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How Merkl's *Stufenbaulehre* Informs Kelsen's Concept of Law

How Merkl's Stufenbaulehre informs Kelsen's concept of law. For many reasons, it seems that Kelsen's legal theory uses two competing concepts of law, one turning on coercion, the later concept reflecting the process of law creation. But this is not the case. Actually the two concepts are incorporated into a single concept of law. Here we face with two points of view which are combined in a single concept of law that reflects both process and coercion. In such an enterprise, the *Stufenbaulehre* and the conceptual machinery that can be drawn from it is central to our understanding of Kelsen's concept of law.

Keywords: hierarchy of norms, dynamic principle, static principle, *Stufenbautheorie*, Hart, Kelsen, Merkl

1 INTRODUCTION

In a telling passage in his treatise of 1945, *General Theory of Law and State*, Hans Kelsen appears to depart from his traditional concept of law. The traditional concept is “defined” by Kelsen in terms of the possibility of coercion as set by the reconstructed legal norm. He now appears to be replacing this concept of law with another:

if one looks upon the legal [system] from the dynamic point of view ... it seems possible to define the concept of law in a way quite different from that in which we have tried to define it [thus far]. [In particular, it seems] possible to ignore the element of coercion in defining the concept of law.¹

According to this view, Kelsen continues:

law is anything that has come about in the way the constitution prescribes for the creation of law ... [For example, an] important stage in the law-creation process [comprises] the procedure[s] by [means of] which general norms are created, that is, the [process] of legislation.²

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1 Kelsen (1945 : 122).

2 Kelsen (1945 : 122, 123).

In the latter passage, Kelsen is clearly hinting at the *Stufenbaulehre* or doctrine of hierarchical structure that he took over lock, stock, and barrel from his gifted, and much neglected, colleague, Adolf Julius Merkl.³

Do we indeed have, then, two competing concepts of law in Kelsen's legal theory, the earlier concept turning on coercion, the later concept reflecting the process of law creation? I think not. On the contrary, as I shall argue, the two concepts of law to which Kelsen refers here are in fact two sides of a single concept of law or – in language that Kelsen adopted from Wilhelm Wundt and the Baden Neo-Kantians – two standpoints, two points of view (*Betrachtungsweisen*),⁴ that are incorporated into a single concept of law. Earlier, there is a static or *ex post* point of view, where the focus is on the issued legal norm and thus on coercion, and, later, there is a dynamic or *ex ante* point of view, antedating the issuance of the legal norm and thus emphasizing the process of law creation. These points of view are combined in a single concept of law that reflects both product and process, or – in the language of Kelsen's *General Theory of Law and State* – both coercion and law creation. As we shall see, the *Stufenbaulehre* – and the conceptual machinery that can be drawn from it – is central to the entire enterprise, profoundly informing our reading of Kelsen's ramified concept of law.

I develop, in section II, some of the rudiments of Kelsen's earlier concept of law, based on coercion. I turn, in section III, to a brief statement of Kelsen's later concept of law, which turns on law creation. I then turn, in section IV, to Kelsen's utilization of the so-called complete legal norm – another of the doctrines he drew from Adolf Julius Merkl. Here Kelsen himself, bringing together the two concepts of law to which he refers in *General Theory of Law and State*, in effect shows that they are in fact two sides of a single, ramified concept of law. Moving beyond the basic structure, I turn, in section V, to a problem that Kelsen had confronted in his legal theory from the beginning, namely, the “essence of the objective law” and the “ideal linguistic form” of the legal norm, as he puts it in his first major treatise, *Main Problems in the Theory of Public Law*.⁵ This back-

3 See Merkl (1923: 201–223), and Merkl (1931: 252–294; 1993: 437–492). The earlier text is Merkl's first systematic statement of the *Stufenbaulehre*, while the latter text represents his most complete statement. The *Stufenbaulehre* was first adopted by Kelsen in an essay (1924: 374–408). Kelsen reprinted this statement verbatim in the *Allgemeine Staatslehre* (1925, §§ 32–36, 229–255). On the *Stufenbaulehre*, see the rich and rewarding paper by Borowski 2005. I comment on the neglect of Merkl in my review of the first two volumes of his *Gesammelte Schriften* (see above), in Paulson (2004a: 263–264). The neglect has gone so far that Merkl (1890–1970) has in fact been confused, in some circles, with the Straßburg legal theorist Adolf Merkel (1836–1896), a proponent of the late nineteenth-century *Allgemeine Rechtslehre*, on which I cannot forbear mentioning the rewarding study by Funke 2003.

4 See Kelsen (1911: 4, 5), with references to Windelband (1924: 59–98), and to Wundt (1903: 1–10).

5 Kelsen (1911: 237). The treatise has been translated into Polish, Spanish, and Italian.

ground from *Main Problems*, illuminating Kelsen's quest for a defensible concept of law, shows that more was at stake from the very beginning than the offhand references to coercion might suggest. Finally, I take up, in section VI, a thought experiment drawn from John Locke, Merkl, and H. L. A. Hart. In Kelsen's hands, as the thought experiment makes clear, the functions represented by law issuance and law application – or, in Kelsenian parlance, the functions represented by the empowerment to issue norms and by the empowerment to impose sanctions – *supplant* the original, directive function of the law. To be sure, the so-called directive function survives in Kelsen's theory, but in an emasculated form, as the function or purpose of law *qua* social technique. "Function" with respect to its source is ambiguous. The so-called directive function of the law is not numbered among the legal functions *per se*. Rather, it stems from a source outside of "the cognition of the positive law".⁶ It stems, in other words, not from the ideal world of the law but from the empirical world of fact.

My aim, in short, is to go beyond the standard reading of the *Stufenbaulehre* or doctrine of hierarchical structure, *as the notion pertains to Kelsen*. It is well known that the doctrine served to relativize the differences between law creation and law application, and thereby to relativize the standing of the different species of law themselves. As Kelsen puts it, reflecting on the significance of the *Stufenbaulehre*, Merkl "*relativized* what had ossified into the absolute: the opposition...between general and individual norm, between abstract and concrete norm."⁷ In short, Kelsen points out that both the tradition in legal theory and he himself in *Main Problems* ignored an entire spectrum of legal norms, those between general statutory provision and concrete legal act. The only way to set things straight, Kelsen argues, is to follow Merkl's graduated scheme, which exhibits all the levels of legal norm in the legal system, from the most general constitutional and legislative norms to the most concrete legal acts. Legislation, the standard-bearer of nineteenth-century statutory positivism (*Gesetzespositivismus*), loses its privileged position, a point that is, to be sure, a fundamental contribution of the Vienna School of Legal Theory. But there is more. The *Stufenbaulehre* bears directly on Kelsen's concept of law, and this is the point I wish to develop here.

2 KELSEN'S EARLIER CONCEPT OF LAW: COERCION

In his discussion of coercion in the First Edition of *Reine Rechtslehre* or Pure Theory of Law, Kelsen introduces the notion by appealing to four separate motifs, with attention to a different aspect of coercion in each of them. He does not

6 Kelsen 1928.

7 Kelsen (1998: 13–14) (emphasis in original).

speak, *expressis verbis*, of coercion *qua* concept of law, but in *General Theory of Law and State*, as we have seen, he points to coercion as the hallmark of his earlier concept of law. And what is more, the four motifs taken together do appear to stand for a concept of law.

What, then, are the four motifs? There is, first, coercion as *differentia specifica* of the formal category of norm, second, coercion as empirical criterion of the law, third, coercion as a proper part of the reconstructed legal norm, and, fourth, coercion vis-à-vis Kelsen's doctrine of the identity of state and law. The motifs overlap, of course, and I shall invite attention to the overlap at several points.

2.1. Coercion as *differentia specifica* of the formal category of norm

To make sense of this initial motif, one has to begin with the genus that Kelsen goes on to differentiate. The genus, he tells us, is “[t]he formal category of norm”, the category “designated by ‘ought’”.⁸ Here the norm is undifferentiated and applies therefore in all of the normative fields, say, logic, philology or prescriptive linguistics, aesthetics, ethics, and the law.⁹ How, then, is the legal norm to be differentiated? “[T]he legal norm”, Kelsen writes, “is a coercive norm (a norm providing for coercion)”, and it is precisely thereby that “the legal norm is distinguished from other norms.”¹⁰

2.2. Coercion as empirical criterion of the law

Kelsen goes on to speak of the coercive element as an “empirical criterion” of the law,¹¹ a line that might well be read with puzzlement, for Kelsen also argues again and again that “the law is norm”.¹² The law is, in other words, not empirical at all but “ideal”,¹³ a position that reflects the fact-value distinction cham-

8 Kelsen (1992: § 12, 26).

9 See Kelsen (1911: 4), for a similar list. Kelsen is decidedly ambivalent on the status of ethics. On the one hand, he sometimes appears in the guise of a sceptic, and this is certainly the view of him emphasized by most interpreters. On the other hand, he presses his “no-conflicts thesis” – that is, no possible conflict between ethics and the law – in virtually everything he has written on the theory of public international law, of which his defense of monism is an integral part. Monism provides an explanation of sorts, if hardly a justification, of his “no-conflicts thesis”. See e.g. Kelsen (1920: § 27, 107–111); Kelsen (1926: 267–270). On Kelsen's monism generally, see Paulson 2005.

10 Kelsen (1992: § 12, 26).

11 Kelsen (1992: § 12, 26).

12 Kelsen (1992: § 12, 26; § 5, 11; § 7, 13; § 8, 15; § 11(a), 23; § 15, 32; § 19, 38; § 29, 58).

13 Kelsen (1992: § 8, 15): “[J]ust as one distinguishes the law from nature, so one is also to distinguish the ideal phenomenon, law, from other ideal phenomena, especially from norms of other types.”

pioned by the Baden Neo-Kantians: Matters of fact exist and are found in the external world, but the law *qua* norm “obtains”, is “valid”, in a second world.¹⁴ This claim of Kelsen's is captured by the import of his “formal category of norm”, above. Still, Kelsen's point here that coercion is an empirical criterion of the law can perhaps be saved by arguing that just as, for Wittgenstein, pain behaviour is an empirical criterion of pain,¹⁵ so likewise, for Kelsen, the coercive element is properly understood as an empirical criterion of the law, which, for its part, is not empirical but ideal.

To be sure, coercion *qua* criterion proves to be a more complex doctrine than it appears on first glance to be. For Kelsen is referring not only to the imposition of coercion but also to conformity to the law, which, he argues, is motivated by the wish to avoid subjecting oneself to coercive measures. Kelsen is quick to add that the wish to avoid subjecting oneself to coercive measures is *scarcely the only reason* people conform to the law.¹⁶ And if the notion of conformity to the law *qua* empirical criterion were fully worked out, it might well swallow the coercive element whole. The party identifying the law by appeal to the reworked criterion would not be unlike the “cognitive observer” in H. L. A. Hart's theory (not a representative of the internal point of view, but one who nevertheless knows the rules that the representatives of the internal point of view follow).¹⁷

2.3. Coercion as a proper part of the reconstructed legal norm

From the beginning, Kelsen speaks of the need to arrive at the “ideal linguistic form” of the legal norm¹⁸ in order, *inter alia*, to distinguish the law from morality. The results of his inquiry are captured in the expression “reconstructed legal norm”.¹⁹ In the present context I consider the reconstructed legal norm only in so far as Kelsen's coercive element bears on it.

14 The two-worlds doctrine is given expression, first, in Kelsen (1911: 4–8 *et passim*), and in Kelsen (1925 : § 5(c), 19 ; § 13(b), 62, *et passim*). See generally Paulson (2002a: 223–251).

15 See Wittgenstein (2001: §§ 256–257) and, indeed, the entire section on the private-language argument (2001: §§ 243–315).

16 See Kelsen (1992: § 14(c), 31–32).

17 What I have termed the “cognitive observer” is tacit in Hart's theory, namely, where he speaks of a “[moderate] external point of view” (the point of view of one who, “without himself accepting [the] rule of recognition, states the fact that others accept it”), Hart (1961: 99). Hart does not, however, develop the doctrine. See MacCormick (1981: 36–40), who was perhaps the first to see this point clearly. MacCormick in fact speaks of a “hermeneutic observer” here. I recognize that to develop Kelsen's “empirical criterion” in this direction tends to undermine his starting point, “the coercive element” in the concept of law, and I offer the remarks in this paragraph of the text as a reflection on Kelsen's criterion, not as part of a statement of his earlier concept of law.

18 See note 6 above.

19 The expression, as used here, stems from Bulygin (1983: 20), also in Spanish in Bulygin (1988:

Kelsen writes that coercion is “essential for the legal character of the norm”,²⁰ and that the secondary legal norm,²¹ for want of the coercive element, “cannot be an essential expression of the law”.²² The “mode specific to the law”²³ is reflected in the hypothetically formulated or reconstructed legal norm, which links “a human being’s behaviour, regarded as socially harmful, with a coercive act, perceived by that human being to be an evil”.²⁴ In the earlier 1930s, before Kelsen had come expressly to the conclusion that empowerment is the fundamental modality in the law, his most elegant statement on the reconstructed legal norm was found at section 11(b) in the First Edition of *Reine Rechtslehre* or Pure Theory of Law. Posing the question of how one can sever the concept of the legal norm from its source, the concept of the moral norm, in order thereby to secure the autonomy (*Eigengesetzlichkeit*) of the law even vis-à-vis morality, he writes:

the Pure Theory does this not by understanding the legal norm, like the moral norm, as an imperative – the usual approach of traditional theory – but by understanding the legal norm as a hypothetical judgment that expresses the specific linking of a conditioning material fact with a conditioned consequence. The legal norm becomes the reconstructed legal norm, which exhibits the basic form of positive laws. Just as the law of nature links a certain material fact as cause with another as effect, so the law of normativity links legal condition with legal consequence (the consequence of a so-called unlawful act). If the mode of linking material facts is causality in the one case, it is imputation in the other, and imputation is recognized in the Pure Theory of Law as the particular lawfulness, the autonomy, of the law.²⁵

Here the coercive element, not evident on first glance, comes in through the back door. Imputation, Kelsen’s juridico-normative category, serves to warrant imputing liability to the legal subject, with “liability” meaning liability to the imposition of a sanction, and with “sanction” now standing in for coercion.²⁶

11). On the reconstructed legal norm as Kelsen understands it in the First Edition of *Reine Rechtslehre*, see also Paulson (1992: 132–134).

20 Kelsen (1992: § 14(b), 29).

21 This is Hart’s primary rule.

22 Kelsen (1992: § 14(c), 31).

23 Kelsen (1992: § 14(c), 31).

24 Kelsen (1992: § 14(c), 31).

25 Kelsen (1992: § 11(b), 23).

26 On imputation, see (1992 : § 11(b), 23–25 ; § 25(a), 47–48 ; § 25(d), 50–51 ; § 100(b), 100–101). It is fair to say that no consensus has developed on the import of imputation in Kelsen’s theory. Still, the concept is now enjoying some attention. See e.g. Heidemann 2005; Renzikowski (2002: 253–282); Paulson (2001: 47–63).

2.4. Coercion vis-à-vis Kelsen's doctrine of the identity of state and law

In identifying the state with the law,²⁷ Kelsen combats traditional views of the state, rooted as they are in what he regards as an indefensible metaphysic or ideology. Indeed, Kelsen's monism with primacy of public international law is a response in part to the absence of the state in his legal theory and, therefore, the absence of state sovereignty as a structure existing independently of the law and serving as its foundation. The alternative to the state and to state sovereignty is a hierarchy of laws. Alfred Verdross, in particular, developed the *Stufenbaulehre* with an eye to capturing the monism with primacy of public international law.²⁸

The present focus on Kelsen's doctrine of the identity of state and law, however, is solely in the context of coercion. Here Kelsen's simple syllogism will suffice.²⁹ The state, Kelsen writes, is by definition a coercive social system, and since a coercive social system is a legal system, it follows straightaway that the state is a legal system. Thus, the coercive element, which serves as the distributed term in Kelsen's syllogism, is a defining property of the legal system, too. The same will be true, *mutatis mutandis*, of a decentralized legal system, most obviously public international law, the difference being, of course, that there is no occasion here to speak of a state. But, Kelsen insists, coercion *qua* defining property is *no less evident*, for if "so-called international law" is a legal system *at all*, "then this system of norms, too, must count as a coercive system".³⁰

3 KELSEN'S LATER CONCEPT OF LAW: LAW CREATION

In effect, Kelsen's later concept of law, reflecting the legal system "from the dynamic point of view",³¹ is captured by the *Stufenbau* itself. That is, the dynamic point of view invites attention to a property characteristic of the law, namely, that it regulates its own creation, precisely the property at the heart of the *Stufenbaulehre*. Just as constitutional norms govern the process of legisla-

27 See e.g. Kelsen (1920: § 3, 12; § 4, 17); Kelsen (1922: § 15, 86–91); Kelsen (1925: §§ 10–17, 47–91); Kelsen (1992: § 48, 99–106); Kelsen (1945: 181–207). See also Dreier (1986: 208–211); Paulson (2002b: 113–116). It is perhaps worth noting that Kelsen's so-called identity does not, *qua* identity, withstand close scrutiny, for it applies – and, indeed, Kelsen would have it apply – in only one direction. It does not therefore count, strictly speaking, as an identity at all. Kelsen identifies the state with the law, to be sure, but there are decentralized species of law that have no counterpart in a state. A more accurate formulation of Kelsen's point might run as follows: What we know as the state is fully to be incorporated into, and restated in terms of, the law. It is not the case, however, that wherever there is law, there is *eo ipso* a counterpart state.

28 See Verdross 1923.

29 See Kelsen (1992: § 48(a), 99).

30 Kelsen (1932: 483).

31 Kelsen (1945: 122) (see quotation, text at note 1 above).

tion, so legislative norms govern the process of administrative regulation, and so on. As Kelsen writes:

the relation between a higher and a lower level of the legal system – as between constitution and statute, or between statute and judicial decision – is a relation of determining or binding In governing the creation of the lower-level norm, the higher-level norm determines not only the process whereby the lower-level norm is created, but possibly the content of the norm to be created as well.³²

This is not to say – the “formalism” charge of Kelsen’s many critics to the contrary notwithstanding³³ – that the process is in any way mechanical. A creative dimension is undeniable, for there is an unavoidable element of discretion involved in the issuance of the lower-level norm. In other words, the determination of lower-level norm by higher-level norm is never complete.

The higher-level norm cannot be binding with respect to every detail of the act putting it into practice. There must always remain a range of discretion, sometimes wider, sometimes narrower, so that the higher-level norm, in relation to the act applying it (an act of norm creation or of pure implementation), has simply the character of a frame to be filled in by way of the act.³⁴

The primary emphasis here, however, is not the creative dimension of the process. Rather, the primary emphasis here is empowerment – more precisely, the fact that the norm to which one appeals in order to issue a norm, to make law, is an empowering norm. Kelsen introduces empowerment *qua* legal norm for the issuance of legal norms only tacitly, that is, as a part of his adoption of Merkl’s *Stufenbaulehre*. Later, however, in taking up a second species of empowerment, namely, empowerment *qua* legal norm for the imposition of sanctions, he addresses empowerment on the merits. I return to the point in section V below.

4 THE COMPLETE LEGAL NORM AND THE RAMIFIED CONCEPT OF LAW

As I noted at the outset, I am arguing that Kelsen artfully combines his earlier and later concepts of law, drawing the so-called complete legal norm from Merkl’s mature statement of the *Stufenbaulehre*. To anticipate Kelsen’s move here, it is well to begin with the overriding concepts, dynamic and static.

32 Kelsen (1992: § 33, 77–78).

33 See Paulson (2002b: 109–113); to be sure, my remarks here barely scratch the surface of an interesting question of juridico-intellectual history: Why was Kelsen attacked by, among others, virtually all of the Weimer *Staatsrechtler* on the ground that he was engaged in a wrong-headed enterprise known as “*Logizismus*”? Was this simply the wearisome reproach of formalism or was something more interesting going on?

34 Kelsen (1992: § 33, 78).

“Dynamic” – the modern expression is traceable to Leibniz³⁵ – conveys the idea of force, motion, or change. Significantly, its etymological precursors include the scholastic “*potentia*”, that is, the capacity or power to develop.³⁶ Similarly in the law. The international lawyer and legal theorist Josef L. Kunz, an important figure in the Vienna School of Legal Theory, writes that a “dynamic theory of international law has to deal with the problem of the creation of international law”.³⁷ The well-known legal theorist Ota Weinberger, for some purposes a modern-day representative of the Brno School of Legal Theory, defends a dynamic theory of law, treating “dynamic” and “change” as synonyms.³⁸ Merkl writes that without empowering norms, without a means of creating new law, the “legal system would be absolutely rigid and inflexible”.³⁹

A *change* in the legal system, brought about by the *creation* of law – these are Kelsen’s themes, too. Returning to his statement in *General Theory of Law and State*,

law is anything that has come about in the way the constitution prescribes for the creation of law... [For example, an] important stage in the law-creation process [comprises] the procedure[s] by [means of] which general norms are created, that is, the [process] of legislation.⁴⁰

This dynamic point of view is usefully conceptualized as an *ex ante* perspective, a focus antedating the issuance of the legal norm and thus emphasizing the process of law creation. The norms depicted from this point of view – most prominently, those that enable legislators to issue general norms, to pass legislation – are empowering norms. In a familiar triad, empowering norms determine *who* can issue norms, *which* norms can be issued, and *by what means*.⁴¹

Kelsen goes on to introduce a complementary static point of view, which can be usefully conceptualized as an *ex post* perspective. Here the legal norm has already been issued, and the focus is on it, the legal norm proper. Once again the text is *General Theory of Law and State*:

what, from a dynamic point of view, is [a higher-] level norm, in particular, a constitutional [empowering norm that determines] the creation of a general norm[,], becomes in a static presentation of law one of the conditions [of] the general norm.... In a static presentation of law, the higher-[level] norms of the constitution are, as it were, projected as parts into the lower[-level] norms.⁴²

35 See Leibniz (1904: 256–272).

36 See generally the article “Dynamik”, in Ritter (1972: 302–303).

37 Kunz (1933–34: 412).

38 See Weinberger (1978: 175 *et passim*).

39 Merkl (1931: 281; 1993: 475).

40 Kelsen (1945: 122, 123) (my insertions).

41 See Ross (1968: 130–131).

42 Kelsen (1945: 144) (my insertions).

Whereas the dynamic or *ex ante* perspective is associated with the *Stufenbau* itself,⁴³ with its various empowering norms at the various levels manifest in the legal system in question, Kelsen's static or *ex post* perspective is aimed at reproducing the *Stufenbau* in miniature by means of the so-called complete legal norm. The reproduction serves to replicate the levels of the *Stufenbau*, from the constitution to the hypothetically formulated sanction-norm at the base of the structure – all of this *from the standpoint of the particular norm that has been issued*. Merkl's own example of a complete legal norm, drawn from the Austrian legal system, is useful. The concrete legal norm – issued and serving as the point of departure for the construction of the complete legal norm in the example – is set in at the base, below, as marked by [g]:

[a] If an organ, empowered by federal constitutional statute to initiate legislation, has introduced a bill in the National Assembly (*Nationalrat*) to the effect that the seller of certain wares is to pay a sales tax amounting to a certain percentage of the proceeds from the sale, and further, [b] if the National Assembly, first in committee and then in plenary session, in the procedure specifically prescribed by parliamentary rules of order, has passed a bill to this effect, and further, [c] if this legislation has been submitted to the Federal Assembly (*Bundesrat*), which either raised no objection within a period of eight weeks or decided before this deadline to raise no objection, and further, [d] if the Federal President has signed this legislation, and the Federal Chancellor as well as the Federal Minister of Finance have countersigned the presidential signature, and further, [e] if the Federal Chancellor has published the signed and countersigned legislation in the Federal Statute Book, and further, [f] if, after the effective date of this legislation, the tax official designated in the statute has prescribed in a certain procedure that a certain person is to pay a certain tax, and finally, [g] if this certain person does not pay the prescribed amount within the prescribed time, then a penalty for the tax offense ought to be imposed on him.⁴⁴

Is Merkl's "complete legal norm" truly complete, and if it is not, does that matter? The query merits a brief discussion. Beginning with the concrete legal norm [g], if its antecedent condition obtains – the individual did not pay the duly prescribed tax – then its consequent may be drawn, to the effect that the individual is liable to the imposition of a penalty. If the individual chooses to challenge the law as applied to him, he might well argue that one or another of the antecedent conditions [a]–[f] was not satisfied and that lack of satisfaction violates, say, due process of law. This last notion, drawn from the constitution, is not a part of Merkl's "complete legal norm", underscoring its actual incompleteness. Indeed, even if all the constitutional constraints that might possibly apply were added as antecedent conditions, the (ostensibly) complete legal norm would still fall short of completeness. For it is always possible that an unanticipated new reading will emerge from a constitutional challenge based on, say, a

43 Or, more accurately, it yields a suitably simplified version of the *Stufenbau*, which would defy description altogether if the demand were to fill it out in all of its complexity.

44 Merkl (1931: 281; 1993: 465–466).

new interpretation of a constitutional provision, and such a reading can always become a part of the received opinion. In a very real sense, then, *no* (ostensibly) complete legal norm is complete for all purposes.

This does not, however, undermine Merkl's model, for in practice the applicable conditions are filled in *after the fact*.⁴⁵ The neat distinction drawn by the philosopher of science between the often chaotic "process of discovery" and the tidy "process of justification" applies here, too. Filling in the conditions of a complete legal norm after the fact reflects the spirit of the process of justification.

This detail respecting completeness aside, how does the so-called complete legal norm serve to bring together the two concepts of law, law creation and coercion? The key lies in the distinction between *ex ante* and *ex post* perspectives. From the *ex ante* perspective, the complete legal norm represents the applicable empowering norms, which, if acted upon, will yield the sanction-norm at [g]. From the *ex post* perspective, the empowering norms are projected into the issued sanction-norm as its conditions or "parts", as Kelsen sometimes refers to them.⁴⁶ Thus, the complete legal norm provides a birdseye view of both sides of the ramified concept of law – the *ex ante* perspective inviting attention to law creation, the *ex post* perspective focusing on coercion, now embedded in the consequent of the hypothetically formulated sanction-norm. What is more, these two perspectives, *ex ante* and *ex post*, capture the two types of empowerment at work in the system, the empowerment to issue norms and the empowerment to impose sanctions.

To appreciate why the ramified concept of law adumbrated here reflects more accurately Kelsen's own programme than do his remarks about coercion, it is well to turn to his concern, from the beginning, with the objective law and the "ideal linguistic form" of the legal norm. I set the stage by introducing Kelsen's polemic against the "system of subjective law", the antipode to the "system of objective law".

5 THE OBJECTIVE LAW AND THE "IDEAL LINGUISTIC FORM" OF THE LEGAL NORM

It is well known that Kelsen struggled to move beyond various dualisms in the law, in particular that between subjective and objective law. He addresses the issue in a number of his writings. Here is a statement from the First Edition of his *Pure Theory of Law*:

⁴⁵ This approximates the *modus operandi* in using Hart's rule of recognition, too. In practice, one is not trying to cope with the rule of recognition writ large. Rather, one resorts to working rules of recognition.

⁴⁶ See Kelsen (1960: § 6(e), 55–59).

When general legal theory claims that its object of enquiry, the law, is given not only in an objective sense but also in a subjective sense, it builds into its very foundation a basic contradiction, that is, the dualism of objective law and subjective right. For general legal theory is thereby claiming that law – as objective law – is norm, a complex of norms, a system, and claiming at the same time that law – as subjective right – is interest or will, something altogether different from objective law and therefore impossible to subsume under any general concept common to both. This contradiction cannot be removed even by claiming a connection between objective law and subjective right, by claiming that the latter is defined as interest that is protected by the former, as will that is recognized or guaranteed by the former. In line with its original function, the dualism of objective law and subjective right expresses the idea that the latter precedes the former logically as well as temporally.⁴⁷

The concept of objective law is tolerably clear. “Objective law” refers to the sum total of general, abstractly formulated legal norms in the legal system.⁴⁸ Underscoring Kelsen’s conception of objective law is his thesis of the identity of state and law, of state and legal system. “Subjective law” and, indeed, the “system of subjective law”, as understood by its nineteenth-century proponents, not least of all Georg Friedrich Puchta and Heinrich Dernburg, antedates the objective law and exists independently of it. Puchta’s commitment to personal liberty, expressed in the Kantian language of “self-determination or autonomy”, is conspicuous here. Dernburg in his treatise explains in a helpful way the import of Puchta’s position:

Historically speaking, rights in the subjective sense existed for a very long time before a conscious political order developed. They were based on the personality of individuals and on the respect these individuals were able first to win for themselves and their property, and then to enforce. It was only by way of abstraction that contemplation of existing subjective rights gradually led to the concept of the legal system. It is therefore unhistorical and incorrect to view rights in the subjective sense as nothing but emanations of law in the objective sense.⁴⁹

Kelsen regards the idea that the subjective law might exist independently of the objective law as well-nigh wrong-headed. Rights and duties are legally valid only if their validity systems from the objective law, from a legal system.⁵⁰ The “contradiction” to which Kelsen refers in the quoted text stems from granting this point and saying at the same time that the system of subjective law can exist independently of the system of objective law.⁵¹ The only way to resolve

47 Kelsen (1992: § 19, 38 ; see also § 20, 39–40).

48 Windscheid etc.

49 Dernburg (1991: 65), quoted in Kelsen (1992: § 19, 39). Dernburg’s treatise first appeared in 1884. He was, to be sure, a latecomer to the “*Pandektistik*”. Windscheid in his later work had already rejected.

50 This may strike one as transparently false. What of the system of subjective rights that antedates the system of objective law? Kelsen speaks to the issue, for example, in his debate with Eugen Ehrlich, arguing that the rudiments of a system of objective law are always present if one is claiming that the subjective rights at issue are indeed legally valid.

51 Of course, the proponents of dualism do not grant Kelsen’s point at all. They argue that the

the contradiction, Kelsen contends, is to eliminate the system of subjective law altogether.

In his treatise of 1911, *Main Problems in the Theory of Public Law*, Kelsen takes up the question of “the essence of the objective law”, the general, abstractly formulated legal norms in the legal system, by posing a second question, that of the “ideal linguistic form” of such norms. As he writes:

The question of whether the legal norm is to be understood as an imperative or as a hypothetical judgment is the question of the *ideal* linguistic form of the legal norm or, indeed, the question of the essence of the objective law. The practical wording used in concrete legal systems is irrelevant to the solution of the problem. The legal norm (in its ideal form) must be constructed from the content of statutes, and the components necessary to this construction are often not present in one and the same statute but must be assembled from several.⁵²

The essence of the objective law is manifest in the objectified or reconstructed legal norm, that is to say, the legal norm whose formulation is ideal in the required sense. In short, the “essence of the objective law” and the “ideal linguistic form” of the legal norm are intimately related questions. Already clear to Kelsen, in *Main Problems*, is the notion that the legal norm be formulated hypothetically, that it be addressed to the legal official, *a move representing, of course, a shift away from the legal subject* and the trappings of subjectivity that the concept “legal subject” connotes.

Kelsen conceives of the “ideal linguistic form” of the legal norm as a central part of his general programme of concept formation, and the programme represents in turn his initial response to naturalism in legal science: Concepts in the law, normative in character as they are, resist the naturalist's penchant to reduce them to (what the naturalist sees as) their factual counterparts. Of course Kelsen was not the only theorist engaged in concept formation. One thinks, for example, of Ernst Zitelmann (1852-1923), who, with an eye to establishing the *desideratum* of the objective law, had posed, nearly a quarter of a century before Kelsen's *Main Problems*, the question of the linguistic form of the legal norm. All objective law, he wrote:

whatever the time, whatever the place, has one and the same logical form. This form of juridical thought, capable of encompassing the most various of material content, is itself simply form, completely devoid of content.⁵³

Over a period of some thirty years, Kelsen seeks further properties of the legal norm in its ideal linguistic form, and he defends, beginning in the late

validity of subjective rights is traceable to a separate source. Kelsen, however, regards his point as transparently clear, capturing the import of objective law and tracking at the same time the unity of law. The proponents of dualism are mistaken – or so Kelsen would have us believe.

52 Kelsen (1911: 237) (emphasis and parentheses in original).

53 Zitelmann (1888: 193–5, 201–03, 209–12, at 194; 1916: 10).

1930s, the idea that the hypothetically formulated sanction-norm, addressed to the legal official, is an empowerment.⁵⁴ Kelsen elaborates the point in *General Theory of Law and State*, where he argues for the first time that the legal “ought” is to be seen not as giving expression to the concept of legal obligation but as a *place-marker*.⁵⁵ Specifically, in the objectified or reconstructed legal norm, the presence of the legal “ought” marks the possibility that under certain conditions a sanction can be imposed, that is, the legal organ is empowered under certain conditions to impose a sanction. To be sure, it may be the case that a legal official, say A, is obligated to impose a sanction. This is to say, on Kelsen’s analysis, that a higher-level legal official is empowered to impose a sanction on legal official A, should A fail to impose the sanction on the legal subject. Thus, the concept of legal obligation is preserved, but its analysis now turns on a bi-level construction of empowering norms.

At this juncture, Kelsen’s construction of the ramified concept of law is essentially complete, for he has now introduced a second type of empowerment, complementing the empowerment he adopted from Merkl. In the newly introduced empowerment to issue sanctions, the coercive element is embedded in a normative structure and no appeal is made to coercion as such. Rather, Kelsen’s appeal is to a certain legal relation – the legal power of the official to impose a sanction, reflected in the legal liability of the legal subject to its imposition.

6 SUPPLANTING THE DIRECTIVE FUNCTION OF THE LAW

Finally, I want briefly to turn to a thought experiment that draws in a familiar way on John Locke,⁵⁶ Merkl,⁵⁷ and H.L.A. Hart.⁵⁸ Merkl, like Locke before him and Hart after him, begins at one point in the “Prolegomena” paper with a “primitive system of rules”, manifesting the directive function of law. He then builds in additional structures in order to correct the difficulties inherent in the primitive system. In Kelsen’s hands, as I suggested in the Introduction, the additional structures supplant the original, directive function. My interest, here, in the thought experiment is less a matter of textual detail, and more a matter of illustrating Kelsen’s move.

Imagine, then, a primitive rule-system that has but a single level, represented by duty-imposing rules, a system in which the subjects are required simply

54 See Kelsen (1987: 1-108, esp. 72-75). (The text is reproduced from a ms. of the late 1930s.)

55 See Kelsen (1945: 61, see also 62-63).

56 See Locke (1690: ch. 9, at §§ 124-131).

57 See Merkl (1931: 253-259). Repr. in Merkl 1993.

58 See Hart 1961.

to comply with these rules. Now we are invited to examine the system's defects. The most obvious of these is the inability to issue new rules or to abrogate existing rules, for there is by hypothesis no lawmaking (for example, legislative) apparatus at hand. To mend the defect, our interlocutor proceeds to build in a second level, that of empowerment, thereby transforming the primitive rule system into a norm system that is dyadic in structure.

The next question is whether the dyadic structure is not itself wanting. With an eye to facilitating the enquiry, our interlocutor reverts straightaway to the language of legal functions. The monadic structure reflects the directive function alone: Rules impose obligations on – and thereby direct – subjects. The transformation of the monadic structure into a dyadic structure marks the introduction of a second function, that of lawmaking. These two functions, however, do not suffice. As the interlocutor argues, even if the dyadic structure with its directive and lawmaking functions is adopted, noncompliance with give rise to problems. There is no institutional means to determine noncompliance or, even if noncompliance could be determined, to impose sanctions.

Our interlocutor responds by introducing a third function, that of law application, which complements the directive and lawmaking functions. Once the third function is in place, the result would seem to be a triadic structure, that is, a structural hierarchy built from precisely these three levels. Kelsen, however, takes a different tack, one that is reflected in his ramified concept of law. He sees the latter two functions of the triadic structure as together *supplanting*, in legal science, the original, directive function. The latter functions correspond, in Kelsen's scheme, to the *ex ante* and *ex post* perspectives reflected in the so-called complete legal norm. By the same token, the latter functions correspond, in Kelsen's scheme, to Kelsen's empowerments to issue norms and to impose sanctions respectively.

Why would Kelsen say that the latter functions supplant the directive function? The answer lies in his commitment to the two-worlds theory.⁵⁹ The constructions of legal science are found in the second, ideal world, not in the external world of tables and chairs, as the philosophers are fond of putting it. The external world *is*, however, the home of the directive function, and nothing stemming from Kelsen's reconstructions changes this fact. On the contrary, Kelsen understands the directive function as a reflection of social phenomenon. As he puts it, the fact that individuals live together is, first of all, a biological phenomenon, and it becomes a social phenomenon by virtue of the directive function.⁶⁰ Thus, it turns out that the directive function is not a part of legal science. It is found outside of the "cognition of law".⁶¹

59 See generally Paulson 2002a.

60 See Kelsen (1941–42: 75; 1957: 231).

61 Kelsen 1928.

References

- Martin BOROWSKI, 2005: Die Lehre vom Stufenbau des Rechts nach Adolf Julius Merkl. *Hans Kelsen – Staatsrechtler und Rechtsphilosoph des 20. Jahrhunderts*. Eds. Stanley L. Paulson, Michael Stolleis. Tübingen: Mohr-Siebeck.
- Eugenio BULYGIN, 1983: Zur Problem der Anwendbarkeit der Logik auf das Recht. *Festschrift für Ulrich Klug zum 70. Geburtstag*. Ed. Günter Kohlmann. Cologne: Peter Deubner.
- , 1988: Sobre el problema de la aplicabilidad de la lógica al derecho. Trad. par Jerónimo Betegón. Hans Kelsen, Ulrich Klug, *Normas jurídicas y análisis lógico*. Madrid: Centro de Estudios Constitucionales.
- Heinrich DERNBURG, 1911: *Pandekten. System des Römischen Rechts*. 8. ed. (pt. 1). Berlin: H. W. Müller.
- Horst DREIER, 1986: *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*. Baden-Baden: Nomos.
- Andreas FUNKE, 2003: *System und Entwicklung der Strukturtheorie des Rechts: Die Allgemeine Rechtslehre der Jahre 1874 bis 1917*. PhD thesis. Würzburg: Univ. Würzburg.
- Herbert L. A. HART, 1961: *The Concept of Law*. Oxford: Clarendon Press.
- Carsten HEIDEMANN, 2005: Der Begriff der Zurechnung bei Hans Kelsen. *Hans Kelsen – Staatsrechtslehrer und Rechtsphilosoph des 20. Jahrhunderts*. Eds. Stanley L. Paulson, Michael Stolleis. Tübingen: Mohr-Siebeck.
- Hans KELSEN, 1911: *Hauptprobleme der Staatsrechtslehre*. Tübingen: J. C. B. Mohr.
- , 1920: *Das Problem der Souveränität*. Tübingen: J. C. B. Mohr.
- , 1922: *Der soziologische und der juristische Staatsbegriff*. Tübingen: J. C. B. Mohr.
- , 1924: Die Lehre von den drei Gewalten oder Funktionen des Staates. *Archiv für Rechts- und Wirtschaftsphilosophie* 17 (1923–24). 374–408. Reprint in Hans Kelsen, 1925: *Allgemeine Staatslehre*. Berlin: Julius Springer.
- , 1926: Les rapports de système. Entre le droit interne et le droit international public. *Recueil des Cours* 14 (1926).
- , 1928: Das Idee des Naturrechtes. *Zeitschrift für öffentliches Recht* 7 (1928).
- , 1932: Unrecht und Unrechtsfolge im Völkerrecht. *Zeitschrift für öffentliches Recht*. 12 (1932). 481–608.
- , 1945: *General Theory of Law and State*. Cambridge, Mass.: Harvard University Press.
- , 1957: The Law as a Specific Social Technique. *University of Chicago Law Review* 9 (1941–42). 75–97. Reed. Hans Kelsen: *What is Justice?* Berkeley, Los Angeles: University of California Press.
- , 1960: *Reine Rechtslehre*. 2. éd. Vienna: Franz Deuticke.
- , 1987: Recht und Kompetenz. Kritische Bemerkungen zur Völkerrechtstheorie Georges Scelles. *Auseinandersetzungen zur Reinen Rechtslehre: Kritische Bemerkungen Zu Georges Scelle Und Michel Virally*. Eds. Hans Kelsen, Kurt Ringhofer, Robert Walter. Vienna and New York: Springer.
- , 1992: *Introduction to the Problems of Legal Theory*. Transl. Bonnie Litschewski Paulson, Stanley L. Paulson. Oxford: Clarendon Press.
- , 1998: 'Foreword' to the Second Printing of Main Problems in the Theory of Public Law. *Normativity and Norms. Critical Perspectives on Kelsenian Themes*. Eds. Stanley L. Paulson, Bonnie Litschewski Paulson. Oxford: Clarendon Press.
- Josef L. KUNZ, 1933–34: The 'Vienna School' and International Law. *New York University Law Quarterly Review* 11 (1933–34). 370–421.
- Gottfried Wilhelm LEIBNIZ, 1904: *Hauptschriften zur Grundlegung der Philosophie*. Eds. Artur Buchenau and Ernst Cassirer. Leipzig: Miner.
- John LOCKE, 1690: *Second Treatise on Civil Government*.
- Neil MACCORMICK, 1981: *H. L. A. Hart*. London: Edward Arnold.
- Adolf Julius MERKL, 1923: *Die Lehre von der Rechtskraft*. Leipzig, Vienna: Franz Deuticke.
- , 1931: Prolegomena einer Theorie des rechtlichen Stufenbaues. In: *Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre*. Ed. Alfred Verdross. Vienna: Springer. Réed. Merkl 1993.
- , 1993: *Gesammelte Schriften*. Eds. Dorothea Mayer-Maly, Herbert Schambeck, Wolf-Dietrich Grussmann. Berlin: Duncker & Humblot.
- Stanley L. PAULSON, 1992: Appendix. *Introduction to the Problems of Legal Theory*. Transl. Bonnie Litschewski Paulson, Stanley L. Paulson. Oxford: Clarendon Press.
- , 2001: Hans Kelsen's Doctrine of Imputation. *Ratio Juris* 14 (2001). 47–63.
- , 2002a: Faktum/Wert-Distinktion, Zwei-Welten-Lehre und immanenter Sinn. Hans Kelsen als Neukantianer. *Neukantianismus und Rechtsphilosophie*. Ed. Robert Alexy, Lukas H. Meyer, Stanley L. Paulson, and Gerhard Sprenger. Baden-Baden: Nomos. 223–251.

- , 2002b: Neumanns Kelsen. *Kritische Theorie der Politik. Frank L. Neumann – eine Bilanz*. Eds. Matthias Iser, David Strecker. Baden-Baden: Nomos.
- , 2004a: Review of *Gesammelte Schriften von Adolf Merkl*. *Ratio Juris* 17 (2004).
- , 2004b: Souveränität und der rechtliche Monismus. Eine kritische Skizze einiger Aspekte der frühen Lehre Hans Kelsens. *Demokratie und sozialer Rechtsstaat in Europa. Festschrift für Theo Öhlinger zum 65. Geburtstag*. Eds. Manfred Stelzer, Alexander Somek, Stefan Hammer, Barbara Weichselbaum. Vienna: WUV-Universitätsverlag.
- , 2005: *Hans Kelsen – Staatsrechtler und Rechtsphilosoph des 20. Jahrhunderts*. Eds. Stanley L. Paulson, Michael Stolleis. Tübingen: Mohr-Siebeck.
- Joachim RENZIOWSKI, 2002: Der Begriff der 'Zurechnung' in der Reinen Rechtslehre Hans Kelsens. *Neukantianismus und Rechtsphilosophie*. Eds. Robert Alexy, Lukas H. Mayer, Stanley L. Paulson, Gerhard Sprenger. Baden-Baden: Nomos. 253–282.
- Joachim RITTER (Ed.), 1972: *Dynamik. Historisches Wörterbuch der Philosophie* (2. vol). Basel: Schwabe.
- Alf ROSS, 1968: *Directives and Norms*. London: Routledge & Kegan Paul.
- Alfred VERDROSS, 1923: *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*. Tübingen: J. C. B. Mohr.
- Ota WEINBERGER, 1978: *Die normenlogische Basis der Rechtsdynamik. Gesetzgebungstheorie, Juristische Logik, Zivil- und Prozeßrecht. Gedächtnisschrift für Jürgen Rödig*. Eds. Ulrich Klug, Thilo Ramm, Fritz Rittner, Burkhard Schmiedel. Berlin, Heidelberg, New York: Springer.
- Wilhelm WINDELBAND, 1924: *Normen und Naturgesetze. Präludien*. (1st ed. Freiburg i.B.: J. C. B. Mohr, 1884, 211–246), 9th ed., 2 vols. Tübingen: J. C. B. Mohr, 1924 (vol. 1, 59–98).
- Ludwig WITTGENSTEIN, 2001: *Philosophical Investigations*. Transl. Elizabeth Anscombe. 3. éd. Oxford: Blackwell.
- Wilhelm WUNDT, 1903: *Ethik*. Vol. 2 (3. éd.). Stuttgart: Ferdinand Enke.
- Ernst ZITELMANN, 1888: Die Möglichkeit eines Weltrechts. *Allgemeine österreichische Gerichts-Zeitung* 39 (N. F. 25). Rééd. in Zitelmann 1916.
- , 1916: *Die Möglichkeit eines Weltrechts*. Munich et Leipzig: Duncker & Humblot.