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.
  - semantic (e.g. meaning of sentences -> psychological concepts of belief and intentions)
  - ontic (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”
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 succeeded 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
PRACTICAL ARGUMENT

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.
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
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!)
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
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- 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!