Kelsen Revisited

New Essays on the Pure Theory of Law

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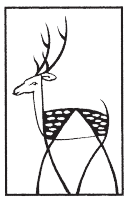

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12

In Canonical Form: Kelsen's Doctrine of the 'Complete' Legal Norm

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I. INTRODUCTION

A. Legal Propositions

IN ORDER PROPERLY to define my subject, let me begin by inviting your attention to the following quotation from the second edition (1960) of Kelsen's *Pure Theory of Law*:

> [A legal order] may be described in sentences pronouncing that under specific conditions (that is, under conditions determined by the legal order) 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.[1]

The background to this claim lies in Kelsen's understanding of legal science as one of the 'normative' sciences, and thus as 'essentially different' from the

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[1] H Kelsen, *The Pure Theory of Law*, M Knight transl (Berkeley, University of California Press, 1967 [1960]) 58. I modify Knight's translation, substituting 'legal proposition' for 'rule of law'; on this terminology *cf* n 20. Even apart from this point, it should be noted that Knight's translation of this passage (as of others) is not quite faithful to the original, whose second sentence begins instead (in my translation) 'All the material given in the norms of a legal order . . .': *cf Reine Rechtslehre*, 2nd edn (Vienna, Franz Deuticke, 1960) 59. But Knight notes in his 'Translator's Preface' (at vi) that his version was 'carefully checked' by Kelsen; and whether or not that was indeed the case, in this passage, at least, I do find his English-language rendition to convey (what seems to me to be) Kelsen's actual view more accurately than the autograph text: compare eg Kelsen's remarks on 'legally irrelevant contents' at 52f of *The Pure Theory of Law* or in *General Theory of Law and State* (Cambridge, Mass., Harvard University Press, 1945) 123, 131.

natural sciences.[2] The natural sciences describe their objects according to the principle (the '*Ordnungsprinzip*'[3]) of causality, which connects two elements as cause and effect, and whose 'fundamental form' is 'if *A* is, *B* is'.[4] But in so far as a *normative* science – a science of norms, a science of what ought to be – is at all possible, says Kelsen, it 'must describe its object according to a principle different from causality'.[5] A normative science must describe its object according to a principle connecting two elements, not as cause and effect, but according to an essentially normative copula. Kelsen calls this principle 'imputation' ('*Zurechnung*'). Its form – the form, or scheme, of the propositions with which a normative science describes its object – is 'If *A* is, *B* ought to be'.[6]

Such propositions, Kelsen maintains, are truth-apt. They are descriptions of what ought to be the case according to some given normative system. Hence they are true if, and only if, the corresponding norm 'exists' in that system: if, and only if, that is to say, it is a 'valid' norm of the system.[7] That is why these propositions are called 'normative' propositions (Kelsen's term is '*Sollsätze*'[8]). They are propositions *about* norms. Thus in submitting that, according to some normative system *S*, some state of affairs *B* 'ought' to be the case if some state of affairs *A* is the case, one is not prescribing anything. One is not thereby issuing a norm. One is merely describing the contents of *S*. The 'ought' has here, Kelsen says, 'only a descriptive character'.[9] Of course, a linguistic formulation with that very same form – 'if *A* is, *B* ought to be' – might be used prescriptively rather than descriptively. It could naturally be uttered, for example, by someone in a position of practical authority who intends to make a requirement or issue a command. In that case the authoritative speaker is not describing anything. She is instead requiring or commanding that *B whenever A is the case*. If she does indeed enjoy the necessary authority,

[2] Natural sciences such as 'physics, biology, or physiology' are not 'essentially different' from social sciences such as 'psychology, ethnology, history, [or] sociology'. The latter, says Kelsen, are *causal* social sciences: they, too, seek to 'interpret the mutual behaviour of men according to the principle of causality'. Legal science, in turn is one of the *normative* social sciences: *cf The Pure Theory of Law* (n 1) 75, 85–86; and see also H Kelsen, *Introduction to the Problems of Legal Theory*, BL Paulson and SL Paulson transl (Oxford, Clarendon Press, 1991 [1934]) 13f.

[3] *Reine Rechtslehre* (n 1) 79.

[4] *cf The Pure Theory of Law* (n 1) 76f.

[5] ibid 75.

[6] ibid 76f; *Reine Rechtslehre* (n 1) 79f; and see also H Kelsen, *Allgemeine Staatslehre* (Berlin, Julius Springer, 1925) 47f; *Introduction to the Problems of Legal Theory* (n 2) 23f; *General Theory of Law and State* (n 1) 46f, 164; and *General Theory of Norms*, M Hartney transl (Oxford, Clarendon Press, 1991 [1979]) 290f.

[7] *cf The Pure Theory of Law* (n 1) 10: 'By the word "validity" we designate the specific existence of a norm'; see also *Introduction to the Problems of Legal Theory* (n 2) 12; *General Theory of Law and State* (n 1) 30; *General Theory of Norms* (n 6) 28.

[8] *cf Reine Rechtslehre* (n 1) 77.

[9] *The Pure Theory of Law* (n 1) 79; see also *General Theory of Law and State* (n 1) 163: 'ought-statements . . . have a merely descriptive import; they, as it were, descriptively reproduce the "ought" of the norms'.

she will be issuing a norm. This means that the difference between the norm and the normative proposition may not be apparent at the linguistic level of the formulations employed by a speaker to express one or the other. But it is 'logically' rather than linguistically, says Kelsen, that the difference between the norm and the normative proposition is to be drawn.[10]

Legal science, however, does not describe its object merely *as a norm*. Legal science comprehends and describes its object 'legally' – 'from the viewpoint of the law'.[11] It comprehends its object, not merely as a norm, but 'as a *legal* norm'.[12] What does Kelsen mean by this? Consider, first, that according to Kelsen legal norms must be reconstructed from the variety of legal source-'materials' that are the 'products of the law-making procedure':

> The different elements of a norm may be contained in very different products of the law-making procedure, and they may be linguistically expressed in very different ways. When the legislator forbids theft, he may, for instance, first define the concept of theft in a number of sentences which form an article of a statute, and then stipulate the sanction in another sentence, which may be part of another article of the same statute or even part of an entirely different statute.[13]

It is 'the task of the science of law', says Kelsen, to reconstruct the content of the law in the form of normative propositions – to 'represent' the law as a system of norms.[14] Yet not just any set of normative propositions, even if it were completely and truthfully to describe the contents of some given legal system, would succeed in presenting that system as a system of *legal* norms. This is because the scheme of imputation – 'If *A* is, *B* ought to be' – is not a specifically legal scheme. It is, rather, a *common* scheme to the domain of the normative sciences, a domain that includes (according to Kelsen), apart from legal science, the 'science of morals' (or, as he also calls it, 'ethics').[15] But if there is, within this general frame of the normative sciences, an autonomous science of legal norms, then there must be, thinks Kelsen, a specifically legal

[10] *The Pure Theory of Law* (n 1) 73; though in connection with a different issue, Kelsen remarks in *Hauptprobleme der Staatsrechtslehre*, 2nd edn (Tübingen, JCB Mohr, 1923 [1911]) 271 that 'there is no discipline in which reliance on ordinary linguistic usage is more dangerous than in jurisprudence' (my translation).

[11] *The Pure Theory of Law* (n 1) 70.

[12] ibid, my emphasis.

[13] *General Theory of Law and State* (n 1) 45; see also *Hauptprobleme der Staatsrechtslehre* (n 10) 237.

[14] *General Theory of Law and State* (n 1) 45.

[15] *cf The Pure Theory of Law* (n 1) 86; see also at 90 for examples of (non-legal) normative propositions describing positive 'moral' norms such as those 'enacted by a religious leader or created by custom': 'If someone has rendered to you a good service, you ought to show gratitude; if someone has sacrificed his life for his country, his memory ought to be honoured; if someone has sinned, he ought to do penance'. In other works Kelsen also mentions logic, aesthetics and even grammar as further examples of non-legal normative sciences: see eg *Hauptprobleme der Staatsrechtslehre* (n 10) 4, 6.

way of representing legal norms.[16] A formulation that applies 'only to legal norms', he says, will have to include 'the essential element which distinguishes a legal norm from other norms'.[17] This element, in Kelsen's view, is coercion: 'the legal norm is a coercive norm (a norm providing for coercion), and . . . precisely thereby the legal norm is distinguished from other norms'.[18] Accordingly, the form of the legal normative proposition – the form, in short, of the 'legal proposition': Kelsen's term is '*Rechtssatz*' – corresponds to a partial interpretation of the general form of imputation 'If *A* is, *B* ought to be'.[19] In the legal proposition, '*B*' is to be interpreted as standing for a legally determined 'act of coercion':

> If the law is conceived as a coercive order, that is, as an order stipulating coercive acts as sanctions, then the law-describing legal proposition appears as the statement that under certain conditions, determined by the legal order, a certain coercive act, likewise determined by that order, ought to be performed.[20]

[16] In 'J.W. Harris's Kelsen' in T Endicott, J Gezler and E Peel (eds), *Properties of Law. Essays in Honour of Jim Harris* (Oxford, Oxford University Press, 2006) 17ff, Stanley L Paulson proposes to understand Kelsen's views on this matter in terms of the idea – which Paulson traces back to the work of Baden Neo-Kantian philosopher Heinrich Rickert – that it is the hallmark of an autonomous scientific discipline that it has own 'methodological form'. See also SL Paulson, 'A "Justified Normativity" Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz' in M Klatt (ed), *Institutionalized Reason. The Jurisprudence of Robert Alexy* (Oxford, Oxford University Press, 2012) 109ff.

[17] *General Theory of Norms* (n 6) 272.

[18] *Introduction to the Problems of Legal Theory* (n 2) 26; see also *Hauptprobleme der Staatsrechtslehre* (n 10) 212; and *The Pure Theory of Law* (n 1) 56, 145.

[19] The form of the legal proposition (the '*Rechtssatz*') may thus be characterised as a *species* of the form of the normative proposition (the '*Soll-satz*'); the 'methodological form' of legal science (see n 16), in other words, is a species of the general form of imputation. In 'J.W. Harris's Kelsen' (n 16) 18, Stanley Paulson maintains that Kelsen views imputation as *the* characteristic methodological form of legal science. My suggestion is instead that – just like causality, which, as Paulson rightly remarks (*cf* ibid 17), 'has to be taken as the *genus* of the methodological forms in the natural sciences generally, for it has application to all of them' (which is to say that each of the natural sciences will have its own specific methodological form) – Kelsen's imputation has to be taken, analogously (and to use the same words), as the *genus* of the methodological forms in the normative sciences generally, for it has application in all of them. Compare, indeed, Kelsen's own contention (which I quote in Bonnie and Stanley Paulson's own translation) that 'the formal category of the norm – the category designated by 'ought' – yields only the genus, not the *differentia specifica*, of the law', in *Introduction to the Problems of Legal Theory* (n 2) 26.

[20] *The Pure Theory of Law* (n 1) 108. Again I substitute 'legal proposition' for the translator's 'rule of law' – an unfortunate choice of terminology which has brought about a great deal of confusion among those who have read Kelsen in English (see eg HLA Hart, 'Kelsen Visited' in his *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983 [1963]) 286ff). In fact, 'rule of law', in this sense, occurs already in the *General Theory of Law and State* (n 1) eg at 45f, although elsewhere in the same work (eg on the opening pages of ch I, or on p 29) the expression seems also to be used as a synonym for 'general legal norm'. With 'rule of law', I presume, the translators were attempting to convey Kelsen's point that, by analogy to the '*Naturgesetz*' – a term which translates straightforwardly as 'law of nature' – the proposition of law (ie the '*Rechtssatz*') could also be *called* '*Rechtsgesetz*': *cf* the exposition in *General Theory of Law and State* (n 1) 46, and see also *The Pure Theory of Law* (n 1) 77 and 79f. Yet the two nouns from which the compound term '*Rechtsgesetz*' is formed – '*Recht*' and '*Gesetz*' – both translate into English as 'law'. (Not so in other languages: '*Recht*' translates into

These introductory exegetical remarks are meant to put into context the quotation with which I opened the chapter. But Kelsen's general point should be fairly familiar. It was highlighted by HLA Hart, who in *The Concept of Law* and in other works discussed what he characterised as Kelsen's view that there is a

> canonical form for the representation of law . . .: statements that if such and such conditions are fulfilled then such and such a sanction will follow. These are the statements by which the normative science of law is said by Kelsen to describe or represent law.[21]

B. Kelsen's 'Complete' Legal Norm

Let us now pay closer attention to an example of a legal proposition. Consider, first, the following hypothetical situation, again excerpted from Kelsen's *Pure Theory*:

> Suppose that the legal order of a state prohibits theft by attaching to it in a statute the penalty of imprisonment. *The condition of the punishment is not merely the fact that a man has stolen.* The theft has to be ascertained by a court authorized by the legal order in a procedure determined by the norms of the legal order; the court has to pronounce a punishment, determined by statute or custom; and this punishment has to be executed by a different organ. The court is authorized to impose, in a certain procedure, a punishment upon the thief, only if in a constitutional procedure a general norm is created that attaches to theft a certain punishment. The norm of the constitution, which authorizes the creation of this general norm, determines a condition to which the sanction is attached.[22]

French as '*droit*', into Italian as '*diritto*', into Spanish as '*derecho*', into Portuguese as '*direito*'; and '*Gesetz*', respectively, as '*loi*', '*legge*', '*ley*' and '*lei*'). Kelsen's '*Rechtsgesetz*' would therefore literally translate into English, confusingly, as 'the law of law'. (The idea could perhaps be slightly less opaquely rendered as the 'law of Law', the 'legal law', perhaps also as the 'juridical law'). It is this 'law' ('*Gesetz*') of Law ('*Recht*') that – just like the 'law' ('*Gesetz*') of nature ('*Natur*') – is said by Kelsen to be a 'law' in a purely 'descriptive sense': a thought which, though reasonably clear in German, does not come across in English at all if 'rule' is used instead of 'law' (and '*Rechtsgesetz*' translated as 'rule of law'). In later writings Kelsen himself no longer uses the equivocal 'rule of law' to translate '*Rechtssatz*', which he now renders as 'proposition of law': see eg 'Professor Stone and the Pure Theory of Law' (1965) 17 *Stanford Law Review* 1132ff.

[21] Hart, 'Kelsen Visited' (n 20) 298; see also his 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (1957) 105 *University of Pennsylvannia Law Review* 959; 'Positivism and the Separation of Law and Morals' in his *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983 [1958]) 61; 'Prolegomenon to the Principles of Punishment' in *Punishment and Responsibility. Essays in the Philosophy of Law*, 2nd edn (Oxford, Oxford University Press, 2008 [1959]) 7; and *The Concept of Law*, 3rd edn (Oxford, Oxford University Press, 2012 [1961]) 35ff.

[22] *The Pure Theory of Law* (n 1) 56 (my emphasis); a similar example is given in *General Theory of Law and State* (n 1) 143f.

The topic at stake is the description of the law on theft in a given legal order. It might at first blush seem that a proposition stating that 'whoever steals ought to be punished [by some court *C*, with a certain sanction *S*]' would aptly discharge that task. But note the italicised sentence. Kelsen observes here that the legal consequence – viz. that the punishment ought to be brought about – depends on the verification of a complex set of conditions. Thus 'the legal proposition that describes this situation' will read, according to Kelsen, as follows:

> 'If the individuals authorized to legislate have issued a general norm according to which a thief is to be punished in a certain way; and if the court authorized by the Code of Criminal Proceedings in a procedure prescribed by this code has ascertained that an individual has committed theft; and if that court has ordered the legally determined punishment; then a certain organ ought to execute the punishment.'[23]

Kelsen's point, then, is that the 'independent' ('*selbständige*') or 'complete' ('*vollständige*')[24] formulation of the legal proposition requires that in its antecedent all the conditions on which the consequent depends – which conditions encompass, for example (and besides the fact of theft itself), the enactment, by an authorised organ, of the corresponding criminal statute – be included and spelled out. This again illustrates the point, highlighted above,[25] that the variety of provisions that are the result of law-making activities (and to the contents of which lawyers will naturally refer as 'norms') are to be represented as 'elements', as 'parts', of 'complete' legal propositions (and thus also of 'complete' norms). Constitutional law is a case in point. Those constitutional norms which empower legislators and regulate the organisation and procedure of legislation are viewed by Kelsen as adding to the 'conditions' under which the sanction is to be applied,[26] and thus as 'intrinsic parts of all the legal norms' – that is, the 'complete' legal norms – 'which the courts and other organs have to apply'.[27]

This, too, is a familiar doctrine. It was discussed by HLA Hart as the 'extreme' version of the argument that 'what are loosely or in popular modes of expression referred to as complete rules of law, are really incomplete fragments of coercive rules which are the only "genuine" rules of law':[28]

> On this view, what is ordinarily thought of as the content of law, designed to guide the conduct of ordinary citizens, is merely the antecedent or 'if-clause' in a rule

[23] *The Pure Theory of Law* (n 1) 57.

[24] For these adjectives *cf* eg *General Theory of Law and State* (n 1) 53, 143; *The Pure Theory of Law* (n 1) 57, 238; and for the original text see *Reine Rechtslehre* (n 1) 58, 244.

[25] *cf* text to n 13.

[26] *The Pure Theory of Law* (n 1) 57.

[27] *General Theory of Law and State* (n 1) 143f.

[28] Hart, *The Concept of Law* (n 21) 35.

> which is directed not to them but to officials, and orders them to apply certain sanctions if certain conditions are satisfied. All genuine laws, on this view, are conditional orders to officials to apply sanctions . . . Thus, the theory bids us disentangle the substance from the obscuring forms; then we shall see that constitutional forms such as 'what the Queen in Parliament enacts is law', or the provisions of the American constitution as to the law-making power of Congress, merely specify the general conditions under which courts are to apply sanctions. These forms are essentially 'if-clauses', not complete rules: 'If the Queen in Parliament has so enacted . . .' or 'if Congress within the limits specified in the Constitution has so enacted . . .' are forms of conditions common to a vast number of directions to courts to apply sanctions or punish certain types of conduct. This is a formidable and interesting theory, purporting to disclose the true, uniform nature of law latent beneath a variety of common forms and expressions which obscure it.[29]

Such a theory, Hart objected, distorts the 'different social functions which different types of legal rules perform'.[30] I am not convinced by Hart's rejoinder, which seems to me beside the point. But I do agree, for different reasons, that Kelsen's views on norm-completeness are questionable. Such views are also fully autonomous from his views on the specific form of the *legal* norm and its distinctively *legal* consequent. (Neither set of views, incidentally, amounts to a doctrine of norm-'individuation'. Instead, they both concern the structure of legal norms and propositions, and tell us nothing about the criterion by which to determine whether any given true legal proposition describes exactly *one* norm. In fact, and in spite of what is sometimes claimed, Kelsen has no doctrine of individuation at all.[31]) Kelsen's criterion of completeness, in effect, concerns the relation between the antecedent and the consequent of a norm or normative proposition, irrespective of their peculiarly legal character. The

[29] ibid 36f.

[30] ibid 38f, and *cf* also Hart's essay 'Legal Powers' in his *Essays on Bentham. Studies in Jurisprudence and Political Theory* (Oxford, Clarendon Press, 1982) 219.

[31] See J Raz, *The Concept of a Legal System*, 2nd edn (Oxford, Clarendon Press, 1980) 73f (for the contrast between questions of structure and questions of individuation proper) and 77ff and 109ff (for a conjectural reconstruction of what Raz unassumingly refers to as Kelsen's 'implicit' doctrine of individuation). Raz does sometimes frame the issue of individuation as that of determining which statements describe 'one *complete* norm' (or, in a slightly different formulation, which statements '*completely*' describe 'exactly one' norm): *cf* eg ibid 49f, 73f, 113 fn 2, 219ff (my emphases). But the adjective 'complete' has here a different meaning than it does in Kelsen's works. Consider the statement '*Every person* ought to inform the Home Office of his address within a fortnight of the passing of this Act, and thereafter within a fortnight of changing his address'. If this statement describes one complete law, then the otherwise identical statement beginning '*All adult males* ought to inform the Home Office' is said, in Raz's terminology, not to describe a 'complete' norm but only 'part of the content of a norm' (and thus 'less' than a complete norm): *cf* ibid 73 (my emphases). (By the same token, the conjunction of at least two true statements describing complete laws would itself be a statement describing 'more' than one complete law.) Given that those two statements are identical in structure, Raz's idea of a 'complete' norm, as well as his corresponding idea of a 'part' of a norm, is at least partly a structure-independent idea. In Kelsen, in turn, the labels refer to purely structural notions.

two issues can thus be taken separately for discussion and criticism. In this chapter I deal only with the first; I offer a critique of Kelsen's account of 'complete' legal norms.

II. THREE NOTIONS OF NORM-COMPLETENESS

As Hart notes in the passage just quoted, we do often (if 'loosely') refer to the prescriptive contents of discrete legal provisions – such as a section or article in a statute – as 'norms'. Think of some legislative provision stipulating, say, that whoever performs an action of some given type 'shall be punished' in some given manner: we would naturally speak of *the* corresponding 'sanction norm'. Consider, then (to work with Kelsen's theft example), the following formulation:

> (T) Whoever dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it ought to be punished [with sanction *S*].

In effect, Kelsen, too, would employ the term 'norm' to refer to the contents of such provisions, or indeed to refer to the content of constitutional provisions such as those empowering certain agents as legislators and laying down law-making procedures. So his point is not that the term 'norm' is not aptly used in connection with such provisions.[32] His point seems rather to be that no such legislative or constitutional norms – and thus no norm like (T) – would count as a 'complete' norm, in a particular reading of the adjective.

But what reading is that? There is clearly more than one sense in which a formulation like (T) may be said to be 'complete' or 'incomplete'. There is, for one, an elementary sense in which (T) is complete: it is a well-formed, autonomous unit of meaning. As we saw, however, Kelsen's complete norm purports to be 'complete' in a different sense. Kelsen's 'complete' norm is the norm whose antecedent includes the *total set* of elements (or at any rate *one* such total set, if there happens to be more than one set of elements whose ascertainment suffices to trigger the consequence) on which the normative consequent depends. And it is surely true that in order for a judge correctly to convict and sentence someone for theft it is not sufficient that the actual theft has been committed. Other conditions must obtain: that no justificatory or exculpatory circumstances emerge, for example; that the act-type of theft has in fact been validly defined by law as a criminal offence; that the particular

[32] In several of the passages quoted above, in fact, Kelsen uses the term 'norm' in this very sense: he refers eg to the '*norm* of the constitution' which 'determines a condition to which the sanction is attached' (*cf* the passage quoted to n 22, now with my emphasis) or to the 'general *norm*', issued by the legislature, 'according to which a thief is to be punished in a certain way' (*cf* the passage quoted to n 23, now with my emphasis).

court has jurisdiction to try the case; and so on. I wish to suggest, however, that to frame the issue of norm-completeness in this way is to propitiate confusion. Let me introduce the following distinction.

Keeping with Kelsen's theft example, formulation (T), which, to repeat, I am taking as a reconstruction of a corresponding section or article in some statute or criminal code (and which is at any rate 'complete' in the first, elementary sense mentioned in the previous paragraph) can usefully be said to be *in*complete in (at least) two (other) relevant senses. At this preliminary stage of the discussion I offer only semi-ostensive characterisations.[33] Thus: (a) in a certain sense of the 'complete'/'incomplete' distinction, the formulation in (T) is incomplete because there are cases in which someone who steals ought *not* to be punished: for example when the agent has a valid justification or excuse; and (b) in another sense of the adjectives, the formulation in (T) is incomplete because for someone to be convicted of, and punished for, theft it is also necessary, for example, that the statutory provision criminalising theft has been validly issued by a legally authorised law-making organ. More precisely, then:

(*A*) In sense *A*, (T) is incomplete because it fails to incorporate (as either positive or negative conditions[34]) the circumstances under which whoever steals *ought not* to be punished (circumstances which *in our example* would mainly be the available defences).

(*B*) In sense *B*, (T) is incomplete because it fails to incorporate the circumstances that regard the valid production (eg issuance by the authorised organ) of the legal source-material (which would *in our example* be the statutory provision or article making theft a criminal offence) whose content is reconstructed in (T).

Kelsen's notion of norm-completeness assumes that this distinction tracks no relevant difference. And in fact it was only with reference to a given norm-formulation – it was only with reference to formulation (T) – that I was able to distinguish between senses (*A*) and (*B*). Kelsen, in contrast, frames the issue relative to a given normative *consequence* (which is, in his example, the criminal conviction for theft). He therefore treats as equivalent all the 'conditions' on which that consequent can be said to depend, and accepts as 'complete' only the antecedent in which all such conditions are incorporated. What I will now argue is that there is indeed a fundamental difference between (*A*) and (*B*), and moreover that the notion of completeness-(*B*) is devoid of theoretical usefulness.

[33] More rigorous definitions will be given in section V.

[34] I now gloss over the debate about how, exactly, the absence of defences (and of exceptions more generally) is to be represented in our formulations of conditional legal norms. On this issue see my 'A Proof-Based Account of Exceptions' (2013) 33 *Oxford Journal of Legal Studies* 133.

III. NORM-'LEVELS' AND THE DESCRIPTION OF LAW

In our theft example – and it is important to stress that my discussion will be carried out in view of this example – the problem of completeness-(*B*) concerns the possibility of incorporating into the antecedent of (T), as further conditions, the circumstances of the valid issuance of those provisions on whose contents (T)'s consequent can be said (in some sense) to 'depend'. The problem thus regards, more generally, the relation between power-conferring norms (or 'norms of competence', as they are also sometimes called) and the norms, particularly the duty-imposing norms of conduct, issued by the competent authorities.[35]

It is not fully clear what claim or claims should be attributed to Kelsen on this classic jurisprudential topic. On this matter there seems to be no single, unitary thesis consistently endorsed by him at any given point of his career, let alone across time. But let me continue to focus on the second edition of the *Pure Theory*, where it is safe to say that the notion of 'competence' (or 'authorisation'), in what Kelsen calls the 'narrowest' sense of the term,[36] is very closely connected to the notion of a duty. This is not a specifically legal connection. Kelsen illustrates what he dubs the 'dynamic type' of normative system – the type of system, that is, the validity of whose norms ultimately depends on 'nothing but . . . the authorization of a norm-creating authority'[37] – with the following example:

> A father orders his child to go to school. The child answers: Why? The reply may be: Because the father has so ordered and the child ought to obey the father. If the child continues to ask: Why ought I to obey the father, the answer may be: Because God has commanded 'Obey Your Parents', and one ought to obey the commands of God.[38]

Similar examples are given for the case of law. They are meant to illustrate the thesis that a legal norm is valid not 'because it has a certain content', but 'because it is created in a certain way': because it has been created, 'posited', by an authorised law-making agent.[39] Kelsen also maintains (because of his much-criticised conflation of two notions of 'validity': systemic membership and binding force) that to say that a norm is valid 'means that it is binding –

[35] Here, again, the term 'norm' is employed in its ordinary sense, not in the sense of Kelsen's 'complete' norm: recall n 32.

[36] In its 'strict sense', the term 'competence' designates the power to create legal norms; in a wider sense it also encompasses powers to perform acts other than acts of norm-creation: *cf* eg *The Pure Theory of Law* (n 1) 57, 147, 149. There are finer distinctions to be drawn, but they need not detain us here: see E Bulygin 'On Norms of Competence' (1992) 11 *Law and Philosophy* 202f.

[37] *The Pure Theory of Law* (n 1) 196.

[38] ibid.

[39] see ibid 198ff.

that an individual ought to behave in the manner determined by the norm'.[40] It seems, then, that Kelsen would have endorsed one particular version of the claim that power-conferring norms can be 'reduced' to duty-imposing norms: the version according to which the attribution of norm-creating power to an organ *A* is tantamount to a prescription, addressed at subject *B*, to do as *A* requires.[41] In the simplest case – the case in which norm-creating power is attributed to *A* with no restriction as to the possible content of the norms that *A* may choose to issue – the prescriptive norm of conduct to which the attribution of power is (according to this view) reducible can be formulated as:

(1) One ought to do as *A* requires.

In order for it to be the case that someone ought, on the grounds of (1), to perform some given action, it is necessary that *A*, the power-holder, does happen to exercise her power by issuing (by 'positing', as Kelsen would put it) some determinate prescription. In this regard, (1) is an indeterminate prescription, and *A* might be said to hold the power to determine its content – and thereby to bring about changes to the legal positions of those to whom (1) may happen to be addressed.[42] Let us then assume that *A* prescribes that everyone pay 40 per cent tax on professional income. In that case, the norm

(2) One ought to pay 40 per cent tax on professional income

is 'valid', in Kelsen's sense, for it was issued by an authorised (a 'competent') agent. But (1) and (2) are two different norms. If (1) is valid, then the corresponding normative proposition – the proposition that *one ought to do as A*

[40] ibid 193. For discussion, see A Ross, 'Validity and the Conflict Between Legal Positivism and Natural Law' (1961) *Revista Jurídica de Buenos Aires* 46ff; MP Golding, 'Kelsen and the Concept of "Legal System" ' (1961) 47 *Archiv für Rechts- und Sozialphilosophie* 368ff; CS Nino, 'Some Confusions Around Kelsen's Concept of Validity' (1978) 64 *Archiv für Rechts- und Sozialphilosophie* 357ff; E Bulygin, 'An Antinomy in Kelsen's Pure Theory of Law' (1990) 3 *Ratio Juris* 29ff. Ross's, part of Nino's, and Bulygin's articles are reproduced, with minor revisions, in SL Paulson and BL Paulson (eds), *Normativity and Norms. Critical Perspectives on Kelsenian Themes* (Oxford, Clarendon Press, 1998) at 147ff, 253ff and 297ff, respectively.

[41] See Bulygin, 'On Norms of Competence' (n 36) 204; and J Ferrer Beltrán, *Las Normas de Competencia. Un Aspecto de la Dinámica Jurídica* (Madrid, Centro de Estudios Políticos y Constitucionales, 2000) 29ff. The ascription of this particular reductionist view to Kelsen is further supported by the fact that the basic norm, whose function is to authorise (ie to empower) the creators of the historically first constitution (see *The Pure Theory of Law* (n 1) eg at 197, 202ff), can also be formulated, according to Kelsen, as 'One ought to behave as the [historically first] constitution prescribes' (ibid eg at 8, 46, 201). Compare in any case Kelsen's very clear assertion, in a 1963 essay on the self-determination of law, that 'in empowering an individual to issue norms commanding other individuals to behave in certain ways, law commands these individuals to comply with the norms issued by the empowered individual': H Kelsen, 'Die Selbsbestimmung des Rechts' in H Klecatsky, R Marcic and H Schambeck, *Die Wiener Rechtstheoretische Schule* (Vienna, Europa Verlag, 1968 [1963]) 1446 (my translation); and also *General Theory of Norms* (n 6) 103f.

[42] See L Lindahl, *Position and Change. A Study in Law and Logic* (Dordrecht, Reidel, 1977) 193ff; T Spaak, *The Concept of Legal Competence. An Essay in Conceptual Analysis* (Aldershot, Dartmouth, 1994) 102ff, 171ff.

requires – is true whether or not *A* has in fact ever exercised her competence. But the proposition that *one ought to pay 40 per cent tax on professional income* is true (in our example) only if and when the power-holder has indeed issued the norm indicated as (2).

Kelsen would say here that *A*'s act of prescribing that everyone pay 40 per cent tax on professional income is a norm-'creating' act – it 'creates' the norm in (2) – and thus that (1) is a 'higher' norm than (2).[43] We may express this point in a different way. Always assuming that *A*'s norm-creating power is not substantively restricted, (1) entails, say, that

(3) If *A* requires everyone to pay 40 per cent tax on professional income, then one ought to pay 40 per cent tax on professional income.

But (3) is but an instance of the following conditional reformulation of (1):

(1′) If *A* requires *X* to φ, then *X* ought to φ,

in which 'φ' is a placeholder for any type of action (be it the payment of the mentioned 40 per cent tax, or any other type of action whatsoever), and '*X*' stands for the addressee(s) of *A*'s prescriptions. So we can derive (3) from (1) with no need for further premises. In fact we can immediately derive from (1) an infinite number of formulations like (3). But the same is not true of (2), which does not straightforwardly follow from (1). In order to get (2) it is also necessary that *A* does in fact prescribe the payment of 40 per cent tax on professional income (rather than some other action). For the 'existence' of the norm in (2) – in the sense in which Kelsen speaks of a norm's 'existence'[44] – is dependent on the exercise by *A* of her norm-creating power. Only then will the normative proposition that *one ought to pay 40 per cent tax on professional income* be true. But (1) remains a valid norm; and even after (2) has been validly created, the normative proposition will of course remain true that *one ought to do as A requires*.[45]

[43] *The Pure Theory of Law* (n 1) 221: 'The relationship between the norm that regulates the creation of another norm and the norm created in conformity with the former can be metaphorically presented as a relationship of super- and subordination. The norm which regulates the creation of another norm is the higher, the norm created in conformity with the former is the lower one'.

[44] See n 7.

[45] In our example, the exercise by *A* of her norm-creating power simultaneously amounts, as I noted (*cf* text to n 42), to a determination of the content of her subjects' duty. But there is a distinction to be drawn between levels of norm-creation and degrees of content-determinacy. If, modifying the example, we now suppose that instead of prescribing the payment of 40% tax on professional income, *A* prescribes (thereby 'delegating' her power) that one does as *C* requires, then the norm

(2′) One ought to do as *C* requires

will also be 'valid', because, again, it will have been issued by an authorised agent. Thus everything said in the text with regard to (2) would also hold true of (2′). (2′) is 'created' by *A* in the same sense in which, in our first example, (2) had been; and (1) is a 'higher' norm than (2′) in the same sense in which it was a 'higher' norm than (2). In what concerns the determination of

With these examples in mind, we may now return to the notion of completeness-(*B*) introduced in the previous section. For clarity, let us adapt our formulations to Kelsen's theft example. We shall thus have, say, as an example of the same type as (1),

> (1K) One ought to do as Parliament requires,

which is to be taken – as was (1), mutatis mutandis – as the formulation of a partially indeterminate norm of conduct equivalent to the attribution of norm-creating power to Parliament. Assuming, then, that Parliament validly issues a provision stipulating that 'Whoever dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it shall be imprisoned for up to three years', the corresponding norm – paralleling (2) – might be formulated as

> (2K) Whoever dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it ought to be imprisoned for up to three years,

or, in a more explicitly conditional rendition, as

> (2K′) If someone dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it, he or she ought to be imprisoned for up to three years.

Kelsen's claim here would be, as we have seen, that a formulation like (2K) is not 'complete' because it omits any reference to the exercise by Parliament of the corresponding norm-creating power. The complete formulation, according to Kelsen, would read instead as follows:

> (3K) If Parliament prescribes that whoever dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it shall be imprisoned for up to three years, then whoever dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it ought to be imprisoned for up to three years.

We also saw that Kelsen holds that legal propositions – truth-apt descriptions of the law – are true just in case the corresponding norms 'exist'. Yet the truth of (3K) depends only on the truth of (1K), for (3K) and (1K) are related in precisely the same way as (3) and (1). It would be possible to substitute any other contents whatsoever for the references in (3K) to the action of theft and to the consequence of imprisonment for up to three years. Thus (3K) would *not* amount to a description of the law on theft in any given legal system. (3K) would be true even if (2K) were false: even if, that is, Parliament had *not* made

the types of action which anyone ought to perform on the grounds of (1), however, (2′) is – differently from (2) – just as indeterminate as (1). A difference in 'level' does not necessarily map onto a difference in content-determinacy.

theft a punishable criminal offence, and the corresponding norm had never come to be valid.

To be clear, propositions (1K) or (3K) *are* truth-apt legal propositions in Kelsen's sense. Their truth, relative to some given legal system *S*, depends on its being the case that Parliament – rather than some other agent, or indeed none at all – is indeed the organ authorised, in *S*, to legislate on criminal subjects (which is a contingent matter of positive law). And (2K), too, is a truth-apt legal proposition; its truth depends on its being the case that Parliament has indeed issued the corresponding norm making theft a criminal offence. So it may well be that (3K) and (2K) are *both* true relative to the same legal system. But they are set at different 'levels', and both are needed in a complete description of the corresponding legal system.

Interestingly, Kelsen seems to have had an inkling of this problem. He states at one point that his 'complete' propositions of law are meant to describe only what he calls 'general' norms. But 'individual' norms, as created by judicial decisions or administrative acts, cannot, he tells us, be similarly described:

> The proposition of law ('*Rechtssatz*') that presents itself as a legal law ('*Rechtsgesetz*'[46]) has a general character, like the law of nature ('*Naturgesetz*'), which means that the legal law *describes the general norms* of the legal order and the relationships constituted by these norms. The individual legal norms, created by judicial decision or administrative acts, are described by the science of law as a concrete experiment is described by natural science referring to the law of nature that manifests itself in the experiment. A textbook in physics might, for example, contain the words: 'Since, according to a law of nature, a metallic body expands when heated, the metallic sphere that physicist *X* dropped before heating through a wooden ring, did not pass through it after heating'. Or a text on German criminal law might say: 'According to a legal law to be formulated with reference to German law, an individual who committed theft ought to be punished by a court by imprisonment; therefore the Court *X* in *Y*, having determined that *A* committed theft, has decided that *A* ought to be forcibly confined in prison *Z* for one year'. By saying that '*A* having committed a certain theft ought to be forcibly confined in prison *Z* for one year' the individual norm is described which Court *X* in *Y* has enacted.[47]

Though the example is slightly misconstrued, the passage reads clearly enough as an application of Kelsen's 'dynamic' account of the 'foundation of the validity of a positive norm' in terms of a syllogism in which both the major premise and the conclusion are normative propositions, and the minor premise is a non-normative proposition asserting the instantiation of the antecedent of the major premise:

> [t]he major premise is the assertion about a norm regarded as objectively valid, according to which one ought to obey the commands of a certain person, that is,

[46] See n 20.

[47] *The Pure Theory of Law* (n 1) 80 (my emphasis).

> one ought to behave according to the subjective meaning of these commands; the minor premise is the assertion of the fact that this person has commanded to behave in a certain way; and the conclusion is the assertion of the validity of the norm: one ought to behave in this particular way.[48]

We already know that Kelsen 'figuratively' refers to the norm described in the major premise as 'higher' than the one asserted in the conclusion.[49] A legal system, he says, 'is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms'.[50] A change in 'level' is therefore dependent on the verification of certain facts – which are said (also figuratively) to 'create' the lower-level norms. Evidently 'the major premise and the minor premise are both conditions of the conclusion'; but Kelsen stresses that the '*is*-statement' in the syllogism's minor premise is indeed an 'essential link'.[51] Without the corresponding fact or facts, the respective lower-level norms are not created, not 'posited' – they do not come into 'existence' – and cannot therefore be truthfully 'described' in normative propositions. And *this* is what Kelsen appears to be acknowledging in the lengthy passage quoted above:[52] that given that the 'existence' of the individual norm is dependent on the verification of the fact that instantiates the antecedent of the general norm, that individual norm can be described only (for it comes into existence only) if and when such a fact can be said to have occurred. For what the proposition describing the individual norm asserts is not that thieves (in general) ought to be punished in a given way. What the proposition describing the individual norm asserts is that *some individual agent* ought to be punished in a given way. The individual norm is 'lower' than the general one, and the proposition describing the former cannot be incorporated in the proposition describing the latter; for the 'higher' proposition is true independently of the verification of any individual theft.

But then it is also the case (is it not?) that this differentiation of 'levels' of normative propositions does not yield only *these* two strands (the 'general' and the 'individual'). In effect, the norms that Kelsen calls 'general' do not all belong to the same 'level'. They are rather distributed by many 'levels': by as many levels, indeed, as those into which any given legal system may be plausibly divided (which is again, of course, a contingent feature of the particular legal system in question). Kelsen identifies three main strata in what he calls the 'normal situation'[53] of a legal system: (a) the constitution (in the 'material sense'), understood as the 'positive norm or norms which regulate the creation

[48] ibid 202.
[49] *cf* ibid 193, and see n 43.
[50] ibid 221.
[51] ibid 194.
[52] To n 47.
[53] ibid 224.

of general legal norms';[54] (b) the 'next step down in the hierarchy', integrated by the 'general norms created by legislation or custom'[55] which have the complex function of determining the 'content' of individual norms, the organs authorised to create them and 'the procedure to be observed by them';[56] and (c) the level of the individual norms produced by judicial or administrative organs.[57]

Stated in this order, these levels are progressively less 'abstract'; the process of law-creation, Kelsen says, 'is a process of increasing individualization and concretization':

> Contemplated from the point of view of the dynamics of the law, the creation of individual norms by the courts represents a transitional stage of the process that begins with the establishment of the constitution, continues via legislation or custom to the judicial decision, and leads to the execution of the sanction. This process, in which the law keeps renewing itself, as it were, proceeds from the general (abstract) to the individual (concrete); it is a process of increasing individualization and concretization.[58]

In this case, however, it is also not possible to describe the norms placed at *each* of the supra-'individual' levels except in the very same way by which, according to Kelsen, individual judicial norms are to be described. If there are different levels of norms, there are different levels of normative propositions; and there must be, for each level of norms, the corresponding level of propositions.

Therefore, though Kelsen rightly notices (if I read him correctly) that no single legal proposition can simultaneously take up material from the 'general' and from the 'individual' levels, he fails to see that this very argument has application within the very domain of 'general' law. For this domain is itself divided into more than one 'level' of norms. Differently from what Kelsen claims in the quotation with which this chapter began, then, it is not possible to describe the *whole* of general law by means of his supposedly 'complete' propositions, which are meant to incorporate 'material' from at least two norm-levels (the constitution, and ordinary legislation). The point is not that it is not possible to reconstruct *true* 'complete' Kelsenian legal propositions[59] from the legal materials of any given legal system. It is. (Many such propositions, if not all, will be made true, as Joseph Raz remarks, on the grounds of

[54] ibid 222.
[55] ibid 224.
[56] ibid 230.
[57] ibid 233ff; further specificities are irrelevant for our present purposes.
[58] ibid 237.
[59] Like the one in the passage quoted to n 23.

constitutional law alone.[60]) The point is rather that it is not possible to describe the *whole* of positive law with just those propositions.

IV. MISUNDERSTANDING MERKL?

As an aside, and although my goals in this chapter are not primarily exegetical, I would like to put forth a tentative conjecture regarding the origin of this flaw in Kelsen's theory.

It was only in the 1920s that Kelsen became concerned with legal 'dynamics', that is, with theorising the process by which law is created and applied. His programme in the 1911 *Hauptprobleme* was restricted, as he acknowledged 12 years later, to the issue of '*static* legal cognition'.[61] Kelsen's 'dynamic turn', as Stanley Paulson has called it,[62] was incited by the work of Adolf Julius Merkl – the ground-breaking theorist to whom the '*Stufenbau*' doctrine, the doctrine of the hierarchical structure of the legal system, is entirely owed. Kelsen himself explicitly notes that

> it 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 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

[60] *cf* Raz, *The Concept of a Legal System* (n 31) 118; see also Robert Walter's criticism in *Der Aufbau der Rechtsordnung. Eine rechtstheoretische Untersuchung auf Grundlage der Reinen Rechtslehre*, 2nd edn (Vienna, Manz, 1974 [1964]) 26f; and J Ferrer Beltrán, *Las Normas de Competencia* (n 41) 24ff. In *La Teoria del Diritto di Hans Kelsen. Una Introduzione Critica* (Bologna, Il Mulino, 1999) 359ff, Bruno Celano offers a different reading of Kelsen's proposal to recast power-conferring norms as 'fragments' of complete norms. In our theft example, the antecedent of the complete norm, in Celano's reconstruction, would embed not only the proposition that Parliament *has* prescribed that thieves be sentenced for up to three years, but also the proposition asserting that Parliament is indeed authorised to do so; the antecedent of the complete norm, in other words, would embed, as a clause, the proposition describing the very norm attributing norm-creating power to Parliament. Thus the Kelsenian norm in its 'canonical form' should be formulated, Celano would suggest, along the following lines: 'If ((if Parliament requires *X* to φ, then *X* ought to φ) & (Parliament requires courts to sentence whoever commits theft to up to 3 years' imprisonment) & *P* has committed theft), then courts ought to sentence *P* to up to 3 years' imprisonment'. But this reading (irrespective of whether it aptly reconstructs Kelsen's views, which I doubt) not only does not avoid the problem discussed in the present chapter, but indeed exacerbates it – for the corresponding legal proposition would now *always* be true: it would be true, that is, relative to any legal system whatsoever, and whatever the content of the law might be.

[61] *cf* Kelsen, '"Foreword" to the Second Printing of *Main Problems in the Theory of Public Law*', SL Paulson and BL Paulson transl, in *Normativity and Norms* (n 40) 11, my emphasis. For an account of Kelsen's 'constructivist' programme in the *Hauptprobleme* and up to 1920, see SL Paulson 'Hans Kelsen's Earliest Legal Theory: Critical Constructivism' (1996) 59 *Modern Law Review* 797ff.

[62] *cf* SL Paulson, 'On the Implications of Kelsen's Doctrine of Hierarchical Structure' (1996) 18 *The Liverpool Law Review* 50ff.

> firmly held in my *Main Problems* – that the law is found only in the general statute. . . . Drawing support from the work of Merkl . . . 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.[63]

Paulson says that Merkl's doctrine of hierarchical structure was adopted by Kelsen 'lock, stock, and barrel'.[64] I am not so sure. As Paulson observes, it is in Merkl's work that we find the first occurrences of what came to be called the 'complete' legal norm in the sense in which Kelsen, as we have seen, uses the term. Here is how Merkl articulates what Paulson calls 'the best approximation of a so-called complete legal norm'[65] (even though 'complete legal norm' is not a term that Merkl uses in connection with this example); I quote Paulson's own translation:

> [a] If an organ, authorized by federal constitutional statute to initiate legislation, has introduced a bill in the National Assembly (*Nationalrat*) to the effect that the seller of certain wares is to pay a tax on sales amounting to a certain percentage of the proceeds from the sale, and, further, [b] if the National Assembly, first in committee and then in plenary session, in the procedure specifically prescribed by parliamentary rules of order, has passed a bill to this effect, and, further, [c] if this legislation has been submitted to the Federal Assembly (*Bundesrat*), which either raised no objection within a period of eight weeks or decided before this deadline to raise no objection, and, further, [d] if the Federal President has signed this legislation, and the Federal Chancellor as well as the Federal Minister for Finance have countersigned the presidential signature, and, further, [e] if the Federal Chancellor has published the signed and countersigned legislation in the Federal Statute Book, and, further, [f] if, after the effective date of this legislation, the tax official designated in the statute, [following] a certain procedure, has [determined the tax] of a particular individual and prescribed its payment, and, finally, [g] if this particular individual does not pay the prescribed amount within the prescribed time, then the penalty for tax offence ought to be imposed on him.[66]

This complex formulation – which regards the goods sales tax in Austrian law at the time – is meant to display the way in which different acts by various organs relate to one another in a 'chain-like series'.[67] It does look similar in

[63] *cf* ' "Foreword" to the Second Printing of *Main Problems in the Theory of Public Law*' (n 40) 13f.

[64] See eg SL Paulson, 'On the Implications of Kelsen's Doctrine of Hierarchical Structure' (n 62) 49; 'Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization' (1998) 18 *Oxford Journal of Legal Studies* 164; or his 'Introduction' to *Normativity and Norms* (n 40) xxv.

[65] See eg Paulson, 'On the Implications of Kelsen's Doctrine of Hierarchical Structure' (n 62) 56 fn 26.

[66] ibid 59; the original passage is in AJ Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaus' (1931) in *Die Wiener Rechtstheoretische Schule* (n 41) 1337; the letters within square brackets are Paulson's own interpolations.

[67] Merkl speaks of a '*kettenförmige Aktreihe*': see 'Prolegomena einer Theorie des rechtlichen Stufenbaus' (n 66) 1337.

structure to Kelsen's own examples of 'complete' legal norms,[68] only more carefully phrased. But Merkl makes a series of important remarks in connection with this series of acts. He stresses, first, that only *some* of the links in the 'chain' – viz. only those acts that require some given action under the threat of legal punishment – can be interpreted as 'legal norms'.[69] These 'normative acts' find themselves included in a series of other acts which, though they cannot be similarly interpreted, are nonetheless necessary links in the multi-staged process by which law is created and applied.

Note that in denying that all the acts in the series have the meaning of legal norms, Merkl is simply using – as he informs us[70] – *Kelsen's* notion of a legal norm *qua* 'hypothetical judgement' about the state's will with respect to a punitive legal consequence. This is Kelsen's early articulation of the notion, as developed in the *Hauptprobleme*. It is therefore a 'static' notion, not a 'dynamic' one. But then if one wishes to refer to Merkl's 'chain-like series' of acts by calling it a 'complete norm', one will be using 'norm' in a different sense. Merkl's series does not purport to represent the structure of whatever 'static' legal norms may be reconstructed, from any given set of validly produced legal materials, at any given moment. Merkl's series purports instead to reconstruct and model the dynamic process of law-production and law-application. Indeed, Merkl explicitly remarks that if one is concerned with the (static) reconstruction of the law as a system of norms rather than with the (dynamic) process by which the law is created, then the *only* links in the chain that are to be considered are those that can be understood as legal norms:

> For the dynamic consideration, the introduction of the bill in the *legislative* collegial body, for example, is just as important as the publication of the legislation in the Statute Book; the opening of the judicial proceeding by calling the parties and the witnesses is an essentially complete act as much as the publication of the judicial decision; all these partial acts are equivalent. The static consideration, on the contrary, introduces a break in the continuous course of the legal process, brings one partial act to the fore, and converts all the preceding procedural links into similarly ordered pre-requisites of this act.[71]

This sounds exactly right. If one wishes to know, say, what the law on theft is in a given legal system at some given moment, one will not be at all concerned with the *structure* of the legal process – one will be concerned with the *results* of this process.[72] The 'static' inquiry is an inquiry into the normative contents of validly created materials, not an inquiry into the process by which such materials came to be validly created.

[68] Like the one in the passage quoted to n 23.
[69] Merkl, 'Prolegomena einer Theorie des rechtlichen Stufenbaus' (n 66) 1337.
[70] ibid 1325.
[71] ibid 1338 (my translation; Merkl's italics).
[72] Merkl's expression is '*Verfahrensergebnisse*': the 'results of the process'; see ibid 1338.

Now, the view that all the 'legally relevant' results of the legal process can be reconstructed (as parts of either the antecedent or the consequent) in the form of sanction-stipulating norms is a claim about the 'static' reconstruction of law.[73] The set of materials which forms the basis of such reconstructions will be the result of validly performed acts of law-creation. It follows that any reference *to* the occurrence of those facts of law-creation *in* the antecedents of the reconstructed legal norms is quite simply out of place.[74] And this, as we have learned in section III, was the very point that Kelsen got wrong. If I understand him correctly, though, Merkl not only avoids this mistake, but anticipates and explicitly denounces it. It amounts to a misconstruction of the doctrine of hierarchical structure and of the difference between the 'dynamic' and the 'static' points of view.

We have here, then, an important aspect of Merkl's doctrine that Kelsen seems either to overlook or plainly to misunderstand. Whereas Merkl's 'complete' chain-like series of law-creating acts – the 'complete' model of the legal process, from top to bottom – is clearly presented as a matter of legal dynamics, Kelsen seems to want to graft his idea of a 'complete' norm onto legal statics.

It is true that there are some passages in Kelsen's works in which he seems to be in line with Merkl. Thus he rightly affirms that

> [i]f we adopt a static point of view, that is, if we consider the legal order only in its completed form or in a state of rest, then we notice only the norms by which the legal acts are determined. If, on the other hand, we adopt a dynamic outlook, if we consider the process through which the legal order is created and executed, then we see only the law-creating and law-executing acts.[75]

Kelsen also appears to acknowledge that his views on the possibility of reconstructing the entire content of the law in the form of coercive norms are views that he is putting forth as a matter of legal 'statics':

> If one looks upon the legal order from the dynamic point of view . . . it seems possible to define the concept of law in a way quite different from that in which we have tried to define it in this theory. It seems especially possible to ignore the element of coercion in defining the concept of law. . . . According to this [dynamic] concept, law is anything that has come about in the way the constitution prescribes

[73] Recall the remarks on Kelsen's reference to 'all legally relevant material' in the passage quoted to n 1; we find the same idea in Merkl's 'Prolegomena einer Theorie des rechtlichen Stufenbaus' (n 66) 1330.

[74] Not that there is no room to ask what would count as a *complete* 'static' norm. After all Merkl explicitly observes (as does Kelsen, as we have seen: *cf* eg the passage quoted to n 13) that we will often have to articulate the contents of different provisions in order properly to reconstruct legal norms. And in fact Merkl does literally speak of 'complete' (*'vollständige'*) norms *in this sense*: see ibid 1333. But these are not Kelsen's 'complete' norms. Merkl's static 'complete norms' are not meant to incorporate, as elements or conditions in their antecedents, the higher-level facts of law-creation.

[75] *General Theory of Law and State* (n 1) 39.

> for the creation of law. This dynamic concept differs from the concept of law defined as a coercive norm. According to the dynamic concept, law is something created by a certain process, and everything created in this way is law. This dynamic concept, however, is only apparently a concept of law. It contains no answer to the question of what is the essence of law, what is the criterion by which law can be distinguished from other social norms. This dynamic concept furnishes an answer only to the question whether or not and why a certain norm belongs to a system of valid legal norms, forms part of a certain legal order.[76]

Yet he simultaneously (and, to my mind, inconsistently) says the following. Having pointed out (correctly) that 'the court has to answer not only the *quaestio facti* but also the *quaestio juris*', and that it has 'in particular to examine whether the general norm it intends to apply is really valid', that is, 'whether it has been created in the way prescribed by the constitution',[77] Kelsen goes on to assert that

> [t]he norms of the constitution *which regulate the creation of the general norms to be applied by the courts are* . . . not independent complete norms. They are *intrinsic parts of all the norms which the courts and other organs have to apply*. . . . What, from a dynamic point of view, is the creation of a general norm determined by a higher norm, the constitution, becomes in a static presentation of law one of the conditions to which the sanction is attached as a consequence in the general norm (which, from the dynamic point of view, is the lower norm in relation to the constitution). In a static presentation of law, the higher norms of the constitution are, as it were, projected as parts into the lower norms.[78]

This passage encapsulates Kelsen's mistake. The italicised sentences alone illustrate his inconsistency. It is precisely because constitutional norms regulate the *creation* of the general norms to be applied by the courts that *these* norms cannot have *those* norms as their 'parts'.[79]

V. RESULTS

Let me now generalise the point made in section III. My remarks so far have been made with Kelsen's (and Merkl's) own 'hierarchical structure' in mind. But we are certainly not bound to reconstruct norms according to the specific normative levels described in the *Pure Theory of Law*. It is perfectly possible (and

[76] ibid 122.

[77] ibid 143.

[78] ibid 143f (my emphasis).

[79] See also R Walter's *Der Aufbau der Rechtsordnung* (n 60) for a very useful discussion of the ambiguity of the term 'norm' as used by Kelsen throughout his works. Walter distinguishes (among others) a 'dynamic' and a 'static' sense of a norm (ibid 16ff), and points out that the only consistent way of reconstructing Kelsen's idea of the 'complete' legal norm is to understand it as a 'dynamic' rather than a 'static' norm (18, 26f). See, in this regard, n 32.

by no means unusual), for example, that in order to identify the law on any given matter and reconstruct the corresponding legal norm (or norms) one has to read together several different provisions variously issued by authorities placed at different levels in the Kelsenian structure. Yet any such legal norm – as well as the corresponding legal proposition – will also itself define a 'level', in the exact same sense in which, in Kelsen's structure, a 'legislative' norm defines a distinct 'level' from the constitutional or the judicial ones.

Any conditional norm *N*, to put it more precisely, defines (a) a level 'higher' than that of the norm *N-minus-1* which is (or would be) created by the verification of any one of the facts that feature as elements in the antecedent of *N*; and (b) a level 'lower' than that of the norm *N-plus-1* which may be reconstructed by incorporating, as conditions of *its* antecedent, the set of facts on whose verification the 'existence' of *N* depends.

The facts in either group – the facts 'above' and the facts 'below' any given norm *N*, to keep with Kelsen's metaphor – may be facts of any sort. They may be intentional acts by which some authorised agent or organ issues or posits some provision or section of the legal materials. But they may also be facts of any other kind which happen to instantiate any one of the elements featured in the antecedent of any given conditional norm. Seen from this perspective, in other words, the acts of norm-issuance performed by the competent authorities are equivalent to any other acts, and even to any other events more generally. All are equally well-placed to 'create' or 'posit' norms.

Kelsen does propose to expand the notion of authorisation – understood, he says, 'in the broadest sense' – to include an individual's 'capacity of committing a delict'. He refuses, however, to extend the notion even further, so as to encompass events other than facts of 'human behaviour'.[80] I do not mean to question the linguistic propriety of this restriction. Nor do I mean to suggest, more generally, that there is no good reason, in many contexts, jurisprudential as well as practical, to emphasise the usual division between, on the one hand, the facts whose occurrence gives rise to an expansion and/or a contraction of the set of valid legal materials (and thus to a change in the so-called 'general' law), and, on the other hand, the facts of the 'cases' to which general law is said to 'apply'. My point is merely that from the point of view of the role of facts in the norm-creation process there is no reason to draw such a line. And of course in contexts in which one's concern is with the reconstruction of such 'general' norms, then while one may simply assume that the relevant facts of the first kind (those facts, whatever they may happen to be, on which the valid production of the legal materials depends) have duly occurred, the successful reconstruction of any given norm will have to specify, in the antecedent, *all* the facts of the 'case' to which the consequent is attached. This

[80] *cf The Pure Theory of Law* (n 1) 146.

is the only relevant sense in which the norm can be said to be 'complete': the antecedent specifies a sufficient condition of the consequent.

We may now return to the example, introduced in section II, with which our discussion began: the example of a candidate 'sanction norm' (T), corresponding to a statutory provision making theft a punishable offence. Here it is again:

> (T) Whoever dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it ought to be punished [with sanction *S*].

If indeed we are concerned, as Kelsen says, with accurately reconstructing and stating the general law on theft on the basis of the set of valid legal 'materials' at any given moment, then it is true that (T) may (and typically would) be *incomplete* in the sense just mentioned. For there may be other facts or circumstances – that is, facts other than the actual commission of a theft – that pertain to the relevant 'case'. As mentioned in section II, these facts may conceivably include, for example, the absence of justificatory or exculpatory circumstances, which, if present, would mandate an acquittal.[81] As for the other facts on which the consequence in some sense 'depends' – the facts, that is, on which the valid production of the respective legal 'material' depends – they are presupposed, in the sense that they are deemed to have occurred, and could in principle be discriminately pointed out (in conjunction with further normative premises) if someone were to call into question the legal 'validity' of the reconstructed norm. But there is simply no conceptual room for embedding them as further, lower-'level' elements, in the reconstructed norm's antecedent.

More precise definitions can now be given of the two notions of completeness – completeness-(*A*) and completeness-(*B*) – introduced in section II. The distinction does not essentially concern, as I hope I have made clear, the contrast between conditions concerning norm-creating power, on the one hand, and conditions concerning the 'case'. This was merely what happened to be the case in our (or rather, Kelsen's) theft example. The distinction concerns instead the contrast between two different 'levels' of facts on which any given normative consequence may be said in some sense to 'depend'. Here, then, are the relevant definitions:

(*A*) For any norm-formulation *NF*, *NF* is *complete in sense* (*A*) if, and only if, its antecedent incorporates all the conditions on whose verification the normative consequent actually depends (as a matter of law, in some given legal system).

[81] See text to n 34.

(*B*) For any norm *N*, *N* is *complete in sense* (*B*) if, and only if, the conditions on which the (validity) of *N* depends are satisfied.

The notion of completeness-(*A*) is the notion just identified as the only relevant one. The notion of completeness-(*B*) concerns the facts on which the validity of any given norm *N* depends, and these facts are 'conditions' of the consequent of *N* only in the oblique and trivial sense that in a deductive argument the premises are 'conditions' of the conclusion. The notion of completeness-(*B*) does not speak to the question of whether the *formulation* of any given norm (or of the corresponding normative proposition) is in fact 'complete' or 'incomplete'. As a theoretical notion of normative completeness, it is useless; and, what is more, to employ these adjectives in sense (*B*) is, at best, to risk confusing the problem of normative completeness with the problem of a norm's validity conditions. So the notion of completeness-(*B*) may now be abandoned. As for completeness-(*A*), it is but the expression of the elementary idea that the joint verification of the elements represented in the antecedent of a conditional legal norm should allow the consequent to follow.