PURE THEORY OF LAW
- Legal Validity -

Literature:
A. Marmor, *Philosophy of Law*
PURE THEORY OF LAW

- explanation
  - scientific method by which a phenomenon is interpreted by stating the circumstances, causes and purposes of its emergence
  - why something is as it is
  - func., hist., psych., teleol., caus., reduct.

- reduction
  - procedure for proving that some being, object or theory are fully reducible to some other being, object, theory, etc.
  - constitutive or metaphysical reduction: e.g. mental states and processes -> brain states, i.e., physical entities, different neuronal processes and structures
Kelsen’s *antireductionist* theory of law

- “purified of all *political ideology* and every element of the natural *sciences*”
  - purified of axiology and sociology
- “conscious of the autonomy of its object of enquiry”
- “conscious of its own unique character”
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PROBLEM 1

- normative nature of law => temptation to ground law on moral-ideological foundations
- law should make practical difference – why act according to law? – morality of law
- => what law is depends on what is good/right/morally required
- Kelsen: what law is and whether it is good or bad are separate questions
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PROBLEM 2

- non-normative facts as conditions of legal validity
  - social facts about people’s actions, beliefs, and attitudes
  - reductive explanation of the nature of law?
  - reduction of legal theory to sociology?
Kelsen’s main challenge:

- to provide an explanation of legal validity and legal normativity without an attempt to reduce jurisprudence to other domains

- but, did he succeed in his antireductionism with respect to legal validity?
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- law as a scheme of interpretation
- attaching legal-normative meaning to certain actions and events
- reality of law (its objectivity) resides in the sphere of (legal-normative) meaning
- chain of authorization
- end of chain: basic norm (*Grundnorm*)
  - pressuposition of the legal validity of the first constitution
Major Premise (norm): *You should do what your father says.*

Minor Premise (description): *Your father says “Go to bed.”*

Conclusion (norm): *You should go to bed.*
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- theoretical functions of the idea of the basic norm
  a) to ground a nonreductive explanation of legal validity
  b) to ground a nonreductive explanation of the normativity of law
  c) to explain the systematic nature of legal norms
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- law’s systematic nature
  a) every two norms that derive their validity from one basic norm belong to the same legal system
    - orderly succession of states?, Canada?
  b) all legal norms of a given legal system derive their validity from one basic norm
    - EU?

- legal validity ≠ membership in a legal system
  - private international law?

- legal validity is spatiotemporal (facts!)
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- relationship between legal validity and efficacy
  - a norm is *efficacious* if it is actually (generally) followed by its addressees
  - efficacy of a legal norm as the condition of its LV?
  - efficacy of a legal system as the condition of LV of a norm of the system (social practice!)
  - efficacy of a legal system as the condition of its existence
  - efficacy of a basic norm as the condition of its LV?
Kelsen’s argument (in the form of a Kantian transcendental argument)

1. P is possible only if Q
2. P is possible (or, possibly P)
3. Therefore, Q

P = the fact that legal norms are "ought" statements
Q = pressuposition of the basic norm
pure theory of law

- presupposition of a BN is optional (a matter of choice)
  - anarchist (Marmor, 22)
- one is not rationally compelled to accept the BN (normative relativism)
- BN is presupposed only by those who accept the normativity of law (i.e., that law gives them reasons for action)
- comparison to religious beliefs
content of the BN: normative validity of *positive law* (the law that is practiced by a certain population)

=> content of the BN is determined by the actual practices that prevail in the relevant community (*reductionism*)

– Is that the right interpretation of Kelsen’s view?
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=> tension between normative relativism and antireductionism

- Kelsen’s normative relativism
  - presupposition is a matter of choice
  - relative to the point of view
  - relative to actual conduct, beliefs and attitudes

- => reductive explanation of legal validity

- legal validity is determined by the content of the BN that is actually followed in a given society(?)
Thank you for your attention!