Federal Constitution's constitutional supremacy, as even opponents of the doctrine do *not* advocate for a constitutional revolution.[169]

The assessment of hierarchical inter-norm conflicts, which is the concern of the Pure Theory, misses the heart of the basic structure doctrine debate: the real conflict, which is located *within the same legal norm* (the Federal Constitution),[170] involves a clash between a provision asserting

Ratio from Dicta in Maria Chin Abdullah' (2021) 1 Malayan Law Journal ccxcix; *Zaidi bin Kanapiah*, paras 66–67) the concern of this article is less the continued applicability of the basic structure doctrine (its significance notwithstanding) and more the legal-theoretic underpinnings of the controversy. In any case, the present uncertainty of the status of basic structure doctrine in Malaysian constitutional jurisprudence was acknowledged in *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jeneyah & Ors* [2022] MLJU 576 paras 128–129.

[165]While procedural *ultra vires* concerns whether the correct procedures have been followed in the promulgation of the norm, substantive *ultra vires* occurs when the promulgated norm exceeds the 'scope, extent and range of power' conferred by the enabling norm: see Yunus et al (n 102) for an example of substantive *ultra vires*.

[166]*Rovin Joty*, para 286; *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, 74.

[167]A dissenting judgment in *Zaidi bin Kanapiah* had argued that 'Changing the basic features of the FC would result in a change of the *Grundnorm* … and thus effectively eliminate the very foundation of Malaysia itself' (para 72). With respect, even if there were in fact an effective and unauthorised change in the superior legal norm of a legal system upon the amendment of Article 121(1) of the Federal Constitution in 1988, the *Grundnorm*'s role is not to cast judgment on whether the 'moral' status quo should be preserved, but merely to adapt to the factual change. As such, any view that such change is undesirable would have to be justified by recourse to theories other than the Pure Theory.

[168]See *Semenyih Jaya*, para 75: 'With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign.'

[169]At a fundamental level, both the proponents and opponents of the basic structure doctrine agree that the *Grundnorm* of the Malaysian legal system prescribes that participants of the Malaysian legal system ought to obey the Federal Constitution: see eg, *Maria Chin Abdullah*, paras 311 and 600; *Rovin Joty*, paras 77 and 310; *Zaidi bin Kanapiah*, paras 94 and 340.

[170]The distinction between inter- and intra-norm relationships is the reason why, while it would make sense to speak of the Federal Constitution's authorisation of Act A704, it would nevertheless be odd to claim that Article 121(1) is legally derived from and validated by Article 4(1). After all, it was the Federal Constitution *as a whole*, rather than Article 4(1) in particular, that was designated as the supreme legal norm of the Malayan legal order in 1957. Moreover, because the supreme status of the Federal Constitution was derived not from a *legal* source, but from an axiomatic, *extralegal* one (Green (n 92) pt II), it would be incorrect to say that it was Article 4(1) that had bestowed the Federal Constitution with constitutional supremacy.

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the constitutional supremacy of the Federal Constitution (Article 4(1)) and, on the other hand, a provision (Article 121(1)) which when taken literally would allow for Article 4(1) to be abrogated.[171] It thus becomes clear that the difficulty in the controversy lies not merely in asking whether the enacted norm is procedurally and/or substantively *intra vires* (which is the focus of the Pure Theory), but more crucially in ascertaining the *very criteria which the norm must abide by* in order to be *intra vires*:[172] for example, has the promulgated norm exceeded the scope of its legal authorisation if it has the effect of limiting the sovereignty or altering the fundamental characteristics of the empowering norm?[173]

The interpretative perspective

Even if one were to characterise the basic structure doctrine debate as involving a conflict of views as to how particular constitutional values are mediated and circumscribed by the text of the Federal Constitution,[174] the Pure Theory's normative agnosticism[175] similarly offers little insight into how these interpretative differences can be resolved. Under Kelsen's own 'theory' of interpretation[176] as elucidated in *The Pure Theory of Law*, Kelsen wore the hat of an interpretative skeptic who, much like the moral skeptic who asserts that there are no 'determinately correct' answers to moral questions,[177] believed that methods and techniques of interpretation can never lead to one correct answer.[178] Instead, Kelsen described the act of interpretation as an exercise in discovering the 'frame within which several applications are possible';[179] a frame which is open-ended in nature and has the capacity to admit different outcomes of interpretation, all with equal standing and value.[180] For Kelsen, the act of selecting the 'correct' interpretation falls under the domain of legal policy (which can be rife with norms of morality and justice)[181] rather than legal theory (which, under the dictates of the Pure Theory, is strictly formal and legal in nature), and as such he did not delve into the method of selecting the right choice from the different possible available interpretations.[182] By contrast, a Dworkinian judge who desires to preserve the constitutionalist

[171]If the judiciary were fully subordinate to the legislature, as a literal interpretation of Article 121(1) of the Federal Constitution would have it, the judiciary would be powerless to invalidate laws inconsistent with the Federal Constitution if Parliament enacts a law that ousts the jurisdiction of the courts. Realistically, even if Article 4(1) of the Federal Constitution remains intact, it would be rendered ineffectual in practice if Parliament usurps the judiciary as its co-equal, for there would be no other state organ with the power to review Parliamentary actions.

[172]To use a Hartian analogy, the difficulty lies not in ascertaining whether the rules of recognition have been followed, but rather what the rules of recognition are. Dworkin terms the latter a form of 'theoretical' as opposed to 'empirical' disagreement: Dworkin (n 52) 5.

[173]Green (n 92) would most likely answer the question in the positive, leveraging on which the Pure Theory is able to make the syllogistic determination that such a norm is invalid and thus 'revolutionary'. However, the basic structure doctrine debate exists precisely because such a view is by no means conclusive nor universally accepted.

[174]For example, the Federal Court in *Rovin Joty* (para 346) example, the Federal Court in stated that although there was 'no doubt' that separation of powers and judicial independence are cornerstones of a democratic society, nevertheless their application '[depend] on the provision of the Constitution'.

[175]David Dyzenhaus, 'Form and Substance in the Rule of Law', in Christopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000) 154.

[176]Indeed, some critics have questioned whether Kelsen has an interpretative theory to begin with: see Stanley L Paulson, 'Kelsen on legal interpretation' (1990) 10 Legal Studies 136.

[177]Matthew H Kramer, 'When is there not one right answer?' (2008) 53 The American Journal of Jurisprudence 49.

[178]Kelsen, *Pure Theory of Law* (n 8) 352.

[179]ibid 351.

[180]This stands in contradistinction to theories of interpretation which suggest that there is an inevitable answer to each interpretative act, most notably Ronald Dworkin's 'one-right-answer thesis'. Stephen Guest, 'Dworkin's 'One-Right-Answer' Thesis' (2016) Problema: Anuario de Filosofía y Teoría del Derecho no 10, 3 <https://www.redalyc.org/articulo.oa?id=421943648001> accessed 10 Mar 2021.

[181]Kelsen, *Introduction to the Problems of Legal Theory* (n 24) 83, 129.

[182]Such sentiments were echoed by the Federal Court in *Rovin Joty* (para 250), which took the view that doctrines and concepts which are not contained in the provisions of the Federal Constitution cannot be used to interpret the Federal Constitution. However, *contra* Kelsen, who acknowledged the open-textured nature of legal interpretation and who believed

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values that form part of the basic structure doctrine would either adopt the pre-amendment meaning of Article 121(1) notwithstanding the amendments made in 1988,[183] or strike down the 1988 amendment entirely and restore the pre-amendment language of the article on the basis that the amendment was unauthorised and invalid.[184]

The inability of Kelsen's methodologically formal theory to break the constitutional impasse of the basic structure doctrine debate necessarily means that guidance needs to be sought from other legal theories if one genuinely intends to ascertain the likely, if not 'right', answer to the debate. To languish in the open-ended theorising of normative possibilities, while intellectually tempting, is nevertheless 'methodologically nihilistic'[185] and practically sterile, for it does nothing to guide the courts and constitutional theorists on how, if at all, the basic structure doctrine in Malaysia should be applied and developed.

It is therefore clear to us that although Kelsen's *Grundnorm* is helpful in illuminating the supreme nature of the Federal Constitution and facilitating the ascertainment of the legal validity of positive norms, this must not be taken as a dispensation for a wholesale subscription to the Pure Theory as the jurisprudential basis which best (or even adequately) describes the Malaysian constitutional landscape. The Pure Theory's aim to merely 'depict the law as it is'[186] without wishing to pronounce on its merits impedes its ability to serve as a comprehensive jurisprudential theory for the Malaysian legal system.

Concluding Thoughts

The value of legal theory lies in its ability to 'give an effective and meaningful direction' to the participants of a legal system.[187] While some might be inclined to believe that jurisprudential introspection is 'boring' and 'achieves little' in practice,[188] a neglect of the constitutional and jurisprudential foundations of a legal system would deprive legal participants of the ability to use 'first principles' to solve 'intractable and seemingly insoluble problems'.[189]

At present, Kelsen's Pure Theory, while undoubtedly useful in the ascertainment of the legal validity of the various legal norms that were present throughout Malaysia's legal history, provides little to no guidance on how conflicts relating to the meaning and content of norms can be resolved. A *Grundnorm* prescribing for the Federal Constitution to be obeyed draws our attention to the foundational point of the Malaysian legal system and demonstrates why, as a matter of legal science, this can generate valid and binding obligations. However, neither the Pure Theory nor the device of the *Grundnorm* can provide any helpful insight when a constitutional dispute is substantive rather than formal.

It is therefore imperative that wider efforts are made to expound a legal theory that can coherently and holistically account for the various features of the Malaysian legal system.[190] The existence

that legal interpretation alone can lead to no right answer unless extralegal considerations are taken into account, the Federal Court appears to believe that 'settled rules of construction' (para 172) *sans* policy considerations are sufficient for the arrival at the correct interpretation.

[183] As has been the case in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*.

[184] See Wilson TV Tay, 'Basic Structure Revisited: The Case of *Semenyih Jaya* and the Defence of Fundamental Constitutional Principles in Malaysia' (2019) 14 Asian Journal of Comparative Law 113, 135.

[185] Klaus Adomeit, *Rechtstheorie für Studenten : Normlogik, Methodenlehre, Rechtspolitologie* (von Decker 1979) 77.

[186] Kelsen, *Introduction to the Problems of Legal Theory* (n 24) 18.

[187] Lon Fuller, *The Principles of Social Order* (K Winston ed, Bloomsbury 1981) 249–250.

[188] As pointed out by NW Barber, 'The Significance of the Common Understanding in Legal Theory' (Oxford Legal Studies Research Paper no 2/2012) 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995809> accessed 8 Aug 2022.

[189] Randy E Barnett, 'Why We Need Legal Philosophy' (1985) 8 Harvard Journal of Law & Public Policy 1, 16.

[190] One should not be put off by the prospect that it may be practically impossible to identify a legal theory which can account for every single aspect of the Malaysian legal system, since legal theories possess a certain degree of universality whereas individual legal systems are necessarily idiosyncratic: Joseph Raz, 'Can there be a theory of law?', in Martin P Golding & William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell

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of such a theory would provide a stable framework under which Malaysian legal jurisprudence can develop in a certain, principled, and predictable fashion. In the particular context of the basic structure doctrine, a proper legal theory would prevent the invocation of arguments from different starting points (even amongst those who arrive at the same conclusion), and instead provide a set of dynamically constant fundamental principles from which normative guidance can be supplied when constitutional conundrums arise.[191]

Publishing Ltd 2005) 337–342. For example, although Hart's positivistic rule of recognition is commonly seen as the source of validity for the supremacy of the British constitutional system (Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 Oxford Journal of Legal Studies 61, 62), it has not impeded efforts arguing for a 'natural law' conception of the British legal system. For instance, Trevor Allan has criticised the failure of positivistic theories to account for the instances where 'courts interpret legislation in the light of the constraints of legality' and protect fundamental rights 'by recognizing implicit limitations to Parliament's legislative supremacy' (TRS Allan, 'Questions of legality and legitimacy: Form and substance in British constitutionalism' (2011) 9 International Journal of Constitutional Law 155).

[191]Mark Greenberg, 'Principles of Legal Interpretation' (2016) 1 <http://philosophy.ucla.edu/wp-content/uploads/2016/08/Principles-of-Legal-Interpretation-2016.pdf> accessed 10 Mar 2021.

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