

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

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- 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?

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- 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*)
 - presupposition of the legal validity of the first constitution

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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.*

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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 \neq 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?

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- 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 = presupposition 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

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- 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!