Hans Kelsen's *Allgemeine Theorie der Normen* and Power-Conferring Norms: Adolf J. Merkl's Final Victory

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Abstract

The legal discourse includes sentences that relate to the capacity to produce new legal entities and to the validity of the ensuing entities. In order to deal with these entities, legal scholars have to craft appropriate concepts. Kelsen's initial individuation of the legal norm was based on the following scheme: "If certain conditions are met, then coercion ought to be used by the states' organs". Insisting on the mandatory character of norms, whose unique function is to create obligations, Kelsen considered that the other functions of legal sentences, like power-conferring, are merely apparent. They may be reduced to the obligation-imposing one if they are understood as mere fragments of norms properly so-called or, as Kelsen proposed in the *Allgemeine Theorie der Normen*, as indirect ways to impose obligations. But this posthumous book also offers another theory of power-conferring sentences, whereby these are understood as full-blown legal norms. On the one hand, this major change in Kelsen's ontology of law is based on a shift from Kantianism to empiricism in his conception of legal science. On the other hand, it results from the unsuspected consequences of Kelsen's adoption of Adolf J. Merkl's *Stufenbaulehre*. Just like Merkl was led to distinguish between two kinds of norms, Kelsen was conceptually constrained by the internal dynamics of this conception of the legal system that was alien to his initial theory to revise his individuation of legal norms. Only at the end of his life did he seem fully conscious of the consequences of Merkl's theory.

Keywords: Power-conferring Norms. Legal Dynamics and Legal Statics. Epistemology. Individuation of Legal Norms. Legal Concepts.

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1. Introduction

Reviewing the publication of Adolf J. Merkl's *Gesammelte Schriften*, Stanley L. Paulson suggested that Kelsen might have been unfair to his friend and disciple:

> How is it that Adolf Julius Merkl himself has remained an obscure figure? The answer is Hans Kelsen (1881–1973). Kelsen took over Merkl's *Stufenbaulehre* lock, stock, and barrel, incorporating it as a fundamental part of his own legal theory […]. To be sure, he acknowledged his debt to Merkl early on and spoke directly to the issue in the "Foreword" to the second printing (1923) of his major treatise, *Hauptprobleme der Staatsrechtslehre* (first appearing in 1911): "[I]t is Adolf Julius Merkl who deserves the credit for recognizing and then characterizing the legal system as a genetic system of legal norms that proceed from one level of concretization to another, from the constitution to the statute to the administrative regulation and to other intermediate levels, right down to the individual legal act of enforcement. In a number of writings, Merkl energetically put forward this theory of hierarchical levels of the law qua theory of legal dynamics, combatting the prejudice – still firmly held in my *Hauptprobleme* – that the law is found only in the general statute. Merkl also relativized what had ossified into the absolute: the opposition between statute and enforcement, between law creation and law application, between general and individual norm, between abstract and concrete norm. Drawing support from the work of Merkl and Verdross, I took up the theory of hierarchical levels in my own later writings, adopting it as an essential component in the system of the Pure Theory of Law" […]. In the *Allgemeine Staatslehre* […], however, Kelsen confined his acknowledgement of Merkl's contribution to an endnote […]. Later, in the First Edition of the *Reine Rechtslehre* (1934) and in the Second Edition of the same work (1960), the *Stufenbaulehre* plays a decidedly prominent role in Kelsen's theory […], now expanded in order to highlight, inter alia, the difference between the old, unworkable doctrine of nullity (*Nichtigkeit*) and invalidatability (*Vernichtbarkeit*), which Kelsen, not unlike Merkl in the brilliant *Fehler-Kalkül* […], defends. Kelsen makes no reference at all, however, to Adolf Julius Merkl. Despite Merkl's extraordinary achievements in the field […] he was, in effect if certainly not by design, left behind[1].

By addressing Kelsen's theory of power-conferring norms or, more precisely, the lack thereof until the *Allgemeine Theorie der Normen*, the following remarks suggest that Kelsen's posthumous book may be regarded as Merkl's revenge.

In order to substantiate this claim, I will rely on two main assumptions. First, I take it for granted that the legal discourse includes fragments, which I will conventionally call "power-conferring sentences"[2]. They relate:

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[1] Paulson 2004: 263-264.

[2] For a more elaborate presentation, see Tusseau 2006. Regarding Kelsen's positions, see also Tusseau 2007.

(a) to the capacity to produce new legal entities, such as: «The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States»[3], and

(b) to the validity (or invalidity) of the ensuing entities, such as the United Kingdom Supreme Court's ruling pursuant to which «[The advice that led to the prorogation of Parliament] was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect […]. It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect»[4].

Secondly, I take it for granted that in order to approach the lawgivers' discourse, legal theory

(a) needs to propose legal concepts, but

(b) is very free to devise the concepts it likes, the only test being their utility for legal disciplines.

The following discussion deals with the decisions Kelsen made regarding the conceptual handling of power-conferring sentences.

2. Kelsen's initial individuation of the legal norm

Kelsen's Pure Theory of Law offers both a theory of law and a theory of legal science. In keeping with his Neo-Kantian background[5], he considers that any science constitutes its own object[6]. Therefore, the specificity of a science of law depends on the object it constructs. Kelsen defines law as an order of human conduct based on the use of coercion. Its functional peculiarity lies in that it guides human behaviour by attaching sanctions to specific conducts[7]. From 1911 to 1965, Kelsen retained a unique concept of a legal norm, the characteristics of which are twofold.

First, «The model of the legal norm is as follows: 'under certain conditions (that is to say in case of a certain human behavior), the State wants to carry out certain

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3 Art. I(8) of the US Constitution.

4 *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*, [2019] UKSC 41, par. 69.

5 Paulson 2000: 139-142.

6 Kelsen 1962a: 98-99.

7 Kelsen 1925: vii-ix, 17-18, 22-25, 52-54, 95, 133, 139, 147, 150-151, 238-239, 322; Kelsen 1934: 25-31, 46, 65-66, 120, 127, 131, 149; Kelsen 1997: 66-80; Kelsen 1953: 61-64, 68, 70; Kelsen 1962a: 33-51, 289.

actions, more exactly certain actions which are the consequence of a delict (that is to say, he wants to punish or enforce [a prescription])»[8]. Such is «the paradigmatic form in which it must be possible to represent all the data of the positive law»[9]. This conditional canonical structure only gives an indication of the *genus* of the law. Its *differentiam specificam* depends on the nature of the consequence: an act of coercion.[10] «The Pure Theory recognizes in legal obligation simply the individualized legal norm, that is, a legal norm (establishing [as obligatory] certain behaviour) in its connection to the concrete behaviour of an individual […]: a human being is legally obligated to behave in a certain way in so far as the opposite behaviour is set in the legal norm as the condition for a coercive act qualified as the consequence of an unlawful act. […] Legal obligation, then, is recognized as the sole essential function of the objective law. Every reconstructed legal norm must necessarily establish a legal obligation»[11].

Secondly, a legal norm deals with the behaviours of the State organs, as opposed to those of the ordinary citizens. Because the law expresses the will of the State and because it is only possible to want one's own behaviour, the law needs to be directed to the State's own behaviour[12]. «The conduct of the subjects must then play a different role in the legal norm from that attributed to it by the imperative theory. […] The legitimate conduct of the subjects must not appear in the legal norm as the content, but as the condition of a State's will»[13]. One may of course express norms that command the behaviour that the law "intends" to provoke, i.e. the behaviour that allows avoiding the sanction. However, a norm such as "Thou shalt not kill" presupposes a norm that complies with Kelsen's pattern, such as "if somebody kills, a State organ ought to punish him"[14]. The latter is the norm's primary form, whereas the former is only the secondary form[15]. Strictly speaking, the secondary norm can be dispensed with[16].

Because it is based on the will to conceive of the law, globally as well as in all its components, as an order of coercion, Kelsen decided to adopt a reductionist perspective. How can relying on a single concept of norm account for power-conferring sentences?

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8 Kelsen 1911: 212. See also Kelsen 1925: 49; Kelsen 1953: 45.

9 Kelsen 1934: 66 (Engl. tr. Kelsen 1992: 58).

10 Kelsen 1962a: 195; Kelsen 1934: 26, 131; Kelsen 1997a: 356, 376; Kelsen 1953: 61.

11 Kelsen 1934: 47-48 (Engl tr. Kelsen 1992: 43). Kelsen 1997a: 109-110, 376; Kelsen 1953: 67, 101. See also Kelsen 1925: 47, 51-52; Kelsen 1934: 46; Kelsen 1997b: 450-452; Kelsen 1997a: 177, 376; Kelsen 1953: 66-67, 71, 101; Kelsen 1962a: 68, 71, 106, 149.

12 Van Eikema Hommes 1984: 162.

13 Kelsen 1911: 206.

14 Kelsen 1911: 233-235, 253; Kelsen 1934: 30-31.

15 Kelsen 1934:32 (Engl. Tr. Kelsen 1992: 31).

16 Kelsen 1997a: 111-115, 192; Kelsen 1953: 67; Kelsen 1962a: 35.

3. The first analysis of power-conferring sentences

3.1. Kelsen's puzzlements

3.1.1. The several functions of legal norms

Kelsen seemed to admit several functions for legal norms, and not only one. In the theory of the hierarchy of norms, each norm's validity depends on another, superior, norm. Each superior norm at least partially determines the procedure of the creation of the inferior norm and its content[17]. Consequently, except for the lowest norm in the pyramid, each norm must fulfil an empowering function, in addition to its obligation-imposing function. Ultimately, all the legal system is founded on a presupposed basic norm, whose function does not seem to be that of imposing obligations[18]. Instead, it is rather presented as giving its normative signification to the first lawgiver's act[19], delegating the power to create norms to an authority that enjoys effective control of a given population on a given territory,[20] creating a norm-giving fact[21], defining a supreme law-making authority[22], conferring the power to create norms,[23] or allowing for a normative interpretation of given facts[24].

Similarly, international law does not seem to limit itself to imposing obligations. It coordinates domestic legal systems[25], defines their respective spheres of validity[26], empowers domestic legal systems or establishes norm-creating facts[27]. Neither does constitutional law totally correspond to the model of the mandatory norm. According to Kelsen, «The essential function of the constitution in the material sense of the term is to determine the creation of general legal norms, that is, to determine the organs and the procedure of legislation and also – to some degree – the contents of future laws»[28].

3.1.2. The interlocking of coercive norms

Even Kelsen's account of the concept of obligation led to some difficulties. The complete formulation of a primary norm reads: «If individual *i* adopts conduct *c*,

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17 Kelsen 1934: 73-78; Kelsen 1997a: 178-190; Kelsen 1953: 123; Kelsen 1962a: 310.

18 See e.g. Ross 1946: 47; Raz 1980: 66, 95, 97, 101; Raz 1979: 122-145; Riccobono 1990: 134; Gavazzi 1967: 99 Ruiter 1993: 1, 13, 92-93; Weinberger 1991: 19

19 Kelsen 1934: 66.

20 Kelsen 1934: 67-69; Kelsen 1997a: 172; Kelsen 1962a: 68.

21 Kelsen 1925: 249; Kelsen 1934: 64, 130.

22 Kelsen 1925: 233, 251; Kelsen 1997b: 451.

23 Kelsen 1997a: 170.

24 Kelsen 1997b: 451-452; Kelsen 1997a: 174.

25 Kelsen 1925: 113, 125, 174, 200; Kelsen 1934: 136-138, 143, 147; Kelsen 1953: 129.

26 Kelsen 1925: 138; Kelsen 1997a: 397; Kelsen 1962a: 445.

27 Kelsen 1925: 174, 194, 196, 200; Kelsen 1934: 71, 129-130, 137; Kelsen 1953: 164.

28 Kelsen 1946: 267. See also Kelsen 1925: 200, 221; Kelsen 1934: 75; Kelsen 1962a: 62-63.

then sanction *s* ought to be enforced against him by functionary *F1*». Translated into a secondary norm, this norm imposes an obligation for *i* not to adopt conduct *c*. According to Kelsen's definition, every primary norm imposes an obligation and is directed to a State organ. The latter's behaviour consists in enforcing a sanction. However, the norm that prescribes a behaviour to a certain actor can only be a secondary norm. It derives from a primary norm that is addressed to a functionary, whose function is to enforce sanctions. In the present case, this second primary norm must establish that "If *F1* does not enforce sanction *s* in case individual *i* adopts conduct *c*, then a sanction ought to be enforced against *F1* by functionary *F2*." If *F2* does not enforce the said sanction in the predetermined case, *F3* ought to punish him, etc. Nevertheless, the chain of positive norms necessarily ends at some point. The last norm cannot establish an obligation for functionary *Fn*, for *ex hypotesi*, there is no functionary *Fn+1* who could impose a sanction on *Fn*. Therefore, at least one norm does not impose any obligation[29].

Kelsen answered by making it clear that «A rule is a legal rule not because its efficacy is secured by another rule providing for a sanction; a rule is a legal rule because it provides for a sanction. The problem of coercion (constraint, sanction) is not the problem of securing the efficacy of rules, but the problem of the content of the rules»[30]. However, the difficulty is not related to the efficiency of norms. It results from Kelsen's concept of obligation, and the interlocking of primary and secondary norms it imposes. His answer is nevertheless remarkable. Because the series of norms needs to stop, the enforcement of sanctions by functionaries necessarily is, at this very point, the content of a non-mandatory norm. «The legal obligation to a certain conduct may be based on a norm which merely empowers a legal organ, without requiring it to react with a sanction in case of contrary conduct, and […] if the organ is obliged to react by a sanction, this obligation can only be based, in the last resort, on a norm which empowers another organ to react by a sanction, but does not make it mandatory»[31]. The series of norms must be closed by a norm the sanction of which is not an obligation according to Kelsen's definition[32]. Although it is presented as the norm itself, the obligation cannot be understood except in its relationship with another norm that is not mandatory[33]. That is the reason why Stanley L. Paulson contends that, paradoxically, the most fundamental normative modality in Kelsen's theory is empowerment rather than prescription, which is only derivative[34].

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[29] See Bentham's solution to this difficulty in Tusseau 2014.

[30] Kelsen 1946: 29.

[31] Kelsen 1962a:163 n. 1, this fragment not being translated in Kelsen 1967. See also Kelsen 1962a: 35-36, 68-69.

[32] Kelsen 1997a: 110.

[33] Raz 1980: 60, 77-85, 90; Moore 1972-1973: 154-155.

[34] Paulson 1981: 179 n. b; Paulson 1988: 70; Paulson 1998: xlvi-l; Paulson 2013.

Both difficulties point towards the question of the role of power-conferring sentences in law. Kelsen intended to address this issue in a way that preserved his initial theory.

3.2. Kelsen's solutions

3.2.1. Power-conferring sentences as fragments of norms

A first strategy addressed the problem of apparently non-coercive norms. It was suggested by some developments of the *Hauptprobleme*, and defended more precisely later[35]. For example, Kelsen wrote, «the law itself regulates its creation. The hierarchical construction of the legal order which imposes itself in a dynamic study, considering the creative process of the law, is considerably simplified in a static study of the completed rule of law. In the perfect rule, the provisions of the constitution, of the statute, etc., in a word, of the higher levels which regulate the law-creating facts appear as elements of the fact-condition: a very simple example suffices to prove it. The rule of criminal law in a constitutional monarchy has the following form (still very simplified): 'If the Parliament, constitutionally elected, votes, if the monarch sanctions and if it is published in the Bulletin of laws that the one who steals must be punished, and if someone steals, he ought to be punished'»[36]. This thesis was made more explicit in the *General Theory of Law and State*[37], and maintained in the second edition of the *Reine Rechtslehre*[38] where the said "power-conferring norms" were presented as «non-independent legal norms»[39]. Power-conferring sentences were thus mere parts of complete norms. They were some of the elements that form the condition to which a sanction is attached. The main advantage, for Kelsen, was that «a legal order may be characterized as a coercive order, even though not all its norms stipulate coercive acts; because norms that do not themselves stipulate coercive acts (and hence do not command, but authorize the creation of norms or positively permit a definite behaviour) are dependent norms, valid only in connection with norms, that do stipulate coercive acts […]. Since a legal order, in the sense just described, is a coercive order, it may be described in sentences pronouncing that under specific conditions […] specific coercive acts ought to be performed. All legally relevant material contained in a legal order fits in this scheme of the [legal proposition] formulated by legal science – the [*legal proposition*] which is to be distinguished from the *legal norm* established by the legal authority»[40].

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35 Kelsen 1911: 218, 565-566; Kelsen 1925: 125; Kelsen 1942a: 19-20.
36 Kelsen 1932: 185.
37 Kelsen 1946: 143-144.
38 Kelsen 1962a: 320.
39 Kelsen 1962a: 74.
40 Kelsen 1962a: 78 (Engl. tr. Kelsen 1967: 58).

The "fragments of norms thesis" met the objection. Non-mandatory elements of the legal discourse, which seemed to be incompatible with Kelsen's model, could be incorporated into it so that he could preserve his definition of law and legal norm.

3.2.2. The enlargement of "ought"

A second strategy aimed at facing the fact that, by stating "If A is, B ought to be," every norm created an obligation, Kelsen was led to admit non-mandatory norms. In order to preserve this conditional scheme, he was compelled to change the meaning of the verb "ought" (*Sollen*). Although this theory seems to have appeared before,[41] it was clearly stated only in 1960[42]: «'Ought' usually expresses a command, not an authorization or permission. The legal 'ought,' however, the conjunction which in the [legal proposition] connects condition and consequence, embraces all three meanings: the command, the authorization, and the positive permission of a consequence»[43]. Accordingly, Kelsen was able to preserve the canonical form of legal norms, even for the last element of the regression that was imposed by his concept of obligation.

Nevertheless, this argumentation was not without consequences. First, the nature of each norm's *Sollen* remained obscure. In order to identify it, one needed to refer to the *Sollen* of another norm. *N1*'s *Sollen* is an obligation if failure to enforce the sanction *N1* establishes is itself, according *N2*, a condition to which a sanction is attached. However, *N1*'s *Sollen* is a permission or an empowerment if the non-enforcement of the sanction is not the condition of another sanction. In this case, moreover, nothing is said about a possible difference between permission and empowerment. Secondly, it became difficult to understand why only a power-conferring norm was a fragment of norm[44]. Once a wide concept of *Sollen* had been admitted, there seemed to be no obstacle to power-conferring norms properly so called.

However, conceiving of power-conferring sentences as fragments of norms was only one of the three conceptual theses Kelsen offered.

4. The second analysis of power-conferring sentences

4.1. Limited innovation in the *Allgemeine Theorie der Normen*

Starting in the 1960s, Kelsen contended that «commanding is not the only function of norms: norms also empower, permit, and derogate»[45]. In his last writings,

41 Kelsen 1997a: 111; Kelsen 1953: 74; Kelsen 1958; Kelsen 1960.
42 Kelsen 1962a: 7, 107, 162-163.
43 Kelsen 1962a: 107 (Engl. tr. Kelsen 1967: 77-78).
44 Raz 1980: 117-118.
45 Kelsen 1991: 1. See also Kelsen 1991: 97; Kelsen 1965b; Kelsen 1962b.

the enlarged concept of *Sollen* developed into a full-blown taxonomy of norms[46]. Nevertheless, Kelsen maintained previous fundamental ideas. For example, «the law is essentially a coercive order. It prescribes a certain behaviour by connecting to the opposite behaviour the being-obligatory of a coercive act as consequence»[47]. The nature of the sanction distinguished what is moral from what is legal[48] and the basic function of the legal system remained the creation of obligations[49]. Kelsen kept considering that individuals are only indirect addressees of legal norms, whereas their immediate addressees are the State organs which apply coercive acts[50]. The concepts of primary and secondary norms were preserved[51].

However, regarding the issue of power-conferring sentences, a major change had taken place. Although Kelsen remained faithful to a reductionist perspective, power-conferring sentences were not regarded as fragments of norms anymore, but as full-blown norms. Previous writings already implied a strong connection between empowerment and obligation, foreshadowing this late conception of power-conferring sentences[52]. However, Kelsen only explicitly adopted an analysis of power-conferring sentences in terms of indirect mandatory norms in his posthumous work.

4.2. The *Allgemeine Theorie der Normen*'s first theory of power-conferring sentences

Initially, «Empowering implies commanding»[53]. As Kelsen put it, «If a norm of the constitution empowers the legislative organ to posit general legal norms *binding* on those subject to the law, it is not only the legislative organ's competence to posit general legal norms which is based on the constitution, but also the *binding* nature of these norms for those subject to the law. For by empowering the legislative organ to enact statutes *binding* on the subjects of the law, the constitution empowers the legislator to make the subjects' behaviour which does not agree with the statutes the condition for sanctions and thereby make the statutes he enacts binding on the subjects of the law. Thus, the subjects are bound in the last analysis by the constitution itself – not immediately, but through the intermediary of the sanction-decreeing statutes empowered by the constitution. In other words, they are commanded by

46 Bobbio 1992: 143 n. 5.
47 Kelsen 1991: 23.
48 See e.g. Kelsen 1991: 97-98, 133-135.
49 Kelsen 1991: 136-137.
50 Kelsen 1991: 52, 56-57.
51 Kelsen 1991: 56-57, 133-135, 142-143.
52 See e.g. Kelsen 1925: 56-58, 84, 99, 125, 153; Kelsen 1934: 109-110; Kelsen 1946: 190; Kelsen 1962a: 401.
53 Kelsen 1991: 103.

the constitution to comply with the statutes»[54]. A power-conferring norm thus fulfilled two different functions with respect to two distinct kinds of addressees.

From a slightly different perspective, then, Kelsen considered that «the normative function of empowering someone to posit norms can be reduced to a function of commanding»[55]. In this case, «The higher norm empowering an individually or generally specified organ to posit lower norms can be presented as a hypothetical general norm prescribing that under the condition specified in the lower norm by the organ specified in the higher norm, the consequence specified in the lower norm posited by the organ specified in the higher norm is to occur [i.e. a sanction]»[56]. In this respect, power-conferring sentences were considered as complete legal norms and not mere fragments. However, this innovation needed to be qualified, as their conceptual upgrading was the consequence of an explicit reduction to the one and only concept of norm that Kelsen had favoured since the beginning, that of a mandatory norm. Nevertheless, this second analysis of power-conferring norms was not the last one.

5. The third analysis of power-conferring sentences

5.1. The *Allgemeine Theorie der Normen*'s second theory of power-conferring sentences

For more than half a century, Kelsen rejected any self-standing concept of power-conferring norm. Contrary to this conceptual choice, the *Allgemeine Theorie der Normen* opened with the following sentences: «the word 'norm' comes from the Latin *norma*, and has been adopted in German to refer primarily, though not exclusively, to a command, a prescription, an order. Nevertheless, commanding is not the only function of norms: norms also empower, permit, and derogate»[57]. Kelsen thus admitted four functions for legal norms[58]. Although not totally absent from previous writings, since 1965 they resulted in four types of independent norms.

A norm was defined as the meaning of an act of the will[59]. Kelsen straightforwardly contended that there is «no norm without a norm-positing act of will; or as this principle is usually phrased: No imperative without an imperator, no command without a commander»[60]. A general norm is valid once it is enacted. But it cannot

54 Kelsen 1991: 103-104.
55 Kelsen 1991: 260.
56 Kelsen 1991: 260.
57 Kelsen 1991: 1. See also Kelsen 1991: 97; Kelsen 1965b; Kelsen 1962b.
58 Kelsen 1991: 96-114.
59 Kelsen 1991: 2. Before, see Kelsen 1953: 33-40; Kelsen 1962a: 4-13.
60 Kelsen 1991: 2-3. See also Kelsen 1991: 6, 276-278 note 6, 283-285 note 16.

be immediately observed and enforced. Indeed, it needs to be made concrete by an individual norm. The latter prescribes *in concreto* the behaviour that is mandatory *in abstracto* pursuant to the general norm[61]. According to a common view, the individual norm is the result of a logical deduction from the general norm.

Departing from previous writings, Kelsen refused to admit any logical relation between norms[62]. He first considered that conflicts between norms are possible[63], and that it does not belong to legal science to solve them. Legal science develops a cognitive activity, which implies that it cannot derogate any of the conflicting norms[64]. Only can an empowered authority do it[65]. Secondly, Kelsen rejected the possibility of deducing an individual norm from a general one. Because a norm is the meaning of an act of the will, its validity cannot be implied by the validity of any other. In order to be valid, the individual norm must be established by a specific act of the will, the meaning of which it is[66]. It is impossible to deduce a norm from another one, i.e. to establish a norm by an operation of the thought[67]. The very possibility of a static normative system, where the validity of norms is based on the deduction of their content from the content of a superior norm was already problematic in previous works. It was now rejected. Only a dynamic system, in which the validity of a norm depends on the way it has been produced, was possible.

The need for a concretisation of general norms and the impossibility to analyse this phenomenon as a logical operation imposed another explanation. Every normative creation results from an act of the will. However, not every act of the will has the objective meaning of a norm: «It is only the meaning of an act of commanding which is qualified in a certain way which is a valid norm, namely an act of commanding empowered by a norm of a positive […] legal order»[68]. That is the reason why specific developments addressed the concept of power-conferring norm.

Kelsen precisely distinguished between empowerment, permission, and command[69]: «The normative function of *empowering* means: conferring on an individual the power to posit and apply norms. […] A legal norm empowers certain

61 Kelsen 1991: 46, 50-51, 220-221, 300-301 note 43.

62 The *Allgemeine Theorie der Normen* has benefitted from Kelsen 1965a, Kelsen 1967b, and Kelsen 1969. In his correspondence with Ulrich Klug in 1959, Kelsen already denies the possibility of applying logic to law. See Kelsen & Klug 1981. On this topic, see Losano 1985: 62-70; Alarcón Cabrera 1989; Gianformaggio 1990a.

63 Kelsen 1991: 123. See also Kelsen 1991: 123-127, 213-214.

64 Kelsen 1991: 126-127, 190-191, 213-214, 223-225, 245, 394-395 note 155. Kelsen himself acknowledges a major evolution. See e.g. Kelsen 1997b: 449-452; Kelsen 1997a: 420-421; Kelsen 1962a: 273-275.

65 Kelsen 1991: 106-114.

66 Kelsen 1991: 203-205, 235-236.

67 Von Wright 1983 and Von Wright 1984 have reached a similar conclusion.

68 Kelsen 1991: 27. See also Kelsen 1991: 27-28, 252-257.

69 Kelsen 1991: 103-104.

individuals to create legal norms or to apply legal norms. In such cases, we say that the law confers a legal power on certain individuals. Since the law regulates its own creation and application, the normative function of empowering plays a particularly important role in law. Only individuals on whom the legal order confers this power can create or apply legal norms»[70]. The acts that are not empowered do not have the objective meaning of norm-creation or norm-application. They do not exist from a legal viewpoint, and can be regarded as null and void. The specificities of a power-conferring norm also appear on a pragmatic level, i.e. from the perspective of its relation with the addressee's behaviour: «The difference between the function of commanding (or prohibiting) on the one hand and the functions of permitting (positively) and empowering on the other hand is expressed in the difference between *observing* (or *violating*) a norm and *applying* a norm»[71].

In his *Allgemeine Theorie der Normen*, Kelsen self-consciously and explicitly abandoned his previous choices regarding the individuation of norms. What can explain such a radical change?

5.2. The reasons for the admission of a concept of power-conferring norm

5.2.1. A modification of Kelsen's conception of legal science

A change of his conception of legal science may explain Kelsen's final choice to adopt a concept of power-conferring norm. Initially, Kantianism inspired his epistemological project. It progressively evolved towards a more empirical orientation. This first led him to limit the reconstructive role of legal science. In his first writings, he proposed organising the legal material according to a unique pattern, that of the "*Rechtssatz*" defined in his *Hauptprobleme*. Later, this term stopped referring to a norm, and applied to a metalinguistic proposition that described this material[72]. After the 1940s, the distinction between a *Rechtsnorm* and a *Rechtssatz*[73] expressed the fact that legal science must describe the language of legal actors instead of reconstructing it.

According to Kantian epistemology, science creates its own object. In Kelsen's writings, this transfers the properties of knowledge (unity, independence, systematicity, etc.) to the object of knowledge[74]. In 1928, Kelsen indeed considered that «Cognition cannot be merely passive in relation to its objects; it cannot be confined to reflecting things which are somehow given in themselves, which exist in a transcendent sphere. As soon as we cease to believe that these things have a transcendent

[70] Kelsen 1991: 102.

[71] Kelsen 1991: 104. See also Kelsen 1991: 3, 38, 104-105.

[72] Weinberger 1973: xxiv-xxv; Gianformaggio 1990a: 189; Gianformaggio 1990b: 95.

[73] Kelsen 1941: 51; Kelsen 1942b; Kelsen 1953: 42-45; Kelsen 1962a: 96-103; Kelsen 1991: 26, 128-130, 152-155, 223.

[74] Calsamiglia 1985: 99-101; Ruiz Manero 1990: 57.

existence, independent of our cognition, cognition must assume an active, productive role in relation to its objects. Cognition itself creates its objects, out of materials provided by the senses and in accordance with its immanent laws»[75]. Legal science creates its own object as a whole that is intelligible to human reason, i.e. devoid of any contradiction[76]. If the raw legal language of legal actors contains logical defects, it belongs to it to correct them. On the contrary, after 1960, the possibility of normative contradictions was admitted without this being an obstacle to legal science. It did not have to solve them anymore to offer an accurate study of its object. This was evidence of the adoption of a more empiricist model of legal science, which limited itself to the description of the material that was offered by positive law and treated it as a given, however incoherent it may appear[77].

Secondly, in the *Allgemeine Theorie der Normen*, Kelsen appeared to be more sensitive to the variety of the legal actors' ordinary language. He considered this dimension when he devised his theoretical concepts. Ordinary legal language has always resisted the model of intelligibility based on the concept of primary norm. Being closer to the tools of contemporary philosophy of language, Kelsen finally understood the legal norm as a unit of directive communication[78]. This may explain why he admitted several functions for legal norms, and not only one[79]. He thus decided to enrich his theoretical concepts so as to admit a concept of power-conferring norm. At least another cause may also contribute to explaining this important change.

5.2.2. The reception of the *Stufenbaulehre*

5.2.2.1. Merkl's theory

The *Stufenbaulehre* is not a Kelsenian creation, but the result of Adolf J. Merkl's thought. It consists of two fundamental theses. First, it highlights the plurality of modes of production of the law. Traditional legal doctrine only admitted one legal form: the statute[80]. However, defined as a general norm, a statute cannot foresee all the details of concrete situations. It is necessary to individualise it. Only at this level, and not in the enactment of the statute, can the law be fully achieved[81]. Therefore,

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75 Kelsen, H. 1946b: 434. See also Kelsen 1997b: 448, 450, 451, 483-484.

76 Kelsen 1997b: 448, 451-457, 483-487; Kelsen 1934: 66-67, 84, 88-89, 134-136; Kelsen 1953: 134, 168-169; Kelsen 1962a: 273-278. See also Pastore 1991: 381-385; Mazzarese 1988: 439-441; Mazzarese 1989: 117-119; Mazzarese 1990: 142-143.

77 See Troper 1994: 59-64; Hartney 1991: xxviii-xxix, xxxi-xxxiv, xxxix, lii-liii; Bulygin 1990: 35-36; Gianformaggio 1990a: 196, 201-202; Pastore 1991: 385-387; Guastini 1991: 426-427; Calsamiglia 1985: 94-96, 99-101, 104-105; Carrino 1988: 19-20; Heidemann 2000: 270, 272-273.

78 Parodi 1985: 162-165, 171, 175-176; Heidemann 2000: 263.

79 Legault 1977: 40, 126; Robles 1980: 48; Vernengo 1989: 302; Pattaro 1990: 135.

80 Merkl 1918: 1091, 1094-1095; Merkl 1931: 1313.

81 Merkl 1917: 1185-1188; Merkl 1918: 1094, 1099-1100.

the application of the statute also creates the law. No more than the last step in the production of the legal order is the statute the first one. It is indeed adopted pursuant to the procedural and substantive provisions of the constitution, so that the legislator cannot be presented as purely creating the law. It also applies the constitution[82], which needs to be understood as a norm as well. All the manifestations of the law, whatever their denominations, their authors or their generality, are legal norms[83]. These phenomena are unified from the viewpoint of their nature and connected from the viewpoint of their creation.

A second thesis relates to the creation of the law. Merkl highlights the fact that the law regulates its own creation. In order to be valid, a normative production must comply with the conditions that are laid down by other, pre-existing, norms[84]. A "determining" norm thus foresees the form and content of other, "determined," norms. «The legal norm without the existence of which the meaning of a legal norm could not be attributed to particular acts is defined as superior. […] The series of determinant and determined norms thus appears as a succession of degrees or, to say it with an image, as a hierarchy of acts»[85].

At each layer of the pyramid, i.e. for every phenomenon of legal production, objective elements – the determinations that result from superior norms – and subjective elements – depending on the decision of the lawgiver – need to be combined[86]. Even if their respective importance may vary, none is ever totally absent. Each degree of application of the law is also a degree of creation of the law[87]. The contention that the law regulates its own creation does not make it a separate sphere that has no connection with the empirical world. On the contrary, human action necessarily intervenes in this process. But because a normative *Sollen* cannot directly follow from a fact, the law must regulate this action. According to Merkl, it is regulated by a specific kind of norm: «this relation of production which exists between any determining legal phenomenon and any determined legal phenomenon precisely explains the expression self-production of the law (by steps). This way of speaking does not express any belief of the miraculous type, which would put any deus ex legal machina instead of the human activity of creation of law. The scientific notion of self-production of all law is based on experimental evidence according to which the legal order is composed of two parts whose contents differ. On the one hand, there are the rules of human behavior. On the other hand, there are the rules governing the introduction, the form, in short the production of these rules of behavior. […] Without such rules on legal production, the legal order would remain

82 Merkl 1918: 1092 n. 3.
83 Merkl 1931: 1325-1326, 1332; Merkl 1917: 1171.
84 Merkl 1931: 1336, 1344.
85 Merkl 1931: 1339-1340.
86 Merkl 1931: 1345; Merkl 1918: 1095-1098.
87 Merkl 1918: 1099, 1107, 1109-1110; Weyr 1927-1928: 225-228; Bonnard 1928: 684-687.

absolutely rigid and could only be conceived as a static and not a legal dynamic»[88].

By (1) admitting that the law consists of many norms that are necessary to the operational regulation of human behaviour, and by (2) considering that all these norms result from human decisions, Merkl was forced to focus on the specific legal regulation that applies to these actions[89]. Indeed, only this regulation explains the fact that these actions lead to the production of valid norms. It essentially results from the power-conferring sentences that confer normative powers to the legislators, the administrators, the judges, or the citizens. In the understanding of the global functioning of the legal system, the role of power-conferring sentences is essential. They account for the production of any valid norm, and for the power of the actors who participate in this process. In order to approach these sentences and their crucial function among legal phenomena, Merkl considered it was necessary to distinguish sharply two types of norms, and thus adopted a concept of power-conferring norm. Kelsen's late move in the same direction was the consequence of his adoption of his disciple's major doctrine.

5.2.2.2. The Kelsenian reception

Kelsen's *Habilitationschrift* was based on a strictly static conception of the law[90]. It remained faithful to most of the teachings of classical legal positivism, such as the predominance of the statute and a strict distinction between creating and applying the law[91]. In the 1920s, the fundamental elements of Merkl's theory of the legal order had been integrated into Kelsen's writings[92]. Nevertheless, his theory of the legal norm remained that of the *Hauptprobleme*[93], however much adopting the *Stufenbaulehre* made an adaptation of Kelsen's concept necessary[94].

The more or less latent antagonism between these two lines of reflection was only solved in Kelsen's posthumous work. Until that moment, the ambition to reduce all the legal material to a coherent unity of homogeneous elements coexisted with the perspective of the law regulating its own creation through specifically qualified human acts[95]. In the *General Theory of Law and State*, Kelsen suggests that there might be two concepts of the law, depending on the viewpoint – static or dynamic – one

88 Merkl 1931: 1346.

89 On this intellectual matrix, see Tusseau 2011a; Tusseau 2011b.

90 See the preface to the reedition of this book, Kelsen 1923: xii-xvi.

91 See Kelsen 1913a; Kelsen 1913b. Merkl 1917: 1192 n. 13 explicitely rejects this position.

92 Kelsen 1920: 118-119 n. 2; Kelsen 1924, ripr. in Kelsen 1925: 229-255. Carrino 1988: 12 considers that Kelsen adopted the *Stufenbau* in 1917.

93 Paulson 1982: 165; Paulson 1996: 50-51; Paulson 2000: 150-151; Paulson 2004: 263-267; Delgado Pinto 1977: 179.

94 Losano 1990: 117; Pfersmann 1997.

95 Gianformaggio 1991: 12; Carrino 1991: 205, 209; Mazzarese 1988: 443-446; Mazzarese 1989: 122-125; Mazzarese 1990: 152-156.

uses to address it[96]. As Agostino Carrino puts it, «The idea that the law is defined by its dynamic character, that is to say by being produced and applied, by the creation of its various layers by means of a will that can ultimately but be empirical, is not properly Kelsenian. It is Merkl's idea […]. But it is much more than an idea: it is a truly original theory of law, and not a fragment that can be adopted by any other legal doctrine. It is no coincidence that, once welcomed by Kelsen in his system, it has not limited itself to 'slipping' into it, but has gradually superseded it, forcing Kelsen to continual modifications and adaptations that […] will lead to the decision-making irrationalism of the last years of his life»[97]. Progressively, and not without some hesitation[98], Kelsen adopted many of Merkl's theses. Such was for example the case for his theory of legal interpretation[99], or his theory of the alternative provisions and the res judicata[100]. Such was also the case as far as the taxonomy of norms was concerned. Admitting many possible forms for the law imposes pondering over the conditions for their creation and existence. Because their production depends on a decision that necessarily implies some discretionary power, one cannot be satisfied with logical deduction as an explanatory device. Nevertheless, a decision is a fact. Because of the separation between is and ought, a fact alone cannot produce norms. To this end, it must be the object of specific legal norms[101]. Because he was not fully conscious of the implications of his own theoretical choices[102], Kelsen refused for a long time to abandon the concept of legal norm he had constructed in 1911 in order to establish a legal science. He only drew the consequences of the adoption of the definition of the law as a dynamic normative system at the end of his life[103]. Just like Merkl was led to consider that the law consists of two types of norms, Kelsen finally adopted a concept of power-conferring norm that accounts for the singularity of power-conferring sentences with respect to other elements of the legal discourse[104]. Paying attention to the dynamics of law imposes underlining the specific function of power-conferring sentences. Because of this functional specificity, adopting a concept of power-conferring norm may seem necessary.

Eventually, Merkl's influence was all the deeper as it remained silent. Such was his victory in Kelsen's mature legal thought.

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[96] See esp. Paulson 2013. See also Walter 1964.

[97] Carrino 1991: 219.

[98] See e.g. Paulson 1986.

[99] Patrono 1987: xxxvi. See Merkl 1916.

[100] Merkl 1923; Merkl 1925; Merkl 1919; Merkl 1917.

[101] Hartney 1991: xxvi; Gavazzi 1967: 104-106; Mazzarese 1991: 375-377; Paulson 2004: 263-267.

[102] Weinberger 1981: 6; Calsamiglia 1985: 7.

[103] See similarly Paulson 1996: 62; Barberis 1990: 50; Barberis 1983: 229; Losano 1985: 69; Carrino 1991: 224; Mazzarese 1990: 139-140, 152-156; Mazzarese 1993: 155-169; Ruiz Manero 1990: 9-12, 19-95; Delgado Pinto 1977: 184.

[104] See similarly Carrino 1991: 224.

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