Problems of the *Stufenbaulehre*: Kelsen's Failure to Derive the Validity of a Norm from Another Norm

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The *Stufenbaulehre* (doctrine on the hierarchical structure of the legal order, or literally 'step structure doctrine') is perhaps the most characteristic feature of the Pure Theory of Law. In the present article, this construction and the criticism of it are sketched (section 1), followed by an account of the attempt by Robert Walter, a contemporary exponent of the Vienna School of legal theory, to structure the legal system in a way different from the *Stufenbaulehre* (section 2). Finally, the article shows what ideological background the *Stufenbaulehre* is often alleged to have and examines if it is justified (section 3). The results of the present survey are then summarized (section 4).

1. The Hierarchy of the Legal Order

Although the *Stufenbaulehre* is known as a part of the Kelsenian Pure Theory of Law,[1] the idea does not come from him, but from one of his disciples,[2] Adolf Merkl. Merkl first developed his doctrine in his article 'Das doppelte Rechtsantlitz',[3] then in his book *Die Lehre von der Rechtskraft*,[4] and in its full form in 'Prolegomena einer Theorie des rechtlichen Stufenbaues'.[5]

Kelsen adopted the argumentation of Merkl[6] first in the second edition of the

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1. The words 'Pure Theory of Law' refer here not to Kelsen's book with the same title, but to the whole Vienna School and its doctrine. For the same terminology, see Robert Walter, 'Der gegenwärtige Stand der Reinen Rechtslehre' (1970) Rechtstheorie 69; and the founding document of the Hans Kelsen-Institut (Vienna), see *Hans Kelsen zum Gedenken* (1974) at 77. Kelsen first called his doctrine '*reine Rechtslehre*' (with a small 'r') in the subtitle of his *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (1920).
2. Gabriele Kucsko-Stadlmayer, 'Der Beitrag Adolf Merkls zur Reinen Rechtslehre' in Robert Walter, ed., *Schwerpunkte der Reinen Rechtslehre* (1992) at 107 et seq.; Wolf-Dietrich Grussmann, *Adolf Julius Merkl. Leben und Werk* (1989) at 14 and 18 et seq. with further references.
3. Adolf Merkl, 'Das doppelte Rechtsantlitz' (1918) Juristische Blätter at 425 et seq., 444 et seq. and 463 et seq.
4. Adolf Merkl, *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff* (1923).
5. Adolf Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaues' in Alfred Verdross, ed., *Gesellschaft, Staat und Recht. Untersuchungen zur reinen Rechtslehre. Festschrift Hans Kelsen zum 50. Geburtstag gewidmet* (1931) at 252 et seq. It was, however, as indicated in the title (Prolegomena = Preface), only an introductory article, and Merkl planned, as he himself mentioned (see *ibid.* at 294), to write a whole monograph on this topic. This announced major work was never written.
6. It has to be mentioned, that the *Stufenbaulehre* of Merkl (particularly in its methodological premises) draws strongly on Hans Kelsen's *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* (1911). Hence one speaks best of a 'cross-fertilisation'. Similarly

Hauptprobleme der Staatsrechtslehre (more precisely, in the preface of this otherwise unchanged edition).[7] He made this doctrine known worldwide in his *Reine Rechtslehre*.[8] Kelsen himself considered the *Stufenbaulehre* as a central element of the Pure Theory of Law, and regarded therefore Merkl as a co-founder of the Vienna School of legal theory.[9]

1.1 The Stufenbaulehre as a Construction of Legal Theory

The starting question is: What is the unity of the legal system based on? The answer, according to the Pure Theory of Law, is that it is the so-called *basic norm* (*Grundnorm*) from which every norm in the legal system derives its validity.[10] Validity can never be based on social facts ('is', *Sein*), since an 'ought' (*Sollen*) may come only from another 'ought'. The validity of a norm can stem only from another norm. In this case, an 'ancestral norm' (*Urnorm*) has to exist there, from which the validity all other norms can be derived.[11] If one does not intend to construct a metaphysical, natural-law theory, then one has to choose a formal *basic norm* (i.e., lacking substantive content) in order to prove the validity.[12]

But what does derivation mean? It is not equal to the assumption that the content of legal norms could be derived by deduction from the *basic norm* (it would be characteristic for moral systems of norms or for Natural Law). Derivation means that an act of will (i.e., not a mere act of thought) '*A*' is to be regarded as an act of law creation (*Rechtserzeugungsakt*), if it is an act of law creation according to a norm '*B*' regulating the creation of law. It means that validity of the norm '*A*' that came into existence by the law-creating act '*A*' is to be derived from the validity of the norm '*B*', since if the creation of the norm '*A*' does not correspond to the

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Jürgen Behrend, *Untersuchungen zur Stufenbaulehre Adolf Merkls und Hans Kelsens* (1977) at 49.

7. Hans Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze* 2. Aufl. (1923) at XV et seq. acknowledges the contribution of Merkl to the development of the Pure Theory of Law explicitly.
8. Hans Kelsen, *Introduction to the Problems of Legal Theory* (1992), trans. by Bonnie Litschewski Paulson & Stanley L. Paulson (Oxford: Clarendon Press, 1992). [*Reine Rechtslehre* (1934)] at 55 et seq. [hereinafter *Introduction*].
9. As Kelsen writes in a letter to Merkl, '...if only there is a 'Vienna School of legal theory', it is, in a very great part, due you', cited by Wolf-Dietrich Grussmann in Robert Walter, ed., *Adolf J. Merkl. Werk und Wirksamkeit* (1990) at 142; see also Hans Kelsen, 'Adolf Merkl zu seinem 70. Geburtstag' (1960) Zeitschrift für öffentliches Recht 313. See also Kelsen's letter to Merkl, where he acknowledges 'most gratefully the great importance of his scholarly work for the Pure Theory of Law' in Max Imboden, et al., eds., *Festschrift für Adolf J. Merkl zum 80. Geburtstag* (1970) at 11.
10. As Merkl, *supra* note 4 at 210 states: 'If one wants to be able to present the chaos of legal forms as a sum of coherent phenomena, in a word as a legal system, as a cosmos of law, [...] it has to be [...] acknowledged as the outcome of a common origin'. Thus, unity of the legal order is to be found in the chain of delegations (*Delegationszusammenhang*). For this, cf. Adolf Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaues [1931]' in Hans Klecatsky et al., eds., *Hans Kelsen—Adolf Merkl—Alfred Verdross: Die Wiener Rechtstheoretische Schule* (1968) [hereinafter *WRS*] 1336; Hans Kelsen, 'Der Begriff der Rechtsordnung [1958]' in *WRS* 1395 et seq.
11. Cf. Christian Dahlmann, 'The Trinity in Kelsen's Basic Norm Unravelled' (2004) ARSP 149.
12. Behrend, *supra* note 6 at 68. On the double case of the Pure Theory of Law against the role of, first, causal sciences, e.g., sociology and, second, of natural law in legal science, see Horst Dreier, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (1986) at 42.

process of law creation as described in the norm '*B*', then the norm '*A*' is not valid. Thus, the *Stufenbaulehre* gives an answer to the question concerning the origin of validity ('Where does the validity of a legal norm come from?') as well.

The next step of the argument is that derivation is also connected to the question of forms of law (*Rechtsform*). In different law-creating processes different forms of law (according to the current terminology 'sources of law', e.g., statute, ordinance) are created. The number of possible forms (sources) of law is limited within a certain legal system; the possible content of law (i.e., the actual content of the regulation) is, however, infinite.[13] These forms have a hierarchic relation to each other, according to which a certain form of law has its validity from the other. Thus, an individual norm (e.g., an administrative act) is subordinate to the ordinance according to the *Stufenbaulehre*; the former has its validity from the latter.

Therefore, an individual norm is valid only because its validity can be derived from a valid ordinance, which is, again, only valid because it corresponds to the statutes; and a statute has its validity from the constitution; the constitution itself—if it was produced legally (i.e., according to the law)—from the previous constitution, and so on until the historically first constitution. The *historically first constitution* can be recognized by its illegal (i.e., unlawful) way of production. The question is, then, where the validity of this historically first constitution comes from. The answer of the Pure Theory of Law comprises the rather idiosyncratic solution of the *hypothetical basic norm (hypothetische Grundnorm)*.[14] According to that, one has to presuppose that there exists such a hypothetical *basic norm* that is the precondition of every kind of legislation. Otherwise the 'ought' that is characteristic for law could not be derived. This *basic norm* says that 'Coercion is to be applied

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13. Merkl, 'Prolegomena', *supra* note 10 at 1311. Every form may have an arbitrary content, see Merkl, *ibid.* at 1313; Hans Kelsen, *The Pure Theory of Law*, trans. by Max Knight (Berkeley: University of California Press, 1967) [*Reine Rechtslehre*, 2. Aufl., 1960] [hereinafter *PTL2*] at 201. Thus, every topic may be *theoretically* (i.e., if the concrete legal system does not impose something else, e.g., in the constitution) regulated by any kind of sources of law, see Behrend, *supra* note 6 at 54, n. 191.

14. In the terminology of Merkl: original norm (*Ursprungsnorm*); see e.g., Merkl, *supra* note 4 at 209, n. 1. Kelsen himself uses the expression original norm sometimes; e.g., in his *Allgemeine Staatslehre* (1925) at 99 [hereinafter *AStL*]. The idea of the *basic norm* (*Grundnorm*) (but not the expression) appears in Kelsen's works before the *Stufenbaulehre*; first in his article 'Reichsgesetz und Landesgesetz nach österreichischer Verfassung' (1914) Archiv des öffentlichen Rechts (1914) 216 et seq., but the article of Alfred Verdross, 'Zum Problem der Rechtsunterworfenheit des Gesetzgebers' (1916) Juristische Blätter at 471 et seq. contributed to its final elaboration (the distinction between the constitution of positive law and the *basic norm* as constitution in a legal-logical sense), as it was explicitly acknowledged by Kelsen, *supra* note 7 at XV et seq. Perhaps this is why Kelsen dedicated the second edition of the *Hauptprobleme* to Merkl and Verdross (*ibid.* at III). On the role of Verdross, see also Robert Walter, 'Entstehung und Entwicklung des Gedankens der Grundnorm' in Robert Walter, ed., *Schwerpunkte der Reinen Rechtslehre* (1992) at 51.

The expression '*basic norm*' comes from Edmund Husserl, *Logische Untersuchungen. 1. Prolegomena zur reinen Logik* (1900) at 45, see Helmut Holzhey, 'Kelsens Rechts- und Staatslehre in ihrem Verhältnis zum Neukantianismus' in Stanley L. Paulson & Robert Walter, eds., *Untersuchungen zur Reinen Rechtslehre. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985/86* (1986) at 177 et seq. Cf. Werner Krawietz, *'Grundnorm'* in Joachim Ritter, ed., *Historisches Wörterbuch der Philosophie*, Bd. 3, 921 et seq.

Just to be sure: the *basic norm* of the valid U.S. legal system is not the Constitution (1787) (which is the constitution of positive law), but the norm that says: 'The Constitution (1787) ought to be obeyed'.

under certain conditions and in a certain way, namely, as determined by the framers of the first constitution or by the authorities to whom they have delegated appropriate powers.'[15] The validity of the hypothetical *basic norm* can be recognized inasmuch as the legal order based on it is *by and large* effective (i.e., it is obeyed). It does not mean that efficacy and validity are identical, only that 'efficacy of the legal order' is a (necessary) condition of the validity of the legal order.[16]

The hierarchy in the *Stufenbaulehre* is thus constructed as follows: hypothetical *basic norm* (or synonymically: constitution in terms of legal logic[17])—constitution (constitution in terms of positive law)—statutes—ordinances—statutory instruments—judicial decisions, administrative acts, private legal transactions (e.g., contracts)—physical executive acts (acts of compulsion or coercive acts).[18] The latter (i.e., coercive acts) are not considered as part of the legal order, since they do not comprise norms, only executions of norms (i.e., an 'is').

But this is an account of the hierarchy (*Stufenbau*) of an ideal typical, parliamentary legal order. A valid legal order is not necessarily constructed according to this scheme. But there are, according to Merkl, at least two necessary levels: 1. the *basic norm*, and 2. norms with the threat of immediate coercion.[19]

Some theoretical implications and characteristics of the *Stufenbaulehre* are to be mentioned here: 1. First, a high level of autonomy inherent in the legal order that is obtained in the way that law regulates its own creation and validity ('self-creation of law', *Selbsterzeugung des Rechts*). 2. Second, every level of the hierarchy comprises creation and application of law at the same time (except for the levels of the *basic norm* and the physical execution, since the former means only legislation, while the latter means only application), i.e., all legal acts have a *double legal appearance (doppeltes Rechtsantlitz)*. They are Janus-faced.[20] Legal acts are thus, to a certain extent, always objectively determined by law, but they depend

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15. Kelsen, *Introduction, supra* note 8 at 57.

16. *Ibid.* at 61: 'while the law cannot exist without power, neither is it identical to power'.

17. Kelsen, *AStL*, *supra* note 14 at 248 et seq. Another synonym is 'the constitution in the transcendental-logical sense', see Hans Kelsen, 'Naturrechtslehre und Rechtspositivismus [1961]' in *WRS* note 10 at 827; Hans Kelsen, 'Die Funktion der Verfassung' [1964] in *WRS* note 10 at 1976. On synonymity, see Uta Bindreiter, *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine* (2003) at 18.

18. Single levels can also be skipped (an individual act may also be, for example, based directly on the statute and does not have to gain its validity by the ordinance as an intermediate) as Hans Nawiasky rightly point out in his 'Kritische Bemerkungen zur Lehre vom Stufenbau des Rechtes' (1927) Zeitschrift für öffentliches Recht at 495. In the same way Joseph Raz, *The Concept of a Legal System. An Introduction to the Theory of Legal System*, 2nd ed. (Oxford: Clarendon Press, 1980) at 99, n. 1, who therefore prefers the metaphor of a tree to the usual image of a pyramid. This is, however, only a slight addition to the *Stufenbaulehre*, and cannot refute it at all.

19. Merkl, *supra* note 4 at 209 et seq.; *idem*, 'Gesetzesrecht und Richterrecht [1922]' in *WRS* note 10 at 1618; on relevant modifications in the work of Merkl, see Behrend, *supra* note 6 at 19 et seq. Moreover, according to Behrend, one needs at least three levels to make a legal order: the two mentioned by Merkl and the norm of competence for the creation of the coercive norm; see Behrend, *supra* note 6 at 26. The argument of Behrend assumes, however, that one wants to maintain the possibility of a later modification of coercive norms. It is—although rational—not conceptually necessary; or, in the usual expression of the Pure Theory of Law, not essential to law (*rechtswesentlich*).

20. Merkl, *supra* note 4 at 216; Adolf Merkl, 'Das doppelte Rechtsantlitz [1918]' in *WRS* note 10 at 1097.

also, to a certain degree, on the subject of the law-creating/law-applying organ.[21] This freedom of the law-creating/law-applying organ becomes less and less on the way from the hypothetical *basic norm* to the physical coercive act, as the acts become more and more concrete and individualised,[22] but the freedom of decision (even if less and less) still remains. The *autonomous* and *heteronomous determinants* are, then, present in both creation and application of law at the same time.[23] Therefore, an absolute opposition of creation and application of law is inadequate, since they differ in degree but not in kind. 3. Third, it has to be mentioned that the *Stufenbaulehre* explains more than do traditional conceptions of the hierarchy of norms, as it explains not only the general norms but also the individual acts (individual norms in the terminology of the Pure Theory of Law)[24] like judicial decisions and the physical executive acts.[25] 4. Fourth, it is a new feature of the *Stufenbaulehre*, as opposed to previous[26] conceptions of the hierarchy of norms, that it does not only identify the hierarchy, but also gives criteria ('test') for its identification.[27] 5. And lastly, its most important feature (its virtue, according to some)[28] is that it gives a dynamic approach to the legal order instead of the static one ('In what system do the norms exist?'), i.e., it answers the question how norms are created.[29]

1.2 Points of Criticism

In the following section, an account is given of the points where objections are or could be made to the *Stufenbaulehre*: (1) the indefensibility of the *basic norm*, (2) blurring the difference between individual and normative acts, (3) the defeasibility of monism, (4) the derivation of the validity of a norm from *one single* other norm, and last (5) the derivation of validity itself. It has to be examined, to what extent each respective criticism is right, and what answer was or would have been given by exponents of the Pure Theory of Law.

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21. The reason for this is not the explicitly approved discretion, but the fact that linguistic expressions are themselves indefinite to a certain extent; see Merkl, 'Rechtsantlitz', *ibid.* at 1111: '*Every word* has, along with a definite *core* of meaning, more or less wavering *peripheral* meanings' (emphasis added)—in the year 1918, a long time before Hart.

22. Adolf Merkl, *Allgemeines Verwaltungsrecht* (1927) at142, 146. Norbert Achterberg, 'Hans Kelsens Bedeutung in der gegenwärtigen deutschen Staatslehre' (1974) *Die öffentliche Verwaltung* at 454 explains that the pyramid of norms corresponds to an opposite pyramid showing the role of extra-legal factors: it is the broadest in the constitution, and the narrowest in the coercive act.

23. Merkl, *supra* note 22 at 142.

24. Behrend, *supra* note 6 at 51. In this aspect, Ernst Rudolf Bierling, *Juristische Prinzipienlehre*, Bd. II, 1898, 117 et seq., esp. 119 and 127 may be mentioned as one of the predecessors.

25. Theo Öhlinger, *Der Stufenbau der Rechtsordnung. Rechtstheoretische und ideologische Aspekte* (1975) at 10.

26. Particularly Binding, Bierling and Thon. Cf. Wolfram Müller-Freienfels, 'Zur Rangstufung rechtlicher Normen' in *Law in East and West. Recht in Ost und West* (1988) at 19 (with further references) and 21.

27. Öhlinger, *supra* note 25 at 11.

28. Stanley L. Paulson, 'Zur Stufenbaulehre Merkls in ihrer Bedeutung für die Allgemeine Rechtslehre' in Adolf J. Merkl. Werk und Wirksamkeit, ed. by Robert Walter (1990) at 93 et seq.

29. Merkl, *supra* note 10 at 1314. Kelsen himself emphasises this advantage, see Kelsen, *supra* note 7 at XII.

1.2.1 The Basic Norm

Criticism of the *basic norm* has almost become some kind of custom in legal theory: there is hardly any comprehensive work on legal theory that does not—routinely—attack it.[30] This criticism has five main grounds, i.e., the *basic norm* seems to be assailable in five different aspects: (a) first, as the failure of disparity between 'is' and 'ought', (b) second, as a metaphysical construct, (c) third, as fiction, (d) fourth, as a logical *circulus vitiosus*, and (e) fifth, as a redundant notion. In addition to that, general methodological objections (the elimination of morals in particular)[31] can be made to the Pure Theory of Law, but they are not elaborated on here,[32] since they concern some underlying assumptions of the Pure Theory of Law (e.g., value-relativism or normativism), whose assessment would need a general analysis of the Pure Theory of Law that is not possible here. The present examination of the *basic norm* is limited to the points of criticism that can (also) be made while accepting the methodical starting points of the Pure Theory of Law.

(a) The first point of criticism, i.e., the failure of the 'is'-'ought' disparity, basically means that the *basic norm* actually depends on efficacy, that is to say, on social facts. This would mean that the source of legal order ('ought') could still be found in 'is'.[33]

(b) According to the second possible point of criticism, the *basic norm* is in fact a hollow construction of Natural Law, i.e., a metaphysical relic in the Pure Theory of Law.[34] Kelsen himself, as a matter of fact, also admits this, as he considers the

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30. Kelsen's inconsequence occasionally gives another ground for criticism, especially the fact that sometimes he refers to the legal order as a condition of the *basic norm*, but sometimes he does its inverse. See Dreier, *supra* note 12 at 45, n. 117 with further references.

31. Such criticism, e.g., Ralf Dreier, 'Bemerkungen zur Theorie der Grundnorm' in *Die Reine Rechtslehre in wissenschaftlicher Diskussion* (1982) at 38 et seq., esp. 45.

32. We do not have to discuss here the criticism of H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 245 et seq. (ch. VI, n. 1), who challenges Kelsen's basic methodical approach and therefore states—among other points—that the *basic norm* is simply 'redundant'. The criticism of Werner Krawietz, 'Die Lehre vom Stufenbau des Rechts—eine säkularisierte politische Theologie?' in Werner Krawietz & Helmut Schelsky, eds., *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* Rechtstheorie (1984) 5 Beiheft at 264 et seq. remains also out of analysis, who claims that the *Stufenbaulehre* cannot grasp 'social reality', since it pretends that decisions are determined from the top to the bottom—although there is another, inverse way of influence, also omitted, because this criticism points to a problem of sociology (of law), while the *Stufenbaulehre* (as a purely normative theory) says nothing about it.

33. E.g., Karl Larenz, *Methodenlehre der Rechtswissenschaft*, 4. Aufl., 1979, 79 et seq.; Ernst v. Hippel, *Allgemeine Staatslehre* (1963) at 146; Hans-Ludwig Schreiber, *Der Begriff der Rechtspflicht* (1966) at 144; Aleksander Peczenik, 'Two Sides of Grundnorm' in *Die Reine Rechtslehre in wissenschaftlicher Diskussion* (1982) at 61.

34. See Stefan Hammer, 'Kelsens Grundnormkonzeption als neukantische Erkenntnistheorie des Rechts?' in Stanley L. Paulson & Robert Walter, eds., *Untersuchungen zur Reinen Rechtslehre. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985/86* (1986) at 225; Dreier, *supra* note 12 at 51, n. 138 with further references. For similar reasons (namely because of the supposition of a non-empirical, transcendental *basic norm*), see Norbert Hoerster, 'Kritischer Vergleich der Theorien der Rechtsgeltung von Hans Kelsen und H. L. A. Hart' in *Untersuchungen zur Reinen Rechtslehre. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985/86*, ed. by Stanley L. Paulson & Robert Walter (1986) at 1 et seq., esp. 18 finds Kelsen's theory less plausible than that of Hart. I think that the argument of Hoerster is a strong one, however, I am not going to discuss it here, since (as is emphasised by Hoerster himself) it cannot finally refute the *Stufenbaulehre*, but only weaken it.

basic norm as a relic of Natural Law.[35]

(c) According to the third possible objection, the *basic norm* is a (redundant) fiction, i.e., it has nothing to do with the objective description of law as announced by the Pure Theory of Law, since—strictly speaking—it does not even exist. This objection is supported by Kelsen himself, who refers to the *basic norm* in his later works as fiction.[36]

(d) According to the fourth possible objection, the idea of the *basic norm* is based on a *circulus vitiosus*, as it is deduced from legal order, and the legal order is deduced from it.[37] A plausible compound of the third and fourth objection was developed by Roman Herzog and says that the *basic norm* is either *circulus vitiosus* (if derived inductively from the existing legal order), or a fiction (if it is not derived from the valid legal order but simply postulated).[38]

(e) According to the fifth possible objection, the *basic norm* is a redundant notion, since the question about the validity of the legal order or the constitution does not make any sense, as validity implies empowerment; validity is a 'concept of relation' ('Does the norm correspond to the constitution?'), therefore no question can be asked meaningfully about the validity of the legal order or the constitution.[39]

To give an answer to these questions (objections) is even harder, since Kelsen elaborated his views about the *basic norm* in different places in different ways and partially contradicts himself in his argumentation.[40] In the following section an attempt is made to reconstruct how one can meaningfully advocate the idea of the *basic norm*, even if some explications of Kelsen have to be rejected thereby.[41]

The most important point is that the *basic norm* has an exclusively epistemological ('transcendental-logical')[42] function,[43] i.e., *basic norm* does not ground any claim for obeying,[44] and it does not even ground the objective existence of legal

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35. Hans Kelsen, 'Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus [1928]' in *WRS* note 10 at 294; Hans Kelsen, *General Theory of Law and State* (1949) at 437 [hereinafter *GTL*]. The idea of the *basic norm* does, so to speak, offer itself to be rewritten in the spirit of Natural Law. For such an attempt see, e.g., René Marcic, 'Das Naturrecht als Grundnorm der Verfassung' (1964) Zeitschrift für öffentliches Recht at 69 et seq.

36. Hans Kelsen, 'Die Funktion der Verfassung, [1964]' in *WRS* note 10 (1975) et seq. He puts it in the same way in his posthumously published work: Hans Kelsen, *General Theory of Norms* (Oxford: Oxford University Press, 1991), trans. by Michael Hartney [*Allgemeine Theorie der Normen*, ed. by Kurt Ringhofer & Robert Walter (1979)] at 258 et seq. [hereinafter *GTN*].

37. Joseph Raz, 'Kelsen's Theory of the Basic Norm' (1974) 19 Am. J. Juris. 99.

38. Roman Herzog, *Allgemeine Staatslehre* (1971) at 90.

39. Cf. Rainer Lippold, *Recht und Ordnung. Statik und Dynamik der Rechtsordnung* (2000) at 499 et seq., esp. 505.

40. Dreier, *supra* note 12 at 45, n. 117. Because of this contradictory nature, Priester calls the *basic norm* a chimera, i.e., something that has many features at the same time, which are not compatible with each other. Cf. Jens-Michael Priester, 'Die Grundnorm als Chimäre' in Werner Krawietz & Helmut Schelsky, eds., *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* Rechtstheorie (1984) 5 Beiheft, 238. The chimera has the head of a lion, the back of a dragon, and the trunk of a goat. According to Priester, Kelsen's arguments about the *basic norm* are similarly 'manifold'.

41. Here I follow principally Dreier, *supra* note 12 at 42 et seq.

42. According to Kant (and the neo-Kantian Kelsen), 'transcendental' refers to the epistemological method (i.e., *a priori*) and 'transcendent' to the knowledge that is beyond experience. See Immanuel Kant, *Kritik der reinen Vernunft*.

43. Kelsen, *PTL2, supra* note 13 at 218; Behrend, *supra* note 6 at 65.

44. Dreier, *supra* note 12 at 49.

order. It serves only the purpose of regarding a coercive order that claims to be law *as* an objective legal order. An objective object of knowledge is an implication of scientific survey, Kelsen says.[45] 'In different words: the Pure Theory of Law does not say that law *is* an objectively valid order, because one presupposes the norm, according to which one has to abide by the historically first constitution; but: law can only be regarded as an objectively valid order, *if* one assumes that one has to abide by the historically first constitution, i.e., by *presupposing* the basic norm.'[46]

Therefore, any question if the *basic norm* is derived from the legal order or *vice versa*, is already wrong in itself. The only thing that exists temporally and logically before the *basic norm* is the effective coercive order. *Basic norm* is not 'before' or 'after' the legal order, but makes possible to conceive an effective coercive order—claiming to be law—*as* a legal order.[47] As Kelsen puts it: 'an anarchist, for instance, who denied the validity of the hypothetical *basic norm* of positive law [...], will view its positive regulation of human relationships (such as property, the hiring contract) as mere power relations'.[48]

What is this all about, then? If one thinks of an action as accomplishing or violating a norm (norm as interpretive scheme), one presupposes the existence of a norm as well. Thus, the next question is why this norm exists, i.e., where its validity comes from. As it cannot come from an 'is', one can only think of another norm (i.e., of another 'ought').[49] But also this latter 'ought' also has its origins somewhere, and so on...—until one cannot find any more (man-made) norm, to deduce the norm from—then we are at the historically first constitution. Once arrived at this point, one has to assume the existence of a *basic norm* and from this presupposed *basic norm*, the validity (the existence) of the historically first constitution is to be derived.[50] The *basic norm* is thus not part of the positive legal order, since it is not set, only supposed. It is therefore necessary to assume the *basic norm* in order that one be able to consider an act as accomplishing or violating a norm—and without that, any legal science is unthinkable.[51]

This argument (i.e., assuming the *basic norm*) is, of course, without any use for the citizen or the legal practice. But the *basic norm* of Kelsen was developed for legal science and not for the citizen.[52] Thus, the *basic norm* is essentially a useful postulate of legal scientific work.[53] What is the meaning of this? The Pure Theory

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45. Hoerster, *supra* note 34 at 2.

46. Hans Kelsen, 'Recht, Rechtswissenschaft und Logik' (1966) ARSP at 547 (emphasis in the original).

47. Dreier, *supra* note 12 at 47, n. 119.

48. Kelsen, *GTLS*, *supra* note 35 at 413.

49. Kelsen, *GTN*, *supra* note 36 at 255: 'Only a norm can be the reason for the validity of another norm.'

50. On the identification of existence, validity and binding force in Kelsen, see *infra* note 125.

51. I.e., a non-proved supposition becomes *sine qua non* of scientific knowledge. It seems at first paradoxical, but a great deal of epistemological considerations work this way. See e.g., Willard V. O. Quine, 'On Empirically Equivalent Systems of the World' (1975) Erkenntnis at 313 et seq.

52. Raz, *supra* note 37 at 104 et seq. esp. 107 and 109; J. W. Harris, 'When and Why does the Grundnorm Change?' (1971) 29 Cambridge L. J. 103 at 117, n. 57a: 'The grundnorm is postulated by Kelsen as something logically essential to explain the practice of legal scientific discourse.'

53. Robert Walter, 'Wirksamkeit und Geltung' (1961) Zeitschrift für öffentliches Recht at 539 et seq.

of Law (as opposed to more old-fashioned positivism) does not say anything about the validity of norms in concrete legal orders; it regards its object of knowledge simply 'as if' it were valid law.[54] The *basic norm* is therefore only an epistemological postulate:[55] 'It allows to show, to describe effective coercive orders as normative ones, or, more precisely, *as if* they were normative orders, although a science cannot decide this.'[56]

From the fact that the existence (validity) of the *basic norm* is hypothetical, follows that the existence (validity) of the whole legal order is hypothetical, since the latter is derived from the former. If the legal order is based on an assumption (or presupposition) that is not proven and cannot be proven, it is obvious that one cannot prove its existence (and its synonym, according to Kelsen: its validity or legal binding power) either.[57]

A possible objection against this view could be that in this way the 'historically existing' legal order is based on an uncertain ground, since the validity of the 'historically existing' legal order is based only on a postulate of legal scholars. This counterargument, however, stems from a misunderstanding, since Kelsen did not say anything about the 'historically existing' legal order, so the question of its validity remains open. Kelsen makes use 1. of a concept of legal order that is consequent in terms of theory of science (in a neo-Kantian sense) only for the purposes of legal scientific work, and he constructs, for that reason, a system of 'ought' for himself, that 2. is compatible with the everyday legal work/experience (i.e., with the generally effective coercive order experienced by him). This system of 'ought' (constructed from the point of view of a legal scholar) is, at the same time, not perceptible to the senses (thus transcendent): it is the 'price' to pay for the neo-Kantian method (especially the disparity of 'is' and 'ought').

After clarifying the function of the *basic norm*, we now turn to the question of the proper terminology. The problem with the '*hypothesis*' is—as is shown by the criticism of Verdross—that it is used in natural sciences only for assumptions that can be proven as true or false. In the case of the *basic norm*, however, the question cannot be whether it is true or false. The problem with '*fiction*' is that it does not express the actual function of the *basic norm*.[58] Moreover, one could make a similar objection to it as to the hypothesis, since it is characteristic of a fiction that it is not in accordance with reality. In the case of the *basic norm*, however, one cannot verify the truth, i.e., one can never be sure that the *basic norm* does not exist 'in reality', because it is not perceptible to the senses (i.e., transcendent).

Consequently, the terminology of '*assumption*' ('*Annahme*')—according to the suggestion of Robert Walter—seems to be the most appropriate.[59]

Basically, this terminology also gives an answer for the third ('fiction') and fourth ('*circulus vitiosus*') objections, since what is concerned is not a simple invention

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54. Cf. Walter, *supra* note 1 at 73.
55. Walter, *ibid.* at 81; Behrend, *supra* note 6 at 71.
56. Walter, *ibid.* at 80 (emphasis added).
57. See also *infra* note 125.
58. Walter, *supra* note 14 at 56 et seq.
59. Walter, *supra* note 1 at 80 et seq.

(fiction), nor the deduction of its existence from the legal order. As a matter of fact, it is about an epistemological assumption that allows us to conceive coercive orders that claim to be legal orders *as* (objective) legal orders, and allows them thereby to be examined by legal science.

What answer, then, can be given to the first ('efficacy') and second ('metaphysics') objections?

The simplest—but relatively weak—answer could be that although for Kelsen efficacy means a (necessary) condition of validity, it is not the ground of validity, and even less validity itself.[60] This answer would squarely contradict the *Stufenbaulehre*, according to which a norm is to be considered as the ground of the validity of another norm, even because it is the condition of its creation (ground and condition are thus taken as equal, i.e., the argument of the *Stufenbaulehre* draws on the identification of both concepts). It is obvious that one cannot equate validity with efficacy, since it is only about a 'conditional relation', but one could say that the hypothetical (assumed) validity has its origins in efficacy. And in this way, the attempt to make a sharp distinction between 'is' and 'ought' would be a failure. What is, then, the proper answer that saves the *basic norm*? It is, in fact, the same that was said above, but from a different perspective.

Given the fact that the matter here is an epistemological assumption, one has to presuppose a *basic norm*, that serves the purpose of gaining the desired knowledge. Hence if the valid legal order has to be examined as well, one has to presuppose a *basic norm* that catches the examination of the valid legal order, i.e., that allows legal science to examine the order supported by coercion. In this case, one cannot dispense with the moment of efficacy. This does not mean, however, that the *basic norm* is based on efficacy, only that from the variety of possible *basic norm*s, one has to choose the one which is the most useful for a legal scientific examination, i.e., the one supported by effective power.[61] In this way, redundant arguments can be avoided (*economy of thought* [*Denkökonomie*]).[62]

As for the (second) error, admitted by Kelsen, i.e., the error of metaphysics, in the case of *basic norm* it is not about metaphysics. In this aspect, Kelsen has made an admission of a charge that could not have been brought against him at all. He did not claim that the *basic norm* really exists, only that it has to be presupposed for the sake of legal scientific work, or more precisely, one should pretend that it exists.[63] And an epistemological assumption that has its origins in pragmatics of science cannot be equated with the declaration of a transcendent existence. Kelsen does not claim the existence of any norm, not even of the *basic norm*: he only says

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60. Behrend, *supra* note 6 at 70.

61. This means that for, e.g., the scientific analysis of the valid German legal order, one does not choose a *basic norm* that refers to the legal order of the Weimar republic. Thus, if one wants to work scientifically with the valid German legal order, one should not suppose the *basic norm* to be 'The Weimar constitution is valid.' See also *supra* note 14.

62. Cf. Leonidas Pitamic, 'Denkökonomische Voraussetzungen der Rechtswissenschaft' (1917) Zeitschrift für öffentliches Recht at 347. On the role of Pitamic in the development of the idea of the *basic norm*, see Kelsen, *supra* note 7 at XV; Walter, *supra* note 14 at 52.

63. Hans Kelsen, Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus [1928] in *WRS* note 10 at 294.

that if one wants to do legal scientific work, one has to suppose that there are objectively existing norms.[64] Whether there are *in fact* norms can never be found out, as norms are transcendent (parts of the 'ought'), so not perceptible to the senses.

The last objection, viz., according to which the *basic norm* is a redundant notion since any question about the validity of a constitution or a legal system is meaningless, would be adequate only if Kelsen would understand validity as a concept of relation (i.e., a norm is valid only if it corresponds to the constitution). But validity is, according to Kelsen, a mode of existence (*Existenzmodus*) and not a concept of relation. In this sense, one may meaningfully ask questions about the validity of the constitution that originates from the *basic norm*.

Thus, objections to the *basic norm* are answered, i.e., it has been defended (sometimes even against Kelsen).

A feature of the Pure Theory of Law has to be shown here which has not mentioned yet, and which follows from the function discussed above. According to this theory, there is no legal order that is objectively obligatory *per se*. Supposition of the *basic norm* is in fact an *act of legal self-obligation* by the legal scholar,[65] i.e., normativity is not grounded as generally obligatory, but it depends on individual decisions. Individuals can reject or accept the claim of effective coercive orders to be legal orders. In the first case, they regard norms only as conglomerates of structures of power, as mere expressions of the factual situation; their objective validity is recognized only in the second case.[66] According to Kelsen, every legal approach is based on this latter hypothesis.[67]

The final conclusion is that objections to the *basic norm* are based on misinterpretations or can be eliminated by correcting the description of the *basic norm*.[68]

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64. This means that it is not necessary for the existence of the legal order to suppose the *basic norm* (to put it somewhat sharply: there also have been legal orders before the Pure Theory of Law), only for its scientific analysis. A scientific analysis does not give an answer to the question about the existence of the legal order anyway, but only presupposes it. In fact, the methodical starting points (e.g., moral relativism) are in general of metaphysical nature—but this is a general characteristic of all epistemological starting points. Cf. *supra* note 51.

65. Dreier, *supra* note 12 at 54, n. 160. This juristic self-obligation, however, does not mean that a given legal order is somehow morally justified, and lawyers are morally obliged to abide by it, since this is a moral question, and thus definitely eliminated by Kelsen from his theory of law.

66. Objective validity means here a validity that is independent from the subjective will of the norm-poser. Cf. also *supra* note 15.

67. Dreier, *supra* note 12 at 55. Cf. Kelsen, *Introduction*, *supra* note 8 at 58; Kelsen, *PTL2*, *supra* note 13 at 204 et seq., that the *basic norm* expresses only what positivists have always thought.

68. But only if the methodological starting points are accepted (so especially the elimination of sociological and natural-law elements, and the objectivity of science). We cannot examine the question of rejection here.

The defence is a conditional one also in the sense that not all (possible) objections have been answered. (1) Especially, the sophisticated anti-Kelsenian example of Raz, *supra* note 37 at 98, was not discussed. Raz mentions a colony that becomes independent in peace, its constitution of independence being given by its mother country. In this case, the new constitution can be derived from the legal order of the mother country, i.e., from the *basic norm* of the mother country—although the former colony considers itself (as every other country, including its mother-country consider it) as an independent country that should thus have an independent *basic norm*. I.e., it is not an autonomous legal order after all. The objection of Raz can be overcome if one adopts the monism of international law—as does Kelsen himself—and hence considers all legal norms to be parts of a single huge legal order: in this way, arguments based on the 'independence of a legal order' are neutralised. This solution may, however, be problematic from other aspects,

1.2.2 Blurring the Difference Between Individual and General Acts

An important characteristic of the *Stufenbaulehre* in its original form is that it relativizes the difference between general and individual acts, as it says that this difference is only one of degree.[69] The lower the level in the *Stufenbau*, the more concrete and individual the norm is. It precludes the perception of any sharp logical difference between general acts and individual acts.[70] The original argument may be, however, modified in order that the *Stufenbaulehre* survive the recognition of the difference between individual and general.

This amendment was made by Robert Walter, who is, after Kelsen, the most known exponent of the Pure Theory of Law. He holds the view that concretisation and individualisation are not interchangeable,[71] since a general norm (like a statute) may well be concrete, and an individual norm (like a command) may be general. So, for example, the disposition that 'the President of the U.S. ought to take a look at the White House from the south every morning at 8:15' is obviously a general one (as it is valid for every U.S. President), even if it is completely concrete.[72] On the contrary, the disposition that 'Mr. John Abraham Schmitt ought to do something good' is, without any doubt, an individual one, but not concrete at all.

A disposition is either individual or not. There are no transitional levels, no 'more' or 'less individual' norms. A transition in degree is possible only in terms of 'concreteness'. Therefore an amendment to the *Stufenbaulehre* has to be made, i.e., the lower the level in the *Stufenbau*, the more concrete a norm is. But whether it is an individual one or not, is not explained by the *Stufenbaulehre*.

In this way, the *Stufenbaulehre* is not destroyed, only corrected to some extent. Both starting questions (1. where does the validity of law come from?; 2. what is the unity of legal order based on?) are thereby still answered.

1.2.3 The Indefensibility of Monism

In terms of the relation between national and international law, the Pure Theory of Law advocates monism.[73] Its grounds are of epistemological origin; as Kelsen

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see below *1.2.3 The Indefensibility of Monism*. (On the other anti-Kelsenian example of Raz, see *infra* note 105.) (2) The criticism of Ilmar Tammelo, 'Von der reinen zu einer reineren Rechtslehre' in Werner Krawietz & Helmut Schelsky, eds., *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* Rechtstheorie (1984) 5 Beiheft, 252, is also worth mentioning: a plurality of *basic norms* could also be logically imagined, as several logical systems exist with more axioms. Tammelo is undoubtedly right on this point. But if it is not about previously given *basic norm*(s), but constructions assumed by legal scholars themselves, then it is much more elegant to minimize the number of (epistemological) assumptions. Therefore, the objection of Tammelo is not very persuasive.

69. Kelsen, *AStL*, *supra* note 13 at 235.

70. On the logical difference in Hungarian legal order see András Jakab, *A jogszabálytan főbb kérdéseiről* [On the Main Questions of the Theory of Normative Legal Acts] (2003) at 21 et seq.

71. Robert Walter, *Der Aufbau der Rechtsordnung* (1964) at 40 et seq.

72. 'Concrete' means *specialis*, therefore its sphere of validity is a narrower one, see Jakab, *supra* note 70 at 43.

73. On the debates about the question cf. Josef L. Kunz, *Völkerrechtswissenschaft und reine Rechtslehre* (1923) at 69 et seq. On Kelsen's theory of international law in general, see Alfred Rub, *Hans Kelsens Völkerrechtslehre. Versuch einer Würdigung* (1995).

puts it: 'The unity of the epistemological position calls authoritatively for a monistic approach.'[74] If one works with a unitary legal method, the object of knowledge also has to be unitary, since it is the method, according to neo-Kantian epistemology, that produces its object.[75]

It means that one has to accept monism—either with the primacy of international law, or with the primacy of national law.[76] The choice between the two is not a question of law but one of *Weltanschauung* and politics. The primacy of international law may be advocated by pacifists, the primacy of national law by imperialists.[77] Kelsen, being a pacifist, makes a stand for international law.

The question is, then, what this all has to do with the *Stufenbaulehre*. If there is only one legal order, there is only one *basic norm*. The *basic norm* of international law explains not only the validity of international law, but also the validity of national legal orders.[78] National legal order (or the state itself) is therefore only a partial legal order.

This argument and—in more general terms—monism are assailable at various points,[79] but the critique of monism is not discussed here, since monism and *Stufenbaulehre* are—despite their connection by Kelsen—not necessarily connected to one another. Even Kelsen contradicts himself in this case, as he somewhere speaks of monism and the *basic norm* of international law, while somewhere else of the *basic norm* of a national legal order.[80] The contradiction between these two constructs is obvious, but it is not of importance here.

A suitable solution may be that monism is not a necessary consequence of the *Stufenbaulehre*: one could work without any problem with the *basic norm*s of single national legal orders and still give an answer to the starting questions (1. where does the validity of law come from?; 2. what is the unity of legal order based on?). Thus, a dualist view may well be compatible with the *Stufenbaulehre*.[81]

Monism does not have to be discussed here, since if it is untenable, it can be separated from the *Stufenbaulehre* (hence the *Stufenbaulehre* may not be rejected in this way). On the other hand, if it is tenable, it simply cannot endanger the *Stufenbaulehre*.

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74. Kelsen, *supra* note 1 at 123. Cf. also Jochen v. Bernstorff, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001) at 70 et seq.

75. See also Jürgen Mittelstraß, *Enzyklopädie Philosophie und Wissenschaftstheorie*, Bd. 2. (1984) at 989: the typically neo-Kantian claim of the 'unity of the object of knowledge'.

76. Kelsen, *AStL*, *supra* note 14 at 121: '...the necessary unity of the normative system. Two orders, as legal orders, cannot be declared as valid, unless their validity is somehow derived from a unitary reason of validity.'

77. See e.g., Hans Kelsen, *Principles of International Law* (1952) at 446 et seq. Cf. v. Bernstorff, *supra* note 74 at 93. For a detailed presentation of this argument, see Alfred Verdross, 'Völkerrecht und einheitliches Rechtssystem. Kritische Studie zu den Völkerrechtstheorien von Max Wenzel, Hans Kelsen und Fritz Sander' (1923) Zeitschrift für Völkerrecht at 415 et seq.

78. On the changes of formulation of the *basic norm* of international law in Kelsen's *oeuvre*, see François Rigaux, 'Hans Kelsen on international law' (1998) 9 Eur. J. Int'l Law 325.

79. As shown by Albert Bleckmann, 'Monismus mit Primat des Völkerrechts. Zur Kelsenschen Konstruktion des Verhältnisses von Völkerrecht und Landesrecht' in Werner Krawietz & Helmut Schelsky, eds., *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* Rechtstheorie (1984) 5 Beiheft at 340 et seq.

80. Bleckmann, *ibid.* at 339 with further references.

81. A plurality of *basic norm*s is used by Theodor Schilling, 'Zum Verhältnis von Gemeinschafts- und nationalem Recht' (1998) Zeitschrift für Rechtsvergleichung at 149 et seq.

1.2.4 The Validity of a Norm Conditioned by One Single Other Norm

According to the *Stufenbaulehre*, the validity of a norm ('conditioned norm', *bedingte Norm*) stems always from one single other norm ('conditioning norm', *bedingende Norm*). The problem with this idea is—according to Öhlinger—twofold: 1. it is never *one single other* norm that is the condition of the validity of another norm, and 2. sometimes it is not *another* but the same norm that is the condition of its creation (procedural condition). Therefore, validity does not have to stem from *one single other* norm.[82]

For example, the procedural conditions of a statute are always the constitution, the Standing orders of the Parliament, and maybe the Act on Legislation (e.g., in Hungary)[83] or the Act on Promulgation (e.g., in Austria).[84] Thus, the case is anything but that *one single* other norm is the condition of setting a norm. Sometimes it is not even *another* norm. In making an amendment to parliamentary Standing orders, the parliamentary Standing orders themselves have to be followed and are therefore the conditions of their own creation. If one would like to draw the hierarchy according to the condition of creation, it would be a failure, since the result can only be an infinitely complex network—the descriptive potential of a metaphor of *Stufenbau* would be strongly limited.[85]

One can only say that the condition of setting a new norm is a part of the legal order (i.e., some of the norms). But this would also mean that there is no hierarchy anymore, always only two respective levels.[86]

The standard answer to such objections given by exponents of the Pure Theory of Law is that in the case of the *Stufenbaulehre* it is about an ideal type, and hence it cannot be denied by giving counterexamples.[87] This, however, contradicts to the objective of the Pure Theory of Law that claims to be 'a general theory of dogmatics of positive law'.[88] If this theory does not fit with positive legal orders, the objective is obviously not achieved. Moreover, these are not simple counterexamples (exceptions) here,

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82. Öhlinger, *supra* note 25 at 17.

83. Act Nr. XI of 1987 on Legislation.

84. Federal Act on the Federal Official Journal of 1996 (BGBl 1996/660).

85. Öhlinger, *supra* note 25 at 17.

86. It is also acknowledged by Walter, *supra* note 71 at 63. A radical claim of Öhlinger, *supra* note 25 at 17 et seq. is based on this. According to Öhlinger, the hierarchy of legal order according to the legal conditioning (i.e., the original form of the *Stufenbaulehre*) is useless for legal theory. After this, Robert Walter, 'Die Lehre vom Stufenbau der Rechtsordnung' (1980) Archivum Iuridicum Cracoviense at 9 refined his view: 'What I have told is that there are regularly only two different levels of conditions in law-making; it does not preclude the possibility of further levels. Would there be any of them, then Öhlinger too should consequently acknowledge a "hierarchy" according to the conditions of law-making.' To the argument of Walter, the following answer could be given, according to Öhlinger's logic: Even if one assumes that validity of a norm stems from one single norm in some cases, no hierarchy emerges there, since the next level is probably (in Walter's words: 'regularly') again an infinitely complicated network. This means that we have only one moment of sanity (a level of sanity) before going back to the jungle again.

87. Bettina Stoitzner, 'Die Lehre vom Stufenbau der Rechtsordnung' in Stanley L. Paulson & Robert Walter, eds., *Untersuchungen zur Reinen Rechtslehre. Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985/86* (1986) at 58; Heinz Mayer, 'Die Theorie des rechtlichen Stufenbaues' in Robert Walter, ed., *Schwerpunkte der Reinen Rechtslehre* (1992) at 40 et seq.

88. Robert Walter, *Hans Kelsens Rechtslehre* (1999) at 8.

but general functional mechanisms of legal order(s) departing 'regularly' from the model of the *Stufenbaulehre*.

Thus, the problem seems to be even more complicated than Öhlinger or Walter saw it. It may be illustrated with a simple example of the amended regulation of procedure of the Parliament. The problem is the following: if a regulation of the Parliament was (in accordance with its own dispositions) already modified, its validity is based partially on itself and the cat catches its own tail. There are two possible argumentative counter-tactics, as follow.

A possible solution could be to regard the amended regulation as a completely new one, whose validity can be derived from the former regulation (so one makes use of the fiction that a completely new regulation was set). The problem with this solution is not only that, (a) it is not true (being a fiction), but also, that (b) it is not compatible with lawyerly *common sense*. Do we have to regard an amended regulation as a new one just in order to save the *Stufenbaulehre*? Only this absurd answer seems to be possible—therefore this possibility is to be rejected.

Another solution could claim that only the validity of the amended dispositions (i.e., not the validity of the whole regulation) has to be derived from the regulation, thus not from the regulation 'in general', but from its previous state. In this way circularity could be avoided but a high price has to be paid for it: one cannot speak of validity of legal acts as a whole but only of validity of single dispositions (i.e., provisions). But if questions can be made only of single dispositions, it is not the whole legal act that *carries validity*, but only the single dispositions, and thus also the answer is to be found in single dispositions: therefore the validity of a disposition does not stem from another legal act but from the dispositions regulating its production (that are to be found in legal acts). And there are a great number of these.

Also the (historically first) constitution comprises many dispositions, i.e., the question would be not: 'Where does the validity of a concrete last positive valid normative unit come from?' (the answer for it was the *basic norm*). But there would be a number of last positive valid normative units (in this case dispositions). The *basic norm* would not, then, speak of the 'constitution' (or of obeying it), but about the 'dispositions of the constitution'.

Thus, the question is whether one can eliminate the objection of Öhlinger with this disposition-based and temporally differentiated[89] *Stufenbaulehre*. The answer is yes. The validity of a disposition could be in this way derived from a number of other dispositions (this obvious 'complicatedness'[90] is the 'price' for such an amendment to the *Stufenbaulehre*), but it is, at least, never circular. The various lines of derivation ('chains of validity', with an expression of Raz)[91] do not unite in a single disposition: there are more original starting points in positive law. The ensemble of these original starting points is called the historically first

89. 'Temporally differentiated' refers to the distinction between the states of the norm in different moments.

90. Therefore, there are not only a few lines of derivation (as one could imagine after Öhlinger), but hundreds (!).

91. Raz, *supra* note 37 at 97.

constitution.[92] The validity (or supposed/hypothetical validity) of these starting points is derived from the *basic norm*.

The originally elegant and simple *Stufenbaulehre* became thus an overcomplicated monster, but it is still alive. It does still give an answer to the questions 1. about the unity of the legal order, and 2. about the origin of validity. It is the next point where the *coup de grâce* is given to it.

1.2.5 Derivation of Validity (Existence) of a Norm in Extreme Examples

According to the next point of criticism, the basic idea that claims the validity of a norm to stem from the norm that regulates its creation is wrong in itself.

1. In order to understand this objection, one has to call forth the idea of the *basic norm* that was already discussed. According to this idea, the *basic norm* is only an assumption.[93] But since the validity (= existence in Kelsen's theory) of the whole legal order stems from the *basic norm*, the whole legal order is also only an assumption. This assumed legal order is used as an interpretive scheme (*Deutungsschema*) to interpret different 'is'-events as violating or accomplishing the law.

This assumption has to be made by the individual himself, it cannot be enforced. An anarchist will not share this assumption and will never use legal order as an interpretive scheme: experienced coercive acts will remain for him mere abuse of power and will never be interpreted as violating or accomplishing the law.[94]

There is a consequence of the assumptional character of the *basic norm* (and thereby of the whole legal order) that could be best described as *solipsism of legal theory*: every legal scholar has legal order in his mind and uses it as an interpretive scheme.[95]

2. But from the very *constructivist* nature of law described above (i.e., that the legal scholar assumes or constructs it in his mind) also follows that one cannot speak of automatic (logical) derivations. The validity of every single norm is constructed in the mind of the legal scholar. In an individual case, it always depends on him whether he carries out this construction: he follows the principle of economy of thought (*Denkökonomie*) here.

3. To avoid dangerous pathways of constructivist and solipsistic structures of thought, Kelsen makes use of the principle of *Denkökonomie*.[96] According to that

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92. Cf. Walter, *supra* note 71 at 62, who sees rightly that the hierarchy of the legal order according to the conditions of law-making is independent from the traditional levels of the hierarchy of norms (e.g., constitution, statute), as the latter is the hierarchy of the legal order according to the derogatory power. See section 1.3 for a more detailed account.

93. See section 1.2.1.

94. Therefore, one can always consider international affairs as an anarchy that is only subject to the principle of power, see Hans Kelsen, *Law and Peace in International Relations* (Cambridge: MA: Harvard University Press, 1942) at 48, 54.

95. One may well ask whether these interpretive schemes (i.e., legal orders) are the same at all (at least in their content). There are good reasons for claiming that this is not exactly the case, since interpretation of law, according to Kelsen, always includes a subjective element, see Kelsen, *PTL2*, *supra* note 13 at 348 et seq. It means, then, that every legal scholar has a partially different interpretive scheme in his mind. These general problems of the Pure Theory of Law cannot, however, be discussed here at length.

96. Kelsen has adopted this from Pitamic, *supra* note 62 at 339 et seq., as he confirms it in his work: Kelsen, *supra* note 7 at XV.

one must avoid redundant arguments and follow only those compatible with the objective of knowledge. The first consequence of this is that one has to assume such a *basic norm* that is useful for legal scientific work.[97] Second, the *one-level basic norm* follows from the principle of *Denkökonomie*, since, in order to avoid *regressus ad infinitum*, a *basic norm* is assumed that immediately gives validity to the historically first (positive) constitution (without any intermediate levels through merely hypothetical quasi-basic norms).[98] Third, in the second edition of his *Pure Theory of Law*,[99] Kelsen takes for valid only those norms that are effective.[100] Kelsen's opting for this latter (and often ignored) amendment to his theory of law was perhaps motivated by the argument that assuming the validity of an ineffective norm will not lead to new legal knowledge, hence it is not worthwhile to assume its validity (existence).

Without such a 'braking principle' like *Denkökonomie*, every constructivist theory is haunted by scholastic metaphysics, where it is unclear what knowledge can be gained from an argument. Therefore it is wholly justifiable that Kelsen makes use of it.

4. But if one follows the principle of *Denkökonomie* consequently, the basic idea of the *Stufenbaulehre* also falls, according to which validity can be derived. I am going to mention here two examples where the idea of derivation obviously does not work.

4/1. Let us assume that an administrative organ issues a norm 'A' according to the rules, but *nobody* regards it as existent (valid). Subsequently, the government or the legislature issues a number of other norms ('B', 'C') that are considered as valid by *everyone*.[101] In this case, the statement that 'the norm A is a valid norm' is not necessarily false, but contradicts in any case the demand of *Denkökonomie*, and is therefore untenable. Of course, this example is not very probable, particularly in a state governed by law. But improbability does not mean impossibility. It makes clear that validity is not 'derived' but 'emerges' (or 'does not emerge'), even because a norm is regarded as valid by those concerned with law.[102] The influence of norms (in our case the *norm regulating the creation of norms* [*Erzeugungsnorm*]) in this regard (belief) is, normally, a total one; but one can also think of 'abnormal cases' that make clear that this influence is not a conceptual necessity.

4/2. On the other hand, a norm may well be set without any *norm of creation*. In such a case, validity is not derived: its original emergence shows itself. A typical example for this is customary law. A flexible Kelsenian could answer: there is a

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97. Cf. *supra* note 61.

98. Cf. Kelsen, *GTLS*, *supra* note 35 at 111, adopted from Achterberg, *supra* note 22 at 453; Behrend, *supra* note 6 at 77.

99. Kelsen, *PTL2*, *supra* note 13 at 211 et seq.

100. As opposed to the first edition, Kelsen, *Introduction*, *supra* note 8 at 60 et seq., where only the validity of the legal order as a whole was dependent on the efficacy of the legal order as a whole, but not validity of every single norm from the efficacy of that single norm. But see on this problem Robert Walter, 'Bemerkungen zu Kelsen, Geltung und Wirksamkeit des Rechts' in Walter, Jabloner, & Zeleny, eds., *Hans Kelsens stete Aktualität. Zum 30. Todestag Kelsens* (2003) at 35.

101. Thus, it is not about the *desuetude* of the norm empowering the setting of norms.

102. Any other theoretical construction of explanation would contradict the *Denkökonomie*.

norm of creation also in the case of customary law, but it is a tacit (implicit) one.[103] This tacit norm of creation has, however, a nature similar to that of the *basic norm*—in the sense that one has to suppose it for the sake of legal scientific explanation.[104] The only difference is that the *basic norm* is a mere presupposition, but the tacit norm of creation is just an implicit appendix of a positive norm (or the constitution): i.e., it is connected to a concrete (explicit) legislative act. Thus, the construction of Kelsen is to be saved with the help of this tacit *norm of creation*. The *Stufenbaulehre* would be confronted with an insolvable problem only if a legal order that does not recognize customary law changes gradually (peacefully, without a revolution) to a legal order that recognizes it. This new customary law can obviously not be 'derived': it simply emerged.[105] It is not even possible to postulate a tacit *norm of creation*, since at first there was obviously no authorisation to set this customary law, and whoever (e.g., the legislator) could have given this authorisation to the courts (i.e., he could have set the norm of creation of customary law [*Gewohnheitsrechtserzeugungsregel*]), has not done it, not even implicitly, since he did not recognize customary law. In the legal orders where customary law is recognized, one can argue that the legislator implicitly attaches a *norm of creation of customary law* to every statute. But where customary law is not recognized, one cannot argue this, and if later (in applying previous laws) customary law still becomes recognized, the Pure Theory of Law faces this phenomenon helplessly—as it cannot explain the origin of the new customary law.[106] For the Pure Theory of Law, it would be a completely new legal order, but this is seen, from the point of view of *Denkökonomie*, as an implausible reduplication (or construction).

If one, however, makes use of the principle of *Denkökonomie*, one could say that the validity of the new *norm of creation of customary law* need not be derived, it simply has to be assumed, since legal scientific work is made easier in this way.

5. As shown, the idea of derivation fails in some cases. One should therefore rather accept that validity is not derived but assumed, according to the principle of *Denkökonomie*—and it is supposed for every single norm. In this way, not only usual acts of legislation but also the abovementioned extreme cases could be explained.

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103. Disagreeing (as a strict Kelsenian, rejecting such implicit rules) see Robert Walter, 'Die Gewohnheit als rechtserzeugender Tatbestand' (1963) Österreichische Juristen-Zeitung at 225 et seq.

104. It is underlined by Jorge A. Bacqué, 'Stufenbau der Rechtsordnung oder Einebnung der Normenpyramide' in Eugenio Bulygin & Ernesto Garzón Valdés, eds., *Argentinische Rechtstheorie und Rechtsphilosophie heute* (1987) at 115.

105. This sophisticated anti-Kelsenian example can be found in Raz, *supra* note 37 at 99. (On another anti-Kelsenian example by Raz—challenging its plausibility—see *supra* note 68.)

106. One can also not protect the Pure Theory of Law with the argument that the rule regulating the creation of norms in the new customary law came to existence slowly by evolution, since this slow evolution would mean that the rule regulating the creation of customary law was posed by way of customary law. This is, however, impossible, since customary law was not acknowledged (i.e., did not exist) before its rule of creation came into existence in the country of our example.

It would also be implausible to consider the legal order, which acknowledges the customary law, as a new legal order, because the great majority of norms (i.e., all but the rules of customary law) are to be derived from the historically first constitution of the 'old' legal order. To assume the existence of a new legal order, would be then, to a certain extent, a duplication of legal reality, and hence be contradictory to the principle of *Denkökonomie*.

One could say, however, that the examples mentioned here are so extreme (or even absurd), that failure of the *Stufenbaulehre* in these cases is not a serious problem, since in cases of normal (usual) legislation the idea of derivation still works. In the following section, it will be shown that the idea of derivation does not work even in the case of the simplest legislation.

1.2.6 Derivation of Validity (Existence) of a Norm in the Case of Simple Legislation

The idea of derivation does not work even in the case of the simplest legislation, since it implies a logical error, that concludes on an 'is' from an 'ought'. Let us now turn to this point.

Kelsen holds—rightly—that one cannot conclude from an 'is' to an 'ought'.[107] The problem, however, is that it means, according to Kelsen, that an 'ought' may be derived only from another 'ought'.[108] Kelsen thus takes into account only two possibilities: the 'ought' is derived (1) either from an 'is', (2) or from another 'ought'. *Tertium non datur*. And since he—rightly—excludes the first one, only the second one remains. But there is still a third possibility, that is *law-making*. In the case of law-making, there is no derivation—not even in terms of validity. By law-making, a new norm is created. Its validity does not stem from the validity of another norm, but is autonomous and original: it is always just an assumption in the mind of the legal scholar. From the point of view of norm logic, it is created from nothing. In the following section, this problem is analysed more thoroughly.

Kelsen also admitted that the content of the created norm could not be derived from the content of the norm regulating its creation.[109] But at least—as Kelsen probably thought it—its validity should be derived from this other norm, otherwise one should derive it from an 'is'. The derivation from the 'is' is, however, (really) impossible. Therefore, the derivation of validity from another norm is, for Kelsen, necessary. Kelsen was puzzled by this problem from the beginning,[110] and Merkl's *Stufenbaulehre* offered a—seemingly—good solution: it fit right in his theory, it was, so to speak, the missing puzzle piece that explained legislation in such a way that the strong disparity of 'is' and 'ought' could be still maintained.

But why is this conception of the validity of a norm so plausible at first sight? Since setting of norms is regulated by norms, creation of a valid norm is regulated by another valid norm. One can thus easily have the delusion that validity of a

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107. It is persuasively proven by Ulrich Klug, 'Die Reine Rechtslehre von Hans Kelsen und die formallogische Rechtfertigung der Kritik an dem Pseudoschluss vom Sein auf Sollen' in Salo Engel, ed., *Law, State, and International Legal Order. Essays in Honor of Hans Kelsen* (Knoxville: University Press, 1964) at 153 et seq., esp. 156. He shows, without any doubt, that if one would like to have an 'ought' in the conclusion (of a syllogism), one also has to have an 'ought' in one of the premises.

108. Kelsen, *GTN*, *supra* note 36 at 255: 'Only a norm can be the reason for the validity of another norm.'

109. This is an important difference between the legal order and the norms of a moral system, see Kelsen, *Introduction*, *supra* note 8 at 55 et seq.

110. Kelsen, *supra* note 7 at 411: 'This is the great mystery of law and state, that takes place in the act of legislation....'

produced (valid) norm stems from the norm regulating its creation (*rule of creation* [*Erzeugungsregel*]). But what then, does the real situation look like?

The rule of creation only prescribes under which conditions a new valid norm is created.[111] The mere fact, that the *rule of creation* prescribes how under certain conditions (law-making actions) a new valid norm is created, does not mean that under these conditions this norm is really created. It is only a rule that has to be abided by—but this abidance is not conceptually necessary. The basic logical error committed by Kelsen is the following: from that 'A' ought to be (the new norm ought to exist), he concludes that 'A' is the case (the new norm exists). But it is nothing other than the logical error condemned by Kelsen himself, the *naturalist fallacy*, only in the inverse direction. The error may have its origins probably in the fact that the *rule of creation* does not prescribe any physical conduct (where any conduct departing from the norm, being visible, can easily show the fallacy of concluding from an 'ought' to an 'is'), but the existence of a norm. And it easily leads to the false simplification that this norm exists really. The structure of Kelsen's error may be formulated more transparently as follows:

(a) [rule of *c*reation] 'If (performance of law-making actions), then (the law $ought_c$ to exist).'[112]

(b) [content of the concrete *l*aw] 'A $ought_l$ to be.'

Law-making according to *K*elsen:

(k1) 'If (performance of law-making actions), then (the law $ought_c$ to exist).'

(k2) Performance of law-making actions.

(k3) The law exists.

Law-making *r*ightly:

(r1) 'If (performance of law-making actions), then (the law $ought_c$ to exist).'

(r2) Performance of law-making actions.

(r3) The law $ought_c$ to exist.

It has to be made clear first that the 'ought' of the rule of creation ($ought_c$) and the 'ought' as content of the law thus created ($ought_l$) are not the same. If one does not confuse these two 'ought'-s, then the content of the law (b) is henceforth irrelevant. The rule of creation is a norm like other norms: it is thus not a descriptive rule like, If (performance of law-making actions), then (the law exists), but as a rule (norm) it also contains an 'ought'-element (as expressed by '$ought_c$').

As lawyer and as law-abiding man, one abides by this prescription *r3* ('Law $ought_c$ to exist'), i.e., one 'pretends/believes that' the respective norm really came into existence. And if all who are concerned with law believe it, one can suppose,

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111. Thus, it is not only a simple descriptive definition that defines the notion of 'valid norm'. In fact, it is a real 'ought' that prescribes which norm ought to be valid. In law, one often uses descriptive language, even if it is obviously a prescription. E.g., Art. 46, para. 3 of the B-VG: 'The Federal President announces the national referendum.' It is only a simplification in style.

112. It is very important to see that the rule of creation itself is a norm too. It is not merely a description like 'If (performance of law-making actions), then (the law exists)' or like 'If parliament enacts the law (B $ought_l$ to be done), then (B $ought_l$ to be done)'. The latter seems to be a prescription because it contains an 'ought' (precisely: '$ought_l$'), but its actual form would be 'If parliament enacts the law (B $ought_l$ to be done), then the law (B $ought_l$ to be done) *is* valid' which would be merely a description and not a norm.

for reasons of *Denkökonomie*, that this norm came to existence. Therefore this *r3* rule is almost totally accomplished. This, however, does not mean any conceptual necessity (thus no derivation or deduction), only a very high degree of probability (even if this contradicts at first sight our juristic intuition). From the perspective of the *Stufenbaulehre*, this is a hard problem, since it is based on the idea of derivation of validity. The two examples (4/1. and 4/2.) above were intended to show that it is only about accomplishment of norms[113] (and therefore only about a high probability), since in these examples, the idea of derivation of validity failed, hence the improbable but possible distance between creation of norms and the regulation of this creation could be observed here. In the first example, the new law does not come into existence, although the rule of creation was followed. In the second example, in turn, a new norm came into existence without any rule of creation. The error of Kelsen was that he replaced *r3* ('The law ought$_c$ to exist.') with *k3* ('The law exists.'), and concluded thereby implicitly from an 'ought' (*r3*) to an 'is' (*k3*).[114]

The final conclusion of the above argument is that in the case of law-making, the validity of a norm cannot be derived from the validity of another norm.[115]

What are the consequences for the *Stufenbaulehre*? Essentially, it means complete collapse, since the idea, according to which the validity of a legal norm stems from the validity of another legal norm, is a failure. Thereby the hierarchy of legal order according to the conditions of law-making and also the idea of the *basic norm* become untenable (redundant). One does not even reach the point where the question, to which the *basic norm* would be the answer, would arise.

Before turning to the effects of such a collapse of the *Stufenbaulehre* on the Pure Theory of Law, three problems should be examined more thoroughly: 1. another

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113. To be sure: in a Kelsenian way, this 'abnormal exception' may not be explained by saying that the legal order is only 'by and large' effective anyway, and that this is also true for the derivation of validity. Efficacy 'by and large' only refers to the accomplishment of the 'is' and not to the accomplishment in the 'ought'. But as it was just shown, even the accomplishment in the Sollen (i.e., 'ought') is not an automatic (logical) necessity, only a high level of probability. This means that validity, in fact, *cannot be derived*. Such a moment of probability that refers to the world of 'ought' is very far from the ideas of the *Stufenbaulehre*: derivation (deduction) of validity excludes this kind of validity based on probability. But validity is actually based on probability. And: this accomplishment of norms does not refer to the physical 'is', but to the existence of norms in the 'ought' (thus, this is not the usual sociological objection).

114. This was an exclusively logical error and not an ontological one, since the law as well as the disposition 'Law ought$_c$ to exist' are in the sphere of 'ought'.

115. One could clearly refute the previous arguments by showing, by means of symbolic logic, how validity can be derived in legislation in a way that content is not derived at the same time. There was, until now, no such attempt, which is, in itself, not a proof but rather a call for discussion.

It is worth mentioning that, at the end of his life, Kelsen also rejected the derivation of validity of norms from norms (for other reasons than those considered in our argument). Cf. his posthumously published theory of norms, according to which the validity of the individual norm cannot be derived from the validity of the general norm, as an act of will is also needed; see Kelsen, *GTN*, *supra* note 36 at 237 et seq. More generally: validity of a norm cannot be derived from another norm; see Kelsen, *ibid.* at 423 et seq., n. 179; Priester, *supra* note 40 at 238. Kelsen, however, did not revise the *Stufenbaulehre* (what would follow from this); see esp. Kelsen, *GTN*, *supra* note 36 at 258 for his usual old content text.

On how logic became less and less important in the *oeuvre* of Kelsen, see Hendrik J. van Eikema Hommes, 'The development of Hans Kelsen's concept of legal norms' in Werner Krawietz & Helmut Schelsky, eds., *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* Rechtstheorie (1984) 5 Beiheft at 159 et seq.

hierarchy of the legal order, 2. another attempt of the Pure Theory of Law to structure the legal order, and 3. the alleged ideological background of the *Stufenbaulehre*.

1.3 An(?)other Hierarchy of Legal Order

Merkl in his *Prolegomena* also mentions another hierarchy of legal order: the hierarchy according to the derogatory power (*derogatorische Kraft*). In the *hierarchy of legal order according to the derogatory power*, any norm 'A' is superior to norm 'B', if norm 'A' can derogate norm 'B', but the inverse is not possible. This method can be seen as a test of the *Stufenbau* according to the derogatory power, i.e., in the case of two given norms one can decide in this way which one is superior to the other. This hierarchy is not identical with the hierarchy mentioned above as *Stufenbaulehre*, the *hierarchy of legal order according to the conditions of law-making (rechtliche Bedingtheit)*, since the criterion of the hierarchy was, which norm regulates the creation of another norm.[116] The Standing orders of the Parliament, for example, are (in the case of amendments to the constitution) superior to the act of amendments to the constitution in the *hierarchy of legal order according to the conditions of law-making*, since the latter has to be enacted according to the dispositions of the Standing orders. In the hierarchy of legal order according to the derogatory power, however, an act of amendments to the constitution is superior to the Standing orders of the Parliament, since the former can abolish (put out of force) the latter (and the inverse is not possible).

According to Merkl, norms are basically not derogable. The possibility of derogation is created only by positive law.[117] If positive law would not allow that, every small modification to a norm would lead to a completely new legal order. Thus, the necessity of the derogation stems from the fact that identity of the legal order can only be assured in this way.[118] The existence of derogation is, however, not a necessity of norm *logic*, only a question of expedience. Therefore, the hierarchy of the legal order according to the derogatory power is only a question of positive law, and not one of legal logic or of legal-logical necessity.[119] This may be the reason why Kelsen does not discuss this question more thoroughly and does not adopt this part of Merkl's argument.[120] This problem is re-introduced into the Pure Theory of Law only by Robert Walter (1964),[121] and has since then been a topic frequently discussed in the writings of the Vienna School of legal theory.

The most puzzling question of the hierarchy of the legal order according to the derogatory power is, of course, the notion of derogation itself. According to the

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116 Merkl, 'Prolegomena', *supra* note 10 at 1350; Friedrich Koja, *Allgemeine Staatslehre* (1993) at 20.

117. Adolf Merkl, *Die Unveränderlichkeit von Gesetzen—ein normlogisches Prinzip* [1917] in *WRS* note 10 at 1088.

118. Merkl, *supra* note 4 at 259.

119. Öhlinger, *supra* note 25 at18.

120. Behrend, *supra* note 6 at 42.

121. Walter, *supra* note 71 at 55 et seq. See Robert Walter, 'Die Reine Rechtslehre—eine Theorie in steter Entwicklung. Einige Klarstellungen' (1994) Juristische Blätter at 494. Cf. in terms of EU-law Jürgen Bast, 'Handlungsformen' in Armin von Bogdandy, ed., *Europäisches Verfassungsrecht* (2003) at 505 et seq.

most widely used definition, derogatory power is 'the ability of a legal norm to abolish or at least confine the validity of another legal norm.'[122] Derogatory power basically depends on the law-making process (i.e., on the *rule of creation*). Thus, if another step in the process is needed to set a norm, it is superior to a norm that can be set in a more simple way.[123] If the law-making process is the same for both, they are at the same level.[124]

On the ground of derogatory force, another weak point of the Pure Theory of Law becomes clear: validity is understood as existence but also as binding force. The expression 'to abolish validity' means namely the (peremptory) end of existence, while 'to confine validity' means 'lack of applicability'.[125] Applicability and existence do not have a relation of 'more-or-less', but are simply different concepts.[126] The most important difference is that if derogation means the end of existence, after the derogation of norm 'A' that has derogated norm 'B', norm 'B' does not resurge but has to be set again. If, however, derogation means only the end of applicability, then after the derogation of norm 'A' derogating norm 'B', norm 'B' does resurge and becomes applicable again (since it existed continuously, but was not applicable, its applicability being suspended). Confusion of both conceptions is particularly problematic in terms of the relation of European Community law to the law of Member States (priority in validity vs. priority in application). A striking example for the difference between the two is offered by the relationship of Community law and Member States law. The former does not affect the validity of national norms but has a priority of application (called normally as supremacy of Community law) against them. Supremacy of Community law means that the legal order of a Member State can be applied only if the question is not regulated otherwise by Community law. Community law cannot, however, repeal the law of a Member State. Consequently, this priority of application is not more and not less than derogation (which is based on the concept of scope) but is simply of another nature.

In fact, legal orders can be hierarchized in more aspects.[127] 1. There is a hierarchy according to the power to put out of force (abolish) a norm.[128] In terms of the

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122. Öhlinger, *supra* note 25 at 22; in the same way Walter, *supra* note 71 at 57 et seq., but with different words ('complete annulment' (*vollständige Vernichtung*), 'to annul completely' (*gänzlich vernichten*) and 'to repeal irreversibly' (*unwiederbringlich beseitigen*) on the one hand, and 'limited repeal' (*beschränkte Beseitigung*) on the other hand; Mayer (n. 87), 43 with another different terminology ('peremptory' [*endgültige*] vs. 'temporal [*vorläufige*] derogation').

123. Walter, *supra* note 71 at 59.

124. Walter, *ibid.* at 55. But not necessarily *vice versa*: they may well stand on the same level, in spite of the different legislative processes. E.g., this may be the case with a statutory decree of former socialist countries or statutory instruments according to Henry VIII clauses in England, both of which are able to amend statutes though issued by the executive (thus not in a statute-making process).

125. See 'validity' as the mere existence of a norm: Kelsen, *Introduction*, *supra* note 8 at 12 and 71 et seq. on the validity of unconstitutional statutes. On the other hand, as binding force: Kelsen, *Introduction*, *supra* note 8 at 56 et seq. Normally, Kelsen uses the words '*Geltung*' and '*Gültigkeit*' as synonyms, see Hoerster, *supra* note 34 at 8.

126. For a clear conceptual distinction, see also Ewald Wiederin, *Bundesrecht und Landesrecht* (1995) at 51 et seq.

127. This is indicated by the question mark in the title of this section after 'an', see *1.3 An(?)other Hierarchy.*

128. A particular form of abolishment is the abolishment of existence, which is a kind of abolishment that has a retroactive effect on the beginning of the temporal sphere of validity.

Hungarian legal system, for example, hierarchy of sources of law is understood as this kind of hierarchy: a statute is thus superior to an ordinance, since the former can abolish the latter, while the inverse is impossible.[129] 2. Hierarchy according to priority in application is most characteristic of the US-American legal system, in which an act contrary to the constitution is simply not applied (without being formally abolished) by the courts. This means that in the case of collision, the constitution has priority in application over statutes.[130] 3. And finally, one can speak of hierarchy according to 'annulment because of collision'.[131] A superior norm can be recognized in the case of collision: if another norm is contrary to it, then it is annulled by an authority (mostly by the constitutional court).[132] The hierarchy according to annulment and the hierarchy according to the power to put out of force (abolish) a norm may be connected to each other. (In the current Hungarian legal system, for example, an infringement of the hierarchy according to derogation—i.e., the hierarchy of sources of law—has the legal consequence of annulment by the Constitutional Court).[133] But this is not necessary: in Hungary, before the establishment of the Constitutional Court there was no hierarchy according to annulment, only one according to derogation.

One may, of course, attempt to describe each legal order with each form of hierarchy. The question is, however, by which description the most transparent and complete picture of the respective legal system can be obtained. If there is a contradiction between the two criteria, one has to deliberate.

The now undifferentiated concept of derogation is, however, not able to describe hierarchies adequately.[134] Therefore, some Austrian attempts to explain the relation

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129. Jakab, *supra* note 70 at 71 et seq. According to that, one can go further into details. Abolishment is in some legal orders (e.g., in Hungary, according to Art. 13 of the Act Nr. XI. of 1987 on legislation) only possible explicitly (formally), while in others also implicitly (materially) (e.g., in England, implied repeal doctrine), i.e., in the case of a contradiction, the former norm of the same level is to be considered automatically as abolished.

130. See *Marbury vs. Madison* 1 Cranch 137 (U.S. 1803).

131. Annulment is actually a kind of abolishment, i.e., because of some violation of the law. It may happen for substantive as well as procedural reasons. It is the former that is of importance here, i.e., annulment because of a contradiction with the content of another norm, since—as it was shown above—the hierarchy based on the process (i.e., the *Stufenbaulehre*) offers no clear and tenable structure for the legal order.

132. In my view, this is the best way to give an account of the hierarchy of norms in the Austrian legal order, since the hierarchy according to abolishment cannot handle the fact that the federal constitution (*Bundesverfassung*) cannot entirely abolish the constitution of member states (*Landesverfassung*)—although it is described by the accounts of the hierarchy of Austrian legal order as superior to them, see e.g., Theo Öhlinger, *Verfassungsrecht*, 5. Aufl., 2003, 26. This derogation would be contrary to the fundamental principles of the federal constitution (which are, according to the accounts of the hierarchy, superior to the federal constitution), see Öhlinger, *supra* note 25 at 25 with further references. Another special feature of the Austrian hierarchy of norms is that single dispositions may also have a hierarchic relation to each other (e.g., in certain statutes there are dispositions that are explicitly defined as having a constitutional status—see Art. 1 of the *Datenschutzgesetz*). In Hungary, on the contrary, only legal acts (e.g., statutes, ordinances) can have a hierarchic relation (and the criterion for the hierarchy is the derogatory power, but not the annulment by the constitutional court).

133. Jakab, *supra* note 70 at 74, n. 159.

134. There are two possible solutions: (1) Either one always expresses unequivocally, whichever kind of derogation is spoken of (e.g., *derogation as abolishment* or *derogation as priority in application*), (2) or one uses the notion of 'derogation' only for *abolishment*.

of European Community law and Member State law with the help of this undifferentiated concept of derogation, by including European Community law into the hierarchy of Austrian law, are doomed to fail as well,[135] since in this way different relations of subordination are confused.[136]

It is not meant to say that the search for hierarchy is useless for describing legal orders. But one should work with a more differentiated concept of hierarchy than was the case until now.

First, it has to be mentioned that these hierarchies do not amend the *Stufenbaulehre* but only make use of another (new) concept of hierarchy.[137] The *Stufenbaulehre* (i.e., hierarchy of the legal order according to the conditions of law-making) answered two questions: 1. where does the validity of law come from?, and 2. what is the unity of legal order based on? The hierarchies sketched above fail to answer these questions, and therefore cannot be accepted as substitutes for the collapsed *Stufenbaulehre*.[138]

2. Another Attempt of the Pure Theory of Law to Structure Legal Order

Here, we have to make an excursus to present briefly an attempt to structure the legal order, made by Robert Walter, the most eminent contemporary exponent of the Pure Theory of Law.[139] His structuring suggestion has some points in common with that of Hart ('primary rules'—'secondary rules'). The success of Walter's theory may show that the Pure Theory of Law is to be considered as living legal theory (not only an interesting moment in the history of ideas), even without the *Stufenbaulehre*.

The argument of Walter begins with some criticism of Kelsen:[140] it shows that

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135. One of the advocates of this approach is Theo Öhlinger, a sharp critic of the *Stufenbaulehre* (*the hierarchy of legal order according to conditions of law-making*) (see above, 1.2.4 The Validity of a Norm Conditioned by One Single Other Norm), Theo Öhlinger, *Verfassungsrecht,* 5. Aufl., 2003, 90; Theo Öhlinger, 'Unity of the Legal System or Legal Pluralism: The Stufenbau Doctrine in Present-Day Europe' in Antero Jyränki, ed., *National Constitutions in the Era of Integration* (1999) at 163 et seq. For further discussion of this approach, see Alfred Schramm, 'Zweistufige Rechtsakte—oder: Über Richtlinien und Grundsatzgesetze' (2001) Zeitschrift für öffentliches Recht (2001) at 69, n. 11. These objections are surprising particularly because also (a part of) Austrian literature sees clearly that the word 'derogation' nowadays refers to more concepts; see Stoitzner, *supra* note 87 at 64, 67 et seq.; Öhlinger, *supra* note 25 at 22. I would like to add that the problem here is not that the use of notions is discussed on another level. In that case, Austrian literature should speak of two different 'hierarchies of the legal order according to derogatory power'. One speaks, however, of a single hierarchy of legal order according to the derogatory power, although two completely different phenomena are meant by 'derogation'.

136. See my more detailed criticism: András Jakab, 'Az osztrák EU-csatlakozás alkotmányjogi szempontból' [The Austrian EU-accession from the Perspective of Constitutional Law] (2002/1) Jogelméleti Szemle (http://jesz.ajk.elte.hu/) II./1.3.2.

137. But see a different view: Mayer, *supra* note 87 at 41 et seq.

138. This hierarchy (these hierarchies) is (are) 'weaker' also in the sense that individual norms (*Einzelakte*) are not included; see Stoitzner, *supra* note 87 at 71. A particular survey is needed in the case of every legal order to elaborate on this question.

139. For a view on these points which Walter developed in the light of Kelsen (and differed from his master), see Wolfgang Schild, *Die Reinen Rechtslehren. Gedanken zu Hans Kelsen und Robert Walter* (1975) at 33 et seq.

140. Contemporary Pure Theory of Law often claims that it not only reconstructs and applies the doctrines of Kelsen, but also criticizes and develops them. See Robert Walter, 'Die Reine Rechts-

Kelsen, in his *Pure Theory of Law*, makes use of two different concepts of norm, a dynamic—as Walter puts it—and a static one, not keeping them strictly separate.[141] The dynamic one periphrases a norm so great that is it unmanageable, meaning the whole condition of the application of sanctions (beginning with the constitution, through the statutes and ordinances relevant for the case, to the concrete judicial decision); the static one describes a norm that makes the individual levels in the hierarchy.[142] If one speaks of norm in the dynamic sense, then norms cannot form a hierarchy, and one can speak of a hierarchy at most inside of a norm. The norm is dynamic, because it comprises the whole line of *creation* that leads to the use of coercion.

The advantage of the static norm is that one can work with it easily;[143] it is, however, less suitable for explaining the dynamics of the legal order. Walter calls this static norm *legal disposition* (*Rechtsvorschrift*).[144] The hierarchy of the legal order according to the derogatory power is built on these *legal dispositions*.[145] One has to consider '*legal disposition*' in legal theory because collisions emerge between concrete *legal dispositions*.[146]

The advantage of the dynamic norm is that every legal phenomenon can be described as part of the dynamic norm.[147] Its disadvantage is that it is too broad[148] and therefore difficult to work with;[149] this is why Walter modifies it. Then it is basically a renewal of the hierarchy according to the conditions of law-making. In Walter's view, the positive legal order consists of three kinds of norms: 1. rules of creation of coercive norms (*Zwangsnormerzeugungsregeln*), 2. coercive norms (*Zwangsnormen*) and 3. rules of execution of coercive norms (*Zwangsnormvollzugsregeln*).[150] Walter basically adheres to the original idea that validity of coercive norms stems from the validity of rules of creation of coercive norms.[151] The respective objections were already developed above.[152]

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lehre—eine Theorie in steter Entwicklung. Einige Klarstellungen' (1994) Juristische Blätter at 493 et seq.

141. Walter, *supra* note 71 at 16 et seq.

142. Raz, *supra* note 18 at 109 actually points out the same thing. According to him, the following Kelsenian theses contradict each other: 1. every norm is supported by a sanction, 2. some norms are only empowered for the setting of norms, but are not directly supported by sanctions. The reason for this contradiction is that Kelsen makes use of two different concepts of norm, but not explicitly. Raz shows the difference as one between static and dynamic points of view, see Raz, *ibid.* at 110 et seq.

143. Walter, *supra* note 71 at 19.

144. Walter, *ibid.* at 46 et seq.

145. Walter is interpreted in this way by Stoitzner, *supra* note 87 at 56.

146. Walter, *supra* note 71 at 51.

147. Walter, *ibid.* at 18.

148. In the same way Raz, *supra* note 18 at 115: the dynamic norm is counter-intuitive (it does not correspond to a lawyerly '*common sense*') and over-complicated.

149. Walter, *supra* note 71 at 18.

150. Consequently, the *basic norm* is not part of the positive legal order, and therefore he does not deal with it here. Hence the fact that Walter does not explicitly discuss the *basic norm* in this work, is—in my opinion—exclusively due to the fact that he only describes the structure of positive law. On Walter's view about the *basic norm* in detail, see Robert Walter, 'Die Grundnorm im System der Reinen Rechtslehre' in Aulis Aarnio et al., eds., *Rechtsnorm und Rechtswirklichkeit. Festschrift für Werner Krawietz zum 60. Geburtstag* (1993) at 85 et seq.

151. Walter, *supra* note 71at 26.

152. See above: 1.2.6 Derivation of Validity (Existence) of a Norm in the Case of Simple Legislation.

In fact, Kelsen does not regard the norm called *rule of creation of coercive norms* by Walter as (completely) autonomous, but only as part of the 'great norm' called dynamic norm by Walter (*incomplete legal norm* [*unvollständige Rechtsnorm*]).[153] According to Walter, this is problematic, since the idea of Kelsen would be possible only if the coercive norm has already been created. Until then, however, the existence of the rule of creation of coercive norms is unmanageable in the system of Kelsen (as being just an incomplete norm).[154] Hence it also has to be considered—according to Walter—as an autonomous norm.

This makes clear why the *rule of creation of coercive norms* is considered to be autonomous. The next question is, then, what is the difference between *Zwangsnorm* and *Zwangsnormvollzugsregel* based on. In Walter's view, this differentiation is necessary, because in this way one can also explain the difference between formal law (*Zwangsnormvollzugsregel*) and material or substantive law (*Zwangsnorm*) in this theory.[155] The rule of execution of coercive norms regulates the way from the coercive norm to the physical coercive act. Traditionally, it is the task of the legislature to set the coercive norm, whereas setting the rules of execution of coercive norms is accomplished by the executive.[156] The rule of creation of coercive norms is essentially the constitution in a material sense, i.e., the rules of lawmaking.[157]

All three kinds of norms comprise a number of legal dispositions.[158] A legal disposition may be part of more *coercive norms* at the same time: *legal dispositions* of the general part of the Criminal Code are, for example, part of every coercive norm in criminal law (i.e., of the special part of the Criminal Code).[159] A *legal disposition* may even be simultaneously part of a *Zwangsnormerzeugungsregel* and a *Zwangsnorm*, or of a *Zwangsnorm* and a *Zwangsnormvollzugsregel*, or of all three.[160] A *legal disposition* creating an organ that participates in the creation coercive norms as well as in the execution of coercive norms is part of the rule of creation of coercive norms and the rule of execution of coercive norms at the same time. A *coercive norm* as a whole is part of a *rule of creation of coercive norms* if it is superior to the norm (to be produced) regulated by the *rule of creation of coercive norms*, and thus the new norm cannot contradict it.

According to Walter it is important to emphasise that execution of the coercive norm is not mere execution but also specification. There are three kinds of specification:[161] 1. if the description of facts is inaccurate, 2. if the sanction is unclear and if 3. the description of facts and the sanction are not connected unconditionally (so-called 'real discretion').

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153. Kelsen, *Introduction*, *supra* note 8 at 52 et seq.
154. Walter, *supra* note 71 at 26 et seq. This is the reason why Raz criticizes Kelsen, cf. Raz, *supra* note 18 at 117.
155. Walter, *supra* note 71 at 28.
156. Walter, *ibid.* at 31. To what extent Walter is right in this particular question is not discussed here.
157. Walter, *ibid.* at 30 et seq. and 35 et seq.
158. Walter, *ibid.* at 48.
159. Walter, *ibid.* Cf. Jakab, *supra* note 70 at 60.
160. Walter, *ibid.* at 51 et seq.
161. Walter, *ibid.* at 39.

Let us now turn to the assessment of Walter's theory. A comparison to the similar structure of the legal order suggested by Herbert Hart seems to be a useful starting point. In this aspect, the following can be stated: 1. As a first step, Hart's 'primary rules' can be equated with Walter's *Zwangsnormen*, and Hart's 'secondary rules' with Walter's *Zwangsnormerzeugungsregeln* and *Zwangsnormvollzugsregeln* (and with the *basic norm* that is not part of the positive legal order). 2. It is, however, an important difference (in addition to the epistemological differences that are not analysed here) that according to Hart, coercion is not a conceptual element of law and therefore his structure of the legal order is not based on this. This may be seen as a slight advantage of Hart, since the theory of Walter cannot handle legal orders not based on physical coercion (e.g., canon law). 3. And finally, they also have different backgrounds of legal traditions. Walter tries to adopt traditional German or Austrian legal concepts (e.g., the difference between formal and material law) in a new framework of legal theory.[162]

This new attempt of the Pure Theory of Law to structure the legal order cannot be regarded as a successful one for three reasons. First, Walter also commits the 'error of derivation', i.e., he tries to derive the validity of a norm from another norm. On the other hand, he does not make a clear distinction between legal provision (e.g., a section or an article of a statute) and legal act (e.g., a statute) but includes both in the concept of *legal disposition*. And finally, the conservation of coercion as a conceptual element of law excludes non-coercive legal orders (e.g., canon law) from the analysis. The so-called error of derivation is the most difficult to solve of all problems mentioned above. It is another reason why this structure of legal order cannot count as a substitute for the collapsed *Stufenbaulehre* (1.2.6.).

3. Excursus: The Underlying Ideology of the *Stufenbaulehre*

In the following section, I am going to examine what ideological background the *Stufenbaulehre* is often alleged to have and whether it is justified. Three typical problems will be discussed from this aspect: 1. the inherent autonomy of law, 2. the effect of acknowledging the legal nature of general internal policies of the administration and the doctrine of the separation of powers, and 3. the role of theological conceptions of hierarchy.

These underlying ideologies are not homogenous, but this does not preclude them having they really had some influence on the *Stufenbaulehre*. We have to emphasise in advance, however, that such an unveiling of underlying ideologies cannot refute the *Stufenbaulehre*.[163]

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162. Moreover, Walter's theory also includes a striking criticism on Hart: the distinction between *primary rules* and *secondary rules* (and their 'sub-classes') is actually not as easy to make as one might think at first sight after Hart.

163. To unveil the underlying ideology of a legal theory would refute it only if a legal theory were considered as pure ideology, i.e., if one would deny it any autonomy whatsoever. This approach is characteristic of Marxism. Without discussing this question here at length, it has to be stated that the above analysis of the underlying ideologies of the *Stufenbaulehre* is not intended to do that. Examining the ideological background may only be an interesting excursus in a legal theoretical analysis, but it belongs to another dimension. To show this background, in my opinion, does not mean supporting (or rejecting) a theory of law, only explaining it (from the perspective of science sociology).

3.1 Autonomy of Law

An important feature of the *Stufenbaulehre* (and of the Pure Theory of Law in general) is the emphasising of the autonomy of modern law (*Selbsterzeugung des Rechts*).[164] In terms of sociology of science, this idea may have its origins in the experience of reality in the Austro-Hungarian Monarchy, a state of many nations, where other integrative factors (a common culture, language, national mentality) were obviously absent. Therefore, only law remained as the factor of convergence.[165]

One may ask two questions concerning autonomy: 1. Is modern law really autonomous? 2. Is it socially desirable and useful to believe that it is autonomous? Ad 1. Modern law is, without any doubt, more autonomous than former laws were, i.e., it is more independent of social morality than were pre-modern ones. The answer to the question whether the high degree of autonomy that is asserted by the Pure Theory of Law is present in reality, would, however, lead too far and overextend the scope of this paper.

Ad 2. The answer to the question if it is useful for society to believe that law is autonomous depends on the social context, since the belief in the autonomy of law may be confirmed by the belief in its autonomy. Thus, if there is a social morality that does not allow society to develop efficiently (e.g., lack of respect of property), it may be helpful to regard (and describe) law as autonomous, since arguments like 'but according to the morality of society...', inhibiting the development of society may be denied in this way to be legally useful. But if social morality works for an efficient social structure, as is the case in the United States, this could be used for a more efficient accomplishment. Scholars of legal theory are, however, not always aware of that and in this case—depending on the conception of ideology used—even the ideological character of the respective legal theory may be challenged. This argument, however, is not one of legal science. It is mentioned here as an often forgotten point of view, but its more thorough discussion would lead us too far now.

3.2 Separation of Powers and Acknowledging the Legal Nature of General Internal Policies of the Administration

The two most important virtues of the Pure Theory of Law are, in terms of legal policy: 1. the theoretic ground for constitutional control and 2. acknowledging the legal nature of general internal policies of the administration.[166]

Ad 1. Emphasising the applicative character (*Rechtsanwendungscharakter*) of the setting of norms (and of the legislation in particular), the *Stufenbaulehre* also

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164. Öhlinger, *supra* note 25 at 10. The autonomy of law in Kelsen's system is emphasised in the same way by Raz, *supra* note 37 at 96.

165. Walter, *supra* note 88 at 19; Rudolf Aladár Métall, *Hans Kelsen. Leben und Werk* (1969) at 22. I do not mean by this that, beside the abovementioned factors, only law can play an integrative role. However, the lack of other factors has shaped the autonomous idea of law in the Pure Theory of Law.

166. Öhlinger, *supra* note 25 at 28.

supported the possibility of judicial control of the legislature. It has thereby set the theoretical grounds for constitutional control[167] and contributed thus to the development of rule of law (*Rechtsstaatlichkeit*).

Ad 2. By acknowledging the legal nature of general internal policies of the state administration, *Stufenbaulehre* was of great assistance to democracy and particularly to a democratic administration.[168] Democratic administration means, namely, administration bound by statutes,[169] since statutes are expressions of the will of the people.[170] If we acknowledge the legal nature of general internal policies of the state administration, then we make a judicial review of these policies possible, so we can force the state administration more efficiently to abide by the laws of the legislature.

Stufenbaulehre also means the rejection of traditional theories of separation of powers, where there are three powers of equal position. According to the *Stufenbaulehre*, the two other powers (executive and judiciary) are similarly subordinates to the legislative powers that expresses democracy. This finally means that there are only two powers (legislative and implementing powers; but inside of this the latter executive and judiciary are acting separately).[171] The *Stufenbaulehre* provided thereby the conceptual framework and a legal legitimacy for parliamentary democracy.[172] This new configuration of powers may be called—in the words of Öhlinger—*step structure of branches of powers* (*Stufenbau der Staatsfunktionen*).[173]

Stufenbaulehre thus served the idea of democracy (democratic administration) as well as that of rule of law (judicial review of statutes).[174]

3.3 Secularised Theological Conceptions of Hierarchy

According to one of the well-known allegations, the *Stufenbaulehre* is the secularised form of theological conceptions of hierarchy.[175] The idea of the hierarchy of norms has, without doubt, its origins in the Middle Ages, or even in antiquity

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167. Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (1929) Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer at 30 et seq.; Kelsen, *Introduction*, *supra* note 8 at 71 et seq.; Alfred Verdross, 'Zum Problem der Rechtsunterworfenheit des Gesetzgebers' (1916) Juristische Blätter at 471 et seq.

168. Behrend, *supra* note 6 at 18. On the legal nature of general internal orders of the administration see also Hans Heinrich Rupp, *Grundfragen der heutigen Verwaltungsrechtslehre* (1965) at 11 et seq.; Norbert Achterberg, 'Kriterien des Gesetzesbegriffs unter dem Grundgesetz' (1973) Die öffentliche Verwaltung at 298; Christoph Möllers, *Staat als Argument* (2000) at 154 et seq.; Jakab, *supra* note 70 at 83, esp. n. 172.

169. Öhlinger, *supra* note 25 at 31; Hans Kelsen, *Vom Wesen und Wert der Demokratie*, 2. Aufl., (1929) at 69 et seq.

170. Merkl, *supra* note 22 at 339; Kelsen, *supra* note 169 at 70 et seq.

171. Öhlinger, *supra* note 25 at 29.

172. Öhlinger, *ibid.* at 32.

173. Öhlinger, *ibid.* at 30. Although some—e.g., Stoitzner, *supra* note 87 at 73 et seq.; Öhlinger, *supra* note 25 at 30—regard this as a special *Stufenbaulehre*, it is, in my opinion, something different, since it gives (similarly to the hierarchy according to derogatory power) no answer to the starting questions (1. origin of validity, 2. unity of legal order). It is, therefore, only an underlying ideology and the political consequence of the *Stufenbaulehre*.

174. Öhlinger, *ibid.* at 32.

175. Krawietz, *supra* note 32 at 255 et seq.

(*lex divina*, *lex aeterna*, *lex naturalis* and *positiva*).[176] Knowledge of these conceptions has probably had an impact on the views of contemporary lawyers. But hierarchy of norms is a construct so general that it cannot be connected exclusively to theology. It is not hard to imagine that these conceptions of hierarchy had real influence on the authors of the *Stufenbaulehre*; it is, however, difficult to prove and—to my knowledge—this was not attempted hitherto by anyone on the basis of concrete texts. But *Stufenbaulehre* itself is not necessarily connected to—perhaps doubtful— theological conceptions of hierarchy.

According to another—maybe more interesting—allegation, one of the questions that the *Stufenbaulehre* is intended to answer is of a theological nature: the question about the origin of validity of law,[177] i.e., the assumption that there is a starting point from which validity may be derived. This argument again seems to be plausible, but it is not an argument of legal theory against the *Stufenbaulehre*, but may only be considered as a suggestion for the explanation of its genesis.

4. Is the Pure Theory of Law Still Alive?

4.1 Summary of the Argument

After reconstructing the *Stufenbaulehre* (1.1), the most important objections to it were discussed (1.2). Most of the objections (especially those against the *basic norm* and the statement that validity of a norm is conditioned by one single other norm) could be refuted, except for one: This 'lethal' thrust was given the Pure Theory of Law by the basic doubt as to the derivation of validity (existence) of a norm from another norm. It has, in fact, also made previous defence of the *basic norm* aimless, as the question of the *basic norm* is not reached at all in this way.

This was followed by an analysis of the hierarchy according to the derogatory power (1.3). It was shown that it is, unlike the former hierarchy (conditions of law-making), useful for legal theory (or even for black letter legal science), and that it has a certain explanatory potential, but the concept of derogation should be used in a more differentiated way than is the case nowadays. As criteria of the hierarchy of norms, priority in application (*Anwendungsvorrang*), abolishment (*Aufhebung*) and annulment (*Vernichtung*) should be distinguished. These hierarchies, however, cannot replace the collapsed (1.2) hierarchy according to the conditions of law-making (i.e., the *Stufenbaulehre*) in the system of the Pure Theory of Law, as they cannot answer the starting questions of the *Stufenbaulehre* (1. what is the unity of legal order based on?, and 2. where does the validity of law come from?).

After that, another attempt for structuring the legal order, made by Robert Walter, the most eminent contemporary exponent of the Pure Theory of Law, was sketched.

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176 Öhlinger, *supra* note 25 at 9, n. 1; according to Werner Krawietz, 'Reinheit der Rechtslehre als Ideologie?' in Krawietz, Topitsch & Koller, eds., *Ideologiekritik und Demokratietheorie bei Hans Kelsen* Rechtstheorie (1982) 4 Beiheft, 413, this is why its influence is so strong. It may certainly have contributed to the success of the *Stufenbaulehre*, but it was perhaps even more important that it could give an answer to a number of complicated questions of legal theory with the help of a surprisingly simple construction.

177. Krawietz, *supra* note 32 at 258.

His theory has some common features with the theory of Hart (2.). It was, however, shown that the theory of Walter also suffers from the 'error of derivation' and must therefore be rejected.

An analysis of the alleged ideological background made clear that these ideologies may well have had an impact on the shape of the *Stufenbaulehre* (3.). But these arguments (i.e., 'unveiling' the backgrounds) cannot refute the *Stufenbaulehre* as a construct of legal theory; this is possible only by way of legal theoretical arguments (as was done, for example, in section 1.2.6 of this paper).

4.2 Perspectives of the Pure Theory of Law

If observations have to be made about the perspectives of the Pure Theory of Law, one could state the following: the *Stufenbaulehre* was a central, important part of the Pure Theory of Law (it was not by coincidence that Kelsen mentioned Merkl as co-founder of the Vienna School of legal theory). By its failure, the Pure Theory of Law is also doomed to fail. In the system of the Pure Theory of Law, the *Stufenbaulehre* was intended to answer two questions: 1. what is the unity of legal order based on?, and 2. where does the validity of law come from?[178] Even the notion of legal norm is defined in this way: a coercive norm of the state differs from the threat of sanction made by a gangster inasmuch as the former may be included in the hierarchy of legal order.[179] Without the *Stufenbaulehre*, the Pure Theory of Law cannot solve this problem.

The Pure Theory of Law narrowed its field of examination rather strongly anyway (no sociology, no moral deliberations). Therefore, if it cannot answer the above-mentioned questions anymore, not much of the world of law remains that could be explained by it.[180] Hence the Pure Theory of Law has no perspectives anymore.

4.3 The Virtues of the Pure Theory of Law and Whether They Can be Saved

This does not mean, however, that the Pure Theory of Law has no virtues and achievements for legal theory that are worth saving. These conservable theses or features could not all be thoroughly discussed in the present paper, and are only briefly mentioned here:

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178. Behrend, *supra* note 6 at 54; Dreier, *supra* note 12 at 43.

179. Andreas Trupp, 'Zur Kritik der Stufenbautheorie und wissenschaftstheoretischen Konzeption der Reinen Rechtslehre' in Werner Krawietz & Helmut Schelsky, eds., *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen*, Rechtstheorie (1984) 5 Beiheft, 300. Cf. Kelsen, *GTN*, *supra* note 36 at 27 et seq.

180. The only way remaining is the one that leads back to the state of 1911, see Kelsen, *supra* note 6 at 10: '...Here it is shown unequivocally that any question about the formation and destruction of the "is" is beyond the perception of the "is" (*Seinsbetrachtung*) and its particular (causal) epistemological method of explication, in the same way as any question about the formation and destruction of the "ought" is not at the level of observation focused on the "ought", nor in the scope of a normative epistemological method'; or even 411: 'This is the great mystery of law and state, that takes place in the act of legislation, and this might be the reason why its essence is represented only in images which are far from being satisfactory.' I.e., one cannot explain law-making in the Pure Theory of Law anymore.

1. In terms of methods:
   1.1. conscious selection of applicable arguments in legal science (methodological purity),
   1.2. logical and clear ('true') arguments, clarification of the premises,
   1.3. from an 'is' one cannot logically conclude to an 'ought',
   1.4. rejection of redundant concepts (i.e., those lacking explanatory potential),
   1.5. an inclination to explain legal phenomena in a unitary and overarching conceptual framework.
2. In terms of achievements:
   2.1. the subjective factor cannot be avoided in the application of law,
   2.2. individual legal decisions are also part of the legal order,
   2.3. it is not the 'State that creates legal order'; the state itself is of legal nature,
   2.4. the distinction between public and private law is useless for legal theory,
   2.5. the concept of person is basically a complex of norms, and
   2.6. subjective right (*subjektives Recht*) is to be derived from objective law (*objektives Recht*).

These elements are, however, only 'organs to be transplanted' from the dead body of the Pure Theory of Law, whose heart—the *Stufenbaulehre*—is not able anymore to keep the body alive. The monumental prepared corpse of the Pure Theory of Law can only serve as a spectacle in the museum of futile efforts of legal theory. Any attempt at reanimation would be hopeless.

Summary

The *Stufenbaulehre* is a central and founding element of the Pure Theory of Law. Most of the criticism of *Stufenbaulehre* targets the idea of the *basic norm* (*Grundnorm*), however unjustified. This criticism stems from a misunderstanding of the presumptive character of the *basic norm* and of the whole legal order. Others have criticised the relativisation of the difference between individual and general norms, Kelsen's monism, and the determination of the validity of a norm by a single other norm. These can be refuted as well—either because their critiques do not concern an essential part of *Stufenbaulehre* (monism), or because *Stufenbaulehre* can be saved by making a small modification to it. However, there is one lethal criticism: It concerns the founding thought of the whole *Stufenbaulehre*, i.e., the derivation of validity. In a law-making process, there is never a derivation of validity: the logical result of a law-making process is only a norm saying: The new norm ought to be valid. Whether the new norm is in fact valid, is a different issue which is not dealt with by the Pure Theory of Law. This has serious consequences: without this derivation *Stufenbaulehre* cannot survive, and without *Stufenbaulehre*, Pure Theory of Law cannot survive either. Some valuable parts of Pure Theory of Law might be used in other legal theories, but these are nothing but transplanted organs from the dead body of Pure Theory of Law whose heart—*Stufenbaulehre*—can no longer keep the body alive.[181]

181. For linguistic help I am thankful to Miklós Könczöl. [This article is the author's translation (with modifications) of the German language article: 'Probleme der Stufenbaulehre. Das Scheitern des Ableitungsgedankens und die Aussichten der Reinen Rechtslehre' which appeared in (2005) Archiv für Rechts- und Sozialphilosophie 333 (Franz Steiner Verlag) (Ed. note).]