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FORMAL AND RETICULAR THEORIES OF LAW: DIFFERENT MODELS TO EXPLAIN THE COMPLEXITY OF NORMATIVE REALITY

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A Sarah, Anna e Silvano,

per il loro infinito affetto e sostegno.

A Lucía,

per il suo amore premuroso e luminoso.

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THIRD CHAPTER
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Abstract

This thesis deepens the explanatory models of the legal orders and the normative phenomena, especially the traditional one, symbolically represented by the "pyramid", and the more recent one, depicted as a "net". Its purpose is to critically connect some theoretical paradigms respectively conceived by the formalistic legal culture and the socio-legal one to understand whether one of them is more suitable than the others to represent and even orient the current normative scenario. Hence, on one hand, this paper faces the theories of Hans Kelsen, Norberto Bobbio, and Luigi Ferrajoli, while, on the other hand, it addresses the ideas of François Ost, Michel Van de Kerchove, and Bruno Latour. By studying their different features, some of their strengths and weaknesses, this contribution shows that some elements of each model can be useful and suitable either for explanatory reasons or for outlining a desirable axiological horizon, thus opening the path to the search for *hybrid solutions*. Whereafter, the present work considers the process of globalisation, also in the light of Cassese's posture, and its recent shortcomings to raise a parallel either with the net or the pyramid, as well as it points out some jurisdictional phenomena that may be envisioned either in pyramidal or reticular terms. Eventually, this paper spotlights the recursive-structural crisis between the two paradigms here analysed and thus their *dialectic co-presence* within the legal science scenario, critically drawing some categories from Thomas Kuhn's philosophy of science. Then, a certain amount of vertical hierarchy in the relations among legal norms and the various sources of law is still recommended, both at an ontological-descriptive and axiological-prescriptive level. Especially to protect those ethical-political values and principles sanctioned in contemporary constitutions, as fundamental rights and freedoms, against the possible horizontal normative "anarchy" of a completely *flat* legal world.

Introduction

The line of argument in this dissertation has an interdisciplinary nature that can be placed within the blurred boundaries of Philosophy and Sociology of Law indeed. By drawing from both fields of knowledge, it dynamically addresses at least two possible explanatory paradigms of the current socio-legal world and, in particular, the alleged symbolic shift from the "pyramid" to the "net".

The formalistic legal tradition initiated by Hans Kelsen's "pure" theory of law[1] will be scanned in this paper. I will also explore which I claim to be also well framable Luigi Ferrajoli's formal theory of law and main works[2], in order to relate them to one another, as well as to some criticisms and alternative theories, with special regard to the socio-legal ones. By carrying out a critical comparison between these different perspectives, the purpose here is to outline the different features of each model to then assess which of them might be the best to break down the complexity of the current normative reality.

Accordingly, some relevant parts of Hans Kelsen's theory of law will be firstly considered and illustrated[3]. In order to do that, I will take into account the notion of 'formality' – his legal theory is "pure" in so far as it studies the positive law's formal structure, thus avoiding to assess any kind of contingent value that might be present in it –, the mere analytical-descriptive role attributed to legal science (and scientists) concerning their object of study, and, above all, the "step-wise" construction of the legal order through the "nomodynamics", that clearly entails its "pyramidal" configuration. Eventually, the latter aspect will be connected to the problematic concept of (state)

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[1] The eminent author firstly grounds it in H. Kelsen, *Hauptprobleme der Staatsrechtslehre. Entwickelt aus der Lehre vom Rechtssatz*, Tübingen, J.C.B. Mohr, 1911, and then develops it, in a more systematic and comprehensive way, in *Idem*, *Allgemeine Staatslehre*, Berlino, Springer, 1925. Hence, he publishes its first edition in *Idem*, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, Wien, Franz Deuticke Verlag, 1934, while he broadens it by considering aspects of the *common law* tradition in *Idem*, *General Theory of Law and State*, Cambridge, Harvard University Press, 1945. Eventually, he presents its more extended and "mature" edition in *Idem*, *Reine Rechtslehre*, Wien, Franz Deuticke Verlag, 1960. An exceptional and, to some extent, potentially controversial work – which in some respects overturns the previous logicized Kelsenian setting – is given by his *posthumous* work (*infra*, see footnote 8).

[2] Namely, L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Laterza, Roma-Bari, [1989]2011, and *Idem*, *Principia iuris*. *Teoria del diritto e della democrazia*, Laterza, Roma-Bari, 2007. I will also consider his last effort, well frameable in the stream of *global constitutionalism*, L. Ferrajoli, *Per una Costituzione della Terra. L'umanità al bivio*, Milano, Feltrinelli, 2022.

[3] For this purpose, I will especially take as references, besides the fundamental original writings in German, several English and Italian translations of Kelsen's works. Among others: H. kelsen, *Reine Rechtslehre*, Wien, Franz Deuticke Verlag, 1934, Italian translation by R. Treves, *Lineamenti di dottrina pura del diritto*, Torino, Einaudi, [1967]2000; *Idem*, *General Theory of Law and State*, Cambridge, Harvard University Press, 1945, Italian translation by S. Cotta and G. Treves, *Teoria generale del diritto e dello stato*, Milano, Edizioni di Comunità, [1952]1963; *Idem*, *Reine Rechtslehre*, Wien, Franz Deuticke Verlag, 1960, Italian translation and introduction by M. G. Losano, *La dottrina pura del diritto*, Torino, Einaudi, [1966]2021.

"sovereignty" and the need, under the lens of the legal theory, to guarantee the *unity* of legal experience, in guise of gnoseological assumption, and the *primacy* of the international law will be highlighted.

Secondly, Ferrajoli's *axiomatised* theory of law will be presented as one of the most significant and developed examples of the Kelsenian model. His theoretical construction has been conceived to provide a set of *conceptual tools* to represent, explain and even orient – the latter case when it turns into a *theory of democracy*, thanks to three different empirical-semantic interpretations of it (i*nfra*) – the legal reality of normative systems, mainly in *vertical pyramidal* terms. Indeed, Ferrajoli embraces the nomodynamics of legal orders conceived by Kelsen, while at the same time clearly developing it, in so far as he builds a theory of *validity* that distinguishes the latter category from both the *effectiveness* and the *mere existence* of norms. In this framework, *hierarchy*, *logical consistency* and *completeness* among the various normative levels are the fundamental principles (*external* to law – *principia iuris tantum*) to solve or reduce the threshold of *illegitimate law* (that is, antinomies and failings) that, to a greater or lesser extent, is always present in current constitutional democracies and, in his opinion, requires the legal science to carry out a normative-critical and planning role.

Along these lines, I will spotlight the most relevant analogies and differences existing between the two authors, while looking at Norberto Bobbio's way of orienting the Italian general theory of law in Kelsenian terms (and then the legal science's role in a mere descriptive function). Moreover, there will be room for some remarks and criticism towards Kelsen (and Bobbio) first[4] and Ferrajoli later. With regards to the latter, recalling the brilliant observations from Danilo Zolo, there will also be the chance to propose an interpretation of Ferrajoli's model in order to preserve its value for the field of legal practice and legal operators, as well as its capacity to illustrate and guide the diverse contemporary legal orders.

Later, I will devote an in-depth analysis concerning the iconic (and alleged) *move* from the *pyramid* to the *net*, theorized by the two Belgian scholars François Ost and Michel Van de Kerchove in their *dialectical theory of law*, to describe and thus face (the supposed) shift from the pyramidal theoretical-explanatory model to the reticular paradigm, in today's competition to better represent and explain the normative complexity. Concepts as 'flat-horizontal perspective", polycentricity, governance, mildness (intended as the coexistence of different values, even opposite ones) will be highlighted.

Then, I will focus on the *Actor Network Theory* (ANT), proposed by Bruno Latour and Michel Callon, which – as this paper envisions – will bring some light over the various legal sources and the law itself as *actors* that exist, change, and interact on several different intertwined nets of connections. Following this route map, conceiving them as *actors* in the sense precised by the ANT, i.e., as *moving targets*, they result to be centres

[4] Cf. L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, Roma, Laterza, 1999, and *Idem*, *La logica del diritto: Dieci aporie nell'opera di Hans Kelsen*, Roma, Laterza, 2016.

of interest towards the thoughts, actions, and strategies of the other actors and *actants* present in the social sphere converge. The latter contributing to *shape* them, the former being objects with *liquid* boundaries that can change and be defined again and again (formal norms on legal production notwithstanding).

These reticular approaches embrace a *flat-horizontal* perspective that leads to explain several changes in regulatory practices and habits, such as their relative rapidity, as well as the *polycentric* and *widespread* nature of today's reality, with current and overlapping normative systems. Nonetheless, they most likely fall short when depicting the traditional relations of (normative) power in horizontal terms, especially within states and among their legal sources, as well as the existing vertical hierarchies that today still affect and order most of the subjects, authorities, and regulative centres which are spread all over our legal world. Thus, their evocative force will only *partially* accomplish the purpose to show the normative phenomena, while it can be relevant to build an *integrated* or *hybrid* model together with the traditional one.

Therefore, given the emergence of alternative theories, such as the reticular ones, what this contribution proposes to grasp is whether they constitute a *compelling* framework to *explain* and possibly *orient* the present complexity of the legal-normative reality. Whether they are the most reliable theoretical option (where this would imply the abandonment of the pyramid model, to some extent neither desirable in axiological terms, in light of a real *paradigm shift*[5]) or it is even the case of a (total/partial) "return" to the pyramidal model, in so far as it will result still "dominant".

Or, as a further option, one can observe the *dialectical coexistence* between the two models, whereby each one might be more suitable than the other to represent some normative phenomena instead of others, also depending on the considered spatial-temporal context.

Accordingly, in the last part of this work I will take into account, on the one hand, the process of *globalisation* in the way it affects legal orders, also referring to Sabino Cassese's analysis and providing a critical appraisal of it. On the other hand, I will look at the recent phase of decline of that course, the so-called *de-globalisation*, to outline a cross-parallel respectively between the former and the net, the latter, and the pyramid. Moreover, I will consider the sphere of jurisdiction, particularly, the fundamental *nomophylactic* function that the various national Supreme Courts and the Court of Justice of the European Union must carry out in relation to the peculiar field of the *multi-level*

[5] Some of Thomas Kuhn's categories, such as 'normality', 'anomaly', 'crisis', 'scientific revolution', and 'paradigmatic change', originally thought for natural sciences, will be *critically related* to the dynamics determined by the theoretical paradigms here considered, which are leading models especially in the realm of social sciences. Indeed, we will try and find which category is the most suitable for the alleged shift from the "pyramid" to the "net", generally taking into account three different dimensions: the descriptive one (which theoretical model better explain the normative phenomena?), the prescriptive one (which paradigm should orient the various legal systems?), and the peculiar perspective given by the legal science (pondering whether jurists actually changed their way of thinking or not, theoretically speaking).

protection of human rights. A scope that, in the current framework of legal sources, is growingly complex and hence challenging for legal actors, first and foremost, judges. Then, I will provide some *spatial suggestions* to depict Courts' interaction and location within the European context either in pyramidal or reticular terms.

Eventually, reworking some categories from Thomas Kuhn's philosophy of science, I will highlight the existing situation of *recursive-structural crisis* between the two models, as well as their *dialectic co-presence* within the legal science scenario. Thus, I will try and ground my considerations and final appraisal providing some compelling reasons.

In this picture, both paradigms would maintain their potential role within the legal science's panorama and could be "activated", from time to time, to explain different normative realities and processes. Nonetheless, one may find appropriate to imagine and develop a *hybrid-composite* solution, combining aspects of both models in a new way or adding new features, aiming at overcoming their paradigmatic struggle and duality to reach a further stage of legal thought's evolution.

Concerning the methodology, I will use a method of analysis, evaluation and critical comparison of the different theoretical constructions and models here highlighted, drawing from the panorama outlined by legal science those that I deem to be the most salient for the purposes here presented.

FIRST CHAPTER

HANS KELSEN

Summary: 1.1 *Introduction* – 1.2 *Hans Kelsen and the pyramidal model: nomodynamics, the "step-wise" construction of the legal system, and the concept of legal validity* – 1.3 *The further degrees of international law and the problem of sovereignty* – 1.4 *The 'purity' of his theory and the analytical-descriptive role of legal science* – 1.5 *Kelsen's latent anti-formalism? Dynamic elements and a detectable dialectic tension between reality and normativity* – 1.6 *The most significant connecting dots between Kelsen and the Italian legal scenario: Renato Treves and Norberto Bobbio*.

"Human reason has the peculiar fate
in one species of its cognitions
that it is burdened with questions
which it cannot dismiss,
since they are given to it as problems
by the nature of reason itself,
but which it also cannot answer,
since they transcend every
capacity of human reason"

KANT*

1.1 *Introduction*

A significant part of this thesis is devoted to the pyramidal model and the formalistic legal tradition, with the aim of assessing their suitability to explain (and, for one contemporary author, through an empirical-semantic interpretation of his theory of law, also orienting, in the latest theoretical proposals of this school of thought) the normative reality of legal orders, thus weighing their goodness for the field of legal theory.

In this first chapter, I will provide an in-depth and targeted analysis of Hans Kelsen's Pure Theory of law[6], considering that he is the "founding father" of the

* I. Kant, *Kritik der reinen Vernunft*, Berlin, Fourier, 1781, English translation by P. Guyer and A. W. Wood (eds.), *The critique of pure reason*, New York, Cambridge University Press, 1998, p. 99.

[6] For this purpose, beside making direct reference to Hans Kelsen's works, I take into consideration several different sources of scientific literature that I deem relevant to address his thought and theoretical perspective. Especially, within a boundless panorama, here I have selected the following ones: R. Treves, "Il fondamento filosofico della dottrina pura del diritto di Hans Kelsen", *Atti della Reale Accademia delle Scienze di Torino*, vol. 69, 1933-1934, pp. 52-90; H. Kelsen, R. Treves, & S. L. Paulson, *Formalismo*

aforementioned tradition and arguably the most important legal theorist of the 20th century[7]. By doing this, I will carry out my analysis by at least spotlighting a set of significant profiles of his theoretical construct.

Particularly, I will illustrate the "step-wise construction" of the legal system, in connection with the theory of *validity*, the problematic concept of (state) sovereignty, as the need to overcome it while letting the "pyramid" to reach its summit through the international dimension of law. Then, I will focus on the core idea of *purity*, to clarify why the theory of law should be *formal*, hence stressing the consequent analytical-descriptive role of the legal science and the controversial idea of the in-existence of normative contrasts within the legal system (supported by Kelsen to preserve the *unity* of the whole legal system). Eventually, I will underline a latent but strong anti-formalism in

giuridico e realtà sociale, Napoli, Edizioni Scientifiche Italiane, 1992; S. L. Paulson, *A 'Justified Normativity' Thesis in Hans Kelsen's Pure Theory of Law?*, in Matthias Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy*, Oxford, Oxford University Press, 2012, pp. 61-111, Italian translation by Giovanni Luchena, *Il problema della giustificazione nella filosofia del diritto di Hans Kelsen*, Torino, Giappichelli, 2014; S. L. Paulson, & B. Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, Oxford, Clarendon Press, 1998; A. Carrino, *L'ordine delle norme: Stato e diritto in Hans Kelsen*, Napoli, Edizioni scientifiche italiane, [1984]1992; *Idem*, *Kelsen e il problema della scienza giuridica (1910-1935)*, Napoli, Edizioni scientifiche italiane, 1987; H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*, Tübingen, Mohr, 1920, Italian translation and presentation by A. Carrino, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, Milano, Giuffrè, 1989; L. Gianformaggio, *Hans Kelsen's Legal Theory : A Diachronic Point of View*, Torino, Giappichelli, 1990; Mario G. Losano, *Forma e realtà in Kelsen*, Milano, Edizioni di Comunità, 1981; B. Celano, *La teoria del diritto di Hans Kelsen. Una introduzione critica*, Bologna, Il Mulino, 1999; N. Bobbio, & D. Zolo, "Hans Kelsen, the Theory of Law and the International Legal System: A Talk", *European Journal of International Law*, vol. 9, no. 2, pp. 355-367, 1998.

[7] See H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, Wien, Franz Deuticke Verlag, 1934, English translation by Bonnie Litschewski Paulson and Stanley L. Paulson with an introduction by Stanley L. Paulson, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, Oxford, Clarendon Press, [1992]2022, p. xvii, where Stanley L. Paulson, dealing with Kelsen's place in jurisprudence, recalls some thorough opinions on him: "[t]he American legal theorist Roscoe Pound wrote in 1934 that Hans Kelsen was 'unquestionably the leading jurist of the time'. A quarter of a century later, the English legal philosopher H. L. A. Hart described Kelsen as 'the most stimulating writer on analytical jurisprudence of our day'. And another quarter of a century later, the Finnish philosopher and logician Georg Henrik von Wright compared Kelsen with Max Weber; it is these two thinkers, he wrote, 'who have most deeply influenced […] social science' in this century". There Paulson, besides also observing the strong critiques and attacks that stigmatize Kelsen's works over the years, he concludes that (*ivi*, p. xviii): "A point on which all these writers would agree is that Kelsen was indeed important, a theorist to be reckoned with". Moreover, in framing Kelsen's legal thought within the analytical movement, Alf Ross does not hesitate in holding that: "Hans Kelsen's Pure Theory of Law [is] the most influential achievement in legal philosophy of the present century […]", cf. A. Ross, *Om ret og retfærdighed*, København, A. Busck, 1953, English translation by U. Bindreiter and introduction by J. v. H. Holtermann (ed.), *On law and justice*, Oxford, Oxford University Press, 2019, p. 9. Cf. also B. Celano, *La teoria del diritto di Hans Kelsen*, *cit.*, p. 11.

the Kelsenian theoretical framework, arguing in favour of a *dialectic tension* between the opposite but touching spheres of reality and normativity[8].

In the last part of this chapter, I will analyse the fundamental contribution of two authors who play a key role during the 20th century in transmitting and analysing Kelsen's legal thought and Pure Theory within the Italian scenario: Treves and Bobbio. Where the former has the merit to translate and introduce Kelsen's most relevant works and the latter has the one of wide spreading them throughout his studies on *structuralism* and the *systemic* theory of law, thus orienting in Kelsenian terms, with the project of the analytical legal philosophy (shared, among others, by Scarpelli), the whole Italian general theory of law.

1.2 *Hans Kelsen and the pyramidal model: nomodynamics, the "step-wise" construction of the legal system, and the concept of legal validity*

Starting from the first aspect, one can notice the pyramidal inspiration that shapes the Pure Theory of Law by considering the "step-wise" construction of the legal system

[8] By carrying out this analysis on Kelsen's main theoretical aspects I will implicitly consider, as far as relevant (and possible) here, the different phases that characterize his thought, by even stressing, when appropriate, some shifts or slight changes therein. Regarding this periodization, one should notice that in the legal science there is no unanimous classification, after all. Indeed various authors propose different time scales for framing Kelsen's works, for instance, see the ones designed by Paulson in S. L. Paulson, & B. Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, *cit.*, p. xxxiii ff; by M. Barberis, *Breve storia della filosofia del diritto*, Bologna, Il Mulino, 2004, pp. 111-117; by Losano in H. Kelsen, *La dottrina pura del diritto*, pp. 22, 88. In this thesis I will devote special attention the so-called *classical phase* of Kelsen, which approximately goes from the 1920s to the 1960s, considering it the more reasoned, developed and hence enhanced version of his theoretical proposal, besides still probably being the most "reliable" one. This way, I will rather overlook the (potential) "disruptive" strength of Kelsen's *posthumous* work, *Allgemeine Theorie Der Normen*, Wien, Manz, 1979, where the author seems to rethink or even overturn his lifetime approach and cornerstones (as the applicability of logical principles to the law). By picking up a couple of arguments raised by Losano, indeed, I reckon worth noticing that, on the one hand, the last work of an author is neither necessarily the best nor the definite one. And, on the other hand, Kelsen does not make the decision to publish it, after all. Cf. *Ivi*, p. 24, where Losano, while wondering which work by Kelsen can be considered the *true* Pure Theory of law, whether the homonymous work of 1960 or the *General Theory of Norms* of 1979, states that "[r]imane aperta la discussione su quale sia, oggi, l'autentica dottrina pura del diritto: quella logicista esposta ne La dottrina pura del diritto, oppure quella irrazionalista esposta nella Teoria generale delle norme? La decisione del giudice si fonda su principî logici o dipende unicamente dalla sua volontà? Su questi problemi il dibattito è in corso. In realtà, sembra arduo stabilire quale delle due opere costituisca l'espressione definitiva del pensiero del filosofo praghese: non sempre l'ultima opera è la migliore, né quella finale è la definitiva, specialmente se l'autore l'ha tenuta nel cassetto per anni senza decidersi a darla alle stampe". As far as this thesis is concerned, I might make prudent reference to that last (and to some extent renegade) work to stress that, at most, it can be intended as a further sign of Kelsen's tension towards *anti*-formalistic stances and legal realism-empiricism, this probably showing how he dialectically contemplates in his theoretical discourse both formalistic and anti-formalistic tendencies (cf. *infra*, at the end of section**….**). More in general, I will deal with the existing empirical and realistic elements in Kelsen's perspective, then with his *latent* anti-formalism, by spotlighting, among others, the recognized role of judges as law-creating agents and the growing importance of *efficacy*, as a (problematic) legal category, along with the one of *validity*.

(*Stufenbau*), as it is the feature of Kelsen's legal theory that most implies a certain spatial order and then demonstrates its vertical-hierarchical setting[9].

[9] The *hierarchical structure* is a distinctive characteristic that Kelsen draws from Adolf Julius Merkl's works, as one should be aware of. Indeed, since 1923 the former clearly recognizes the merit of the latter, see H. Kelsen, *'Foreword' to the Second Printing of* Main Problems in the Theory of Public Law, in S. L. Paulson and B. Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, *cit.*, pp. 3-22. There (*ivi*, pp. 12-14), the Prague theorist, while temporally framing (in 1913 and 1914, respectively) his own awareness of the need of a *dynamic* view of the law, alongside the *static* one, and his first theorization of the *basic norm* as a key assumption to ground the *unity* of the whole legal system (on both topics see *infra,* throughout this chapter), he pinpoints 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 legal act of enforcement. In several 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 *Main Problems* – 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 writing, adopting it as an essential component in the system of the Pure Theory of Law". Cf. A. J. Merkl, "Das Recht im Spiegel seiner Auslegung", *Deutsche Richterzeitung*, vol. 8, 1916, pp. 584-592; *Idem*, *Das Recht im Lichte seiner Anwendung*, Hanover, Helwing, 1917; for the first *systematic* formulation of Merkl's *Stufenbaulehre* see *Idem*, *Die Lehre von der Rechtskraft*, Leipzig-Vienna, Franz Deuticke, 1923; then, Merkl presents the arguably most complete version of his doctrine of the hierarchical structure in *Idem*, *Prolegomena einer Theorie des rechtlichen Stufenbaues*, in A. Verdross (ed.), *Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre*, Vienna, Springer, 1931, pp. 252-294, later on reprinted in *Idem*, *Gesammelte Schriften*, in D. Mayer-Maly, H. Schambeck and W. D. Grussmann (eds.), Berlin, Duncker & Humblot, 1993, vol. 1.1, pp. 437-492. On this subject see S. L. Paulson, & B. Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, *cit.*, pp. xxiii-liii, where in his introduction Paulson (*ivi*, p. xxviii) refers to "[…] Merkl's doctrine of hierarchical structure, along with the steps that lead Kelsen to abandon the 'static' view of the law evident in *Main Problems* in favour of Merkl's doctrine, which promises a 'dynamic' view of the law". Furthermore, he points out that (*ivi*, pp. xxviii-xxix): "[h]aving shown his colours in *The Problem of Sovereignty* (1920), identifying himself closely with Merkl's *Stufenbaulehre* or doctrine of hierarchical structure, it is a short step for Kelsen to incorporate the whole of the doctrine into his own theory. The first more or less complete statement of the *Stufenbaulehre* in Kelsen's own hand is found in a lengthy paper of 1923[…]; two years later, the same text appears *verbatim* in the *Allgemeine Staatslehre*". Indeed, Kelsen undoubtedly picks up Merkl's general idea for which *the law rules its own production* (I will stress the importance of this principle in Kelsen's perspective later on), which means that existing superior legal norms govern the procedure by virtue of which other inferior legal norms are enacted. Again, Paulson (*ivi*, p. xxix) shows "how far Kelsen has come, having adopted Merkl's doctrine", by focusing on the significant differences that are detectable in Kelsen's theoretical setting between 1911, when in *Hauptprobleme* he considers *general* legal norms only, thus overlooking individual legal acts, and the period 1916-1923, in which he "comes to recognize that confining his attention to general legal norms is to ignore not only individual legal acts but, indeed, an entire spectrum of legal norms between the general statutory provision and the concrete legal act. The only way to set things straight, Kelsen now argues (following Merkl's lead), is to introduce a graduated scheme that exhibits all the levels of legal norm in the legal system, from the most general constitutional and legislative norms to the most concrete legal acts. This scheme can be visualized in terms of '[t]he relation between the norm determining the creation of another norm, and the norm created in accordance with this determination', a scheme depicting, then, 'a higher- and lower-level ordering of norms'". This *conditional* setting, as Paulson maintains, reflects a core idea of Merkl's doctrine of hierarchical structure, for which (*ibidem*) "the reconstructed legal norms of the

The Prague thinker identifies the law (*rectius*: the *legal order*) as a *system* of general and individual norms. He emphasises a peculiar feature of the legal phenomenon: the law regulates its own production[10]. It means that in the legal system every legal norm,

hierarchy are empowering norms". Then, Paulson concludes his thorough analysis observing that (*ivi*, p. xxx) "Kelsen's adoption of Merkl's doctrine […] is one of the developments marking the beginnings of his classical phase", the long-lasting Kelsenian period on which I will mainly focus. See also S. L. Paulson, "How Merkl's Stufenbaulehre Informs Kelsen's Concept of Law", *Revus. Journal for Constitutional Theory and Philosophy of Law*, vol. 21, 2013, pp. 29-45, where Paulson metaphorically holds that: "Kelsen is clearly hinting at the *Stufenbaulehre* or doctrine of hierarchical structure that he took over lock, stock, and barrel from his gifted, and much neglected, colleague, Adolf Julius Merkl". There, he represents how both the *static* and the *dynamic* standpoints, as two sides of the same coin, compound the *classic* Kelsenian conception of law, from time to time leveraging different elements: while the former is focused on the already existing legal norms and *coercion*, the latter targets towards the enactment of legal norms and the mechanism of *legal production*. Indeed, Paulson reckons that (*ibidem*): "[e]arlier, there is a static or *ex post* point of view, where the focus is on the issued legal norm and thus on coercion, and, later, there is a dynamic or *ex ante* point of view, antedating the issuance of the legal norm and thus emphasizing the process of law creation. These points of view are combined in a single concept of law that reflects both product and process, or – in the language of Kelsen's *General Theory of Law and State* – both coercion and law creation. As we shall see, the *Stufenbaulehre* – and the conceptual machinery that can be drawn from it – is central to the entire enterprise, profoundly informing our reading of Kelsen's ramified concept of law". Eventually, Paulson clearly declares that "[m]y aim, in short, is to go beyond the standard reading of the *Stufenbaulehre* or doctrine of hierarchical structure, *as the notion pertains to Kelsen*. It is well known that the doctrine served to relativize the differences between law creation and law application, and thereby to relativize the standing of the different species of law themselves. […] Kelsen points out that both the tradition in legal theory and he himself in *Main Problems* ignored an entire spectrum of legal norms, those between general statutory provision and concrete legal act. The only way to set things straight, Kelsen argues, is to follow Merkl's graduated scheme, which exhibits all the levels of legal norm in the legal system, from the most general constitutional and legislative norms to the most concrete legal acts. Legislation, the standard-bearer of nineteenth-century statutory positivism (*Gesetzespositivismus*), loses its privileged position, a point that is, to be sure, a fundamental contribution of the Vienna School of Legal Theory". This latter consideration offers a first reason to support one of the theses here defended: despite of his very well known *legal formalism* (see *infra*), Kelsen since the early 1920s also theorizes and experiments a certain growing *legal anti*-formalism or *realism*, stressing, alongside the *static* ones, the *dynamic* elements of his theory, as the *creative* role he assigns to judges in the process of legal production. For further valuable references on Merkl's doctrine see M. Borowski, *Die Lehre vom Stufenbau des Rechts nach Adolf Julius Merkl*, in S. L. Paulson and M. Stolleis (eds.), *Hans Kelsen – Staatsrechtler und Rechtsphilosoph des 20. Jahrhunderts*, Tübingen, Mohr-Siebeck, 2005, and also, as a collection of Merkl's works, with the Italian translation by Carmelo Geraci, A. J. Merkl, *Il duplice volto del diritto: il sistema kelseniano e altri saggi*, Milano, Giuffrè, 1987.

[10] See H. Kelsen, *General Theory of Law & State*, with a new introduction by J. Treviño, New Brunswick-London, Transaction, [1945]2006, p. 132, where he states: "The legal order is a system of general and individual norms connected with each other according to the principle that law regulates its own creation". Cf. also *ivi*, p.113: "The system of norms we call a legal order is a system of the dynamic kind". During the years Kelsen maintain the same *systematic* perspective about the law, cf. *Idem*, *Reine Rechtslehre*, Wien, Franz Deuticke Verlag, 1960, English translation by Max Knight, *Pure Theory of Law*, Berkeley, University of California Press, 1967, pp. 243-244: "the legal order is a system of general and individual norms connected in such a way that the creation of each norm of this system is determined by another and ultimately by the basic norm". More *infra* on the idea of fundamental norm (G*rundnorm*). For a thorough analysis of the legal concepts of *system* and *structure* from the origins and the Historical School of Law to the 20th century and post-modernity see M. G. Losano, *Sistema e struttura nel diritto*, Milano, Giuffrè, [1968]2002. See also the rich contribution of Federico Fernández-Crehuet López concerning the *systemic*

concerning its *procedure* (the way in which it was born) and its *content* (at least to some extent), is regulated by a different and *superior norm*, higher located among the several normative plans of the legal order. In light of the *dynamic* essence of law (*infra*) as a normative system, the "value" of a legal norm – i.e., its *validity*, intended as its *belonging* to the legal order, its *existence* (*infra*) – it depends on the circumstance for which that norm has been enacted in a *precise form*, prescribed by a superior norm, indeed. The latter, according to Kelsen, amounts to the *basis* of validity of the former[11]. In this theorised vertical concatenation of legal norms, which are mutually bonded by a *Sollen*

perspective of Friedrich Carl von Savigny and the idea of *system* in Kant's philosophy, cfr. Federico Fernández-Crehuet López, *La perspectiva del sistema en la obra y vida de Friedrich Carl von Savigny*, Granada, Editorial Comares, 2008. There, the Spanish author (see *ivi*, pp. 113-116) recalls the Kantian definition of *system*, according to which this concept amounts to *the unity of the diversity of knowledge organised under one idea* – see I. Kant, *Kritik der reinen Vernunft*, Berlin, Fourier, [1781]2003, p. 482. Fernández-Crehuet López (*ivi*, pp.113-114) also underlines that the word *idea* in Kant's philosophy corresponds to the point of view of *reason* (*Vernunftansicht*), while the term *category* means *understanding* (*Verstandansicht*). This way, on the one hand, the system's order and unity are drawn from the idea. On the other hand, objectivity stems from categories. Furthermore, Fernández-Crehuet López highlights two fundamental aspects of the aforementioned definition: firstly, the system is *grounded on a principle* (or *idea*) from which its other parts are deductible. Thus, the system is ruled by the reason. In the case of practical reason, the tenant that structures the whole system is the one of freedom. Secondly, the system is – or at least shows a tendency to be – *complete* (*ivi*, p. 114). By observing that this way of thinking (i.e., the Kantian conception of *cognitive system*) had a great appeal on other later conceptions, the Spanish author reckons that it should be distinguished from the idea of *legal system*. Indeed, although during the 19th century both concepts had been frequently overlapped and confused, so that was difficult to identify their distinctive elements, "the conception of the legal system entails, in my opinion, a genealogy which differs from that of the cognitive system" (cfr. *ibidem*). In connection to that, later on I will talk about the *unity* of the legal system and the *fundamental norm* (an hypothetical and presupposed 'premise' that grounds the whole normative structure of the legal order) both conceived in Kelsen's theoretical framework as transcendental gnoseological assumptions (to some extent drawn) from Kant philosophy. Here I stress that also the Kantian idea of *cognitive system*, just highlighted, takes up a crucial role in the Kelsenian universe. Indeed, Kelsen grasps this concept and, to a greater or lesser extent, tries to apply it to his own discourse (even though, I think, rather exclusively concerning the second element above mentioned, while the first one in his view can only be related to *nomostatic systems*, as Morals). By doing this, Kelsen at least partially experiments some sort of *confusion* or *overlapping* between the two ideas of system (cognitive and legal), similar to the dynamic depicted by Fernández-Crehuet López a prop of the 19th century.

[11] See H. Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit*., pp. 63-64. Cf. also H. Kelsen, *Reine Rechtslehre*, Wien, Franz Deuticke Verlag, 1934, Italian translation by R. Treves, *Lineamenti di dottrina pura del diritto*, Torino, Einaudi, 1967, p. 104: "il diritto regola la sua propria produzione, in quanto una norma giuridica regola il procedimento con cui un'altra norma giuridica viene prodotta, e regola anche in grado diverso il contenuto della norma che deve essere prodotta. Dato che per il carattere dinamico del diritto una norma vale perché e in quanto è stata prodotta in una forma determinata, determinata cioè da altra norma, quest'ultima rappresenta il fondamento di validità della prima". On the need for a *dynamic* theory of law, see also H. Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", *Harvard Law Review*, vol. 55, no. 1, 1941, pp. 44-70, where he states (pp. 61-62): "The pure theory of law recognizes that a study of the statics of law must be supplemented by a study of its dynamics, the process of its creation. This necessity exists because the law, unlike any other system of norms, regulates its own creation. An analysis of positive law shows that the process by which a legal norm is created is regulated by another legal norm. Indeed, usually other norms determine not only the process of creation, but also, to a greater or lesser extent, the content of the norm to be created".

('ought to be') constraint, one can grasp the peculiar *spatial distribution* of the Pure Theory of Law:

> Il rapporto fra la norma che determina la produzione di altra norma e la norma prodotta nel modo esaminato può essere rappresentato con l'immagine spaziale dell'ordinamento superiore e inferiore. La norma che determina la produzione è la più alta e quella prodotta nella forma stabilita è la più bassa. L'ordinamento giuridico non è pertanto un sistema di norme giuridiche di egual gerarchia e che si trovino situate l'una vicino all'altra a un medesimo livello, ma è un ordinamento a gradi, composto di differenti strati di norme giuridiche[12].

Far from a horizontal perspective, Kelsen depicts the legal order as a system of legal norms that are dynamically located on different normative layers because of the mechanism of production that characterise their mutual relation (law regulates its production. This leveraging vertical-hierarchical criterion and structure leads to the incisive image of the "step-wise" construction of the legal order[13].

Regarding the whole normative system, Kelsen states that its *unity* is precisely given by this "productive concatenation" among norms, that depends on the circumstance that the creation and the validity of a legal norm depends on a superior norm, whose creation and validity in turn are subordinated to another (superior) norm…and so on,

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[12] H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 105. Concerning the concept of *hierarchy of norms* and *Stufenbau*, cf. *Idem*, "Der Begriff der Rechtsordnung", *Logique et Analyse*, vol. 1, 1958, pp. 150-167, English translation by S. L. Paulson, "The concept of the Legal Order", *American Journal of Jurisprudence*, vol. 27, 1982, pp. 64-84, where the author maintain (p. 69): "The foregoing remarks show that a legal order is not a plurality of valid norms on the same plane but rather a hierarchical structure (*Stufenbau*) of superior and subordinate norms. The higher norm is the norm that regulates the creation of another norm, the lower norm, and is thus the basis of the validity of this lower norm. The higher norm can also regulate in varying degrees the content of the lower norm". In similar terms, although here refering to a national legal order only, see H. Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", *cit.*, p. 62: "The relation existing between a norm which governs the creation or the content of another norm and the norm which is created can be presented in a spatial figure. The first is the "superior" norm; the second the "inferior." If one views the legal order from this dynamic point of view, it does not appear, as it does from the static point of view, as a system of norms of equal rank, standing one beside the other, but rather as a hierarchy in which the norms of the constitution form the topmost stratum".

[13] About the *dynamic nature* and the *hierarchical structure* of the legal order, see also V. Velluzzi, *Percorsi del positivismo giuridico. Hart, Kelsen, Ross, Scarpelli*, in A. Schiavello and V. Velluzzi (a cura di), *Il positivismo giuridico contemporaneo: una antologia*, Torino, Giappichelli, 2005, pp. 10-11, where the author also highlights the features of "productive concatenation" among legal norms and the "step-wise construction", both drawn from Kelsen's Pure Theory of law: "L'ordinamento giuridico ha per Kelsen natura dinamica e struttura gerarchica. Un sistema di norme è dinamico ove le norme che lo compongono sono legate tra loro da rapporti di delegazione del potere di produrle; è gerarchico ove le norme che lo compongono non stanno sullo stesso piano, ma sono ordinate su livelli (gerarchici) diversi. Kelsen sostiene che il diritto è un tipico esempio di ordinamento o sistema dinamico e gerarchico, costruito secondo le immagini efficaci della concatenazione produttiva e della costruzione a gradi: la produzione normativa si svolge attraverso processi di delegazione del potere di produrre norme da un livello all'altro dell'ordinamento giuridico."

according to a "regress" which ends only when it reaches the "fundamental norm" (*Grundnorm*). The latter, hypothetical and presupposed (*infra*), which is not a "positive" norm at all, represents the ultimate foundation of validity of the legal order.

> La […] unità [dell'ordinamento giuridico] è data dalla concatenazione risultante dal fatto che la produzione e quindi la validità dell'una risale all'altra la cui produzione è a sua volta determinata da un'altra, un regresso che sbocca infine nella norma fondamentale, nella regola ipotetica fondamentale e quindi nel fondamento supremo di validità che costituisce la base dell'unità di questa concatenazione produttiva[14].

I deem useful a few clarifications on the main ideas involved in the previous quote. Firstly, Kelsen conceives the *unity* of the legal system as *gnosiological postulate* to access (all the possible) knowledge about the whole *legal experience*[15]. Although he would politically aspire to the creation of a "world state", intended as "the organised unity of a universal worldwide legal community" – grounded on the idea that international and state law are *unified*, at least under the lens of legal theory, he is conscious that such a perspective is far from being achieved. Indeed, he reckons that

> È data solamente una unità di tutto il diritto dal punto di vista conoscitivo; si può cioè concepire il diritto internazionale insieme con gli ordinamenti giuridici degli stati singoli in modo del tutto identico a un sistema unitario di norme, così come si suole considerare come una unità l'ordinamento giuridico del singolo stato[16].

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[14] H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 105. Similarly, let's consider the section devoted by Kelsen to the "step-wise construction" of the legal system in his second edition of the Pure Theory of law, see *Idem*, *Pure Theory of Law*, *cit.*, p. 221 ff. Cf. also H. Kelsen, *Reine Rechtslehre*, Wien, Franz Deuticke Verlag, 1960, Italian translation and introduction by M. G. Losano, *La dottrina pura del diritto*, Torino, Einaudi, [1966]2021, pp. 551-552: "[…] "si è fatto piú volte cenno alla caratteristica del diritto consistente nel regolare la propria produzione. Questo può avvenire nel modo seguente: una norma determina soltanto il procedimento con cui si produce un'altra norma. È però possibile che, al tempo stesso, in certa misura, si determini anche il contenuto della norma da produrre. Poiché, secondo il carattere dinamico del diritto, una norma è valida per il fatto che e nella misura in cui la si produce in un determinato modo (determinato cioè da un'altra norma), quest'ultima costituisce l'immediato fondamento della validità della prima. Il rapporto fra la norma che regola la produzione di un'altra e la norma prodotta conformemente alla prescrizione si può rappresentare con l'immagine spaziale della sovrordinazione e della subordinazione. Superiore è la norma che regola la produzione, inferiore è la norma prodotta conformemente alla prescrizione. L'ordinamento giuridico non è un sistema di norme giuridiche poste l'una accanto all'altra in condizioni di parità, bensí una struttura gerarchica (*Stufenbau*) composta da vari piani di norme giuridiche. La loro unità è prodotta dal nesso risultante dal fatto che la validità di una norma, prodotta conformemente ad un'altra norma, riposa su quest'ultima, la cui produzione a sua volta è determinata da un'altra: un procedimento a ritroso che termina nella norma fondamentale presupposta. La norma fondamentale, ipotetica nel senso ora precisato, è quindi il fondamento supremo della validità, su cui si fonda l'unità di questo nesso di produzione (*Erzeugungszusammenhang*)."

[15] Cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 153-155.

[16] *Ivi*, p. 154.

This *monistic* stance opposes the traditional *dualistic* conception which represents the international and domestic law as two different, separated, and independent normative systems. It claims that the latter view is logically untenable if both types of norms should be considered legal and simultaneously valid[17]. There Kelsen points out the gnosiological need to consider the *whole law* – the variety of all legal phenomena – in a single *system*, namely, to regard it from the same point of view as a whole in itself[18]. Accordingly, the task he assigns to the legal knowledge amounts to present its subject of study as *unity*, because that knowledge aims at conceiving both international and national-state law as "law", intended as valid legal norms. Interesting enough, Kelsen identifies the *lack of contradiction* as a criterion to preserve this unity, stating that this logic principle also applies to the knowledge in the normative field[19].

Furthermore, to complete the picture on the gnosiological postulate of the legal knowledge, in his Pure Theory of Law Kelsen clarifies that what guarantees the unity within the plurality of norms of a certain legal order is the *fundamental norm* – and here

[17] *Ibidem*. See also H. Kelsen, "The concept of the Legal Order", *cit.*, p. 75, where the Praga philosopher argues that "Two normative orders of the dynamic type can be regarded as simultaneously valid only if they have the same basis of validity, that is, the same basic norm, thereby forming a unified system of norms". And again, "If, as is usually assumed, international law and domestic law are simultaneously valid legal orders, then they must form a unity […]".

[18] Indeed, he maintains "l'esigenza gnoseologica di considerare tutto il diritto in un sistema, cioè di considerarlo da uno stesso punto di vista come un tutto in sé conchiuso", see H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 154. More extensively on the concept of *system* cf. see *supra*, footnote 10.

[19] *Ibidem*. In almost identical terms in the early 1960s, about the *theoretical unity* of the law and the *gnosiological postulate* here highlighted, cf. *Idem*, *La dottrina pura del diritto*, *cit.*, pp. 724-725: "Tutta l'evoluzione della tecnica giuridica, sin qui esposta, tende in ultima analisi a cancellare la linea di confine tra diritto internazionale ed ordinamento giuridico dei singoli stati, cosicché il fine ultimo della reale evoluzione del diritto, mirante ad un crescente accentramento, pare essere l'organizzazione unitaria di una comunità giuridica mondiale, cioè la formazione di uno stato mondiale. Attualmente, però, sarebbe fuori luogo parlarne. Esiste soltanto un'unità teoretica di tutto il diritto; in altre parole, si possono concepire tanto il diritto internazionale quanto gli ordinamenti giuridici dei singoli stati come un sistema unitario di norme, cosí come si è abituati a considerare come unità l'ordinamento giuridico di un singolo stato. A ciò si contrappone la concezione tradizionale, portata a vedere nel diritto internazionale ed in quello statale due sistemi normativi indipendenti l'uno dall'altro, isolati l'uno rispetto all'altro, perché fondati su due diverse norme fondamentali. Questa costruzione dualistica – che sarebbe meglio definire 'pluralistica', in considerazione della pluralità degli ordinamenti giuridici dei singoli stati – è però insostenibile già da un punto di vista puramente logico, poiché si devono considerare come norme contemporaneamente valide (e cioè egualmente come norme giuridiche) tanto le norme del diritto internazionale quanto quelle degli ordinamenti giuridici dei singoli stati. In questa concezione condivisa anche dalla dottrina dualistica è già contenuto il postulato epistemologico, secondo cui ogni diritto deve essere concepito come sistema, cioè considerato da un unico punto di vista come totalità compiuta in se medesima. Poiché la conoscenza giuridica vuole afferrare come diritto tanto il materiale definito come 'diritto internazionale' quanto il materiale che si presenta come diritto statale, poiché cioè vuole comprenderli nella categoria della norma giuridica valida, essa si impone un compito perfettamente analogo a quello della scienza naturale: rappresentare come unità il proprio oggetto. Il criterio negativo di quest'unità è il principio di non contraddizione. Questo principio logico vale anche per la conoscenza nel campo delle norme".

goes the object of our second clarification –, conceived as the theoretical foundation of validity for all the norms that belong to that specific legal order[20].

The fundamental norm of a *positive* legal order, indeed, is the essential rule whereby all the legal norms of that system are produced. Assuming this dynamic-formal character on Kelsen's behalf, one could reckon it consists of the *starting point* of the normative creative process that entails the "productive concatenation" of legal norms. Hence the "step-wise" construction of the whole system. Moreover, while the single norms of the legal order cannot be logically drawn from it, Kelsen explains they must be created by *acts of will*, where the latter could take on several different forms, such as legal acts or customs – in case of general and abstract norms – or judicial decisions, administrative or private acts – in case of individual and concrete norms (*infra*). Then, for all these norms to be referred to the fundamental norm, placed at the top of the legal system, they must have been adopted *in accordance* with it[21]. Thus, it is the implicit theoretical assumption for their legal validity, that is, the *hypothetical foundation*[22] and the *logical-transcendental condition* which *allows* jurists to conceive and *know* the validity of the positive legal order and its norms, and even the science that studies them[23]. Precisely,

[20] *Ivi*, p. 518: "Poiché la norma fondamentale è il fondamento di tutte le norme appartenenti allo stesso ordinamento giuridico, essa garantisce l'unità nella pluralità di queste norme". Cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 95, where, in similar terms, by asserting that the law as a legal order amount to a system of legal norms, Kelsen holds that "Una pluralità di norme forma un'unità, un sistema, un ordinamento quando la sua validità può essere ricondotta a un'unica norma come fondamento ultimo di questa validità. Questa norma fondamentale (*Grundnorm*), come fonte comune, costituisce l'unità nella pluralità di tutte le norme che formano un ordinamento. L'appartenenza di una norma a un determinato ordinamento dipende solo dal fatto che la sua validità possa essere ricondotta alla norma fondamentale che costituisce questo ordinamento". In like manner, see *Idem*, "The concept of the Legal Order", *cit.*, p. 69: "The presupposed basic norm of a legal order, which establishes that the fact through which the constitution is adopted is the basic fact of the creation of the norms of this legal order, is the basis of validity common to all legal norms belonging to this legal order. As such, the basic norm constitutes the unity in the plurality of legal norms created in conformity to it. The basic norm of a legal order (*Rechtsordnung*), as the basic regulator of the creation of the law, represents a *dynamic principle*, to be distinguished from the basic norm of a system of norms (*Normensystem*), which represents a *static principle*". *Ibidem*: "The unity of a legal order is the unity of a network of generative relations. That a legal order can be described in noncontradictory propositions is another expression of this unity".

[21] Cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 97.

[22] *Ivi*, pp. 98-99: "La dottrina pura del diritto si vale di questa norma fondamentale come di un fondamento ipotetico. Se si parte dal presupposto che tale norma sia valida, è valido anche l'ordinamento giuridico che si fonda su di essa. La norma fondamentale attribuisce all'atto del primo legislatore e di qui a tutti gli atti dell'ordinamento giuridico che poggiano su questo, il significato del dover essere […]. Soltanto in base al presupposto della norma fondamentale il materiale empirico […] può essere inteso come diritto, cioè come sistema di norme giuridiche. […] Essa è soltanto l'espressione del presupposto necessario per comprendere positivisticamente il materiale giuridico. Essa non vale come norma giuridica positiva, perché non è prodotta nel corso del procedimento del diritto; essa non è posta, ma è presupposta come condizione di ogni posizione del diritto, di ogni procedimento giuridico positivo". Kelsen also states that, with the theory of *fundamental norm*, "la dottrina pura del diritto tenta di rilevare, attraverso all'analisi dei procedimenti effettivi, le condizioni logico-trascendentali del metodo, sinora usato, della conoscenza giuridica positiva" (*ibidem*).

[23] On this subject see the sharp pages written by S. L. Paulson, *Il problema della giustificazione nella filosofia del diritto di Hans Kelsen*, *cit*., pp. 23-29, especially pp. 24-26. There, Paulson clarifies that

according to the language of *possibility* inherited from Kant, Kelsen points out the fundamental norm as this logical-transcendental condition – we need to *assume its existence* because we cannot acquire any cognition or knowledge of it – which "makes it possible" to know the very object of the Pure Theory of law, namely, the positive (and valid) law.

Indeed, he states that

> Insofar as only the presupposition of the basic norm makes it possible to interpret the subjective meaning of the constitution-creating act (and of the acts established according to the constitution) as their objective meaning, that is, as objectively valid legal norms, the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of this interpretation, if it is permissible to use by analogy a concept of Kant's epistemology. Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?" The epistemological answer of the Pure Theory of Law is: "By presupposing the basic norm that one ought to behave as the constitution prescribes, that is, one ought to behave in accordance with the subjective meaning of the constitution-creating act of will—according to the prescriptions of the authority creating the constitution[24]."

"transcendental", in Kant's semantic, refers to the *conditions of possibility* of knowledge: indeed, the philosopher from Königsberg uses that word to mean the knowledge that "si occupa non di oggetti, ma del nostro modo di conoscenza degli oggetti in quanto questa deve esser possibile *a priori*", see I. Kant, *Critica della ragion pura*, Italian translation by G. Gentile, Bari, Laterza, 1963, p. 58. Accordingly, the transcendental foundation of knowledge has a *a priori* component and the word "transcendental" relates to something that goes *beyond* cognition and knowledge. Paulson underlines how Kelsen adopts this Kantian approach, in so far as the latter assumes the transcendental category of law as *a priori* to make the legal experience *possible* (cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, pp. 64-65). Pondering whether and how the *positive law* is realizable as an object of knowledge and analysis, carried out by the legal science, Kelsen answers to this transcendental question by appealing to the *fundamental norm*, that is, the presupposed category which tends to show the possibility of what is under discussion (objectively valid legal norms), cf. S. L. Paulson, *Il problema della giustificazione nella filosofia del diritto di Hans Kelsen*, *cit*., pp. 24-26. On the great importance of Kant's philosophy as well as the Marburg Neo-Kantianism for Kelsen – especially the version given by Hermann Cohen with his principle of *purity* – see H. Kelsen, R. Treves, & S. L. Paulson, *Formalismo giuridico e realtà sociale*, *cit.*, pp. 7-11 and p. 28.

[24] H. Kelsen, *Pure Theory of Law*, *cit.*, p. 202. Cf. also *Idem*, *La dottrina pura del diritto*, *cit.*, pp. 509-510: "Poiché soltanto presupponendo la norma fondamentale è possibile interpretare il senso soggettivo dell'atto costituente e degli atti statuiti conformemente alla costituzione come loro senso oggettivo, cioè come norme giuridiche oggettivamente valide, la norma fondamentale (cosí come la definisce la scienza giuridica) può essere definita la condizione logico-trascendentale di questa interpretazione, se è lecito applicare per analogia un concetto della teoria kantiana della conoscenza. Come Kant si chiede in che modo sia possibile un'interpretazione libera da ogni metafisica dei fatti percepiti mediante i sensi nelle leggi formulate dalla scienza della natura, cosí la dottrina pura del diritto pone il quesito di come sia possibile un'interpretazione del senso soggettivo di certe fattispecie (senza far riferimento ad autorità metagiuridiche come Dio o la Natura) come sistema di norme giuridiche oggettivamente valide e descrivibili in proposizioni giuridiche. A questo problema della teoria della conoscenza la dottrina pura del diritto cosí risponde: ci si deve

To grasp the essence of this peculiar condition, one should firstly understand that it *directly* concerns to a certain constitution, as the fundamental normative act of a legal order, by and large effective, that has been produced by *statutory creation* or by *custom*. Moreover, the fundamental norm *indirectly* refers to the coercive order produced in accordance with that constitution and effective in its broad outlines, thus giving foundation to the validity of both the constitution and the coercive order produced in accordance with it[25]. Indeed,

> The function of this basic norm is to find the objective validity of a positive legal order, that is, to interpret the *subjective* meaning of the acts of human beings by which the norms of an effective coercive order are created, as their *objective* meaning[26].

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comportare cosí come prescrive la costituzione, cioè conformemente al senso soggettivo dell'atto costituente, alle prescrizioni del costituente". See *Idem*, "What is the Pure Theory of Law", *Tulane Law Review*, vol. 34, no. 2, 1959-1960, pp. 269-276, where Kelsen states (*ivi*, 275-276): "[…] the reason for the validity of the constitution and hence of the statutes, judicial decisions, and administrative commands established on the basis of the constitution can only be a norm we *presuppose*, if we are to interpret the acts whose subjective meaning the constitution, the statutes, the judicial decisions, the administrative commands are, as objectively valid norms. A norm is presupposed according to which men ought to behave in conformity with the constitution, hence in conformity with the general norms issued based on the constitution by legislation or custom and, finally, in conformity with the individual norms issued on the basis of statutes or customary law by judicial and administrative acts; that is to say, in conformity with the legal order in its *hierarchical structure*. This norm, which is not a positive norm – not a norm created by an act of human or superhuman will, but only *presupposed* in juristic thinking – is the reason for the validity of a positive legal order. It is called the *basic norm*. Its presupposition is the condition under which every coercive order established by acts of human beings and by and large effective, may be interpreted as a system of objectively valid norms". See also *Idem*, "On the basis of Legal Validity", *American Journal of Jurisprudence*, vol. 26, 1981, p. 189: "[t]he basic norm of the positivistic Pure Theory of Law is not a norm of justice, and it affords no moral-political justification of the positive law, but only a conditional, epistemic foundation for its validity. The basic norm answers the question of how it is possible to interpret the 'ought' that is the subjective meaning of certain acts as their objective meaning. In other words, it answers the question of how it is possible to interpret interpersonal relations as legal relations, and in doing so, the basic norm – by analogy to Kant's theory of knowledge – represents nothing other than the transcendental-logical foundation of the validity of the positive law". On this topic cf. S. L. Paulson, *The Great Puzzle: Kelsen's Basic Norm*, in L. D. d'Almeida, J. Gardner and L. Green (eds.), *Kelsen Revisited. New Essays on the Pure Theory of Law*, Oxford-Portland, Hart Publishing, 2013, pp. 43-61, especially from p. 49 onwards about the chance of a Kantian transcendental argument in legal science.

[25] H. Kelsen, *Pure Theory of Law*, *cit.*, p. 201. Cf. *Idem*, *La dottrina pura del diritto*, *cit.*, p. 508.

[26] *Idem*, *Pure Theory of Law*, *cit.*, p. 202. In similar terms, *ivi*, p. 204: "A positivistic science of law can only state that this norm is presupposed as a basic norm in the foundation of the objective validity of the legal norms, and therefore presupposed in the interpretation of an effective coercive order as a system of objectively valid legal norms". Cf. Also *Idem*, *La dottrina pura del diritto*, *cit.*, p. 510: "La funzione della norma fondamentale è di dare un fondamento alla validità di un ordinamento giuridico positivo, cioè di un ordinamento coercitivo statuito con atti della volontà umana ed efficace nelle sue grandi linee; la sua funzione consiste cioè nell'interpretare il senso soggettivo di questi atti come loro senso oggettivo". *Ivi*, p. 512: "Una scienza positivistica del diritto può soltanto accertare che questa norma, nel senso ora illustrato,

Thus, the basic norm legitimises and works in strict connection with the legal category of *validity* (*infra*), by founding the whole system of legal norms and being the ultimate transcendental and epistemological mechanism that allows both to acknowledge it as a valid positive legal order and to avoid the infinite regression to superior norms in the process of creating (and applying) the law, that is, in the productive concatenation I have highlighted above – where, as one may remember, the two former functions, legal creation and application, in Kelsen's view take place simultaneously, without being in opposition, because of the peculiar feature of law that regulates itself.

Furthermore, in dynamic systems the norms draw the foundation of their validity, but not their content, from the fundamental norm. The latter only establishes how norms must be adopted or which authorities are *empowered* to enact them (in this sense, it works as an authorisation or delegation of power). Indeed, the norms' content depend on the concrete acts of will produced by the entitled organs to undertake the creative-normative process[27].

Then, what is *validity* for Kelsen and when is a norm legally valid? To the first question, I can answer that he considers the validity of a legal norm as what must be observed, namely, that one should behave according to its prescription[28]. In other words, legal validity means that a norm is *binding*, whereby it entails the binding strength of law for its recipients.

To the second question one can answer in the following terms: for Kelsen, a norm is legally *valid* in so far as it *belongs* to the legal order that consists of a dynamic normative system. Then, when does a norm belong to that normative system? It is part of the latter when it draws its reason for the validity ultimately from the fundamental norm.

è presupposta come norma fondamentale nell'attribuire un fondamento alla validità oggettiva delle norme giuridiche e quindi nell'interpretare un ordinamento coercitivo, efficace nelle sue grandi linee, come un sistema di norme giuridiche oggettivamente valide".

[27] See H. Kelsen, *General Theory of Law & State*, *cit.*, p. 113: "[t]he norms of a dynamic system have to be created through acts of will by those individuals who have been authorized to create norms by some higher norm. This authorization is a delegation. Norm creating power is delegated from one authority to another authority; the former is the higher, the latter the lower authority. The basic norm of a dynamic system is the fundamental rule according to which the norms of the system are to be created". Moreover, where Kelsen affirms that law "is always positive law" (*ivi*, p. 114), he also clarifies that "its positivity lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems" and that "[t]he particular norms of the legal order cannot be logically deduced from [the] basic norm […]. They are to be created by a special act of will, not concluded from a premise by an intellectual operation". Cf. *Idem*, *Teoria generale del diritto e dello Stato*, *cit.*, 114: "[l]e norme di un sistema dinamico debbono venir create mediante atti di volontà, da parte degli individui i quali sono stati autorizzati a creare norme da una qualche norma più elevata". See also F. Balaguer Callejòn, *La proiezione della Costituzione sull'ordinamento giuridico*, Italian translation by A.M. Nico, Bari, Cacucci, 2012, p. 21, where the author observes: "[n]ei sistemi dinamici, [a differenza di quelli statici], le norme traggono il fondamento della loro validità, ma non il loro contenuto, dalla norma fondamentale. La norma fondamentale si limita a determinare come si devono produrre le norme, quali autorità devono produrle. Il contenuto di quelle norme dipenderà dagli atti di volontà degli organi legittimati a produrre norme".

[28] Cf. B. Celano, *La teoria del diritto di Hans Kelsen, cit.*, p. 274.

In other words, when it has been created and enacted in a *specific way* so that it will be in accordance with the provisions of higher norms, established by hierarchically superior organs that exist in the legal order, and, eventually, with the G*rundnorm* which grounds the whole normative system[29].

The legal concept of *validity*, therefore intended as *belonging* to a given legal system, is connected to (one of) the functions of the fundamental norm highlighted above, that is, its value to act as *empowerment*. To see this connection, one should grasp the mechanism imagined by Kelsen: for a normative utterance to express a valid legal norm it has to belong to the (considered) legal system. This occurs if that norm has been enacted in a particular way. Ultimately, the one determined by the fundamental norm of that given system. Thereby, the *normative enactment* takes place throughout the exercise of law-creating powers conferred by the appropriate *authorisation norm* (i.e., the basic norm of that specific system which entitles a normative authority, as a legislator or a constitutional

[29] Cf. H. Kelsen, *General Theory of Law & State*, *cit.*, p. 111: "[t]hat a norm belongs to a certain system of norms, to a certain normative order, can be tested only by ascertaining that it derives its validity from the basic norm constituting the order. […] [A]n 'ought' statement is a valid norm only if it belongs to such a valid system of norms, if it can be derived from a basic norm presupposed as valid. […] [T]he reasons for the validity of a norm is a presupposition, a norm presupposed to be an ultimately valid, that is, a basic norm. The quest for the reason of validity of a norm is not […] a *regressus ad infinitum*; it is terminated by a highest norm which is the last reason of validity within the normative system […]". Kelsen (*ivi*, p. 113), while pointing out that "a legal norm cannot be questioned on the ground that its contents are incompatible with some moral or political value", he also explains that "[a] norm is a valid legal norm by virtue of the fact that it has been created according to a definite rule and by virtue thereof only. The basic norm of a legal order is the postulated ultimate rule according to which the norms of this order are established and annulled, receive, and lose their validity". Thus, any normative statement (*ibidem*) "is a valid legal norm if it belongs to a certain legal order. This it does if this norm has been created in a definite way ultimately determined by the basic norm of that legal order, and if it has not again been nullified in a definite way, ultimately determined by the same basic norm". For further references on the Kelsenian concept of *legal validity*, see H. Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", *cit.*, p. 62: "[t]he relation between a norm of a higher level and one of a lower, for instance that between a constitution and a statute enacted in accordance with it, means also that in the higher norm is found the reason for the validity of the lower; a legal norm is valid because it has come into being in the way prescribed by another norm. This is the principle of validity peculiar to positive law. It is a thoroughly dynamic principle. The unity of the legal order is achieved by this connection". Moreover, concerning validity as the *existence* of a norm which express *normativity*, see *Idem*, "On the Basic Norm", *California Law Review*, vol. 47, no. 1, 1959, p. 107: "Since the norm is not a fact but the meaning of a fact, its existence is different from the existence of a fact. Its existence is its validity. The statement that a norm prescribing, permitting, or authorizing a certain behaviour is valid does not mean that this behaviour takes place or that it will take place in the future; it means that it ought to take place, that men ought to behave as the norm prescribes, permits, or authorizes men to behave. The statement referring to the validity of a norm is an 'ought'-statement". Eventually, see *Idem*, "On the basis of Legal Validity", *cit.*, 188: "According to the Pure Theory of Law as a positivistic legal theory, the validity of the positive law is altogether independent of its content; the positive law is valid not because it has some particular content, namely a just content, but because it was created in a particular way, that is, in accordance with the basic norm". Cf. also the analysis carried out by S. L. Paulson, *Il problema della giustificazione nella filosofia del diritto di Hans Kelsen*, *cit*., pp. 53-54.

body, to issue laws and statues), is an essential and sufficient condition for the norm to be part of the legal order/system and, hence, to be valid[30].

From a bottom-up perspective, for a *lower* norm to be valid – hence, for a legal theorist having the chance to *say* that it is valid, thereby expressing a *validity judgment* – it must be in conformity with the *higher* norm that disciplines its own creation and consequently the normative body that is entitled to adopt it. The lower norm, then, must find its reason for the validity in the latter, the higher norm. By climbing up the normative pyramid, to avoid an *infinite regress* from the Kelsenian mechanism of legal production one must reach to its presupposed top, namely, the fundamental norm. As this one had been *thought* by Kelsen to "break" the *validity chain* and to ground the whole normative system – in Kantian terms, it is the *idea* that allows to organise all the legal material in a single system, as a *unity* –, its existence and validity must be only imagined by the juristic thinking and presupposed. As I have already stressed, indeed, it is the transcendental condition that models the law as a valid legal order and to express any judgement about norms' validity[31].

Therefore, for all I have represented so far, one can grasp that for Kelsen the law is *a peculiar system of general and individual norms*, erected in vertical terms and which entails a pyramidal form[32].

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[30] *Ibidem*. In this sense see also the *afterword* written by G. Luchena in S. L. Paulson, *Il problema della giustificazione nella filosofia del diritto di Hans Kelsen*, *cit*., p. 93.

[31] Cf. V. Velluzzi, *Percorsi del positivismo giuridico*, *cit.*, pp. 11-12. Concerning the validity judgments see B. Celano, *La teoria del diritto di Hans Kelsen, cit.*, p. 348.

[32] H. Kelsen, *General Theory of Law & State*, *cit.*, p. 132, where he states: "The legal order is a system of general and individual norms connected with each other according to the principle that law regulates its own creation. Each norm of this order is created according to the provisions of another norm, and ultimately according to the provisions of the basic norm constituting the unity of this system of norms, the legal order. A norm belongs to this legal order only because it has been created in conformity with the stipulations of another norm of the order. This *regressus* finally leads to the first constitution, the creation of which is determined by the presupposed basic norm". Compare with the Italian translation, H. Kelsen, *Teoria generale del diritto e dello stato*, cit., p. 134, where the law as a legal order is still depicted as "un sistema di norme generali ed individuali, connesse fra di loro in base al principio che il diritto regola la propria creazione. Ogni norma di tale ordinamento è creata secondo le disposizioni di un'altra norma, ed alla fine secondo le disposizioni della norma fondamentale, la quale costituisce l'unità di quel sistema di norme, dell'ordinamento giuridico. Una norma appartiene a quell'ordinamento giuridico soltanto perché è stata creata in conformità al dettato di un'altra norma dello stesso ordinamento. Questo *regressus* porta infine alla prima costituzione, la cui creazione è determinata dalla norma fondamentale presupposta". In almost identical terms, see *Idem*, *Pure Theory of Law*, *cit.*, pp. 233-234: "the legal order is a system of general and individual norms connected in such a way that the creation of each norm of this system is determined by another and ultimately by the basic norm. A norm is part of a legal order only because it had been created according to the provision of another norm of this order. This regression leads eventually to the presupposed basic norm, which is not created according to the provision of another norm". Cf. the analysis carried out by J. Treviño in H. Kelsen, *General Theory of Law & State*, *cit.*, xxvii: "[a]ccording to Kelsen's pure theory of law, the legal order is best understood as a *system* of positive norms with a hierarchical structure. It is first of all a *system*, and not a mere aggregate, in that the plurality of legal norms that constitute it function in interrelation with regard to the progressive delegation of law creation. Its dynamic operations make it a

Having illustrated the concepts of *unity* of the legal system, *fundamental norm*, and *validity* of legal norms, in the following pages there will be room to browse the hierarchical structure of this system, by considering the different stages that articulates it.

From the fundamental norm, (not posed, but) *presupposed* at the top of the "pyramid", one can descend to the further degrees of the legal system. Whether the theoretical construction represents the higher normative steps of the international legal order (*infra*) or not, its *extension* can change.

Simply considering the typical case of the national legal order, various normative levels can already be found. Indeed, the Pure Theory of Law identifies at least the following ones[33]: first, the constitution, as the highest normative "outcome" of positive law, entitled by the implicit prescription of the fundamental norm (which should exist *a priori*, as imagined by the *juristic thinking*). The constitutional provisions mainly discipline the production of inferior legal norms, establishing rule of *competence*, thereby identifying which organ is entitled to enact them, and *procedure*, that is, the way in which they must come into existence in order to be valid. To some extent in Kelsen's view, the constitution can also pre-determine their content[34].

At a lower level, *general norms* produced through customs or legislation (or even jurisdiction, if we consider Kelsen's later works) find their place. For instance, here there is room for legal statutes enacted by a Parliament (or a recognised normative authority), but even for judicial decisions that did create a *binding precedent* or amount to a jurisdictional customary law-making practice, both methods of legal production being

closed or 'unified' system […]. The system of progressively delegated powers to create and apply laws runs in the direction from the top of the hierarchy downward. This means that each individual norm in the legal system is valid because it is based on a higher-echelon norm, which itself is based on a still higher one, all the way to the highest, most fundamental norm at the top of the hierarchy. Although the various norms are differentially positioned, there is unity among them in that all belong together in the same legal system. Kelsen refers to his explanation of this procedure of legal authorization as the 'pyramid of law' (*Stufenbau des Rechts*) theory".

[33] For further insights and an extensive explanation of the hierarchical structure of the legal order see the whole section in H. Kelsen, *Pure Theory of Law*, *cit.*, pp. 221-278, as well as *Idem*, *General Theory of Law & State*, *cit.*, pp. 123-136. Cf. also *ivi*, xvii, where Treviño observes: "The scheme of a pyramid of law consists of the individual norms (judicial and executive decisions, private contracts) , which are juridically connected to general norms (court decisions, statutes, precedents), established by the courts, legislation, or custom, which are, in turn, determined by the constitution (it being the highest delegating norm given that it provides the procedure for the creation of all norms), which is itself based on the highest, the most supreme norm in the whole legal system whose validity we do not question – what Kelsen calls the 'basic norm'".

[34] Cf. H. Kelsen, *General Theory of Law & State*, *cit.*, pp. 124-125. There the author, while illustrating the meaning of the constitution in the *material* sense – "those rules which regulate the creation of the general legal norms, in particular the creation of statutes" (*ivi*, p. 124) –, clarifies that "[t]he material constitution may determine not only the organs and the procedure of legislation, but also, to dome degree, the contents of future laws" (*ivi*, 125). Cf. also *Idem*, *Teoria generale del diritto e dello stato*, *cit.*, 126-127.

cornerstones of the common law system, that a "more mature" Kelsen recognized and included in his theoretical framework since, at least, his *General Theory of Law and State*[35].

Even this kind of legal propositions, the general norms, as well as the others placed at the lower normative layers, must be adopted in accordance with the superior norms detectable in the vertical hierarchy of the legal order, in this case, constitutional norms and the highest, fundamental norm. Then, descending the step-wise construction of the legal order, but still dealing with a kind of general norms, regulations, ordinances (for instance, issued by administrative authorities) and governmental decrees follow, with the same obligation to be consistent with the higher normative plans[36].

Having moved forward to this point of the *Stufenbau des Rechts*, if one considers the *first* edition of the *Reine Rechtslehre* only, the act of setting *general* norms could be over. Within this early theoretical framework, indeed, judicial decisions and administrative acts, which, surprisingly (or not), depict another stage of the normative pyramid and clearly should be taken in accordance to superior (general) legal norms, in the process of applying the latter would only provide *individual* norms – concerning judicial acts, for the purpose of settling disputes or solving specific cases, by connecting or not an abstractly determined legal consequence (mainly, a sanction) to a concrete material fact, judicially ascertained (*infra*)[37].

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[35] Cf. *Idem*, *General Theory of Law & State*, *cit.*, p. 149 ff., regarding the different ways, admitted in some legal orders, to create general norms through judicial acts. There Kelsen clearly distinguishes among "general norms which originate in a single decision of a court" (it is the case of the so-called *precedent*) and the ones created "through permanent practice of the courts, i.e., through custom" (*ivi*, 150). I will provide more insights on this topic *infra*. For now, let's just consider this further statement from Kelsen: "[t]he judicial decision may also create a general norm" (*ivi*, p. 149). Also see *ivi*, xxxv, where he declares that: "[t]he present book is intended to reformulate rather than merely to republish thoughts and ideas previously expressed in German and in French. The aim has been a double one: first, to present the essential elements of what the author has come to call the 'pure theory of law' in such a way as to bring it near to readers who have grown up in the traditions and atmosphere of the Common Law; secondly, to give to that theory, such a formulation as to enable it to embrace the problems and institutions of English and American law as well as those of the Civil Law countries, for which it was formulated originally".

[36] H. Kelsen, *General Theory of Law & State*, *cit.*, p. 130 f.

[37] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, pp. 67-68. There Kelsen, at the beginnings of the 1930s, already affirms that "the function of adjudication is constitutive through and through; it is law creation in the literal sense of the word" and that "the judicial decision is itself an individual legal norm, the individualization or concretization of the general or abstract legal norm; it is the continuation of the process of creating law – out of the general, the individual. Only the preconceived notion that all law is contained in the general norm, the mistaken identification of law with the statute, could have obscured this insight into the judicial decision *qua* continuation of the law-creating process". About the analogy between jurisdiction and administration see *ivi*, 68: "[l]ike adjudication, administration manifests itself as individualization an concretization of statutes, namely, as administrative regulations. Indeed, a large part of what one customarily characterizes as state administration does not differ at all, functionally speaking, from what one calls the judiciary, in so far as the administrative apparatus uses the same technique as the courts use to pursue the purposes of the state […]". Likewise, cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, pp. 108-109. As I have already stated previously (footnote 35), Kelsen expanded this theoretical setting

At this point, on the one hand, it is relevant enough to stress that, generally, in Kelsen's view *applying* the law – as in the case of judges issuing a sentence or administrative authorities taking a decision – also means *creating* it and vice-versa, without that any kind of opposition between these two concepts would exist[38].

On the other hand, hence, there is no doubt that already in the early 1930s Kelsen recognises the *creative role* (as "agents creators" of legal norms) of both jurisdiction and administration, although he constraints it to *individual* norms only[39], as just clarified, arguably because in that period he conceives a legal theory exclusively for the European juridical context, while he has to cope with criticism regarding his excessive formalism[40].

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during the 1940s, mainly with his *General Theory of Law and state*, after he moved to the US. Indeed, he implemented the scope of his theory by also considering, for instance, the case of *Common Law systems*, where, as well known, other than normative statutes, judges' decisions might create (not just individual, but also) *general* norms whether through a jurisdictional *customary practice* or through the mechanism of (binding) *precedent.* Once again, cf. H. Kelsen, *General Theory of Law & State*, *cit.*, p. 149 ff. He takes the same stance years after in *Idem*, *Pure Theory of Law*, *cit.*, p. 250 ff.

[38] Cf. H. Kelsen, *General Theory of Law & State*, *cit.*, p. 133: "[a] norm regulating the creation of another norm is 'applied' in the creation of the other norm. Creation of law is always application of law. These two concepts are by no means, as the traditional theory presumes, absolute opposites". Likewise, see *Idem*, *Pure Theory of Law*, *cit.*, p. 234: "A norm that determines the creation of another norm is applied by the creation of that other norm. Application of law is at the same time creation of law. These two concepts are not in absolute opposition to each other as assumed by traditional theory".

[39] Again, see H. Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, pp. 67-68. Likewise, cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, pp. 108-109. Without any sort of ambiguity Kelsen also states that (*ivi*, p. 123) "il [legislatore], nella creazione del diritto, è relativamente molto più libero del [giudice]. Ma anche il giudice è un creatore del diritto ed egli pure è relativamente libero in questa funzione. Appunto per questo, la determinazione della norma individuale nel procedimento esecutivo della legge è una funzione della volontà in quanto con questa viene riempito lo schema della norma generale". Moreover, about the *creative* role of judges, it is useful to recall the analysis made by Renato Treves in his *preface* to the latter quoted work (*ivi*, p. 28): "[Kelsen] afferma […] che, dal punto di vista dinamico, non vi è una sostanziale differenza tra produzione e applicazione del diritto. Relativamente al problema della interpretazione della legge, Kelsen ritiene poi che si deve respingere la giurisprudenza dei concetti, che è la tipica espressione del formalismo giuridico, e ci si deve avvicinare alle dottrine opposte per le quali il giudice è il *creatore* del diritto e la giurisdizione non ha soltanto una funzione dichiarativa, ma *produttiva* e *costitutiva*" (these italics are mine). In his later works, as already pointed out (footnotes 35 and 37), Kelsen restates the *creative role* of adjudication (and administration), but he also *broadens* it in so far as Kelsen contemplates the production of *general* norms even through judicial decisions (or administrative acts), see *Idem*, *General Theory of Law & State*, *cit.*, pp. 134-136 and 149-153. Cf. also *Idem*, *Pure Theory of Law*, *cit.*, p. 236 ff. and p. 250 ff.

[40] Dealing with this sort of criticism, in the attempt to underline the *anti-formalistic* trends and dynamics which were already present in Kelsen's theoretical discourse, see the enlighting analysis given by M. G. Losano in H. Kelsen, *La dottrina pura del diritto*, *cit*., pp. 31-32: "Di fronte a queste accuse, Kelsen ribadí il carattere formale della sua dottrina, ma non ne sottolineò a sufficienza gli elementi dinamici, che avrebbero provato la sua concezione non formale della realtà giuridica. Si può dire che queste polemiche avessero originato una duplice immagine della dottrina kelseniana: in Europa si sottolineò il carattere formalistico della dottrina, sottovalutando quegli elementi dinamici che invece congiungevano le concezioni di Kelsen a teorie diverse ed opposte al formalismo giuridico; invece negli Stati Uniti (non coinvolti nella polemica) si videro in Kelsen quegli elementi realistici ed empirici, piú vicini alla sensibilità giuridica anglosassone. Vivendo negli Stati Uniti, Kelsen divenne sempre piú attento a questi ultimi

Nonetheless, as I have already spotlighted above, in his later works (especially in *General Theory of Law and State* and in the second edition of the *Pure Theory of law*) he comes to contemplate a broader role for judges within the (national) legal orders that are different from the ones that belong to the *Civil Law tradition*, where in some cases they are entitled to pose even *general* legal norms[41].

In his more advanced theory, indeed, he compares two (radically) opposite models regarding the mechanism of legal production and its "location" in the legal system, concerning the relation between the legislative organ and the courts.

On the one hand, the *freie Rechtsfindung* (free jurisdiction) imagined by Plato in his *Ideal State* which entails a radical decentralisation in the process of creating legal norms, thus disentangling this function from centralised legislative bodies and engaging judges and administrative authorities which accordingly are entitled to decide/solve individual cases under their own discretion– although they are not only law-creating but also law-applying organs (indeed, at least a general norm of adjudication law is applied, the one that authorises a specific organ to act as a judge or administrative authority)[42].

On the other hand, on the opposite, there is the (model of) legal system grounded on the principle of *Rechtstaat* which implies a state ruled by the law (only), whereby decisions on concrete cases are significantly constrained by the general provisions enacted by a central legislative organ or body. According to Kelsen, this paradigm lacks *flexibility*, while it allows to achieve a high standard of legal certainty (so that individuals can foresee the possible legal consequences for their actions and therefore adapt their behaviour)[43].

Instead, the first system leverages the consideration for which the (strict) application of general norms, that predetermine judicial decisions and administrative decrees, may not make *justice* to concrete individual cases (because that rigid enforcement overlooks their *peculiarities*), hence fostering a sort of normative decentralisation and a great *flexibility* in appreciating the factual elements of a concrete case. However, Kelsen observes, this model lacks in guaranteeing *legal security*, because individuals cannot foresee the outcomes of both jurisdiction and administration[44].

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elementi, cosicché, per esempio, mentre un tempo aveva respinto la sociologia giuridica come scienza rivolta a fenomeni naturali (e quindi senza punti in comune con la scienza del diritto), in seguito giunse ad ammettere la giurisprudenza sociologica come scienza complementare alla giurisprudenza normativa". Indeed, in his *General Theory of Law and State*, Kelsen designates his pure theory of law as "a radically realistic and empirical theory", cf. *Idem*, *General Theory of Law & State*, *cit.*, p. 13. Once again, he reasserts these considerations later, see *Idem*, *Pure Theory of Law*, *cit.*, p. 128, by pointing out that his pure theory of law is *radically realistic*, that is, "a theory of legal positivism". More *infra* on these realistic and empirical elements, closer to the Anglo-Saxon legal sensitiveness, that exist in the Kelsenian work.

[41] *Idem*, *General Theory of Law & State*, *cit.*, pp. 134-136 and 149-153. Cf. also *Idem*, *Pure Theory of Law*, *cit.*, p. 236 ff. and p. 250 ff. See the analysis already carried out at footnotes 35, 37, and 39.

[42] *Idem*, *Pure Theory of Law*, *cit.*, p. 251 ff. *Idem*, *General Theory of Law & State*, *cit.*, p. 144.

[43] *Idem*, *Pure Theory of Law*, *cit.*, p. 251-252.

[44] *Ivi*, p. 252 ff.

Moreover, being *justice* an irrational ideal[45] and a relative value, this setting basically entails a questionable "substitution": instead of the general norm of positive law established by a legislator (as a Parliament or a legal assembly) which, to some extent, fixes its own ideal of justice, here the main reference to evaluate whether a judicial or administrative act is "just" is the general norm enacted by the same organ that will take the decision and solve the concrete case there examined[46].

Between the two extreme models here highlighted, Kelsen acknowledges the existence of "hybrid" types of legal systems which variously express "different degrees of centralisation or decentralisation of the law-creating function and thereby different degrees of the realisation of the principle of flexibility of law, which is in inverse relation to the principle of legal security"[47]. Moreover, in those years being more in touch with the American legal system, he also identifies

> [a] system of a special kind […] in which general norms are, in the main, not created by a central legislative organ, but by custom, and applied by the courts. Since in case of custom-created general norms the adaptation of the law to changing circumstances is more difficult than in case of creation by a central legislative organ, than the system of customary law has a favourable climate for the development of preceding jurisdiction. It is understandable, therefore, that such jurisdiction flourished especially in the sphere of Anglo-American common law, which essentially is customary law[48].

At the end of this short digression, one should easily grasp how Kelsen, in his later works, deals with the crucial normative role of judges, especially in the *common law* system, thus expanding the scope of his legal theory and, at least to some extent, stressing the *anti-formalistic* trends in his own theoretical framework (more on this subject *infra*) that made him closer to *legal realism*.

Eventually, to briefly conclude the representation of the "step-wise" construction of the *national* legal order, at the bottom of the pyramid, in its lowest level, acts of mere

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[45] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, pp. 17-18. "Justice *qua* absolute value is irrational. However indispensable it may be for human will and action, it is not accessible to cognition. Only positive law is given to cognition, or, more accurately, is given to cognition as a task".

[46] *Idem*, *Pure Theory of Law*, *cit.*, p. 253. "From the point of view of an ideal of justice – possible only as a relative value – the difference between the system of free jurisdiction and of the jurisdiction determined by statutory or customary law is this: in place of the general norm of positive law and the general norm constituting the legislator's ideal of justice functions the general norm of the ideal of justice of the organ who is to render the decision of the concrete case".

[47] *Ivi*, p. 254. These intermediate systems are "those types in which a central legislative organ is established, yet the courts are authorized to create not only individual norms within the framework of the general norms created by the legislative organ but also – under special circumstances […] – individual norms outside this framework; and […] that system in which the courts are authorized to create general legal norms in the form of preceding decisions".

[48] *Ibidem*.

enforcement remain[49]. Indeed, the last phase of the "chain" of legal production which starts from the enactment of the constitution, in Kelsen's view, "is the realization of the coercive act *qua* consequence of an unlawful act"[50].

This *mere execution*, it is just a law-applying act *per se*, without creating any kind of norm. Then, here we can grasp an *exception* in order to that "trend" depicted by Kelsen, for which "most legal acts are acts of both law creation and law application"[51]. In line with this approach, Kelsen clarifies that also the "top" of the hierarchical structure of the normative system, the G*rundnorm*, represents a reciprocal and opposite exception (to the former) to this rule: hypothetical and presupposed, the basic norm is law-creating only. It does not enforce any higher norm[52].

1.3 *The further degrees of international law and the problem of sovereignty*

At this point, we should overcome the national-state perspective which has been illustrated so far, by considering the *true extension* (and "vocation") of the "step-wise" construction of the legal system and, more broadly, of Hans Kelsen's theory of law. Where both were thought to embrace all the legal phenomena, not limiting their explanatory power to the law of states only.

Then, by going beyond the national borders, we must examine the *Stufenbau*'s *supra-national* further "degrees", represented by the various normative plans of the international legal order, precisely keeping in mind that, according to Kelsen, the gnoseological assumption to *know* all the legal experience is considering the latter as *unity*. Already in the "oldest" version of his Pure Theory of Law, he maintains that, if one admits the existence of a *plurality* of national legal order, mutually coordinated and limited in their sphere of validity, as well as the role of the international positive law as the main tool to carry out these fundamental mutual coordination and limitation, therefore.

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[49] *Ivi*, p. 236.

[50] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 70.

[51] *Ibidem*.

[52] *Ibidem*. There Kelsen maintains: "[w]hile the presupposition of the basic norm has the character of pure norm creation, and the coercive act has the character of pure application, everything between these limiting cases is both low creation and low application". In this peculiar "range" conceived by Kelsen the private law transactions also have a room, so that contracts and negotiation acts take on a normative role for the parties involved, which are accordingly bonds by those provisions, jointly decided. Simultaneously, these private law acts mean application of higher general norms (for instance, those concerning the private autonomy of individuals), established by legislation, custom or jurisdiction. More broadly on the legal transaction and contracts cf. *Idem*, *Pure Theory of Law*, *cit.*, p. 256-262.

> one must conceive of international law as a legal system above the state legal systems, bringing them together in a universal legal community. And with that, the unity of all law is assured, cognitively speaking, in one system made-up of hierarchically ordered, consecutive strata of law[53].

Thereby, under the lens of legal theory and in the wake of a Kantian perspective, he sets forth and shows a *cosmopolitan* conception about the law and, consequently, about the political institutions, outlining an *ultra*-national-state dimension. Hence, one can notice that Kelsen has a *global pyramid* in mind, not at all constrained by the national boundaries of the states or, which is the same in his view, their legal orders. Since the early 1930s, by leveraging the asserted *primacy* of international legal order over states, he depicts three further stages, located just upon the states, which complement his theoretical construction[54].

Proceeding from a bottom-up perspective, indeed, he recognizes the legal norms created by *international tribunals* or jurisdictional courts, which integrate the third stage of this international pyramid (*Stufenbau)*. This normative layer is drawn on another higher one, constituted by the contingent agreements or treaties signed by the various subjects of the international legal community (mainly, states) to self-restrain their mutual behaviours. In a nutshell, the *international treaty* law forms the second level in the hierarchical structure of the international legal order. In turn, the latter is directly grounded on the *general international customary law*, which is placed by Kelsen at the top of the *hierarchical strata*[55], and precisely is rooted in its first and highest tenant, that is, the fundamental norm of the international legal order. According to [that former] Kelsen, this *supreme* norm, which directly legitimates the reason for the validity of the international legal community and indirectly does the same for the several different state legal systems, it amounts to a provision that qualifies *custom*, in terms of reciprocal conducts of duly authorized state organs, as *a law-creating material fact*[56].

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[53] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 70. Cf. also *Idem*, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 112: "bisogna concepire il diritto internazionale come un ordinamento giuridico che sovrasta quello dei singoli stati e li riunisce in una comunità giuridica universale. Con ciò, dal punto di vista della conoscenza, è garantita l'unità di tutto il diritto in un sistema di strati giuridici che si susseguono gradualmente".

[54] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, pp. 107-108. Cf. *Idem*, *Lineamenti di dottrina pura del diritto*, *cit.*, pp. 149-150.

[55] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 107, about the *hierarchical structure* of the international legal order: "It should be noted here that particular international treaty law and general international customary law are not to be regarded as coordinated groups of norms. Since the basis of that international treaty law is a norm belonging to the group of norms of general international customary law, the relation between the two is a relation between lower and higher hierarchical levels".

[56] Cf. *Ivi*, pp. 107-108: "if one […] considers the legal norms created by way of international courts and similar organs, then yet a third level is apparent in the structure of international law, for the function of such organs, which create international law, is itself based on a treaty, and thus on a norm of the second

Years later, still assuming the *primacy* of the international legal order and its *sovereignty* (*infra*) regarding the lower normative systems of the states[57], Kelsen by and large keeps the theoretical setting here highlighted, even though he draws some relevant distinctions. Concerning, for instance, whether the *ultimate reason* for the validity of a national legal order lies in a norm of international *positive* law[58] (in this case being only *postponed* the problem of its foundation…) or, as he suggests, in the *fundamental norm* of the international legal order, which accordingly acts as *indirect basis* of the validity of state legal orders[59]. This basic norm (too), as its "nature" demands, is only *presupposed* in the legal thinking, indeed it is not a *positive* or a written norm at all. Kelsen clarifies that it consists of a *presupposition*, by mean of which the

> general international law is regarded as the set of objectively valid norms that regulate the mutual behaviour of states. These norms are created by custom, constituted by the actual behaviour of the 'states', that is, of those individuals who act as governments according to national legal orders[60].

This set of norms, well known as *general international law*, that forms the first, highest stage of the hierarchical structure of the international legal community (*supra*), is intended by the states as *legally binding* precisely because of the existence of that presupposed fundamental norm, which elevates *custom* among the various states as a factual practice that creates those norms. Kelsen points out that

> The basic norm runs as follows: 'States – that is, the governments of the states – in their mutual relation sought to behave in [accordance to their customs]'; […]. This is the 'constitution' of international law in a transcendental-logical sense[61].

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hierarchical level of international law. This second level –international law created by way of international treaties – is based in turn on a principle of general international customary law, the first or highest of the hierarchical strata. The basic norm of international law, then, and thus of state legal systems, too, must be a norm that establishes custom – the reciprocal behaviour of the states – as a law-creating material fact".

[57] *Idem*, *Pure Theory of Law*, *cit.*, pp. 214-217. Indeed, he envisages (*ivi*, p. 214) an international law "not regarded as part of the national legal order, but as a sovereign legal order, superordinated to all national legal orders, limiting them in their spheres of validity". See also *Idem*, *La dottrina pura del diritto*, *cit*., pp. 541-545.

[58] Cf. *Idem*, *Pure Theory of Law*, *cit.*, pp. 214-215, where Kelsen identifies it as the norm that "authorizes an individual or a group of individuals, based on an effective constitution, to create and apply as a legitimate government a normative coercive order. That norm, thus, legitimizes this coercive order for the territory of its actual effectiveness as a valid legal order, and the community constituted by this coercive order as a 'state' in the sense of international law".

[59] *Ivi*, p. 215.

[60] *Ivi*, pp. 215-216.

[61] *Ivi*, p. 216.

Having deepened the "peak" of the international legal order and the way in which Kelsen imagines its formulation, moreover, one should consider at least two further aspects.

Firstly, the "diminished" role recognized by Kelsen to the general principle of *pacta sunt servanda*, comparing its former function in the first edition of the pure theory of law[62]. This tenant still is a relevant part of the first stage of the international pyramid, that is, the general international customary law, which grounds the lower normative layer, thus founding the particular international treaty law[63]. However, it does not amount to the basic norm (or a norm of international customary law of "special significance") anymore[64]. Indeed, still dealing with the idea and the core meaning of the highest transcendental and hypothetical assumption, Kelsen clarifies that

> [t]he presupposed basic norm of international law, which institutes custom constituted by the states as a law-creating fact, expresses a principle that is the basic presupposition of all customary law: the individual ought to behave in such a manner as the others usually behave (believing that they ought to behave that way), applied to the mutual behaviour of states, that is, the behaviour of the individuals qualified by the national legal orders as government organs[65].

Secondly, the most relevant traceable difference in his theoretical framework, according to the thorough analysis carried out by Mario G. Losano and with special regard to the former "intermediate passage" represented by the *General Theory of Law and State*, concerns the *value* of *peace* as the possible purpose of the international law[66].

Indeed, while in the middle of the 1940s Kelsen assesses the (relative) *peace keeping* in a certain (legal) community as its main goal, realized by authorized officials, that to some extent are entitled to use (institutional) coercion to pursue this goal, in the second edition of the Pure Theory of Law he differently addresses and solves the "problem" of peace, whereby this value would not amount to a *moral minimum* that the law should comply in any case. Conversely, thus preserving his legal positivism, he

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[62] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 107. Among the norms of general international law, Kelsen reckons in the early 1930s, "the norm known as *pacta sunt servanda* is of special significance. It empowers the subjects of the international legal community [namely the individual state] to govern their behaviour by means of treaties – that is, the behaviour of their organs and citizens".

[63] *Idem*, *Pure Theory of Law*, *cit.*, p. 216: "[o]ne of the norms of international law created by custom authorizes the states to regulate their mutual relations by treaty. The reason for the validity of the legal norms of international law created by treaty is this custom-created norm. It is usually formulated in the sentence: *pacta sunt servanda*".

[64] To grasp this revised setting cf. *ibidem*, footnote 81, where Kelsen states: "[t]he theory held by many authors (and at one time also by myself) that the norm of *pacta sunt servanda* is the basis of international law is to be rejected because it can be maintained only with the aid of the fiction that the custom established by the conduct of states is a tacit treaty".

[65] *Ibidem*.

[66] Cf. the *introductory essay* by M. G. Losano in H. Kelsen, *La dottrina pura del diritto*, *cit*., pp. 74-81.

maintains that for peace to be a fundamental function of the law one must verify this "assumption" by concretely detecting its existence in the various legal orders. In other words, peace would not represent an essential function of the law, but "one of its tendencies historically ascertainable"[67]. Indeed, a certain order might be qualified as a *legal* one even though it does not sanction and protect a condition of peace in the considered social group. This *extension* of the concept of legal order is remarkable because it allow to embrace both the so called "primitive" ones – in which there is room for violence, self-defense, and unpunished murders of individuals not belonging to the specific social group – and the international legal order too, which in Kelsen's discourse clearly holds a central position. This aspect is crucial for a *systemic* theory which aims at explaining all the legal phenomena. Then, by recalling the more developed version of the Pure Theory of law

> No affirmation of a value transcending positive law is inherent in the basic norm of international law, not even of the value of peace guaranteed by the general international law created by custom and the particular international law created by treaty. International law and – if its primacy is assumed – the subordinated national legal orders are not valid 'because' and 'insofar as' they realize the value that consists in peace; they may realize this value if and so far as they are valid; and they are valid if a basic norm is presupposed that institutes custom among states as a law-creating fact regardless of the content of the norms thus created[68].

Coming back to deal with the *spatial dimension* of his theoretical universe and especially with its *vertical-hierarchical* aspiration, by always conceiving the legal material as a *single whole*, Kelsen once again points out that

> If the reason for the validity of national legal orders is found in a norm of international law, then the latter is understood as a legal order superior to the former and therefore as the highest sovereign legal order. If the states – that is, the national legal orders – are nevertheless referred to as 'sovereign', then this 'sovereignty' can only mean that the national legal orders are subordinated *only* to the international legal order[69].

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[67] Cf. *Ivi*, pp. 77-79. Nonetheless, by stressing the potential role of peace as a "valuable" tendency of law in shaping the most evolved and developed legal orders, Losano observes that "la seconda edizione della *Reine Rechtslehre* ammette che il fine del diritto internazionale non è la pace (in assenza di una norma, pattizia o consuetudinaria, lo stato che si ritenga leso dal comportamento di un altro stato può provvedere direttamente a farsi giustizia con quella autodifesa che è inconciliabile con il valore della pace), ma aggiunge tuttavia che, da questa situazione, prendono origine gli ordinamenti giuridici piú evoluti, che vietano l'autodifesa, e ritorna cosí, anche per l'ordinamento giuridico internazionale, a qualificare il valore della pace come tendenza (se non come caratteristica) degli ordinamenti giuridici."

[68] *Idem*, *Pure Theory of Law*, *cit.*, p. 216.

[69] *Ivi*, p. 216-217. About the hierarchical and dynamic relation between the international legal order and the states, consider also what Kelsen already states at the beginning of the 1930s, cf. *Idem*, *Introduction to the*

At this point of the current analysis, I reckon useful to provide some insights concerning the concept of *sovereignty*, in light of the ferocious criticisms raised by Kelsen.

Indeed, he addresses the idea of (state) sovereignty as a problematic notion, connected to the rise of modern states, that falls into crisis from legal modernity onwards. In its historically best-known meaning, as *suprema potestas superiorem non recognoscens*, in Kelsen's view it could not be applied to states anymore, it should be overcome in favor of an internationalist dimension of law, instead. Where only the latter could effectively guarantee the protection of fundamental rights and peace, thus approaching the horizon that Kant outlined at the end of the 18th century[70].

Concerning sovereignty, I deem extremely iconic to mention the way in which Agostino Carrino frames this problematic concept, stating that

> it is a historical concept, understood as that *dogma* on which jurists, theologians and philosophers have been meeting and clashing for several centuries. It was born [...] and fades, finding historically in Bodin its best-known formulation ('summa legibusque absoluta potesta', 1567) and in Kelsen its radical critique, its final transformation, and its completion. In Kelsen's critique of the dogma of sovereignty as it had been defined in the identification of the Sovereign in the person of the state […], the concept itself dissolves and resolves itself into a logical-cognitive function, into a pure hypothesis of the cognitive reason, and the person of the state becomes merely the 'metaphor of the logical unity' […] of the [legal] order[71].

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problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law, *cit.*, p. 100: " So long as there is no legal system higher than the state legal system, the state itself is the highest, the sovereign legal system or legal community […]. But as soon as the international legal system rises above the legal systems of the individual states, the state can no longer be understood as the sovereign legal system; it can be understood only as the highest legal system relatively speaking, that is, the highest legal system saves for international law, a legal system directly under international law".

[70] On this subject, in line with Kelsen's view, years after Ferrajoli will state that: "There is no doubt that the notion of sovereignty as *suprema potestas superiorem non recognoscens* dates back to the birth of the great European national states and the correlative collapse, at the threshold of the modern age, of the idea of a universal legal order that the medieval culture had inherited from the Roman one. Talking about sovereignty and its historical and theoretical occurrences therefore means addressing the vicissitudes of that particular politico-legal formation that is the modern nation-state, born in Europe a little over four centuries ago, exported in this century all over the planet and now in its twilight years" / "è indubbio che la nozione di sovranità quale *suprema potestas superiorem non recognoscens* risale alla nascita dei grandi stati nazionali europei e al correlativo incrinarsi, alle soglie della età moderna, dell'idea di un ordinamento giuridico universale che la cultura medioevale aveva ereditato da quella romana. Parlare della sovranità e delle sue vicende storiche e teoriche vuol quindi dire parlare delle vicende di quella particolare formazione politico-giuridica che è lo Stato nazionale moderno, nata in Europa poco più di quattro secoli fa, esportata in questo secolo in tutto il pianeta e oggi al tramonto" (English translation are mine), cf. L. Ferrajoli, *La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale*, Milano, Anabasi, 1995, pp. 7-8.

[71] Cf. H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, IX: "Il concetto di sovranità è un concetto storico, inteso come quel *dogma* su cui giuristi, teologi e filosofi per diversi secoli si incontrano e si scontrano. Esso nasce […] e tramonta,

It is precisely the author of the Pure Theory of law who from the 1920s onwards traced the coordinates for the *overcoming* of sovereignty[72], a category ontologically in crisis from its very beginnings and in constant contradiction with the very idea of law (as Ferrajoli would later argue, *infra*).

Indeed, Kelsen claims that, without any hesitation, the notion of (state) sovereignty *must be radically removed* from the legal theory scenario, maintaining that this "technical operation" amounts to the *revolution of cultural (legal) awareness* that is firstly needed. Accordingly, he spotlights how a correct deepening of the legal theory field enables us to overcome several existing obstacles towards legal evolution. As well, he deems that the dogma of sovereignty associated to *particular states* has created plenty of those obstacles for the further developing of the international community and legal order, thus preventing a possible and significant "change of pace" of their, that is, their transformation (also in a political-material sense) from a primitive condition to a *civitas maxima* or a universal legal order grounded on peace (*infra*)[73].

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trovando storicamente in Bodin la sua più nota formulazione ('summa legibusque absoluta potesta', 1567) e in Kelsen la sua critica radicale, la sua finale trasformazione e il suo compimento. Nella critica kelseniana al dogma della sovranità così come si era andato definendo nella individuazione del soggetto sovrano nella persona dello Stato […], il concetto stesso si scioglie e si risolve in funzione logico-conoscitiva, in una pura ipotesi della ragione conoscente e la persona dello Stato diventa solo la 'metafora dell'unità della logica' […] dell'ordinamento [giuridico]". There (*ivi*, X), dealing with the "project" of modernity, Carrino observes that the dogma of sovereignty was the answer to the risk of a never-ending civil war. However, its *sunset* shows the contradictions of that answer and the disability to keep together the single parts of modern society. According to Carrino, the *unity* of a universal legal order – which is Kelsen's proposal – seems to be only the pale specular overturning of the unity of the medieval *Imperium*. For further references to the Kelsenian critique which invests the dogma of sovereignty, in light of Carrino's analysis, cf. also *ivi*, XX, XXXVIII-XXXIX – where is illustrated that for Kelsen the dogma of sovereignty has nothing universal about it, since it is the result of a socio-political and historical process that is clearly entirely contingent: that one of the raise (and fall) of the nation-state, with its relative corollaries of sovereignty and reason of state – and XLIII-XLIV – in connection to the *only* possible option of the *primacy* of international law, whether the criticism raised by Kelsen is scientifically valid.

[72] See H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, p. 402 and p. 469. On this topic also cf. *Idem*, *Lineamenti di dottrina pura del diritto*, *cit.*, pp. 153-169; *Idem*, *Peace through Law*, Chapel Hill, University of North Carolina Press, 1944, Italian translation by Luigi Ciaurro, *La pace attraverso il diritto*, Torino, Giappichelli, 1990, p. 70 ff; *Idem*, *La dottrina pura del diritto*, *cit*., pp. 544-545 and 748-754.

[73] Cf. H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, 469: "Senza dubbio il concetto di sovranità deve essere radicalmente rimosso. È q u e s t a la rivoluzione della coscienza culturale di cui abbiamo per prima cosa bisogno! Essa non avverrà solo grazie a una costruzione giuridica, ma l'approfondimento corretto della teoria giuridica è in grado di aiutare a debellare parecchi ostacoli che si frappongono alla evoluzione del diritto. Infatti la concezione della sovranità dello Stato particolare ha finora – a ragione o a torto – ostacolato tutto ciò che mira ad uno sviluppo dell'ordinamento giuridico internazionale in una organizzazione basata sul principio della divisione del lavoro, alla creazione di organi particolari per il perfezionamento, l'applicazione e l'imposizione del diritto internazionale, alla ulteriore evoluzione della comunità giuridica internazionale dalla sua condizione primitiva in una *civitas maxima* – anche nel senso politico-materiale di questo termine".

Then, one can really grasp that the pyramid model conceived by Kelsen (yesterday, and nurtured by Ferrajoli, today) is not intended to play the role of a bulwark for the nation-state paradigm and the modern concept of sovereignty, although it allows to represent the typical state organization of the sources of law, the traditional vertical hierarchies – (supposedly) marked by logic and coherence –, and hence finds its best representation in the "step-wise" construction of the legal system (*Stufenbau*). Where the latter, however, it should be noticed that was conceived by Kelsen to rise to the pinnacle of international law, how we are stressing here. Precisely, this model is based on the rejection of *statism* as an ideological conception and the fostering of an international dimension (legal and political).

Therefore, the "occurrence" at stake here, the *sunset* of (state) sovereignty[74], interpreting Kelsen's works, is prodromic to ground a doctrine of the international legal order with a *monist* vocation that assumes and, at the same time, allows the *primacy* of international law, so that the latter can assert itself with respect to the single legal orders of the various states (especially, concerning their allegedly autonomous sphere of validity). What animates the famous Viennese jurist and is sustainable by [means of] the abandonment of the widespread idea of sovereignty is precisely proving that perspective for which – as I have already pointed out in this chapter – (all) the law integrates *one only unitary* legal order, a result that would discredit on a scientific level the so-called *dualist* thesis, which postulates the harmonious coexistence, as independent and detached legal orders, of state and international law. Indeed, Kelsen "vindicates" a merely *derivative* legitimacy of states, in function – as one could argue – of an *exclusive* sovereignty of the international order (indeed, the "monist" thesis)[75]. This way, he represents, at the level of legal theory, "the unity of the universal legal system"[76] – where the *unity* is the

[74] From a different point of view and leveraging the logical method of hypothetical thinking, Kelsen maintains the idea of sovereignty, even though in a distinct meaning, cf. *Ivi*, XV-XXIX. Indeed, he states that only this concept can express the circumstance for which the fundamental norm, which must be hypothetically presupposed, is a ultimate, supreme basis of relation. He turns that concept from a metaphysical reality into a gnoseological principle, that is, an assumption of (legal) knowledge. Cf. *Idem*, *Rechtswissenschaft und Recht. Erledigung eines Versuches zur Überwindung der 'Rechtsdogmatik'*, Wien, 1922, p. 133. Then, Kelsen's sovereignty amounts to a hypothesis – the original idea of thought – of a legal science oriented to the knowledge of what normatively matters, without a historical perspective. It exists, as an assumption, in the thought of who considers and comprehends state and law. The logical relation from universal to particular is traceable.

[75] For instance, in favor of *monism*, the primacy of international law and the conception for which states are merely partial and derived legal orders included in the wider international legal order, cf. H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, VII, 14-16.

[76] Cf. *Idem*, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 168: "l'unità del sistema giuridico universale". See also *Ivi*, p. 154, where he holds that the international law and the various state laws integrate "a unitary system of norms", at the same time affirming the *primacy* of the former over the latter (*Ivi*, p. 163). Precisely because he considers the State "a partial legal order derived from international law", by conceiving it as an "organ of the international legal community" (*Ivi*, p. 166), he advocates the overcoming of "[t]he dogma of state sovereignty" (*Ivi*, p. 159) on a political, factual and organizational level, whose "theoretical

gnoseological assumption to know a certain (in this case, legal) object – and thus he promotes, at the level of political reflection, the (renewed) Kantian project of a cosmopolitan pacification achievable, according to the Philosopher from Königsberg, through a "federation of peoples" and the building of a "universal republic"[77].

Indeed, while affirming that only with the emergence of the sovereignty's dogma the perspectives of both a universal state and the international law begin to be seen as a problem, Kelsen considers that the international legal order can even turn into an *organized community* or a *state*, in accordance with the idea of its *primacy* (actually, an already existing idea during the Roman Empire, the Middle Ages and till modernity). Sure enough, in that time he still is optimistic about the strengthening of an international legal science that starts to rebuild the horizon – demolished by the dogma at issue – of a universal state or legal order, which would embrace the single states[78].

Therefore, Kelsen foresees, it is exactly with the overcoming of that dogma that a *civitas maxima*, an objective universal legal order, above all other political-legal subjects (first and foremost states) and without depending on any approval or recognition, will come into being. In Kelsen's view, this global state as a universal organization must be seen as the infinite task of any political effort and discourse[79].

Then, one can notice that for Kelsen, at the core of his legal hypothesis of the primacy of international law, there is a political kernel: *humanity*, contingently divided

dissolution" (*Ivi*, p. 168) has already been reached and is indicated by Kelsen as one of the most salient results of his Pure Theory of law.

[77] Cf. I. Kant, *Idee zu einer allgemeinen geschichte in weltbürgerlicher absicht*, Wiesbaden, H. Staadt, [1784]1914, Italian translation by G. Solari and G. Vidari, *Idea di una storia universale dal punto di vista cosmopolitico*, in N. Bobbio, L. Firpo and V. Mathieu (a cura di), *Scritti politici di filosofia della storia e del diritto*, Torino, Utet, 1965, p. 131. In the same collection of Kantian works, about the project of a "universal republic", see I. Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf*, Königsberg, F. Nicolovius, 1795, Italian translation by G. Solari and G. Vidari, *Per la pace perpetua*, in *Scritti politici di filosofia della storia e del diritto*, cit., 1965, 297 ss.

[78] Cf. H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, p. 402: "osserviamo – quale risultato di queste ricerche – che l'ordinamento giuridico internazionale può diventare anche una comunità 'organizzata', uno 'Stato' in ogni ammissibile senso del termine, senza minimamente minacciare la sua natura. Esso non diventerebbe in tal modo nulla di essenzialmente diverso da ciò che già è, nella misura in cui ci si attiene all'idea del suo primato, idea che già esercita una forte influenza nell'odierna scienza internazionalistica. Storicamente quest'idea era già viva ancor prima che vi fosse una teoria del diritto internazionale: nell'idea dell'*imperium Romanum*, idea che attraversa tutto il Medioevo e gli inizi dell'età moderna. Solo con l'emergere del dogma della sovranità lo Stato universale – e con esso il diritto internazionale – diventa un problema. Ora, però, c'è una scienza del diritto internazionale che un po' alla volta comincia a ricostruire l'idea, distrutta dal dogma della sovranità, di un ordine giuridico o statale universale, comprensivo dei singoli Stati".

[79] Cf. *Ivi*, p. 469: "[…] col superamento del dogma della sovranità, si affermerà anche l'esistenza di una *civitas maxima*, di un oggettivo ordinamento giuridico internazionale, più esattamente universale, al di sopra dei singoli Stati e che non dipenda da nessun 'riconoscimento'. […] Questo è però il compito infinito che dev'esser posto ad ogni sforzo politico: questo Stato universale come organizzazione universale".

into states, should form a *legal unity*, by reaching that universal state, *civitas maxima*, which means a global organization[80].

After all, who could state/hold that this political and legal global institution does not exist at least in legal science, the one imagined and fostered by Kelsen? No one, probably, can deny (although many could still ignore) his cosmopolitan vocation and internationalist framework[81]. His universalistic conception of the world, based on a radical critique of sovereignty, as I have highlighted here, allows to achieve some relevant results, where the most significant is arguably the following one: all the partial and derived legal orders take on the same "quality", that is, none of them has a *surplus value*. Hence, all the legal phenomena being included in one and single legal system, and since *individuals* are considered in that systems only in terms of *legal personalities*, therefore individuals (not just states) are also directly responsible for their conducts in front of both the international law and the history of humankind. According to Kelsen's theoretical building, indeed, the obligations that stem from this international legal order (and community) are binding for both states and individuals. And that is because, in his view, all those who are legal subjects in line with the state law amount to legal subjects internationally speaking[82].

There, the existing bond between the value of *peace*, as a key political option, and the universal legal order – reachable through the overcoming of state sovereignty – which identifies the *global community* theorized by Kelsen (*Weltgemeinschaft*), is rather evident[83].

1.4 *The 'purity' of his theory and the analytical-descriptive role of legal science*

In the last part of this chapter, devoted to the greatest legal theorist from Prague, I will examine, in connection to the role he assigns to *legal science* (or *jurisprudence*),

[80] Cf. *Ivi*, p. 468.
[81] Cf. *Ivi*, p. xxxviii ff., where Carrino carves for this kind of a legal science a *promotional role*: indeed, by rekindling a Kantian perspective, it should elicit the renaissance of the idea of a universal state (*Weltstaat*).
[82] *Ivi*, p. xxxviii-xl. In light of this setting are legally conceivable and justifiable constructions as the German Kaiser's imputation after the World War I or the Nuremberg tribunals. Therefore, no one (neither individuals who act as state organs) can hide themself behind the state sovereignty's dogma, all the political-legal subjects being directly responsible under the lens of international law, instead.
[83] Cf. *Ivi*, p. xlii. See the significant essay H. Kelsen, *Politische Weltanschauung und Erziehung*, 1913, Italian translation by A. Carrino, *Concezione politica del mondo ed educazione*, in A. Carrino (a cura di), *Dio e Stato. La giurisprudenza come scienza dello spirito*, Napoli, Edizioni Scientifiche Italiane, 1988, p. 43 ff. There Kelsen emphasizes the *communitarian* sense and value in comparison with the extreme individualism of the 19th century, thus already outlining a *universalistic perspective* which anticipates his option for the primacy of international law and the world state as *civitas maxima*.

one further aspect of Kelsen's paradigm, maybe the most characteristic: the *purity* of his theory[84].

Through the years, in various passages of his work, Kelsen qualifies his Pure Theory of law as a theory of *positive* law, not focused on a specific and concrete legal order, but conceived to explain all the positive law in general terms, instead. Indeed, it entails a *general* theory of law, without providing particular interpretations of a certain set of norms (as, for instance, state laws or international law).

Its purpose is to reach the whole *cognition* of its object – the positive law, indeed – as well as to *describe* it to its fullest extent, by unleashing its theoretical explanatory force. By doing this – or aiming at doing this – Kelsen's theory does not answer the question of whether its object of consideration is just or unjust – this is a matter for the philosophy of justice, politics, or morals –, it rather analyses the law in its *logical-formal structure*[85].

In other words, this theory does not compromise itself by expressing *value judgments* with respect to the positive law – as I clarified, by assessing whether it is just or unjust, that is, in accordance with morals, a certain ideology or a transcendental superior order established by God or Nature, and so on. After all, Kelsen retains *justice* as an *irrational ideal*[86], as such inaccessible by means of human reason and therefore an impossible object of cognition.

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[84] For this aim I especially take into account the following references: H. Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 7 ff., pp. 13-14, pp. 18-19, p. 23 ff., pp. 34-36, pp. 52-53, p. 106, and *Idem*, Pure *Theory of Law*, *cit.*, p. 1, p. 70, p. 75 ff., p. 85 ff., pp. 101-107.

[85] See H. Kelsen, "Pure Theory of Law and Analytical Jurisprudence, The", *Harvard Law Review*, vol. 55, no. 1, 1941, p. 44-70, where he clarifies (*ivi*, pp. 44-45): "[t]he pure theory of law is a theory of positive law; a general theory of law, not a presentation or interpretation of a special legal order. From a comparison of all the phenomena which go under the name of law, it seeks to discover the nature of law itself, to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different peoples. In this manner it derives the fundamental principles by means of which any legal order can be comprehended. As a theory, its sole purpose is to know its subject. It answers the question of what the law is, not what it ought to be. The latter question is one of politics, while the pure theory of law is science. It is called 'pure' because it seeks to preclude from the cognition of positive law all elements foreign thereto. The limits of this subject and its cognition must be clearly fixed in two directions: the specific science of law, the discipline usually called jurisprudence, must be distinguished from the philosophy of justice, on the one hand, and from sociology, or cognition of social reality, on the other. To free the concept of law from the idea of justice is difficult because they are constantly confused both in political thought and in general speech, and because this confusion corresponds to the tendency to let positive law appear as just. In view of this tendency, the effort to deal with law and justice as two different problems falls under the suspicion of dismissing the requirement that positive law should be just. But the pure theory of law simply declares itself incompetent to answer either the question whether a given law is just or not, or the more fundamental question of what constitutes justice. The pure theory of law – a science – cannot answer these questions because they cannot be answered scientifically at all".

[86] H. Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, pp. 17-18: "justice *qua* absolute value is irrational. However indispensable it may be for human will and action, it is not accessible to cognition. Only positive law is given to cognition, or, more accurately, is given to cognition as a task".

Conversely, his Pure Theory of law simply wishes to study and understand the positive law *as it is*, in its formal structure, thus without considering any contingent value eventually present in it, from time to time. Indeed, it is not legal policy, while it aims at complying the scientific standards of a (legal) *science*, and that is why "[t]he theory attempts to answer the question what and how the law *is*, not how it ought to be"[87].

Then, one can grasp where the theory's *purity* stem from: concerning its object, its main goal is a *descriptive* one and its fundamental *methodological principle*, that guides the way in which the theory is built, developed, and applied, demands the complete removal from any legal analysis or description of "everything that is not strictly law"[88]. Thereby, the Pure Theory of law envisages a law-centered cognition, fostering a legal science free from *alien* or *foreign elements*, in the sense that it should overlook them all.

Thus, Kelsen is claiming a sort of *epistemological isolation* for the *legal science* (which he differently names *jurisprudence* or the group made up of *legal scholars*)[89], at the same time criticizing its *contamination* with any kind of knowledge drawn from other scientific disciplines, such as psychology, sociology, biology, ethics, theology, and political theory[90].

One should notice, on the one hand, that during the 1930s he stigmatizes those peers who borrow "hybrid" materials from other branches of science, stating that a "legal science as such is lost"[91]. On the other hand, in the more enhanced version of his theory Kelsen shows to be conscious about the possible existing connections with these related fields (because they address subject matters that are rather significant for the law and the legal discourse too), although he still maintains that

> [t]he Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture

[87] *Idem*, *Pure Theory of Law*, *cit.*, p. 1.
[88] *Ibidem*.
[89] Cf. *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 7, where Paulson (*Ivi*, footnote 3) points out the three semantic expressions used by Kelsen for designating the legal science.
[90] Even though, as Losano underlines, the "last" Kelsen emphasizes the realistic and empirical elements that exist in his theory, by admitting, for instance, the *complementary role* of *sociological jurisprudence,* thus (slightly) opening the path to epistemological interactions, cf. H. Kelsen, *La dottrina pura del diritto*, *cit*., p. 32: "mentre un tempo [Kelsen] aveva respinto la sociologia giuridica come scienza rivolta a fenomeni naturali (e quindi senza punti in comune con la scienza del diritto), in seguito giunse ad ammettere la giurisprudenza sociologica come scienza complementare alla giurisprudenza normativa". I will stress the different position assumed by Luigi Ferrajoli later on, who in the last decade has been asserting the opportunity of an *epistemological refoundation* for the legal science, involving three different approaches in studying the law: besides the traditional one of legal dogmatics, the further two of sociology of law and philosophy of justice (see *infra*, note 102).
[91] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 7-8.

> of methodologically different disciplines (methodological syncretism) which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter[92].

In such a manner, Kelsen's purpose of avoiding this *methodological syncretism* and the *anti-ideological* character of his theory is pretty evident.

Under the first aspect, by qualifying the law as norm and narrowing the legal science's object to the cognition of norms only, he maintains that the outcome of clearly distinguishing law from nature and identifying the legal science as a *normative* one, in comparison to all the other disciplines that try and explain natural phenomena according to the law of causality, is achievable[93]. Thereby, Kelsen draws a distinction with special regard to (legal) sociology, depicted as "a cognitive science whose task is to enquire into the causes and effects of those natural events that, interpreted by way of legal norms, are represented as legal acts"[94]. Differently, the theoretical framework by Kelsen outlines a specific legal science, which "directs its attention not to legal norms as the data of consciousness, and not to the intending or imagining of legal norms either, but rather to legal norms *qua* (intended or imaged) meaning"[95]. Interpreting the Italian translation provided by Treves, which is slightly different from the latter, I would say that the Pure Theory of law focuses on legal norms conceived as *qualifying structures* and <u>on</u> their *normative-semantic spectrum* (that is, the set of normative meanings ascribable to each single norm)[96]. Moreover, concerning the (contained) role of factual elements, Kelsen's theory embraces "facts only where these facts are the content of legal norms, that is, are governed by legal norms"[97]. That is why, according to the Austrian author, legal science should be considered as *pure*.

Under the second profile, while he strongly criticizes those ideological tendencies that are traceable in the legal science (first and foremost the ones implied in the natural law conception), Kelsen holds that his Pure Theory is a *radically realistic legal theory*, precisely because it aims at depicting the law *as it is*, without providing any kind of justification or delegitimization for it (according to the binomials just – unjust, good – bad, etc.). Thereby/thus, he puts forward a theory which deals with the *real* and *possible* law, not with the *ideal* or *just* law (the ought to be). Far from evaluating its object, in Kelsen's view this theory, as science, must achieve its goal only, which is to comprehend

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[92] H. Kelsen, *Pure Theory of Law*, *cit.*, p. 1.
[93] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, pp. 13-14.
[94] *Ivi*, p. 13.
[95] *Ivi*, p. 14.
[96] Cf. *Idem*, *Lineamenti di dottrina pura del diritto*, *cit.*, pp. 54-55: "La dottrina pura del diritto, come specifica scienza giuridica, non rivolge la sua attenzione alle norme giuridiche considerate come fatti di coscienza, né alla volizione o alla rappresentazione di queste, ma la rivolge alle norme giuridiche come strutture qualificative volute o rappresentate".
[97] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 14.

the essence of positive law through the analysis of its structure. It is not meant to support political interests or nourishing ideologies to approve or undermine a certain existing social order. This way, Kelsen stresses the *anti-ideological* character of his theory[98]. Indeed, the latter should be relevant under the lens of legal theory and for increasing the cognition of positive law only. Sure enough, he states that

> Precisely through its anti-ideological stance, the Pure Theory of law proves itself as a true legal science, whose immanent inspiration is the unveiling of the object of its cognition[99].

Through the years, Kelsen shows consistency with the theoretical framework here highlighted, even if he draws some *nuances*[100]. Indeed, he maintains the key distinction between legal sociology and (the way in which he conceives) legal science, but at the same time, by underlining how these two disciplines deal with *entirely different problems*, to a greater or a lesser extent he concedes a room for the former, in the process of studying the law. Again, he supports the *possibility* and *necessity* of a *normative* legal science – which, in fact, it must be "a discipline directed toward the law as a normative meaning" –, where the crucial "trajectory" he sketches out "is not: to give up this science of law together with the categories of the 'ought' or the norm; but: to confine this science of law to its subject and to clarify critically its methods"[101]. Therefore, he still defends the legal category of the "ought" as a "specific functional connection", which he designates as *imputation*, between the facts qualified by the legal order as conditions for the enforcement of legal consequences and the latter it establishes (mainly, sanctions) to be enforced whenever those conditions are complied[102]. Moreover, he *slightly refocuses* the object of his Pure Theory of law. In such way it still "is directed toward the legal norms […] but toward the legal norms as the meanings of acts of will", where "these meanings and their mutual relations are the subject of the Pure Theory of Law"[103]. Once again, in

[98] Cf. *Ivi*, pp. 18-19. See also *Ivi*, pp. 35-36, where Kelsen states that, if one considers the positive law in relation with a possible superior order (natural law or justice), "[…] the positive law represents the 'real' existing law, and natural law or justice represents ideology. The Pure Theory of Law preserves its anti-ideological stance by seeking to isolate representations of the positive law from every natural law ideology of justice. [It] confines itself to the positive law […]. [It] is the theory of legal positivism".

[99] *Ivi*, p. 19. An inspiration which is the *opposite* of that of every ideology. Indeed, as Kelsen maintains, the latter tends to cover reality, to veil it, having "its roots in will, not in cognition; ideology stems from certain interests, or, more correctly, from interests other than the interests in truth […]. Again, cognition rends the veil that the will, through ideology, draws over things" (*ibidem*). Eventually, Kelsen spotlights that "a cognitive science of the law is what the Pure Theory of Law aims to be".

[100] Cf. *Idem*, *Pure Theory of Law*, *cit.*, pp. 101-107.

[101] *Ivi*, p. 105.

[102] *Ivi*, p. 103. On *imputation* as a specific legal category in Kelsen's theoretical setting see also S. L. Paulson, *Il problema della giustificazione nella filosofia del diritto di Hans Kelsen*, *cit*., pp. 26-29.

[103] Cf. H. Kelsen, *Pure Theory of Law*, *cit.*, pp. 102. The full passage also restates and clarifies Kelsen's position about *facts* and the concrete law-creating *acts of will* (which are different from their *meanings*, namely, the legal norms): "[t]he Pure Theory of Law, as specific science of law, is directed toward the legal

almost identical terms, he affirms that "the Pure Theory has an outspoken anti-ideological tendency", restating all the reasons I have already provided above to support this thesis and framing it as "a theory of legal positivism"[104]. Furthermore, he draws its distance from the "traditional jurisprudence", which he considers ideologically flawed, where in that *gap* he founds the argument for claiming that "the Pure Theory of Law is a true science of law"[105].

Accordingly, as he states in the early 1930s, with his theory he tries to *free* the conception of the legal norm as norm, as ought to be, from its contingent ideological element that refers to justice as an absolute value[106]. For this purpose, he draws a clear line of separation between the concepts of legal norm and moral norm (where the former, in his view, stems from the latter), moreover, he assures the autonomy of the legal sphere in order to moral law (indeed, one of the core principles of legal positivism). Precisely, he pursues this horizon by assigning to the Pure Theory of law a *conceptional shift*: as well known, aiming at identifying the legal norms (essence), he abandons the idea of the *imperative* (by constraining it to moral norms only) and replaces it with the notion of a *hypothetical judgement*. The Pure Theory of law, indeed, conceives "the legal norm as a hypothetical judgement that expresses the specific linking of a conditioning material fact with a conditioned consequence"[107].

There, in connection to the *conditional structure* of legal norms imagined by Kelsen, one can also figure out the crucial role carved for *imputation*, depicted "as the particular lawfulness, the autonomy, of the law"[108]. This *specific functional connection*, to recall the expression I have already quoted *supra* to explain *imputation*, "has normative

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norms; it is not directed toward facts; it is not directed toward the acts of will whose meaning the legal norms are, but toward the legal norms as the meanings of acts of will. And the Pure Theory is concerned with facts only so far as they are determined by legal norms which are the meanings of acts of will; and these meanings and their mutual relations are the subject of the Pure Theory of Law".

[104] *Ivi*, p. 106. More extensively on this subject, Kelsen supports the alleged anti-ideological character of his theory by arguing that: "The Pure Theory exhibits this tendency by presenting positive law free from any admixture with any 'ideal' or 'right' law. The Pure Theory desires to present the law as it is, not as it ought to be; it seeks to know the real and possible, not the 'ideal', the 'right' law. In this sense, the Pure Theory is a radical realistic theory of law, that is, a theory of legal positivism. The Pure Theory refuses to evaluate the positive law. As a science, the Pure Theory regards itself as obligated to do no more than to grasp the essence of positive law and, by an analysis of its structure, to understand it. Specifically, the Pure Theory refuses to serve any political interests by supplying them with an 'ideology' by which the existing social order is justified or disqualified. In this way the Pure Theory prevents that, in the name of the science of law, a higher value is attributed to positive law than it has, by identifying it with an ideal law; or by denying positive law any value, and thus any validity, by claiming that it contradicts an ideal law".

[105] *Ibidem*.

[106] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 23 ff. See also *ivi*, p. 34: "[…] in stripping the positive law 'ought' of its character as a metaphysic-absolute value (leaving the 'ought' simply as the expression of the linking, in the reconstructed legal norm, of condition and consequence), the Pure Theory itself has cleared the way to the very viewpoint that yields insight into the ideological character of the law".

[107] *Ivi*, p. 23 ff.

[108] *Ibidem*.

import, not causal import"[109]. Indeed, the expression of this *legal* connection, that is, the *ought* as a legal category (*das Sollen*), establishes a functional link between a conditioning fact and a conditioned legal consequence, which operates in the legal sphere only. Indeed, it does not amount to a natural necessity or correspondence, for which, according to the law of causality, at a given fact (cause) *must* follow (*das Müssen*) a certain consequence (effect). Again, Kelsen points out a clear distinction between law and nature:

> Expressing this connection, termed 'imputation', and thereby expressing the specific existence, the validity, of the law – and nothing else – is the 'ought' in which the Pure Theory of Law represents the positive law. That is, 'ought' expresses the unique sense in which the material facts belonging to the system of the law are posited in their reciprocal relation. In the same way, 'must' expresses the law of causality[110].

Therefore, while the natural law describes a certain mandatory nexus (*muss*) between a cause and a correspondent effect, the positive law creates a legal duty, for which in presence of legally qualified facts (condition) ought to follow (*soll*) the consequences (sanction) predetermined by the related legal norms[111]. By doing this, the positive law does not entail or mean anything about the contingent ethical or political value of that peculiar connection, that is, *imputation*. Thereby, "[t]he 'ought' designates a relative *a priori* category for comprehending empirical legal data. In this respect, 'ought' is indispensable […]"[112]. Moreover, Kelsen reckons that, as a legal category, it means only the *specific sense* by means of which condition and consequence are linked together in the legal proposition. SO, restating the *anti-ideological* character of his theory even under this aspect, the ought "has a purely formal character", being by and large different "from a transcendent idea of law"[113]. This way, he deems that this legal category stays suitable for every concrete-empirical scenario and regardless of the class of acts (of will) intended as law in a given order. Consequently, there no exists a *social reality* – that probably we should interpret as socio-political community along with its legal framework – that, in light of its contents or essence (e.g. whether it is a democratic or authoritarian regime, a Marxist or a capitalistic economical system, etc.), can be excluded from this *pure* notion of the *ought*, which represents the particular *legal imputation* and "is cognitively and theoretically transcendental in terms of the Kantian philosophy, not metaphysically transcendent. Precisely its transcendental character serves to preserves its radically anti-ideological stance […]"[114].

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[109] *Ivi*, p. 24.
[110] *Ibidem*.
[111] *Ibidem*. "Laws of nature say: 'if *A* is, then *B* must be.' Positive laws say: 'if *A* is, then *B* ought to be.'".
[112] *Ivi*, pp. 24-25.
[113] *Ivi*, p. 25.
[114] *Ibidem*.

Having illustrated the *purity* of Kelsen's theory, one can comprehend the consequent role he attributes to (his) *legal theory* and *legal science*. While he presents his own theoretical model as an *organic* conception of law, by conceiving the latter as an "organism"[115], he outlines a legal theory which, having removed from its practice each possible ethics-political value-judgments, as much as possible turns into an *accurate analysis* of the positive law *structure*[116].

Correspondingly, Kelsen envisages the legal science in *analytical-descriptive* terms only, holding that its purpose is neither providing some kind of *justification* (of a political community, as a state, through its law or vice-versa) nor, hence, formulating *value-judgements* (*infra*) to endorse or delegitimize a certain state or legal order, because those subjective assessments belong to ethics and politics and do not feed an objective knowledge of the positive law. Indeed, since the earliest version of his proposal, Kelsen maintains that "[t]he Pure Theory denies that it can be the task of legal science to justify anything whatever. Justification means evaluation, which is always subjective and therefore a matter of ethics and politics, not of objective cognition. It is objective cognition alone that legal science, too, must serve, if it aims to be a science and not politics"[117].

In accordance with this setting, almost three decades after, Kelsen reaffirms and even emphasizes an *objective* science of law, which aims at *describing* the positive law only. Sure enough, in the second *Reine Rechtslehre* Kelsen declares of having addressed in his last version the essential problems of a *general* theory of law, inspired by the methodological principle of *purity* which characterizes a *scientific* legal science, while he points out that the latter, in so far as it pursues an objective cognition of the law and therefore tends to describe its object only (without making value-judgements), encounters a strong resistance from those who believe that is legitimate to evaluate the positive law and thus provide value-criteria for it – thereby Kelsen especially criticizes the reborn metaphysics of natural law[118].

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[115] Organism, not intended in the expression's biological or psychological meaning, but as a *whole legal order* or *system* (that is, the law, as I have illustrated earlier), in which every problem should be addressed in a *systematic way*, namely, in relation to all the other parts of that *unity*. Cf. *Ivi*, p. 53.

[116] *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 53: "[l]egal theory thus becomes as exact a structural analysis of the positive law as possible, an analysis free of all ethics-political value-judgements".

[117] *Ivi*, p. 106.

[118] Cf. the author's preface to the second edition of his pure theory of law, in H. Kelsen, *La dottrina pura del diritto*, *cit.*, pp. 158-160. There he maintains: "[…] ora ho tentato di risolvere i problemi essenziali di una dottrina generale del diritto secondo i principî della purezza metodologica della conoscenza scientifico-giuridica, cercando in ciò di precisare – piú a fondo di quanto avessi precedentemente fatto – la posizione della scienza giuridica nel sistema delle scienze. […] Oggi come allora, una scienza del diritto oggettiva, cioè tendente soltanto a descrivere il suo oggetto, si scontra con la resistenza ostinata di tutti coloro che, senza tener conto dei confini fra scienza e politica, credono di poter prescrivere, in nome della scienza, un certo contenuto al diritto, credono cioè di prescrivere un diritto giusto, determinando cosí un criterio di valore per il diritto positivo. È soprattutto la rinata metafisica del diritto naturale che, con questa pretesa, si contrappone al giuspositivismo".

Several authors in their analysis duly spotlight the *purity* of Kelsen's theory of law as one of its fundamental and long-lasting features, by also raising connections with Kant and neo Kantism (as I have already illustrated *supra*). Moreover, they underline the consequent role of legal science, as I have pointed out, *objectively describing* the positive law[119], by carrying out an accurate analysis of the logical structure and forms of the law, for acquiring objective cognition of it, as much as possible, while avoiding any kind of ideological element[120].

In any case, regarding the role that legal science must fulfill, according to Kelsen, I deem that there are significant differences depending on the period considered. While its *analytical-descriptive* approach is overall constant over time and by means of it the Pure Theory of Law pursues the goal to know the law as it *is*, the way in which legal scientists should perform their function is not always the same. Indeed, in distinct Kelsenian phases, they can be regarded as more actively or passively engaged.

Accordingly, Kelsen *initially* attributes to jurisprudence an *active* role in *creating* its own object of analysis, namely, the whole system of legal norms, through its *rational cognition*. In the wake of Kantian theory of knowledge, legal science is supposed to *shape* the available legal material – as legal statutes and sentences – and convert it into a

[119] Depending on the considered Kelsenian period, legal science is conceived to perform this function more *actively*, by even shaping the object of analysis-cognition, or more *passively*, by merely describing the acts of will enacted by legislators or judges, but always avoiding value-judgements (except for the *objective* ones). More on this subject *infra*.

[120] S. L. Paulson, for instance, clarifies how Kelsen aims at purifying the legal science from elements drawn from *naturalism* and *psychologism*, cf. S. L. Paulson, *Hans Kelsen's Earliest Legal Theory: Critical Constructivism*, in S. L. Paulson and B. Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, *cit*., p. 30. In the same work are also collected three essays by Kelsen, relevant for the topics here discussed, where the second one especially addresses the connections with (a part of) neo-Kantianism, see then H. Kelsen, *The Pure Theory of Law, 'Labandism', and Neo-Kantianism. A Letter to Renato Treves*, 1933, in S. L. Paulson and B. Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, *cit.*, pp. 169-176. There (*ivi*, p. 170-172) Kelsen takes the distance from the so-called 'Labandism' (considering absurd the parallel raised by some between him and Laband) and fully confirms his ascendancy towards Kant and Cohen: "[i]t is altogether correct that the philosophical foundation of the Pure Theory of Law is the Kantian philosophy, in particular the Kantian philosophy in the interpretation that it has undergone through Cohen. A point of special significance is that just as Cohen understood Kant's *Critique of Pure Reasons* as a theory of experience, so likewise I seek to apply the transcendental method to a theory of positive law". Again, dealing with the cultural streams which Kelsen's philosophical premises are traceable to, Losano points out that Kelsen, in his *Allgemeine Staatslehre*, *cit.*, p. 1, mentions von Gerber, Laband and Jellinek as his main points of reference, although this tribute must be intended for the tendency to pursue the *purity* of legal science only and not as an overlapping of scientific methods. Indeed, Kelsen clearly refers to the neokantism of Windelband and Simmel, picking up the reformulated Kantian distinction between *Sein* and *Sollen*, as well as to the neo-Kantian stream from Marburgo, as just highlighted above, which strongly affects Kelsen's thought. Sure enough, the whole gnoseological theory accepted by Kelsen is drawn from Cohen's works, cf. the analysis carried out by Losano in H. Kelsen, *La dottrina pura del diritto*, *cit.*, p. 32-33. Furthermore, Velluzzi, remarks that Kelsen envisions a *pure* theory in the sense that it aims at reaching an exclusively cognition of the law, by overlooking or rejecting everything that does not belong to its object of analysis. In particular, this theory of legal positivism must be separated from philosophy of justice and sociology (as knowledge of the social reality), cf. V. Velluzzi, *Percorsi del positivismo giuridico*, *cit.*, pp. 7-9.

coherent normative system, without logical contradictions. In other words, it should gather the legal material and transform it into a bundle of *hypothetical-conditional* provisions concerning human behaviour (by the formula: 'if A then B').

Differently, from the second edition of the Pure Theory of law onwards, one can notice that in Kelsen's view the role of legal science turns from an *active-constructivist* function into a rather *passive* one, for which jurists are devoted to the mere and only description of the legal norms created by legal authorities. In some way this is connected to an achieved clear distinction between the *ought to be* (*Sollen*) utterances formulated by the legal science, as statements about the law, and the *ought to be* (*Sollen*) utterances that exist in legal acts or statutes, where only the second ones form legal norms and then have a binding force. This way, because the normative propositions pronounced by legal scientists do *merely* describe the legal norms created by the acts of will traceable to legal authorities and judges, a certain ambiguity present in Kelsen's early works about the role of legal science – simultaneously descriptive and creative – is resolved. Far from that *active-constructivist* view, Kelsen canvasses a *passive* horizon for jurisprudence stressing even more its *analytical-descriptive* role[121].

So, although Kelsen is consistent in affirming that jurisprudence must avoid providing normative critiques or value judgements[122] about the law, in so far as it is a *science* which purely aim at knowing its object, during the years the *function* that he attributes to jurists, at least to some extent, changes. So that the legal science eventually is required to perform a *merely* descriptive analysis of the logical and formal structures of the law only[123], without *creatively shaping* its object of analysis anymore and thus building a legal system free of contradictions.

In these terms, hence, there is a relevant change in the way Kelsen envisions the legal science's contributions: on the one hand, in the early stages of his theory (until the first edition of the Pure Theory of Law included) the same *object* of legal science's analysis – the positive law, the objectively valid law – is *created* by jurisprudence's *cognition*, through the *hypothetical thinking* (that firstly produces the fundamental norm and then the whole legal system), in accordance with the transcendental setting drawn from the Kantian theory of knowledge and neo-Kantianism. On the other hand, as just

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[121] In this sense, see H. Kelsen, *Allgemeine Theorie der Normen*, Wien, Manz verlag, 1979, English translation and introduction by M. Hartney, *General Theory of Norms*, Oxford, Clarendon Press, 1991, p. xxxiii.

[122] Kelsen's stance about *value-judgements* becomes rather complex in the second version of the Pure Theory of Law, but consistent with the postulate of legal positivism for which there is the chance to state the law without expressing an ethic-political position. Indeed, he maintains that whether in the case of a so-called *objective* value-judgement – saying that a given conduct agrees with a norm – or when a descriptive *ought to be*-assertion is made by the legal science – stating that *a certain behaviour is forbidden or allowed* and thus explaining that the utterance amounts to a valid norm within the legal system – these linguistic formulations occur in a rather *detached way*. Namely, both cases do not imply a moral attitude from the speaker or the legal scientist.

[123] *Rectius*: a *merely* descriptive analysis of legal and (potentially) moral norms, that is, the *normative meanings* of the acts of will be enacted by legal and moral authorities.

highlighted, near the end of his life, Kelsen conceives the legal science as *passive* and even more *descriptive* than in the past, for it must be merely focused on analytically mirroring the normative meanings of the acts of will be enacted by legislators and judges. Thereby, jurisprudence does not create its object of analysis anymore (accordingly, in his posthumous work he abandons his former Kantian setting)[124].

1.5 *Kelsen's latent anti-formalism? Dynamic elements and a detectable dialectic tension between reality and normativity*

That being said in order to legal science, picking up the thread, even though over the years Kelsen remains rather consistent with the "pure" methodological approach previously highlighted (he actually provides adjustments or emphasizes even anti-formalistic elements)[125], one may notice that the prime and strongest root of his *formalism* dates back to his early works[126], while an evolution of his thought towards empirical and realistic elements can be traced in the following decades. Indeed, as I have previously underlined (*supra*), especially since the 1940s, when Kelsen "embraces" the American context and legal framework, he starts to emphasize the *anti*-formalistic aspects *already* existing in his theory, leveraging its *dynamic* part, and spotlighting the role of *judges* as law-creating agents.

The last part of this section is exactly devoted to further stress what might arguably be defined as Kelsen's shift from his prime "official" stance of legal formalism towards

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[124] On this developments and changes cf. the sharp analysis of M. Hartney in H. Kelsen, *General Theory of Norms*, *cit*., pp. ix-liii.

[125] Cf. H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, p. xiii ff., pp. xvii-xx, pp. xxxiv-xxxvi, p. xliii, where Carrino, while accounting for the *purity* of Kelsen's legal theory and the way in which he conceives the *legal science* and its function, he also represents, in a diachronic perspective, some relevant theoretical changes or developments in Kelsen's approach. As specified at the beginning of this thesis (cf. footnote 8), the present analysis is focused on Kelsen's enduring *classical phase*, devoting marginal attention to his *posthumous* work – to some extent questionable, as Losano points out in H. Kelsen, *La dottrina pura del diritto*, *cit*., p. 24.

[126] About this initial root of Kelsen's *purity*, see S. L. Paulson, *Il problema della giustificazione nella filosofia del diritto di Hans Kelsen*, *cit*., p. 15. As Paulson observes, Kelsen officially inaugurates the language of a pure theory of law in his work *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, Tübingen, J.C.B. Mohr, 1920, even if the idea of *purity* is implied in his first writings. At the beginning, he refers to a theory of purity, for which the legal theory is pure in so far as it disentangles from facts and values. This setting reflects something of Kant's view about *purity*, cf. I. Kant, *Über den Gebrauch theologischer Principien in der Philosophie*, 1788, in the Royal Prussian Academy of Sciences and subsequent Academies (eds.), *Gesammelte Schriften*, Berlin, G. Reimer, 1902, vol. 8, pp. 157-184, where Kant holds (*Ivi*, p. 184) that what is *pure* does not "depend on anything empirical". On other topics and problems related to Kelsen's neokantism see S. Hammer, *A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?* in Stanley L. Paulson and B. Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, *cit.*, pp. 177-194.

a subtle but powerful *anti*-formalism, leveraging the enlightening considerations made by Treves and Losano.

On the one hand, it is true that Kelsen is initially influenced, to a greater or a lesser extent, by a stream of thought spread in Germany between the end of 19th century and the beginning of the 20th century. In that period, in the fields of legal science and philosophy the idea of constraining the object of analysis to the logical and formal structure of law only develops and flourishes. Regardless of the law's possible economical or sociological content, as well as of the contingent ethics-political panorama existing therein. One can find the most iconic authors of this movement in the public law field, where Gerber, Laband and Jellinek bring to fruition a methodological and systematic rearrangement of public law, where Jellinek achieves to distinguish and autonomously evolve social theory from the state legal theory, as Treves observes[127].

Nonetheless, as I have previously anticipated, with this school of thought the early Kelsen only shares a *tendency* towards the purity of logical and legal categories, not a *commonality* of scientific methods. Instead, the most relevant influence on him is carried out by the aforementioned neo-Kantian line of thought (especially the Cohen's interpretation of Kantian philosophy[128], *supra*), which also certainly reduces the object of analysis to the *logical form* of law only, avoiding the consideration of any ideological or empirical content. It is precisely this line of thought that seeks to enucleate the *formal conditions* of legal experience, aiming at developing a theory of the pure concept of law, by distinguishing either the logical and gnoseological problem or the phenomenological one or the deontological one[129].

On the other hand, however, as Treves suggests, one can grasp that the initial and uncompleted version of Kelsen's theory (which amount to his *Hauptprobleme* of 1911)[130], while to a certain extent represents the *point of convergence* of these formalistic widespread tendencies in the two distinct spheres of legal philosophy and science, at the same time it also consists of the *overcoming* of the extreme limit achieved by those tendencies, because he succeeds in *liberating* the formal structure of law from its value-empirical content[131]. But in the following years he develops his theory by adding, among

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[127] Cf. the foreword by Renato Treves in H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 23.

[128] See H. Cohen, *Kants Theorie der Erfahrung*, Berlin, Ferd. Dümmler, 1871, and *Idem*, *Das Prinzip der Infinitesimal-Methode und seine Geschichte*, Berlin, Ferd. Dümmler, 1883.

[129] Cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 24, where Treves maintains that "[neo-Kantism] […] ha concentrato infatti i suoi sforzi nella ricerca delle condizioni formali dell'esperienza giuridica e ha cercato di svolgere una dottrina del concetto puro del diritto distinguendo nettamente il problema logico e gnoseologico, tanto da quello fenomenologico, quanto da quello deontologico del diritto".

[130] H. Kelsen, *Hauptprobleme der Staatsrechtslehre. Entwickelt aus der Lehre vom Rechtssatz*, Tübingen, J.C.B. Mohr, 1911, Italian translation by A. Carrino, *Problemi fondamentali del diritto pubblico*, Napoli, Esi, 1997.

[131] Cf. *Ibidem*, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 24 the whole passage by Treves: "La dottrina giuridica del Kelsen, esposta per la prima volta e in modo non ancora del tutto completo nel 1911, ha costituito, in certo modo, il punto di confluenza di queste tendenze formalistiche ampiamente diffuse nei

other adjustments or changes, the *dynamic* part of it, beside the static one. Indeed, the first edition of the Pure Theory of Law, in the early 1930s, recollects both and hence represents a first comprehensive account of his theoretical stance.

Firstly Kelsen, through the chapters devoted to *statics*, leads the *purification process* of the traditional formal legal structures and categories to the limit, by separating the law as the specific object of his theory from both the natural facts and the values of morality and justice. Thereby, he differently qualifies the former as phenomena which belong to the sphere of being (*Sein*) – while the law has room in the ought to be sphere (*Sollen*) – and the latter as ideological elements (cf. *supra*), as such impossible objects of cognition – while the law, he states, is rational and knowable. Through the conception of legal norms as *hypothetical judgements* (cf. *supra*), far from the imperative legal theory brought forward by Austin, he avoids Psychologism. Among other profiles, he distinguishes between *validity* and *efficacy*, aiming at clearly differentiate between the law (as an *ought to be*) and the human behaviours (belonging to the sphere of *being*, instead)[132]. Although this latter distinction, clearly drawn in the *Hauptprobleme*, here turns into a rather *fuzzy* profile in Kelsen's setting, by losing its clarity and cogency: *efficacy* of legal norms, indeed, the more and more is seen by Kelsen as a *fundamental condition* for the whole legal order to be *valid*[133]… (in previous quotes, also referred to later works, I underline the Kelsenian passage for which the legal order must be *by and large effective* to be valid, cf. *supra*).

Even if it is true that for Kelsen is a matter of *degree*: he is just requiring *a certain amount* of efficacy – that is, legal subjects and persons must perceive, at least to some extent, *the binding force* of law (as a legal system) and *acting correspondently*, otherwise the latter cannot be considered as an objectively valid legal order[134].

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due diversi campi della scienza e della filosofia giuridica e ha rappresentato anche il superamento dell'estremo limite raggiunto da queste tendenze in quanto è riuscita a depurare nel modo più radicale la struttura formale del diritto dal suo contenuto empirico e valutativo".

[132] Cf. the sharp analysis carried out by Treves in H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 27.

[133] Cf. H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, p. xxiii-xxiv, footnote 50, where Carrino points out a *growing trend* in Kelsen's legal thought about the *conditional relation* between legal validity and efficacy: "[s]i può dire che nel corso degli oltre cinquant'anni della sua attività scientifica Kelsen sia andato sempre più, gradualmente, spostando il rapporto tra validità ed efficacia a favore di quest'ultima, nel senso che sempre più l'efficacia del diritto condiziona la validità del diritto".

[134] On the concept of *validity* intended as the *binding force* of law, and the consequent potential overlapping with the notion of *efficacy*, see S. L. Paulson, *Il problema della giustificazione nella filosofia del diritto di Hans Kelsen*, *cit*., p. 28, where he remembers *one* of the meanings of *validity* according to Kelsen: "[con] 'validità' si intende la forza vincolante del diritto – l'idea, cioè, che il diritto deve essere obbedito da [coloro] il cui comportamento esso regola", cf. H. Kelsen, *Why Should the Law be Obeyed?*, in *Idem*, *What is Justice?*, Berkley-Los Angeles-London, University of California Press, 1957, pp. 257-65, where indeed Kelsen holds that (*ivi*, p. 257) "[b]y 'validity', the binding force of the law – the idea that it ought to be obeyed by the people whose behaviour it regulates – is understood". Moreover, in H. Kelsen, "Pure Theory of Law and Analytical Jurisprudence, The", *cit.*, pp. 54-57, while taking the distance from Austin's

In this sense, he makes similar considerations for the case of a *single* legal norm, whose *validity*, hence, to some extent does also depend on its *efficacy* (whether *is* observed in social reality or not). This way, that norm keeps its *binding force* (in so far as it expresses an *ought to be* for the subjects of a legal order) and its *belonging* to the normative system, namely, its mere *existence*. Indeed, he recognizes that a legal norm should maintain a certain *minimum* of effectiveness for it to be considered *still* valid *over time* (otherwise, it can even lose its binding force, that is, its validity for the legal order). Then, complementing what I have previously pointed out, one can discern that for Kelsen, eventually, a legal norm is valid (i.e. it obtains the status of valid norm and then comes into existence) in so far as it complies with the conditions established by hierarchically superior norms that discipline its own production (that is, competence, procedure, in some cases even its content, cf. *supra*) and, subsequently, achieves a *minimum* of degree of effectiveness (more on this *infra*).

The profile here spotlighted of a certain particular relation between validity and efficacy, critically addressed by more than few authors (for instance, Ferrajoli, cf. *infra*), I hold that it might simultaneously represent either a weakness in Kelsen's perspective – because it may (allegedly) attack the foundations of his Pure Theory – or a sign of his evolution of thought, where in his theoretical framework he gets closer and closer to (the aforementioned, cf. *supra*) empirical and realistic elements of social reality, as human conducts surely are. Yet, the distinction between validity and efficacy, hence, normativity and reality, ought to be and being… fades its contours.

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conception of the norm, stressing the importance of the concept of *ought* and hence pointing out the law as "a 'depsychologized' command" – because "[a] norm is a rule stating that an individual ought to behave in a certain way, but not asserting that such behaviour is the actual will of anyone" – Kelsen maintains that "[t]he law enacted by the legislator is a 'command' only if it is assumed that this command has binding force. A command which has binding force is, indeed, a norm". In other words, one may say that in Kelsen's perspective only a *valid* command amount to a legal norm, that is, a norm belonging to the legal system. In S. L. Paulson, *Il problema della giustificazione nella filosofia del diritto di Hans Kelsen*, *cit*., p. 31, Paulson deals with the *binding force* of law again, as well as in *Ivi*, pp. 48-49, where he distinguishes the *two senses* of *validity* in Kelsen's view: on the one hand, a legal norm is *valid* when it *belongs* to a given legal system (so that, it is one of its elements, as *member* of that system); on the other hand, *validity* exactly means the *binding force* (*Verbindlichkeit*) of law, that is, it refers to the idea for which individuals ought to obey to legal norms. Furthermore, Paulson (*ivi*, p. 50), stressing that *legal validity* is a fundamental notion of Kelsen's conceptual repertoire, frames it both *legally* and *philosophically*: within the first scope, there is room for its "double" meaning already illustrated above, whereby it amounts to both the belonging (*membership*) of a norm to the legal system (so that the norm *exists*) and its binding force – there is also underlined how Kelsen separates the validity of (single) legal norms from the one of the *whole* legal system (which *seems* to coincide, but is not, with its *efficacy*). Within the second scope, philosophically speaking, legal validity corresponds to the *objective* meaning of legal act (for instance, enacted by a legislator), that is, it exists when the shift from the mere subjective meaning of an act to its objective or legal meaning is complete. Therefore, Kelsen holds that the legal validity must be objective, which also means that it does not depend on the contingent will of either officials or legal subjects. On the complex relation between *validity* and *efficacy* in Kelsen's theoretical setting, see the criticisms highlighted by Carrino in H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, p. xxxiii f.

In connection to these considerations and taking up again the first edition of the Pure Theory of law, besides the *statics*, on the other side, it goes the *dynamics* of his theory, for many aspects innovative in comparison to his prime theoretical setting of the *Hauptprobleme*.

Indeed, by dealing with a bundle of relevant topics – most of which I have already explained above, such as the hierarchical structure of the legal order, the simultaneous application and production of law, the relations between state law and international law (where the latter embraces and is superior to the former), and so on – in this *dynamic* part Kelsen shows a (to some extent surprising) *anti*-formalistic stance or attitude. As a matter of fact, I deem shareable the bright analysis of Treves, where he states: "nella parte dinamica […] si può notare come il Kelsen riconosca […] i limiti del formalismo e senta anche, in certo modo, l'esigenza di superarli o, per lo meno, di lasciare una via aperta verso posizioni diverse"[135].

Then, Kelsen seems to recognize the limits of his formalism and even look for a way to overcome them, by opening the path to alternative stances. Sure enough, one can detect the substantial effort made by Kelsen (despite the declarations about a clear distinction between the realms of normativity and reality made in the *static* part of his theory since the *Hauptprobleme*), in relating the *ought* and the *is*, *Sollen* and *Sein*, where for sure human conducts belong to reality but, in turn, are fundamental to apply and produce normativity[136].

Firstly, one can precisely grasp this *anti-formalistic tendency* in the profile I have just illustrated above, that is, the fact he requires for the legal order to be *valid* (and hence to *exist*) a *certain amount* of *efficacy*. Although he is consistent in formally separating *validity* and *effectiveness* as two distinct categories (and phenomena)[137], during the years,

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[135] H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 28. Thus, Treves maintains that: "in the dynamic part [...] one can see how Kelsen recognises [...] the limits of formalism and also feels, in a certain way, the need to overcome them or, at least, to leave a way open towards different positions" (English translation is mine).

[136] *Ibidem*: "è infatti costante lo sforzo di porre a contatto il dover essere del diritto con la sfera dell'essere a cui appartengono i comportamenti umani che lo producono e lo applicano".

[137] Cf. *Idem*, *Pure Theory of Law*, *cit.*, pp. 10-11: "[s]ince the validity of a norm is an *ought* and not an is, it is necessary to distinguish the validity of a norm from its effectiveness. Effectiveness is an 'is-fact" – the fact that the norm is applied and obeyed, the fact that people behave according to the norm. To say that a norm is 'valid', however, means something else than that it is actually applied and obeyed; it means that it ought to be obeyed and applied, although it is true that there may be some connection between validity and effectiveness" (more on this subject *infra*). See also *ivi*, pp. 46-47: "the validity of a norm (which means that one ought to behave as the norm stipulates) should not be confounded with the effectiveness of the norm (which means that one, in fact, does so behave); but that an essential relation may exist between the two concepts, namely, that a coercive order, presenting itself as the law, is regarded as valid only if it is by and large effective". Again, *ivi*, p. 211: "[…] in the same way is the validity of a legal norm not identical with its effectiveness". Cf. *Idem*, *Teoria generale del diritto e dello stato*, *cit.*, p. 39 ff.: "[v]alidità del diritto significa che le norme giuridiche sono vincolanti, che gli uomini devono comportarsi secondo quanto prescrivono le norme giuridiche, che essi devono obbedire ed applicare le norme giuridiche. Efficacia del

passing through *The General Theory of Law and State* and the more elaborated and developed version of his *Pure Theory of Law*, he emphasizes and confirms the former aspect, expressing clear statements on it. For instance, he points out that

> […] it is true that there may be some connection between validity and effectiveness. A general legal norm is regarded as valid only if the human behaviour that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity[138].

Therefore, concerning the significant relation between validity and effectiveness, in Kelsen's view it is a matter of *degrees*, as he already holds when he broadens the scope of his theory to the *common law* universe[139]. Then, what is this essential but complex relation between the two concepts? Again, it is the one for which

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diritto significa che gli uomini si comportano effettivamente come devono comportarsi, secondo le norme giuridiche, che le norme sono effettivamente applicate ed obbedite. La validità è una qualità del diritto; la cosiddetta efficacia è una qualità del comportamento effettivo degli uomini e non, come l'uso linguistico sembrerebbe suggerire, del diritto stesso. La proposizione che il diritto è efficace significa soltanto che l'effettivo comportamento umano è conforme alle norme giuridiche. Pertanto, validità ed efficacia si riferiscono a fenomeni del tutto diversi". By keeping the distinction between the two concepts, but at the same time spotlighting the *very important relation* they have from a *dynamic* point of view, Kelsen maintains (*ivi*, p. 42): "[l]a proposizione che una norma è valida e quella che una norma è efficace sono due proposizioni diverse. Ma sebbene validità ed efficacia siano due concetti del tutto diversi, vi è tuttavia fra di esse un rapporto assai importante. Una norma è considerata valida soltanto a condizione che essa appartenga a un sistema di norme, a un ordinamento efficace nel suo complesso. Pertanto, l'efficacia è una condizione della validità; una condizione, non la ragione della validità. Una norma non è valida *perchè* è efficace; essa è valida *se* l'ordinamento a cui appartiene è, nel suo complesso, efficace. Tale rapporto fra validità ed efficacia è però rilevabile soltanto dal punto di vista di una teoria dinamica del diritto, che tratti del problema del fondamento della validità e del concetto di ordinamento giuridico. Dal punto di vista di una teoria statica, invece, non vi può esser questione che della validità del diritto". Eventually, one should also consider *ivi*, 121, where he restates the distinction and clarifies the relation between validity and effectiveness when they are related to *single* norms: "[…] sarebbe anche in questo caso un errore identificare la validità con l'efficacia della norma; si tratta sempre di due fenomeni diversi. […] Il rapporto fra validità ed efficacia appare quindi il seguente: una norma è una norma giuridicamente valida *a)* se è stata creata in un modo disposto dall'ordinamento giuridico a cui essa appartiene; *b)* se non è stata annullata in un modo disposto da quell'ordinamento giuridico, o per desuetudine, o perchè l'ordinamento giuridico, preso nel suo complesso, ha perduto la sua efficacia". Cf. *Idem*, *General Theory of Law & State*, *cit.*, pp. 39-40, 41-42, 118-120.

[138] *Idem*, *Pure Theory of Law*, *cit.*, p. 11.

[139] Cf. *Idem*, *Teoria generale del diritto e dello stato*, *cit.*, p. 120: "Ogni norma perde la sua validità quando l'ordinamento giuridico totale alla quale essa appartiene perde, nel suo complesso, la sua efficacia. L'efficacia dell'intero ordinamento giuridico è una condizione necessaria per la validità di ogni norma dell'ordinamento. È una *conditio sine qua non*, ma non una *conditio per quam*. L'efficacia dell'ordinamento giuridico totale è condizione, non fondamento della validità delle norme che lo compongono. Queste sono valide non perchè l'ordinamento totale è efficace, bensì perchè sono state create in un modo costituzionale. Esse sono valide, tuttavia, soltanto a condizione che l'ordinamento giuridico totale sia efficace, e cessano

> a coercive order, presenting itself as the law, is regarded as valid only if it is by and large effective. That means: The basic norm which is the reason for the validity of a legal order, refers only to a constitution which is the basis of an effective coercive order. Only if the actual behaviour of the individuals conforms, by and large, with the subjective meaning of the acts directed toward this behaviour – if, in other words, the subjective meaning is recognized as the objective meaning – only then are the acts interpreted as legal acts[140].

Kelsen is aware about the crucial role of this dynamic relation between validity and effectiveness, normativity and reality, the ought to be and the is[141]. As a result of his theoretical efforts, he achieves the solution here highlighted, that is, considering a legal order as objectively valid as it complies with a *certain degree* of effectiveness, thus resulting *by and large* effective. It is pretty evident, hence, that he outlines a *middle solution* between opposite and radical stances, struggling with an *idealistic* theory of law, on the one hand, and a *realistic* theory of law, on the other hand. Where the former claims no connection at all between validity and effectiveness (as the first category would be totally independent from the second one) and the latter argues for the overlapping of the two concepts, by setting forth that they are *identical*. According to Kelsen, *dialectically* engaged in tackling the challenge of a positivistic theory of law – namely, finding "the correct middle road between two extremes" –, both perspectives are wrong, "untenable"[142]. Therefore, his Pure Theory of law presents that composite solution, a sort of *third alternative way*, in the following terms, depicted in detail:

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dall'esser valide non soltanto quando vengono abrogate in un modo costituzionale, ma anche quando l'ordinamento totale cessa di essere efficace. Non si può quindi sostenere che, giuridicamente, gli uomini devono comportarsi in conformità di una data norma, se l'ordinamento giuridico totale, di cui quella norma è parte integrale, ha perduto la sua efficacia. Il principio di legittimità è quindi limitato dal principio di effettività". Accordingly, weighing the *proportion* of this relation, Kelsen maintains that (*ivi*, p. 122) "La validità di un ordinamento giuridico dipende quindi dal suo accordo con la realtà, dalla sua 'efficacia'. Il rapporto esistente fra la validità e l'efficacia di un ordinamento giuridico – la tensione, per così dire, fra il 'dover essere' e l''essere' – può venir determinato soltanto da un limite superiore e da uno inferiore. L'accordo non deve superare un dato massimo nè scendere al di sotto di un dato minimo". Cf. *Idem*, *General Theory of Law & State*, *cit.*, pp. 119-120.

[140] *Idem*, *Pure Theory of Law*, *cit.*, pp. 46-47.

[141] *Ivi*, p. 211: "The correct determination of this relationship is one of the most important and at the same time most difficult problems of a positivistic legal theory. It is only a special case of the relationship between the 'ought' of the legal norm and the 'is' of natural reality. Because the act by which a positive legal norm is created, too, is an 'is-fact' (German: *Seinstatsache*) just as the effectiveness of the legal norm".

[142] *Ibidem: "*A positivistic legal theory is faced by the task to find the correct middle road between two extremes which both are untenable". There, explaining the reasons for this critical appraisal he clarifies: "[the idealistic theory] is wrong for it is undeniable that a legal order in its entirety, and an individual legal norm as well, lose their validity when they cease to be effective; and that a relation exists between the *ought* of the legal norm and the *is* of physical reality also insofar as the positive legal norm, to be valid, must be created by an act which exists in the reality of being. The [realistic] solution is wrong because it is equally undeniable that there are many cases – as has been shown before – in which legal norms are regarded as valid although they are not, or not yet, effective".

> Just as the norm (according to which something *ought* to be) as the meaning of an act is not identical with the act (which actually *is*), in the same way is the validity of a legal norm not identical with its effectiveness; the effectiveness of a legal order as a whole and the effectiveness of a single legal norm are – just as the norm-creating act – the condition for the validity; effectiveness is the condition in the sense that a legal order as a whole, and a single legal norm, can no longer be regarded as valid when they cease to be effective. Nor is the effectiveness of a legal order any more than the fact of its creation, the reason for its validity. The reason for the validity – that is, the answer to the question why the norms of this legal order ought to be obeyed and applied – is the presupposed basic norm, according to which one ought to comply with an established, by and large effective, constitution, and therefore with the by and large effective norms, actually created in conformity with that constitution. In the basic norm the fact of creation and the effectiveness are made the condition of the validity – 'effectiveness' in the sense that it must be added to the fact of creation, so that neither the legal order as a whole nor the individual legal norm shall lose their validity[143].

Here Kelsen is trying to reconsider and appreciate realistic elements, as the *effectiveness* of legal norms and orders – the contingent fact that these are observed and obeyed by individuals, at least to some extent – to recalibrate the *purity* of legal structures and forms, achieved in the static part and related to the legal category of *validity* as an ought to be. Thereby, he shows opposite and convergent thrusts: formalism and anti-formalism.

Secondly and likewise, let us briefly consider that the fundamental norm (just mentioned in the previous quote and widely addressed *supra*) can be intended, from a *dynamic* point of view, not just as a hypothesis, but also as a *fact* in *flesh and bones* or as the product of an *ideological* stance, that is, the outcome of an ethics-political option. Indeed, Kelsen recognizes that the choice of the basic norm, as well as its *position* in the pyramidal hierarchy (whether at the top of a state or at the peak of the international legal order), it is not a matter of *knowledge*, namely, it is not made through a gnoseological act. Instead, it is the fruit of an *act of will* (as it happens for the fundamental norm of the international order and for the primacy of the latter in comparison to states)[144]. Then, even concerning this profile one can detect how Kelsen *walks between opposite sides*, that is, legal formalism and anti-formalism.

Furthermore, as mentioned above, *dynamically* speaking, in Kelsen's theoretical framework the production of law (nearly always) occurs in association with its application and vice versa, so that these activities can be regarded as one, due to the peculiar phenomenon for which law regulates itself (already illustrated *supra*). This way, a judge who is issuing a sentence, on the one hand is *applying* general norms created by statutes, customs, or precedent jurisdictional acts, on the other hand is *creating* at least an

[143] *Ivi*, pp. 211-212. Cf. also *ivi*, p. 217: "The basic norm, presented by the Pure Theory of Law as the condition for the objective validity of law, establishes the validity of *every* positive legal order, that is, of every coercive order created by acts of human beings and by and large effective. […] Every by and large effective coercive order can be interpreted as an objectively valid normative order".
[144] H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 28.

individual legal norm in turn, if not a general one (how Kelsen acknowledges since his *General Theory of Law and State*). Likewise, an administrative authority which decides towards a single case at the same time applies higher legal norms and creates the objective-legal meaning of its act of will, to express it in Kelsenian terms. In the upper floors of the hierarchical structure of the legal order, we know that a similar mechanism of simultaneous legal application and production can be observed between general norms and constitutional provisions, whereby the creation of the former (for instance, through legal statutes) entails the application of the latter. Even in this *coexistence* of (legal) activities the interaction between reality and normativity is traceable, as well as Kelsen's attempt in finding a fruitful balance between the two spheres.

Eventually, this attitude that drives Kelsen towards *opposite stances* to his formalism, which I designate as a sort of *dialectical tension*, is well observable in so far as he firstly recognizes and then later emphasizes the *creative role* of judges – a profile that I have deepened on earlier (cf. footnote 35, 37, 39, 40). As one may remember, indeed, the author from Prague, since the *dynamics* of the first edition of the *Reine Rechtslehre* onwards, acknowledges that judges perform not a declarative function at all, but a *productive* and *constitutive* one[145]. Basically, there he clearly states that they create *individual* legal norms[146], in the process of concretization and individualization of general norms (where the latter would mainly be created by legal statutes and customs). But since the 1940s, by touching base with the Anglo-Saxon legal system, he *expands* his former theoretical setting, encompassing the judges as law-creating agents even regarding *general* norms, showing a sort of nearness to the American legal realism[147]. Therefore,

[145] See *ibidem* for the sharp analysis of Treves, where he holds that: "[r]elativamente al problema della interpretazione della legge, Kelsen ritiene poi che si deve respingere la giurisprudenza dei concetti, che è la tipica espressione del formalismo giuridico, e ci si deve avvicinare alle dottrine opposte per le quali il giudice è il creatore del diritto e la giurisdizione non ha soltanto una funzione dichiarativa, ma produttiva e costitutiva". According to this view, Kelsen substantially disentangles his theory from the *jurisprudence of concepts*, the latter regarded as the expression of legal formalism par excellence. Thus, one can argue that, although he leverages the figure of *system* and carry out an *abstract formalization* of legal categories, this is true in order to the *statics* only, while for the *dynamics* he dialectically weighs the spheres of normativity and reality, by trying to find out a balance or *composite* solution between the two, as I am stressing in this paragraph's final part.

[146] In this regard, once again see H. Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, pp. 67-68, where he deems that "the function of adjudication is constitutive through and through; it is law creation in the literal sense of the word" and that "the judicial decision is itself an individual legal norm, the individualization or concretization of the general or abstract legal norm; it is the continuation of the process of creating law – out of the general, the individual. Only the preconceived notion that all law is contained in the general norm, the mistaken identification of law with the statute, could have obscured this insight into the judicial decision *qua* continuation of the law-creating process". Likewise, cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, pp. 108-109.

[147] Closer to the *common law* world, as I have stressed earlier, Kelsen frames his pure theory of law as "a radically realistic and empirical theory", cf. H. Kelsen, *General Theory of Law & State*, *cit.*, p. 13. Likewise, some years after in *Idem*, *Pure Theory of Law*, *cit.*, p. 128, he holds that his pure theory of law is *radically realistic*, namely, "a theory of legal positivism". On judges and courts even entitled to produce *general* legal norms, see *ivi*, p. 250 ff.

far from being anchored to a pure legislative dimension – where the only relevant role in legal production fulfilled by a legislator or a normative authority as the sole subjects entitled to enact statutes or normative acts –, the more and more Kelsen accentuates jurisdiction as a creative function of law[148], even so weaving and shaping a suitable composite framework for the complex relation between legal reality and normativity.

Then, so stressing again Kelsen's *latent* anti-formalism, even though to some extent his theory surely represents the radical formalistic stance (as far as the *static* part is concerned), "exactly for its position, it reveals points of contact with the extreme opposite and hence a certain need to overcome the limits of formalisms […]"[149]. Nonetheless, it is well known that for many years these profiles, as well as the *dynamic* elements of the theory, remained rather unexplored and overlooked[150].

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[148] See *Idem*, *Peace through Law*, Chapel Hill, University of North Carolina Press, 1944, p. 45 ff. There Kelsen criticizes the traditional doctrine for which judicial decisions should have a *declarative* function only. On the contrary, he stresses the *creative* role of international and national courts, stating that, on the one hand, a disputed fact exists, legally speaking, by means of a judicial decision that ascertains it and hence turns it into a *legal* fact, so that the latter and its legal consequences are *created* by that specific jurisdictional act (otherwise, they would not even *exist* in the legal sphere). On the other hand, by recalling the idea for which there is no antagonism between application and creation of law, he holds that every application of the law also implies its *alteration*, so that national courts, as well as international, inevitably contribute to the *gradual evolution* of law. Accordingly, he also observes that the *submission* of states to an international court decision is not incompatible with the principle of their *equal sovereignty* for it is widely admitted that a judicial decision is not binding or mandatory at all. Differently, Kelsen maintains that it so because jurisdictional acts do not abruptly change the law, as legislative bodies usually do, but can *gradually* modify it instead. And this is possible because he envisions the law (*ivi*, p. 48) "as a body of slowly and steadily changing norms", as a *dynamic system*. Cf. also *Idem*, *La pace attraverso il diritto*, *cit.*, pp. 80-82. In this sense, emphasizing the fundamental role that he assigned to an envisioned international tribunal (a sort of *world court*) to achieve and preserve the peace among states, A. J. Treviño observes that already in *Peace through Law*, just one year before the *General Theory of Law and State*, "[Kelsen] argues that the only way to guarantee a stable, universal peace among states is by compulsory adjudication of international disputes through the formation for a permanent and independent juridical organ – a word court – with the authority to resolve international conflicts and prosecute individuals for war crimes and crimes against humanity", cf. H. Kelsen, *General Theory of Law & State*, *cit.*, p. xxxii. Subsequently, one can reckon that significant drives for "the transition to a more centralized international legal order" (*ibidem*) were both in 1945, the founding of the UN and, at the legal theory level, the *General Theory of Law and State*.

[149] Cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 28, where Treves maintains: "la dottrina del Kelsen, […] pur costituendo l'espressione più conseguente ed estrema del formalismo, rivela, proprio per questa sua posizione, dei punti di contatto con l'estremo opposto e quindi una certa esigenza di superare i limiti del formalismo […]" (the English translation is mine). Furthermore, in 1967, by developing the same orientation, Treves points out that (*ivi*, p. 17), despite his "official" formalism, "[…] nel campo più contesto, cioè nel campo della interpretazione, fu proprio Kelsen ad abbandonare il formalismo e ad assumere atteggiamenti analoghi a quelli degli antiformalisti negando la certezza del diritto e affermando che la funzione giurisdizionale non è una funzione dichiarativa, ma creativa del diritto".

[150] About the reasons for that, concerning the criticisms raised by Kelsen's opponents and his intransigent position in defending the pure theory's *apparent* formalism, see *ivi*, pp. 28-29. Moreover on this subject, cf. footnote 40, where I recall the brilliant analysis of Losano to represent these criticisms – which at that time determine a *double image* of Kelsen's theory – and to especially spotlight the existing *anti-formalistic* trends and dynamics in his theoretical discourse, see H. Kelsen, *La dottrina pura del diritto*, *cit*., pp. 31-32:

Throughout the *General Theory of Law and State*, alongside the implementation of many aspects of his proposal, Kelsen sheds light on those elements and, while maintaining the core former setting of his Pure Theory of Law, he presents it under a new light, in some respects. As Treves observes, "he attaches greater importance to the legal dynamics, better showing the common ground that this part of his system has with certain American legal conceptions very far away from formalism"[151]. Moreover, on a political level, he underlines the relevant ideal perspective which the positive law, the object of his Pure Theory of Law, should hopefully pursue – that is, the goal of *peace keeping* on a permanent base –, thus demonstrating his ethics-political stance, drawing his own axiological horizon[152].

Eventually, in substantially considering that reality and normativity, *Sein* and *Sollen*, are not two completely different and autonomous spheres or entities – they rather represent the outcome of two different ways of interpreting and inquiring –, Kelsen seems to express that, in his view, the whole legal phenomenon *exceeds*, to some extent, its mere formal structure – although the latter for sure remains the object of his pure theory –, being the law "a very much more wide and complex social phenomenon"[153]. It also is useful to remember that for Kelsen, as far as the coercive element is an essential feature

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"Di fronte a queste accuse, Kelsen ribadí il carattere formale della sua dottrina, ma non ne sottolineò a sufficienza gli elementi dinamici, che avrebbero provato la sua concezione non formale della realtà giuridica. Si può dire che queste polemiche avessero originato una duplice immagine della dottrina kelseniana: in Europa si sottolineò il carattere formalistico della dottrina, sottovalutando quegli elementi dinamici che invece congiungevano le concezioni di Kelsen a teorie diverse ed opposte al formalismo giuridico; invece negli Stati Uniti (non coinvolti nella polemica) si videro in Kelsen quegli elementi realistici ed empirici, piú vicini alla sensibilità giuridica anglosassone. Vivendo negli Stati Uniti, Kelsen divenne sempre piú attento a questi ultimi elementi, cosicché, per esempio, mentre un tempo aveva respinto la sociologia giuridica come scienza rivolta a fenomeni naturali (e quindi senza punti in comune con la scienza del diritto), in seguito giunse ad ammettere la giurisprudenza sociologica come scienza complementare alla giurisprudenza normativa".

[151] Cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 30, where Treves, indeed, reckons that Kelsen ascribes "una importanza maggiore alla dinamica giuridica, mostrando meglio i punti di contatto che questa parte del suo sistema ha con alcune concezioni giuridiche americane assai lontane dal formalismo" (English translation is mine).

[152] *Ibidem*. See also *ivi*, p. 16 ff. Indeed, Kelsen is clearly not against politics or justice, he often raised a voice in favor of freedom and democracy, instead. Simply, he aims at *distinguishing* the object of legal science's analysis, the positive law, from political discourses or speculations, thus criticizing those streams of legal thought that *blend* the two realms and operate a risky *confusion* between ideologies and law – so that the law different from a certain ideology should not be considered valid law. More insight on his view about justice, law, and politics, also in relation to science, are available in H. Kelsen, *What is Justice? cit.*, *passim*. Likewise, regarding *peace* as the fundamental axiological horizon to achieve, in *Idem*, *Peace through Law*, *cit.*, p. 34 ff., p. 71 ff., pp. 45-49, he fosters this perspective by leveraging some desirable mechanisms, for instance, a *constrained* conception of state sovereignty (which means that states are *independent* among them, but *subordinate* to international law), a *direct* responsibility of *individuals* (e.g. those acting as state organs) for the violations of the international law, and the *creative* role of international (and national) courts, conceived as fundamental law-creating agents in the *gradual process* of legal evolution.

[153] Cf. H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 30, where Treves maintains: "il diritto nel suo complesso non si riduca per [Kelsen] alla sola struttura formale oggetto della dottrina pura del diritto, ma sia fondamentalmente un fenomeno sociale assai più vasto e complesso" (English translation is mine).

of the law, the latter is intended as *a specific social technique* instrumental to reach a certain desired social state. Even so, then, he stresses the functional nexus between law and society, and points out the dynamic relation between *efficacy* (which relates to reality) and the (*validity* of) legal system (which constitutes the sphere of *normativity*)[154]. He holds that

> What is socially desired is brought about or pursued by attaching a consequence to human behaviour that is the opposite of what is desired – the consequence, namely, of a coercive act (the coercive deprivation of something good, such as life, liberty, or property). […] The purpose of the legal system is to induce human beings […] to behave in the desired way. In this motivation lies the efficacy aimed at by the legal system[155].

All considered, I deem that a certain *balance* among the formalistic elements (represented in the *statics*) and the ones that move towards anti-formalistic stances (expressed in the *dynamics*) exists. Moreover, I maintain that it is a sort of *outcome* of the aforementioned *dialectic tension* which evidently subsists in Kelsen's works and thought between the *ideal purity* of legal categories and the *empirical* and *realistic* elements that the more and more he considers and encompasses in his legal theory[156].

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[154] About the law conceived as a "specific social technique", cf. *Idem*, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 28 ff.

[155] *Ivi*, pp. 28-29.

[156] A *tension* especially witnessed in *Idem*, *General Theory of Norms*, *cit*., *passim*, that, to a greater or a lesser extent, seems to represent a *shift* from the logicized theoretical setting of the (former) Pure Theory of law to a disenchanted view about the applicability of logics to norms, that someone even designates as "normative irrationalism", cf. O. Weinberger, *Kelsens These von der Unanwendbarkeit logischer Regeln auf Normen*, in *Die Reine Rechtslehre in wissenschaftlicher Diskussion. Referate und Diskussion des Internationalen Symposiums zum 100. Geburtstag von Hans Kelsen*, Wien, Manz, 1982, 108-121; *Idem*, *Logic and the Pure Theory of Law*, in T. Richard and W. Twining (eds.), *Essays on Kelsen*, Oxford, Clarendon Press, 1986, pp. 187-199. The Kelsenian "struggle" on this subject-matter seems to find a conclusive posture, for instance, in H. Kelsen, "Law and Logic again. On the Applicability of Logical Principles to Legal Norms", *Neues Forum*, vol. 14, no. 157, 1967, pp. 39-40, now in *Idem*, *Essays in Legal and Moral Philosophy*, selection and introduction by O. Weinberger, English translation by Peter Heath, Dordrecht-Boston, D. Reidel Publishing Company, 1973, pp. 254-256, where he states (*ivi*, p. 254): "[…] I discussed the question whether the law of non-contradiction and the rule of inference are applicable to legal norms and answered it in the negative". Relating to this profile, one can notice that (only) at the end of his long career Kelsen eventually admits, thus overcoming his former stance, that along with the existence of *normative contrasts* within the legal system, regardless of its logical tightness, there may be *logical contradictions* in it. Sure enough, in the early 1930s he undermines the chance of a logical contradiction in case of a normative contrast, that is, when a lower norm is not in accordance with a higher norm in the hierarchical structure of the legal order, aiming at safeguarding the *unity* of the whole legal system. At that time, he only envisions two possible ways of qualifying the norm which has not been enacted with the required forms or content: either is unvalidatable, but still valid as far as it is not invalidated by means of a specific legal act, or it is null and void, where in this case it is not even a norm, thus, it has never existed at all. This way, *that* Kelsen avoids logical contradictions and so protects the *unity* in the step-wise construction of the legal order, arguing that the same law is able to solve any normative contrast among

differently located valid norms. Cf. H. Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, pp. 71-75, and *Idem*, *Lineamenti di dottrina pura del diritto*, *cit.*, pp. 112-116. For another stance about normative conflicts, see, for instance, *Idem*, "The concept of the Legal Order", *cit.*, p. 70 ff., where in 1958 Kelsen holds that: "[a] conflict between legal norms at different levels in the normative hierarchy cannot take place, for the norm at the higher level is the basis of the validity of the norm at the lower level. A lower-level norm is valid only because it conforms to a higher-level norm, namely, the norm that governs its creation; that is to say, the lower-level norm is created as the higher-level norm prescribes". In *Idem*, *Pure Theory of Law*, *cit.*, p. 205 ff., dealing with the fundamental *logical unity* of the legal system, Kelsen maintains that "[t]his unity is expressed also by the fact that a legal order may be described in rules of law that do not contradict each other". Again, referring to the *ought to be*-utterances of the legal science, but raising a (questionable) logical connection with legal norms, he states (*ivi*, p. 206): "[…] logical principles in general, and the Principle of the Exclusion of Contradictions in particular, are applicable to rules of law describing legal norms and therefore indirectly also to legal norms. Hence it is by no means absurd to say that two legal norms 'contradict' each other. And therefore, only one of the two can be regarded as objectively valid. […] A conflict of norms is just as meaningless as a logical contradiction". However, leveraging his gnoseological *cognitivist* vision, there he argues that possible "conflicts of norms within the normative order which is the object of this cognition can and must be solved by interpretation". Due to the hierarchical structure of the legal order, he distinguishes between two potential forms of normative conflicts: a first one is traceable among legal norms located at the same level and is solvable, depending on the kind of conflicting norms, via either the principle *lex posterior derogat priori* or various interpretations which provide a certain degree of meaningfulness to the law-creating acts at stake or by giving the power of choice to executive law-applying organs or by leveraging the fundamental norm that (*ivi*, p. 208) "makes it possible to interpret the material submitted to legal cognition as a meaningful whole, which means, to describe it in logically noncontradictory sentences". On the other hand, the second type of normative conflict addressed by Kelsen is just an *apparent* one. Indeed, (*ibidem*) "No conflict is possible between a higher norm and a lower norm, that is, between one norm which determines the creation of another norm and this other norm, because the lower norm has the reason for its validity in the higher norm. If a lower norm is regarded as valid, it must be regarded as being valid according to a higher norm". Moreover, in *ivi*, pp. 245-250, Kelsen critically addresses the so-called theory of *gaps* sustained by traditional jurisprudence, basically undermining it, whenever a general norm is missing to solve a specific and concrete case, through a *systematic* interpretation of the positive legal order. Indeed, he firstly holds that (*ivi*, p. 245-246) "[…] a positive legal order can always be applied by a court to a concrete case, even when the legal order does not contain, according to the court's view, a general norm positively regulating the behaviour of the defendant or accused; […] [f]or in this case his behaviour is regulated negatively, that is, legally not prohibited, and in this sense permitted". And then (*ivi*, p. 246) he assesses: "[the] theory [of gaps] is erroneous because it ignores the fact that the legal order permits the behaviour of an individual when the legal order does not obligate the individual to behave otherwise. The application of the valid legal order is not impossible in this case in which traditional theory assumes a gap. The application of a single legal norm, to be true, is not possible, but the application of the legal order – and that, too, is law application – *is* possible. Law application is not excluded". About this topic, he concludes claiming that the theory under discussion is to some extent biased by ethics-political purposes, in so far as a gap is detected by a law-applying organ when it aims at stressing the legislator (supposed) shortcomings and thus raising political issues or reasons. Indeed, (*ibidem)* "[u]pon closer inspection it turns out that the existence of a gap is assumed only when the absence of such a legal norm is regarded as politically undesirable by the law-applying organ; when, therefore, the logically possible application of the valid law is rejected for this political reason, as being inequitable or unjust according to the opinion of the law-applying organ". Already in 1945 Kelsen qualifies the idea of *gaps* as a *fiction*, cf. *Idem*, *General Theory of Law & State*, *cit.*, pp. 146-149, observing that "[t]he legal order cannot have any gaps" and that "[t]he theory of gaps in law – it is true – is a fiction; since it is always logically possible, although sometimes inadequate, to apply the legal order existing at the moment of the judicial decision". In the same piece of work (*ivi*, pp. 153-162), coming back to the subject of *normative contrasts*, Kelsen maintains that "[t]here cannot occur any contradiction between two norms from different levels of the legal

After all, the same Kelsen, while dealing with opposite theories in the way of conceiving legal systems, whether grounded on the exclusive creation of the law by the courts or by the legal statutes, observes that "[t]he truth is in between"[157]. Likewise, I reckon that Kelsen, despite his well-known formalism, in some respects can also be considered as an anti-formalist, thus reaching a sort of *middle position* between these antithetical postures. In short, I claim that he is as much formalistic as anti-formalistic, where the different *disposition* depends on which part of his theory is considered, highlighted, or leveraged.

Sure enough, even considering the early stages of his career since the *Hauptprobleme* he defends himself against the accusation of (mere) formalism, where he simultaneously identifies the exclusively formal appreciation of legal norms – namely, the analysis of their formal and logical structure only – as the essential trait of the way in which jurisprudence addresses legal issues and problems. Indeed, coping with his relentless opponents, he declares to abandon his explanatory effort in front of those who do not catch the *theoretical need* of *firmly structured* legal concepts, that is, what is mainly pursuing at that time. Accordingly, there he adverts that his theory can only satisfy theoretical needs, not practical ones, an achievable purpose through a formal speculation only[158] – without this entailing, as one might notice, his subjective preference for the forms of law.

Moreover, while admitting that every legal theory is built upon some ideological premises[159] and then specifying that, therefore, every dispute among legal theories is eventually an ideological conflict, he fosters a correspondent fundamental need for the clashes among legal theories in mutual opposition, (I deem) leveraging a sort of *dialectics*.

Accordingly, besides stating that the theoretical clashes in mutual opposition form a necessity, he maintains that both points of view and stances – as far as logically solid – show the same validity claim[160] or, I should say, the same claim to be true.

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order. The unity of the legal order can never be endangered by any contradiction between a higher and a lower norm in hierarchy of law". Cf. S. L. Paulson, *On the Status of the lex posterior Derogating Rule*, in T. Richard and W. Twining (eds.), *Essays on Kelsen*, *cit.*, pp. 229-247, where Paulson's thorough analysis pinpoints that Kelsen several times changes his view on the possibility of *conflicts* among legal norms, alternating two different visions.

[157] Cf. H. Kelsen, *Pure Theory of Law*, *cit.*, p. 255, where he holds: "[t]he theory that only the courts create law, a theory grown upon the soil of Anglo-American common law, is just as one-sided as the theory, grown on the soil of European-Continental statutory law, that the courts do not create law at all, but only apply already created law. The latter theory amounts to the view that only general legal norms exist, the former that only individual legal norms exist. The truth is in between. The courts do create law – usually individual law; but within a legal order that establishes a legislative organ, or that recognizes custom as law-creating fact, the courts do this by applying general law previously created by legislation or custom. The judicial decision is the continuation, not the beginning, of the law-creating process".

[158] Cf. *Idem*, *Hauptprobleme der Staatsrechtslehre. Entwickelt aus der Lehre vom Rechtssatz*, *cit*, p. x.

[159] As well as his own theory, so that the task he attributes to legal scientists is to study the logics of the connections established among those premises and the utterances formulated by normative jurisprudence.

[160] On these last profiles cf. *Ivi*, p. xii.

Thus, he seems to outline this path with the goal of *intercepting* or *enucleating* a (theoretical) truth that, once again, *is in between* two possible opposites. In his case, legal formalism and anti-formalism, legal idealism, and realism, showing, as I hold, a certain *dialectical balance* between the two alternative visions[161].

[161] I deem that some *assonances* can be found, even if not a full correspondence, between my interpretation of Kelsen's theoretical proposal and the enlightening but also disruptive reading given to it by Pierluigi Chiassoni, who goes so far as to frame Kelsen's works (along with Merkl's ones) as *Wiener realism*. Cf. P. Chiassoni, Wiener *Realism*, in L. Duarte d'Almeida, J. Gardner and L. Green (eds.), *Kelsen Revisited. New Essays on the Pure Theory of Law*, Oxford-Portland-Oregon, Hart Publishing, 2013, pp. 131-162, where he pinpoints that (*ivi*, p. 133): "[m]y claim will be that the Pure Theory of Law can be regarded as an instance of a peculiar form of realism – I propose to label it '*Wiener* realism' – which had both Kelsen and Adolf Julius Merkl as its foremost representatives". Accordingly, Chiassoni observes that (*ivi*, pp. 131-132): "[…] there is, it seems to me, one deep, enduring idea, present in Kelsen's works for more than six decades, which can be said to lie at the very core of the Pure Theory of Law. To put it as plainly as possible, Kelsen always strove to develop and promote a realistic jurisprudence. Underlying the Pure Theory as a whole, in other words, there is a stable epistemological preference for legal realism. […] Evidence for the persistent realistic orientation of Kelsen's jurisprudence can be found, as we will see, since the earliest stages of its development, and particularly since his 'strong' Neo-Kantian constructivist stage (which started in the 1910s and culminated with the first edition, in 1934, of *The Pure Theory of Law*). In fact, Kelsen himself often described the Pure Theory as a 'radically realistic' theory of law – a characterisation that can be found in texts ranging from as early as 1933 to as late as 1960. The evidence has often been overlooked by Kelsen scholars, who, preferring to concentrate almost exclusively on specific single components of the Pure Theory of Law, have lost sight of Kelsen's overall and lifelong goal – viz. to account for *real* law, for law as it really is. From this overarching perspective, however, it is quite possible to give a *unified* account of the different 'periods' of Kelsen's work". Chiassoni, leveraging a famous short story written by Edgar Allan Poe, argues that (*ivi*, p. 133): "Kelsen's realism has endured a fate similar to that of Poe's 'Purloined Letter'; so blatantly evident, so plain, that it is overlooked by those bewitched by the intricacies of its surroundings: as if hidden in plain sight". Again, he claims that (*ivi*, p. 136) "[…] the realistic orientation of the Pure Theory of Law should seem a matter of course. At both the epistemological and the theoretical levels, Kelsen's views on positive law and natural law are, we may say, decidedly realistic". Moreover, Chiassoni (cf. *ivi*, pp. 138-139) identifies two main reasons (which mostly reflect the *dynamic* and *anti*-formalistic elements that I have stressed earlier) for which the Pure Theory of Law, as a general theory of law, should be regarded as *realistic*: "the ('*Stufenbau'*) theory of the hierarchical structure of legal systems, and Kelsen's theory of legal interpretation. Both theories represented, in their day, a veritable revolution in legal thought, and their importance has not since diminished. They are the pillars of Kelsen's 'radically realistic' theory of law, which moreover embraces a moderate form of norm-scepticism". Thus, under the second profile, Chiassoni underlines the Kelsenian conception of general legal norms as "*in*determinate standards", that judges, as legal interpreters, must fill and complete through their judicial decisions and the acts of execution. Indeed, (*ivi*, p. 138) "[l]egal interpretation is always the outcome of an act of will, an act by which interpreters *decide* on the 'proper' or 'correct' meaning of a norm […]". This way, the *constitutive* essence of the jurisdictional function and the consequent *creative* role of judges in the process of legal production are rather explicit and evident in Kelsen's view (as I have also pointed out in this chapter), entailing a certain strong tendency towards *anti*-formalistic and *realistic* elements. Then, under the first profile of the *nomodynamics* of legal orders, aiming at probing the Pure Theory's "realistic orientation towards the knowledge of legal norms *in action*" (*ivi*, p. 139), Chiassoni recalls several elements, most of which I have already highlighted earlier, such as the way in which the Kelsenian legal category of *validity* is to some extent conditioned by the *efficacy* of legal norms, the conception of positive law as a *specific social technique*, and the *dynamic* nature of legal systems, whereby they are "constantly changing". All considered, he qualifies Kelsen's theory (*ivi*, p. 140) as "an empirical, anti-ideological, anti-metaphysical, realistic general theory of law", hence he eventually claims (*ivi*, p. 160)

1.6 *The most significant connecting dots between Kelsen and the Italian legal scenario: Renato Treves and Norberto Bobbio*

Since I will soon devote my analytical efforts to represent and weigh Luigi Ferrajoli's work and theoretical construction – widely recognized as Kelsen's most significant successor, in the wake of the so-called formalistic legal tradition, by also making a comparison between the two pyramidal settings. In this section, I deem useful to briefly spotlight the most significant ways in which Kelsen's thought enters in the philosophical Italian legal scenario[162], as well as the relevant impact he produces on the Italian analytical jurisprudence during half of the 20th century, mainly considering his most preeminent exponent, Norberto Bobbio.

Some authors, already since the 1920s, engage in translating a few Kelsen's pieces of work, thus introducing his reflections in Italy for the first time, respectively focused

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it provides "a model of a kind of *empirical* knowledge of positive law which is at once different from sociological knowledge (which is causal knowledge); from general legal theory (which is analytical-comparative study); and from legal politics *de iure condito* (which is not a form of knowledge at all)". About Chiassoni's stance, see also *Idem*, "Il realismo radicale della teoria pura del diritto", *Materiali per una storia della cultura giuridica*, vol. 42, no. 1, 2012, pp. 237-262, and *Idem*, *Dos preguntas, una solución. Sobre el realismo radical de Hans Kelsen*, in J. J. Moreso and J. L. Martí (eds.), *Contribuciones a la filosofía del derecho. Imperia en Barcelona 2010*, Madrid-Barcelona-Buenos Aires-São Paulo, Marcial Pons, 2012, pp. 177-198. Along a similar path, towards a *realistic* interpretation of Kelsen's theory, see U. Bindreiter, *The Realist Hans Kelsen*, in L. Duarte d'Almeida, J. Gardner and L. Green (eds.), *Kelsen Revisited. New Essays on the Pure Theory of Law*, *cit*., pp. 101-129. There (*ivi*, p. 101), the author indicates that "we are accustomed to thinking of Kelsen as *the* legal positivist: less often he is spoken of as Kelsen the realist. And yet, nothing, as he sees it, would be more natural. The Pure Theory is a positivistic theory of law, he says, and this is to say that it is a realistic theory of law". Bindreiter (*ivi*, p. 129) suggests that "the word 'realistic', in Kelsen's works, ought to be understood in terms of the human act of 'positing' norms. Kelsen used the terms 'positivistic' and 'realistic' in the same breath. […] From the point of view of the Pure Theory, the issue of a specifically *juristic* reality and the issue of the *positivity* of the law seem to be one and the same". Of a different opinion is Juan Ruiz Manero, who directly and critically tackles Chiassoni's posture in J. Ruiz Manero, *Sobre la interpretación genovesa de Kelsen: Kelsen como realista*, in *Idem*, *El legado del positivismo jurídico. Ocho ensayos sobre cinco autores positivistas: Hans Kelsen, Norberto Bobbio, Eugenio Bulygin, Luigi Ferrajoli, Riccardo Guastini*, Lima-Bogotá, Palestra, 2014. As far as my personal stance is concerned, far from *wholly* embracing Chiassoni's thorough but, in many respects, *extreme* interpretation about Kelsen's works, thus, without concluding for Kelsen's *sophisticated realistic normativism* supported by Chiassoni, I limit myself in spotlighting the several *dynamic* and *anti*-formalistic elements that exist and characterize Kelsen's perspective over the years. Then, as already stated, I rather notice a *dialectic tension* between opposite but touching spheres, as normativity and reality, for many aspects unsolved, suspended, therein. Thereby, one may observe that Kelsen reaches a sort of *dialectical balance*, for its nature volatile and relative, between the alternative visions of normativism and realism.

[162] For a deeper and thorough historical reconstruction about the Italian translations of Kelsen's early works see the valuable reference constituted by M. G. Losano, M. Marchetti, R. Orsini, & D. Soria, "La fortuna di Hans Kelsen in Italia", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, vol. 8, no. 1, 1979, pp. 465-500.

on the *dichotomous* public and private law and the problem of *parliamentarianism*[163]. Curious enough, the journal that publishes the second contribution, although rather biased – in so far as its directors support the newborn authoritarian regime and then foster an *ethic* conception of the state, while Kelsen, on the contrary, merges state and legal order independently from any ethics-political judgements and clearly maintains the *anti-ideological* character of his theory –, very contributes to widespread Kelsen's thought in Italy, giving room to more of his writings[164]. Then, a further volume follows, which recollects most of his first translated works and presents to Italian readers an essay about *nature* and the *value of democracy* for Kelsen[165].

Nonetheless, likely the most significant Kelsenian contribution that reaches Italy before the II World War is the one translated by Renato Treves, where the author from Prague sets forth and illustrates the core aspects of his Pure Theory of Law, that is, its fundamental method and concepts[166].

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[163] As Marchetti observes *Ivi*, p. 470 ff. These first work are H. Kelsen, "Diritto pubblico e privato", *Riv. int. fil. dir.*, 1924, pp. 340-357, and *Ibidem*, *Das Problem des Parlamentarismus*, Wien-Leipzig, W. Braumüller, 1925, Italian translation by B. Flury, "Il problema del Parlamentarismo", *Nuovi Studi di diritto, economia e politica*, 1929, pp. 182-204.

[164] As very well depicted in M. G. Losano *at al.*, "La fortuna di Hans Kelsen in Italia", *cit.*, p. 472 ff. Here I recall the last article published by the journal directed by Arnaldo Volpicelli e Ugo Spirito, that is, H. Kelsen, "Juristischer Formalismus und Reine Rechtslehre", *Juristische Wochenschrift*, 1929, pp. 1723-1726, Italian translation by D. Mattalia, "Formalismo giuridico e dottrina pura del diritto", *Nuovi Studi di diritto, economia e politica*", 1931, pp. 124-135.

[165] *Idem*, *Lineamenti di una teoria generale dello Stato e altri scritti*, in A. Volpicelli (a cura di), Roma, Anonima Romana Editoriale, 1933, pp. 173. Therein, the Italian translation made by B. Flury of H. Kelsen, *Vom Wesen und Wert der Demokratie*, Tübingen, J.C.B. Mohr, 1929, pp. vii-119, can be found.

[166] H. Kelsen, "La dottrina pura del diritto. Metodo e concetti fondamentali", *Archivio Giuridico*, 4th s., vol. 26, 1933, pp. 121-171, hence published as autonomous volume in Idem, *La dottrina pura del diritto. Metodo e concetti fondamentali*, Modena, Società tipografica modenese, 1933. About the original work translated by Treves, the latter argues that it will be published, partially modified, and extended, just one year later in Vienna, in the form of the first edition of the *Reine Rechtslehre*. See his foreword in H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 11 ff., where Treves also provides insights about his first meeting with Kelsen, that occurs in Cologne in September 1932. In my opinion, two profiles of Treves's narrative deserve to be stressed: on the one hand, in light of the rise of the national socialist party, the Austrian author, "fervente democratico e irreducibile avversario di quel movimento" (*ivi*, p. 11), reveals his intentions to leave the country soon and move to more hospitable and democratic countries to carry out its teaching and scientific endeavors – indeed, as one might remember, Kelsen in 1933 moves to Ginevra, whereafter, in 1941, reaches the united states to become in 1942 a professor of international law at the University of Berkeley. On the other hand, aiming at broadening the scope of his readers and thus reaching an international audience before leaving Germany, Kelsen already shows Treves the purpose to synthesize the essential tenets of his Pure Theory of Law in a short and clear essay to be translated within 1933 by authors from many different foreign countries. According to this reconstruction, hence, Treves's first translation of a Kelsenian writing refers to a kind of *anticipation* of the (yet *unpublished* at that time) first German edition of the Pure Theory of Law. Differently, Losano reckons that Kelsen publishes the correspondent German original work in the same 1933, in H. Kelsen, "Methode und Grundbegriff der Reinen Rechtslehre", *Annalen der Kritischen Philosophie*, vol. 3, 1933, pp. 69-90. Cf. M. G. Losano *at al.*, "La fortuna di Hans Kelsen in Italia", *cit.*, pp. 474 and 475 (especially footnote 20).

Whereafter, due to the tragic events of the second world conflict, it takes almost two decades to see published the Italian translation of the first (official) *Reine Rechtslehre*, edited in Vienna in 1934. Indeed, Treves comes back from his Argentinian exile to Italy after the end of the war and the fall of the fascist dictatorship only. Then, with the purpose to suggest a clear and concise textbook of general theory of law for his students at the University of Milan, he proposes to the publisher Einaudi to make a (new) translation of Kelsen's Pure Theory of Law[167], which finally appears in 1952[168].

The extraordinary contribution provided by Treves in conveying Kelsen's thought and shedding light on many aspects of his (legal) theory finds more evidence in 1967, when he produces a revisited translation of the first German edition and a new foreword attached to it[169]. Therefore, one can easily grasp why Treves is widely recognized as one of the main contributors to the dissemination in Italy of Kelsen's intellectual production[170]. It is not a coincidence that the same Norberto Bobbio, who, as Danilo Zolo observes, is frequently "regarded as the real importer of Kelsenism into Italy", recognizes the crucial role fulfilled by Treves already in the early 1930s[171] to introduce and foster Kelsen's works in Italy.

Indeed, Bobbio's first piece of work entirely focused on Kelsen's production is published in 1954 only, even though his *conversion to Kelsenism* dates to the early 1940s, as he admits.

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[167] On these historical and biographical profiles concerning Treves, see again his foreword in H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, pp. 12-13.

[168] H. Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, Wien, Franz Deuticke Verlag, 1934, Italian translation and foreword by R. Treves, *La dottrina pura del diritto*, Torino, Einaudi, 1952. In the same year, the Italian translation of the *General Theory of Law and State* becomes available, *Idem*, *Teoria generale del diritto e dello Stato*, *cit.* Concerning the works *on* Kelsen written by other authors, before and after the II World War, there is a rather infinite scientific literature. To gather valuable information and references, at least till the end of the 1970s, see once again M. G. Losano *at al.*, "La fortuna di Hans Kelsen in Italia", *cit.*, p. 475 ff. and p. 481 ff.

[169] This work amounts to H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, which I have quoted several times in this thesis. This new foreword written by Treves shows the crucial role of the Italian debate about Kelsen in the second postwar, to the point that, as Treves claims, every legal scientist interested in legal theory should address, know, and study Kelsen (*ivi*, p. 20).

[170] In this sense, cf. M. G. Losano *at al.*, "La fortuna di Hans Kelsen in Italia", *cit.*, pp. 474, footnote 20, where Marchetti holds that "Renato Treves […] è tra i principali artefici della diffusione del pensiero kelseniano in Italia".

[171] N. Bobbio, & D. Zolo, "Hans Kelsen, the Theory of Law and the International Legal System: A Talk", *European Journal of International Law*, vol. 9, no. 2, 1998, pp. 355-367. There Bobbio reminds Zolo that "[i]n fact it was Renato Treves, who as long ago as 1934 had published a volume, *II diritto come relazione*, largely devoted to Kelsen. By contrast my Kelsenism, which has led me to be regarded as the one responsible for Italy's 'Kelsenitis', started a few years later". More on this subject, *infra*. Again, in N. Bobbio, *Diritto e Potere. Saggi su Kelsen*, Napoli, Edizioni Scientifiche Italiane, 1992, p. 5, Bobbio brings up that Kelsen's Italian luck starts with Treves.

> My first article directly devoted to Kelsen, 'La teoria pura del diritto e i suol critici', appeared in the *Rivista trimestrale di diritto e procedura civile* twenty years after I started out as a legal philosopher, namely in 1954. But my 'conversion' to Kelsenism, to use that term again, had come years earlier. In my lectures at Padoa in 1940-41 there was a section on the step-wise construction of the legal system: the reference was to Kelsen's famous *Stufenbau*, which fascinated me even then. I may add that in the legal philosophy courses I gave at the University of Camerino in the second half of the 1930s, the lesson plans were structured in three parts: the sources of law, the legal norm, and the legal system. This pattern directly reflected my reading of Kelsen. In fact, my 'conversion' to Kelsen coincided with the violent break with the past that came in our country's history between the second half of the 1930s and the early 1940s. That historical break corresponded to a discontinuity in my intellectual life too, both private and public[172].

That is how Bobbio temporally frames his own choice to follow and deepen Kelsen's legal thought and theoretical setting, where this part of interview also shows his fascination and even devotion (that to some extent will last till the end of the 1960s, *infra*) for the *Stufenbau*, the idea of the legal system and, thus, Kelsen normativism[173].

Indeed, while Bobbio consciously points out that Kelsen's most famous conceptual tool, the *Grundnorm*, entails a "delicate problem" within the Kelsenian theoretical framework and then he qualifies it as "a sort of 'logical' closure of the legal system" grounded on *convenience*[174], he completely recognizes that

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[172] N. Bobbio, & D. Zolo, "Hans Kelsen, the Theory of Law and the International Legal System: A Talk", *cit.*, p. 356. Differently, in M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *Revista da Faculdade de Direito – UFPR*, vol. 60, no. 3, 2015, pp. 9-38, the author (*ivi*, p. 13) indicates another period for Bobbio's *conversion* to normativism, precisely 1949, when the latter makes some critical remarks to Francesco Carnelutti's imperativistic general theory of law and expresses his favour towards Kelsen's Pure Theory of Law instead. Cf. N. Bobbio, *Studi sulla teoria generale del diritto*, Torino, Giappichelli, 1955, pp. 1-26 and 27-52. For a comprehensive account on Bobbio's legal thought see A. Ruiz Miguel, *Bobbio y el positivismo jurídico italiano*, in A. Ruiz Miguel (edición a cargo de), *Contribución a la teoría del derecho*, Valencia, Fernando Torres, 1980, pp. 15-58, and *Idem*, *Filosofía y derecho en Norberto Bobbio*, Madrid, Centro de Estudios Constitucionales, 1983. Eventually, Losano recognizes the special relevance fulfilled by N. Bobbio, "La teoria pura del diritto e i suoi critici", *Rivista trimestrale di diritto e procedura civile*, vol. 8, no. 2, 1954, pp. 356-377, a piece of work that definitively consolidates Bobbio's conceptions towards legal positivism – cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, pp. 14-15.

[173] Cf. *ivi*, p. 14, where Losano – so providing a slightly different temporal context, as just highlighted *supra* – pinpoints that in 1949 starts Bobbio's Kelsenian normativism, which, without ignoring its more *skeptical* phase, will last almost three decades, thus significantly contributing to widespread the Pure Theory of Law in Italy: "Iniziava così il periodo – destinato a durare circa trent'anni – in cui Bobbio si accostò criticamente al positivismo giuridico di Kelsen e contribuì in modo decisivo a diffondere la dottrina pura del diritto in Italia".

[174] N. Bobbio, & D. Zolo, "Hans Kelsen, the Theory of Law and the International Legal System: A Talk", *cit.*, p. 358. There Bobbio maintains that: "[…] in an essentially non-metaphysical thinker like Kelsen the 'closure' of a system through the *Grundnorm* is only, so to speak, a closure of convenience. It is a little like the idea of the absolute sovereignty of the nation-state. The Idea of sovereignty as 'power of powers' is a closure of convenience, no different from the *Grundnorm* conceived of as a 'norm of norms'. Nothing verifiable corresponds, nor can correspond, to these notions".

> "[…] what had appealed to me in Kelsen's theory was his conception of the legal system in the 'hierarchical' form (normatively hierarchical, obviously, not politically) of the *Stufenbau*. His step-wise construction introduced an essential order into the relations between legal norms, from the contractual norms of the private sphere to jurisdiction, to legislation, and right up to the constitution"[175].

At the same time, Bobbio stresses the relevant connection existing between Kelsen' stance as "a democratic and pacifist thinker" and the essential task the latter attributes to the *Grundnorm*, arguing that the fundamental norm is probably conceived as "a way of removing the legal system from the arbitrariness of political power, of asserting the primacy of law and of rights and freedoms over *raisons d'état*"[176]. Sure enough, Bobbio recalls the importance of *peace* in Kelsen's view, observing that this fundamental value is assumed and attached by the latter to the same idea of an international legal order, whereby the *primacy* of international law over state law, at least to some extent, stems from this contingent relation between law and peace. Then, Bobbio raises a significant parallel between Kelsen and Hobbes, stating that both authors aim at building peaceful relations among human beings and states by leveraging the law as pivotal *instrument*[177]. I cannot but agree with this observation, considering the *heteropoietic* conception supported by Hobbes, hence by Kelsen (and nowadays by Ferrajoli, who identifies it as the political philosophy expressed by the third meaning of the expression *garantismo*, see *infra*, footnote 254), for which the law and the state, legal and political institutions, are *artifacts* that have been created *by* and *for* human beings with the purpose of safeguarding their own fundamental rights and freedoms[178].

This analysis given by Bobbio here is also relevant in so far as it stimulates some critical notes or objections provided by Zolo, who, as I reckon, in some respects sharply discloses that latent tension between Kelsen's formalism and his subtended anti-

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[175] *Ibidem*.

[176] *Ibidem*.

[177] *Ivi*, p. 359, where Bobbio specifies that "[f]or Hobbes the fundamental natural law, the 'fundamental norm' you might say, is *pax querenda est*. This convergence between Hobbes and Kelsen has always impressed me. It is no coincidence, probably, that after having studied Kelsen I spent a lot of time studying Hobbes' political thought. For both, peace is the fundamental good that only the law can guarantee. *Peace through Law* is in fact the title of a famous book by Kelsen".

[178] T. Hobbes, *Leviathan, or, The matter, forme, & power of a common-wealth ecclesiasticall and civil / Leviathan, sive de materia, forma et potestate civitatis ecclesiasticae et civilis*, London, printed for Andrew Crooke at the Green Dragon in St. Pauls Church-yard, 1651, Italian translation by M. Vinciguerra, *Leviatano*, Bari, Laterza, 1911, I, p. 3, where Hobbes presents a conception of the state for which it is not a value or an end in itself, but a *human artifice* instead, built by and for humankind, "poiché con l'arte è creato quel gran Leviatano chiamato uno stato, il quale non è che un uomo artificiale, benché di maggiore statura e forza del naturale, per la protezione e difesa del quale fu concepito". In this sense, see also *ivi*, chapter XXI, p. 174, "siccome gli uomini, per ottenere la pace e per conservarla, hanno fatto un uomo artificiale, che noi chiamiamo uno stato, così anche hanno fatto delle catene artificiali, chiamate leggi civili, che essi stessi, per mutui patti, hanno avvinte per un'estremità alle labbra di quell'uomo, o di quell'assemblea, a cui essi hanno dato il potere sovrano, e per l'altra alle loro proprie orecchie". Moreover, cf. *ivi*, chapter XXVI, p. 222, where Hobbes refers to the state as an artificial man, "questo nostro uomo artificiale, che è lo stato".

formalism or realism (which I have previously highlighted, *supra*). Indeed, Zolo sets forth the following reasoning:

> If we accept, as you do, that for Kelsen the *Grundnorm* is a 'solution of convenience', then the way is open to a non-formalistic foundation of the legal form. What then emerges in the background is Schmitt's idea of the 'state of exception' or, if you prefer, the idea that the force of law, as Marx wrote, is inseparable from the law of force[179].

Thus, one might state that Zolo, almost provocatively, is emphasizing and then pushing Bobbio for he recognizes that there is an anti-formalistic stance or tendency in Kelsen's theoretical framework, in this case, dealing with the top of the pyramid and its hypothetical and presupposed premise in connection with an alleged factual or political foundation. The issue raised by Zolo is as significant as Bobbio's answer. Indeed, while framing the complex relation between law and power in rather Weberian terms[180], Bobbio identifies a certain *unsolved ambiguity* (we could restate, a certain *dialectic tension*) in Kelsen's framework between law and power, again, between validity and effectiveness of legal norms. He maintains

> […] this ambiguity may also be perceived in Kelsen as a theorist of law and the state […], he does not resolve it. For Kelsen too, the uncertain relationship he sets up between the validity and effectiveness of norms means that at the vertex of the normative system *lex et potestas convertuntur*[181].

This thorough interpretation of Kelsen's stance arguably allows us to further stress the intimate connection between normativity and reality detectable in his thought.

At this point, focusing on the Italian scenario, it may be relevant to clarify the way (and the measure) in which Bobbio adopts that whole theoretical setting and especially the *meaning* of his *formalistic* position in legal theory – which produces a clear impact on the vision he has for the legal science, so that the latter should be analytical-descriptive. Moreover, the evolution and developments of his legal thought over the years will be now taken into consideration, by briefly highlighting its three main phases – which can be illustrated in the following terms: initially, he fully embraces the normative positivism of

[179] N. Bobbio, & D. Zolo, "Hans Kelsen, the Theory of Law and the International Legal System: A Talk", *cit.*, p. 359.
[180] *Ibidem*: "In one way it is law that allocates power – *lex facit regem* – but in another way it is always power that institutes the legal system and guarantees its effectiveness: *rex facit legem*".
[181] *Ibidem*.

Kelsen, then he reworks it in a version he calls *critical* positivism and finally achieves a composite solution, combining both legal *structuralism* and *functionalism* (*infra*)[182].

About his *legal (formalism* or) *positivism*, Bobbio distinguishes three different possible interpretations of it, clearly stating he embraces just one of them, avoiding the other. Indeed, he is far from the idea of legal positivism as a *theory*, for which the "law coincides perfectly with the positive order emanating from the legislative activity of the state" [183]. Moreover, it is very far from legal positivism in so far as it is intended as an *ideology*, which requires *absolute obedience* by individuals and legal subjects of the law enacted by the state as such. Sure enough, he claims that "I have always rejected legal positivism in its specifically theoretical and ideological aspects, although I have accepted it from the methodological viewpoint"[184]. Where the latter meaning of legal positivism is exactly the one, he adopts, by conceiving it as a *method*. He explains it as

> a way of studying the law as a complex of facts, phenomena or social data and not as a system of values; a method which therefore sets at the centre of inquiry the 'formal' problem of the validity of law, not the axiological one of the justice of the contents of norms[185].

As one might notice, in this definition is rather close (if not coincident) with the Kelsenian setting, especially concerning the *anti-ideological* character of the Pure Theory of Law – for which the latter does not aim at weighing the justice or injustice of legal norms (cf. *supra*) – and the precise focus on the legal category of *validity* and the formal structures of law. Nonetheless, I deem that Bobbio to some extent broadens the *object* of his methodological legal positivism in comparison to the one depicted by Kelsen for his Pure Theory of Law. Indeed, while both authors envision to study the law *as it is* (thus, avoiding to consider possible ethics-political values present therein, but also focusing on the logical-formal structures of the law), the latter reserves preeminent attention to the *objective* normative meanings of the acts of will enacted by judges and legislators, that is, legal norms, more than the acts of will as such, regarded as legal phenomena, that produce those norms. Bobbio, instead, in my opinion subtly stresses more the *factual* elements of the law, by encompassing in its scope also facts, phenomena and social data.

All considered, Bobbio pinpoints that "legal scientists are those who are concerned with analysis of the law in force within a definite political community. Accordingly, they

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[182] Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 33.
[183] N. Bobbio, & D. Zolo, "Hans Kelsen, the Theory of Law and the International Legal System: A Talk", *cit.*, pp. 359-360. There Bobbio stigmatizes this *theoretical* meaning of legal positivism, stating that: "This is an imperative, coercive, legalist conception, which upholds the need for a literal, mechanical interpretation of written norms by the interpreters, especially judges".
[184] *Ivi*, p. 360.
[185] *Ivi*, p. 359.

do not set ethical or ethic-legal objectives of a universal nature […]"[186]. Along with reaffirming his position about this latter profile, declaring himself extraneous to the (Kantian) idea that some imperative moral laws or values, as human life, should be recognized and protected in any case[187], at the end of the 1990s Bobbio concedes that, in light of a legal system the more and more less *unitary*, *coherent* and *complete* (as Zolo observes) which has to deal with increasingly complex social phenomena, the regulative role of judges is proportionally growing in importance, so that it should be *reconsidered* even in the European-continental context[188]. Therefore, one may hold that even Bobbio (rather surprisingly) seems to get closer, at the end of his path, to a certain soft legal realism or, at least, he opens the way to positions traceable to it (indeed, he seems to resize or even abandon the conception of the mere declarative function of judges, which entails the exclusion of their creative role in shaping legal norms and then the legal system – a conception that Kelsen has never been supported, given that since the early stage of his career he affirms the opposite, stating the creative role of judges as far as individual norms are concerned).

Nonetheless, since the early 1950s, by orienting in a Kelsenian way the (Italian) general theory of law (as Ferrajoli observes)[189], Bobbio frames it in the following terms:

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[186] *Ivi*, p. 360.

[187] *Ibidem*, where he argues: "[…] I have always regarded the idea of the universality of moral laws as highly problematic. Indeed, I have strongly supported the notion that there is no norm or moral rule or value – not even the principle of *pacta sunt servanda* – which, however fundamental, ought not historically be made subject to exceptions, starting with the two chief distinguishing factors: the state of emergency and self-defense".

[188] *Ibidem*. There, dealing with the complex relation among state legal statutes and the other sources of law, such as jurisdictional acts or contracts, he asserts: "[…] I feel that what is in crisis is not so much the normative model as legal positivism. What is in crisis is the positivist *ideology* of the primacy of the law of the state, the supremacy of legislation in relation to jurisdictional law or contractual law. This is so because of the poor technical quality of legislative output, because of disproportionate quantities of legislation and because of the growing complexity of social phenomena requiring regulation. And I feel that *the thesis of the centrality of the judge*, which has been affirmed in American legal thought for obvious historical and institutional reasons, *ought to be* considered, or at least *re-discussed*, in a continental context" (italics are mine).

[189] See the precious analysis carried out in L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, *cit*., pp. 64-65, where Ferrajoli indicates that the Italian analytical legal philosophy, which starts in those years, assumes the problems of the legal method and the same role of jurisprudence as its main objects of study. There, he assigns the most preeminent role in the process of *methodological revision* of the legal science to Bobbio, the first actor in modernizing the Italian legal culture during the second postwar. Indeed, he precisely begins the renewal of the general theory of law in Kelsenian terms and, along with Uberto Scarpelli, of the studies concerning analytical philosophy, logics, science methodology and the analysis of legal language (cf. *ivi*, p. 65 and footnote 71). A fundamental turning point, indeed, is represented by the classical Bobbio's piece of work dated 1950, N. Bobbio, "Scienza del diritto e analisi del linguaggio", *Rivista trimestrale di diritto e procedura civile*, vol. 6, no. 2, 1950, pp. 342-367, now available in U. Scarpelli (a cura di), *Diritto e analisi del linguaggio*, Milano, Edizioni di Comunità, 1976, pp. 287-324. Ferrajoli (*Idem*, *La cultura giuridica nell'Italia del Novecento*, *cit.*, p. 66) defines that new stream of legal thought, opposite to the old metaphysical and natural law orientations, as a school that "si propone come meta-scienza del diritto positivo: ossia come teoria del metodo della scienza giuridica, come analisi del linguaggio legale quale suo linguaggio-oggetto e dello stesso meta-linguaggio dei giuristi, come teoria

it must be intended (and practiced) as a *formal discipline* which does not look for the contents of law, being a *formal inquiry* instead, thereby reaching the status of a science. A *formal science* of law, he argues, is nothing but what is commonly called 'general theory of law', thus outlining an equivalence between the two poles[190]. Moreover, he holds that the latter, precisely because it explores the *structural elements* of the law, is a theory of legal positivism and it applies within a certain *system*[191]. Hence, Bobbio is fostering a systematic analysis of the legal order (generally intended, whether it be national, international, etc.)[192], this way also making clear his Kelsenian ancestry (about the crucial relevance of the idea of system in Kelsen, see *supra*). Likewise, he emphasizes this strong link with the Kelsenian normativism (as well as his correspondent distance from the analytical jurisprudence of Austin) where he appreciates the fact that normativism only focuses on what constitutes the object of legal scientist's analysis, namely legal norms, or rules, by getting rid of those *inconveniences* connected to an imperative conception[193].

Furthermore, leveraging the *methodological* perspective offered by the Pure Theory of Law, he spotlights a significant result of it: clarifying that the more the legal science achieves to expel from its object of inquiry the scientifically unsolvable problems and the legally irrelevant ones, the more it turns into a *rigorous* science, that is, a system of knowledge theoretically valid[194]. Therefore, Bobbio recognizes to Kelsen's theory the credit of having introduced in the legal science's horizon the selective and analytical

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dell'argomentazione giuridica nella dottrina e nell'applicazione della legge. Per altro verso, proprio la concezione del diritto come linguaggio interpretato dai giuristi e impiegato nella pratica giuridica sollecita l'attenzione alla dimensione pragmatica della sua effettività favorendo, su impulso dello stesso Bobbio e di Renato Treves, lo sviluppo della sociologia del diritto". Moreover, Ferrajoli (*ivi*, p. 84 ff.) spotlights that Bobbio, in his famous essay of 1950, specifies that logical empirism and language analysis epistemologically ground a philosophy of law as a philosophy of *legal knowledge* in a double sense: as a methodology of legal science and as an analysis of legislator's legal language. Accordingly, that empirical-analytical legal philosophy aims at investigating both the epistemological role of legal science and its methods of creation and control of legal concepts and theories. At the same time, it seeks to carry out a rigorous analysis of legal language and rework the legislative discourse, so that legal scientists can free it from vagueness and ambiguities, solve its antinomies and overcome its gaps, thus achieving its inner systematic unity. As Ferrajoli suggests (*ivi*, p. 89), the pivotal points of this program of legal philosophy are: the analytical method, the Kelsenian legal positivism, and a secular and neo-Enlightenment approach which puts together scientific accuracy and political-civil commitment.

[190] Cf. N. Bobbio, *Studi sulla teoria generale del diritto*, *cit*., p. 33 and p. 37.

[191] Cf. *ivi*, p. 40.

[192] Cf. *ivi*, p. 8.

[193] Cf. *ivi*, p. 20, where he pinpoints that normativism aims attention at "ciò che propriamente cade sotto l'indagine del giurista, cioè la regola" and it tries to solve "[…] gli inconvenienti già rilevati della teoria imperativistica, fissando la propria attenzione su ciò che accomuna i vari territori dell'esperienza giuridica, ma non su quello che li divide[…]".

[194] Cf. *ivi*, p. 23, where Bobbio argues: "Se dovessi definire brevemente il significato della teoria pura del diritto dal punto di vista metodologico, direi che essa ci ha insegnato soprattutto una cosa: che la scienza giuridica diventa sempre più scienza rigorosa, cioè si risolve in un sistema di sapere avente validità teoretica, quanto più riesce ad espellere dalla sua ricerca i problemi *scientificamente insolubili* e i problemi *giuridicamente irrilevanti*".

process of elimination, from its object of study, of both the non-scientific and non-legal elements, thus fostering its *scientificity* and *purity*[195].

Symptomatic of this setting are the two course he teaches at the end of the 1950s, respectively devoted to a theory of norm and a theory of (legal) order, where the most significant result of the Kelsenian influence on him, according to Losano, is the way in which Bobbio envisions the law, not as a single norm, but as a normative order[196]. Hence, Bobbio resolves the former theory within the second one[197].

However, at the end of the 1960s in Bobbio's legal thought occurs what Losano defines as "l'inizio della revisione critica della teoria pura del diritto", that is, a kind of *critical* review of Kelsenian normativism[198]. Contextually, the Italian analytical legal philosophy starts to find out its own contradictions and idiosyncrasies, thus officially entering in crisis[199].

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[195] As Losano illustrates, see M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 17.

[196] *Ivi*, p. 18. Although one may notice that at the end of the 1990s, during the aforementioned talk with Danilo Zolo, Bobbio will differently frame the law "as a complex of facts, phenomena or social data", cf. *supra*.

[197] This way he surely follows the Kelsenian conception, to some extent even *going beyond* it, as the same Bobbio admits, cf. N. Bobbio, *Diritto e Potere. Saggi su Kelsen*, *cit.*, p. 9.

[198] M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 19.

[199] Different sensibilities and theoretical settings emerge, indeed, in comparison to the *purity* of legal theory proposed by Kelsen and, hence, Bobbio. Cf. L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, *cit.*, p. 90 ff. On the one hand, Scarpelli, while he shows the fertile contribution of linguistic analysis were applied to the legal universe, he also reveals that a *conventionalist* approach, fundamental to stipulate any legal concept and create a certain theory of law, entails an *inevitably ethic-political dimension*, which eventually shapes the same legal science. On the other hand, Tarello leveraging a realistic-analytical approach, sustains that legal norms are not the pre-existing object of the interpretation carried out by jurists, they are *the product* of that interpretation (and even of their manipulation) instead. As such, they would form a questionable and changeable product. As per the rest, reflecting on the idea for which the law is a *language*, that is, a world of *signs* produced by the linguistic acts of institutional actors and of *meanings* that legal interpreters attribute to them, Mario Jori maintains that this conception, for which the law is a sort of language *administered* by jurists, consequently confers to analytical philosophy a *constructive* and *critical* role with regard to the law and the legal science. In the early 1970s Pattaro and in the late 1980s Jori both deepen and make relevant points on the status of this crisis within the Italian analytical legal philosophy. In a nutshell, this stream of thought struggles in combining two fundamental assumptions: on the one hand, since its members realize that every interpretation of legal language and any creation of a given legal concept or theory entail value judgements by jurists, there is the need (far from the Kelsenian perspective) to foster a legal positivism that ask for a *critical-normative* role of jurisprudence and legal theory (not merely descriptive and contemplative) with regard to their object of analysis. On the other hand, there are the empirical-analytical methodological assumptions, that aim at excluding every value judgement and any ethic-political consideration from the scientific discourse (that should be descriptive-analytical only), thus asking for a change: abandoning the legal positivism for promoting an analysis traceable to legal realism. In light of this scenario, Bobbio admits the crisis, underlying the contrast between those epistemological assumptions or principles that requires *neutrality* for a science and the undeniable prescriptive character of legal operations carried out by jurists. Then, he devotes himself to political philosophy. The other leader, Scarpelli, while stays with his preference for legal positivism, he calls attention for the character of this choice (*ethic-political*, before than scientific). Then, he devotes himself to moral philosophy. As Ferrajoli points out (*Idem*, *La cultura giuridica nell'Italia del Novecento*, *cit.*, p.

Whereafter Bobbio, who over the years turns into a philosopher of politics, the more and more focuses on the problem of *power* in Kelsen, namely, a crucial subject-matter that has to do with the delicate relationship between reality and normativity, the *is* and *ought to be*[200], more than dealing with (his) philosophy of law. Nonetheless, not without a certain reluctance, but being encouraged by many colleagues, in 1993 Bobbio finally publishes his own *general theory of law*[201], a volume which recollects the two previously mentioned academic courses, on the theory of norms and the theory of legal order, that he gives at the end of the 1950s[202]. Even though this work is a collection of teaching materials originally thought for students, he stresses that the two theories there explained form together a *complete* theory of law under the formal aspect mainly[203].

This work *is born old*, for it reflects Bobbio's ideas of more than three decades earlier, a time in which his Kelsenism is still rather strong. However, is extremely significant in so far as it offers a retrospective of synthesis and a conclusive stance on his studies in legal theory[204], by also outlining the common points and differences with Kelsen's Pure Theory of Law.

In *Teoria generale del diritto* Bobbio once again does not conceal his Kelsenian ancestry. For instance, he restates that the separation between the theory of the norm and the theory of order is inspired by Kelsen[205]. Likewise, as already underlined, he conceives that the most distinctive feature of the law is being or constituting the legal order, more than the single norms, by leveraging the classical dichotomous between static and dynamic normative systems (cf. *supra*)[206].

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94 ff.), therefore, during the following two decades a significant uncertainty invests the Italian analytical legal philosophy, which eventually swings between legal positivism and legal realism. This way, Bobbio's project for an empirical-analytical renewal of the whole legal science and theory of law fades away… subsequently, other streams of thought, respectively inspired by Tarello and Scarpelli, stem from this crisis, that is, the legal realism of Guastini and the legal normative stance of Mario Jori and Letizia Gianformaggio. Cf. again L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, *cit.*, p. 99 ff., where the author suggests at least three conditions for the Italian analytical-legal philosophy to *rethink* its own role and perspective.

[200] M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 19. Indeed, in the early 1980s Bobbio produces several contributions on this topic, to the point that the same complex relation between *power* and *law* eventually determines the title of his volume of 1992, quoted above.

[201] N. Bobbio, *Teoria generale del diritto*, Torino, Giappichelli, 1993.

[202] Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 20.

[203] Cf. N. Bobbio, *Teoria generale del diritto*, *cit.*, p. 159.

[204] *Ivi*, *foreword*, where Bobbio defines those two academic courses which form the basis of his general theory as "la sintesi e, in certo modo, la conclusione del periodo di studi da me dedicato prevalentemente alla teoria del diritto, durante una ventina d'anni che vanno dal primo dopoguerra, in cui compii il mio tirocinio commentando alcuni fra i più noti trattati di teoria generale del diritto e prendendo baldanzosamente le difese di Kelsen contro alcuni suoi detrattori, sino, su per giù, al famigerato '68, quando i predicatori dell'immaginazione al potere rifiutavano sdegnosamente la nuda ragione senza potere, ed io mi avviai, sempre più assiduamente, a studi di filosofia politica e passai nel 1972 alla nuova facoltà di scienze politiche per insegnarvi filosofia politica sino all'andata a riposo nel 1979".

[205] *Ivi*, p. viii: "kelseniana è, tanto per cominciare, la distinzione fra teoria della norma (singola) e teoria dell'ordinamento (insieme strutturato di norme)".

[206] *Ivi*, p. ix.

Although he grounds his definition of law on the Italian theory of *institutionalism*, mainly represented by Santi Romano[207], so that he pursues that definition by examining the peculiar characteristics of the (legal) order. Hence, to some extent this school of thought *implements* Bobbio's normativism[208], since the creation of any social group (that is, an *institution*) correspondently entails and implies the enactment of rules of conducts, in accordance with the well-known Latin expression *ubi societas ibi ius, ubi ius ibi societas*[209]. Even more, Bobbio holds that *institutionalism* does not exclude legal normativism, the former *encompasses* the latter instead[210].

Again, in 1993 Bobbio reaffirms his methodological stance and *structuralism*, maintaining that he aims at analyzing legal norms from a *formal* point of view only, thus independently from their contingent (ethic-political) contents[211]. Moreover, he pinpoints his vision about *legal formalism* where he explains that the law should not be considered as the concrete content of legal provisions (what a certain utterance asks to do), but precisely as the *form* that those prescriptions present[212]. Then, he also deals with the complex problem of the law intended as a set of prescriptive propositions and the relation between prescriptive and descriptive propositions. Hence, he qualifies legal norms as *commands* or *imperatives* that aim at determining a given behaviour[213]. In this sense, as far as the teleological profile is concerned, I deem that here one can grasp more than a mere assonance with Kelsen's definition of the law as *a specific social technique* (as I have highlighted earlier, cf. *supra*), being the law to some extent *functional* (through coercion) to reach a certain *desired social condition*.

At the same time, Bobbio outlines *nuances* with regard to the issue of the legal norms' *addressees*, in comparison to the posture assume by Jhering earlier, and Kelsen later on: while for Jhering the recipients of legal norms are officials and judges that have to exercise the state coercive power, not citizens or individuals, for Kelsen, who distinguishes among primary and secondary norms, the addressees can be both. Bobbio

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[207] See S. Romano, *L'ordinamento giuridico: studi sul concetto, le fonti e i caratteri del diritto*, Pisa, Spoerri, 1918.

[208] Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 21.

[209] Santi Romani, while dealing with the relation between the concepts of law and society (as well as of social order), evokes these two latin formulas. The first one (*ubi ius ibi societas*) depicts that the law exists in a social dimension only, not in the inner sphere of individuals; The second one (*ubi societas ibi ius*) illustrates that a society cannot exist without legal phenomena therein. Cf. S. Romano, *L'ordinamento giuridico: studi sul concetto, le fonti e i caratteri del diritto*, *cit.*, *passim*.

[210] Cf. N. Bobbio, *Teoria generale del diritto*, *cit.*, pp. 14-15. Indeed, there he claims: "la teoria dell'istituzione non esclude, bensì *include*, la teoria normativa del diritto", adding that "la teoria dell'istituzione ha avuto il grande merito [...] di mettere in rilievo il fatto che si può parlare di diritto soltanto dove vi sia un complesso di norme formanti un ordinamento, e che pertanto il diritto non è norma, ma un insieme coordinato di norme", namely, "un sistema normativo".

[211] Cf. *ivi*, p. ix, where Bobbio indicates that the analysis of a legal norm must carry out "indipendentemente dal suo contenuto, ovvero nella sua struttura", where he is refering to "[la] struttura logico- linguistica" of legal norms.

[212] Cf. *ivi*, p. 46 ff.

[213] *Ivi*, p. 93 ff. Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 22.

chooses this *balanced* position, also making some critical remarks to Jhering (who, however, with his thesis brings out a certain truth, as Bobbio admits) and pointing out that a legal order aims at both, citizens, and state officials.

Furthermore, he thoroughly faces the Kelsenian conception of the legal norm as *hypothetical judgment* (which allow to separate imperatives of moral and natural laws which command causal relations), concluding that this theory and the idea of legal norms seen as *prescriptions* (supported by Bobbio) are *not incompatible* between each other, because the judgement that constitutes the norm (formulated by a legal operator) is yet a hypothetical *prescriptive*-judgement, not a descriptive one[214].

Moreover, in accordance with the Kelsenian setting, he identifies the *sanction* as the typical element which distinguishes *legal* norms from other kinds of normative propositions (moral and social). Indeed, the latter would not be equally protected in terms of effective or institutionalized sanctions, while legal norms would benefit from *external* and *institutionalized* sanctions, so that a sanction of this type is an essential element of the legal norm[215].

Coherently, where he classifies legal norms in general and singular, affirmative, or negative, categoric or hypothetical, he stresses the *formal* basis of every distinction, making exclusive reference to the *logical structure* of the prescriptive proposition, that is, the legal norm[216]. For this path, by analyzing the structure of the single legal norm, he moves to the analysis of the *ensemble* of legal norms, namely, the legal order, in which those norms are systematically organized. Likewise, he sets forth and develops his theory of the (legal) order under the *formal* aspect only, focusing on the *relations* that norms within a given normative set or system can entertain among them.

About this theoretical duality, although some years earlier Romano deals with the concept of *legal order*, Bobbio gives credit to Kelsen of being the first in literally *isolating* and hence separating the problems of the legal order (traceable to the *dynamics*) from those of the single legal norm (which belongs in the *statics*), thus devoting an autonomous part of his general theory of law, as already showed *supra*, for studying the former ones[217]. Once more, in connection with his *institutionalism*, Bobbio emphasizes that "affinché ci sia diritto, occorre che ci sia, grande o piccola, un'organizzazione, cioè un completo

[214] Cf. N. Bobbio, *Teoria generale del diritto*, *cit.*, p. 109: "la teoria di Kelsen, per cui la norma giuridica si risolve in un giudizio ipotetico, non è una teoria contraria alla tesi della norma giuridica come prescrizione, perché il giudizio in cui si esprime la norma è pur sempre un giudizio ipotetico prescrittivo e non descrittivo".
[215] Cf. *ivi*, p. 123.
[216] *Ivi*, p. 146.
[217] Cf. *Ivi*, p. 161. Bobbio takes as a reference the Italian translation of Kelsen's *The general theory of law and state*, a work that widely leverages the distinction between static and dynamic systems, which strongly affects Bobbio's legal thought over the years (*ibidem*): "Il mio corso si riallaccia direttamente all'opera di Kelsen, di cui costituisce ora un commento, ora uno sviluppo".

sistema normativo"[218]. A system that is formally analyzed, as Losano observes[219], by inquiring the *relations* that connect a plurality of norms among each other and hence produce the whole order or system. Thus, the theory of the (legal) order and the theory of systems in Bobbio's view intertwine… and the formal characteristics of a system in general, as it is for Kelsen (who draws his idea of legal system on Kant's cognitive-rational system, cf. *supra*), are also applicable to the *legal* system. Thereby, *unity*, *coherence*, and *completeness* form the three distinctive features of the legal order for it being a *system of norms*.

Accordingly, in his *Teoria generale del diritto,* Bobbio devotes a single chapter to every of those features. Here, I can briefly represent some analogies and differences in comparison to Kelsen's theory of law.

Thus, one can observe that Bobbio fully embraces the Kelsenian theory of the *unity* of the legal order (cf. *supra*) and hence the *hierarchical structure* of the normative system, as previously underlined. In the legal order, he considers, single norms dynamically distribute themselves in the different *normative stages*. In a nutshell, he completely adopts the *Stufenbau* theoretically erected by Kelsen to explain the complexity of the legal order by leveraging the *unity* of it (where the latter, as one may remember, at least *initially* is for Kelsen a *gnoseological* assumption to *conceive* and *know* the *objectively valid* legal order, cf. *supra*)[220]. At the same time, Bobbio critically addresses the idea of *Grundnorm* as the hypothetical and presupposed foundation of the legal system, for he (sharply) states that with this solution (somewhere else he defines it as the *logical closure*, but also as an *expedient*, an *escamotage*… cf. Zolo's interview, *supra*) Kelsen goes from a theory of positive law to enter in a secular and lasting discussion about the *justification of power*[221]. This way, I deem he stresses a relevant critical point in Kelsen's legal positivism, which on the other hand shows that *dialectic tension* (cf. previous paragraph) between the opposite (but *touching*) spheres of reality and normativity, being and ought to be. A tension that Kelsen manifests more and more in his evolution of thought, especially since the middle of the *classical* phase of the Pure Theory of Law – approximately coincident with his *General Theory of Law and State* – and till his *skeptical* period.

So, even if Kelsen is reluctant to locate the last foundation of the legal system in a *factual power* – on the contrary, as I have highlighted earlier, the legal system, the *basic norm* included, are built throughout the *intellectual cognitive* function of legal scientists

[218] *Ivi*, p. 166. This way, he holds that: "for there to be law, there must be, large or small, an organisation, i.e., a complete normative system" (English translation is mine).
[219] Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 24.
[220] Cf. N. Bobbio, *Teoria generale del diritto*, *cit.*, p. 182, where he pinpoints his choice to adopt "la teoria della costruzione a gradi dell'ordinamento giuridico, elaborata da Kelsen" functional to represent "[la] unità di un ordinamento giuridico complesso".
[221] Cf. *ivi,* p. 193

that form their own object of analysis, that is, the same legal order[222] – he leaves the door open, at the top of the pyramid, to a certain *convergence* between the *power* and the *law*, thus, between reality and normativity[223].

Therefore, it is exactly the *historical perspective* embraced by Bobbio that allows him to allocate *power* as the last foundation of the legal order, even though it is an extra-legal one[224].

About the theory of *coherency*, it entails the *absence* of any normative contrast. Indeed, the *unity* of the legal order requires a correspondent *systematic unity*. Hence, Bobbio frames the concept of *system* as an *ordered totality*, whose constitutive elements *are* in a relation of *compatibility* among each other[225]. Still considering the dichotomous between static and dynamic systems, draws a significant difference compared to Kelsen: he reckons that the legal order is a normative system, but not a *dynamic* one (or at least he doubts it), because he correctly observes that the mechanism depicted by Kelsen of legal production (through several steps of *delegation* of the power) *can effectively produce* normative contrasts therein. However, despite of this bright analysis, I deem he makes a sort of step-back, to some extent: instead of concluding (as Ferrajoli will do, cf. *infra*) that the law, especially in the case of constitutional democracies, form a dynamic system in which *there can reasonably exist* a certain degree (within a given threshold *physiological*) of *illegitimate law*, that is, of normative antinomies and gaps, he chooses to reaffirm that the legal order is a system (although not a *dynamic* one) exactly *because there cannot coexist* incompatible norms[226].

Then, leveraging logical-formal criteria, he devotes efforts to deal with the problem of determination of normative contrasts, examining their different possible kinds. In so far as an antinomy is solvable, he qualifies various criteria (chronological, hierarchical, and of specialty) to solve it, but he also pinpoints that those criteria can clash between each other. Accordingly, he observes that *coherency* is not a necessity, but a *need*. In this latter aspect, he is completely right, an *intuition* that I think rather anticipates what

[222] This is true at least until Kelsen maintains his Kantianism, cf. supra, whereafter reducing the analytical role of jurisprudence to an extremely contemplative-descriptive one. Then, I argue that a certain *convergence* in his view between reality and normativity is at its *maximum* and can be grasped, especially either dealing with the complex relation between effectiveness and validity or envisioning the law as a *specific social technique* or eventually admitting the existence and possibility of *normative contrasts* within the legal order.

[223] As Bobbio suggests in the already quoted passage in N. Bobbio, & D. Zolo, "Hans Kelsen, the Theory of Law and the International Legal System: A Talk", *cit.*, p. 359: "[…] this ambiguity [between law and power] may also be perceived in Kelsen as a theorist of law and the state […], he does not resolve it. For Kelsen too, the uncertain relationship he sets up between the validity and effectiveness of norms means that at the vertex of the normative system *lex et potestas convertuntur*".

[224] As Losano upholds, Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, pp. 24-25.

[225] Cf. N. Bobbio, *Teoria generale del diritto*, *cit.*, p. 201.

[226] Cf. *ivi*, pp. 204 and 208, where he states that "un ordinamento giuridico costituisce un sistema perché non possono coesistere in esso norme incompatibili".

Ferrajoli will express about the three principles of the *unity*, the *coherency*, and the *completeness* of the legal order. Namely, they should be seen as *principia iuris tantum* and not *in iure*, because they do not belong or exist *per se* in the legal order. They are drawn from (deontic) logic, being external to the law, and should *inspire* and *orient* the nomodynamic legal systems instead.

Again, on normative contrasts, Bobbio defines his position in the following terms: two norms of the same normative stage that result *incompatible* are both valid, but only one of them is *effective*[227]. Thus, this solution maintains the Kelsenian idea for which the legal *validity* amounts to the *mere existence* of norms, that is, their *belonging* to the legal system, while it overcomes the problem of normative antinomies using the perspective of *effectiveness* and asking for the abrogative intervention of legislator.

Thirdly, concerning the theory of *completeness*, it basically postulates the *in-existence* of *normative lacunas*, that is, the gaps among the different normative stages of the legal order. Under a different perspective, as Bobbio maintains, it means that a single norm to rule every concrete case (should) exist[228]. This idea identifies a sort of logical assumption that legitimates (and requires) judges to decide all cases submitted to them, leveraging the legal norms of that order only.

One can figure out how this *dogma* of completeness is normally associated to a *statalistic* conception of the legal order, for the judge cannot fill the void of a norm, for instance, with his *equity*, because the one and only law is the law enacted by the state[229]. Bobbio, hence, takes distance from other alternative views that criticize the principle of completeness, observing that other forms of judgment put at risk the tenet of legal *certainty*. Rather, he newly addresses the topic of *legal analogy*, that along with the general principles of law, represents a fundamental tool for the legal order in which *shortcomings* are detectable to self-integrate itself and thus being complete.

In the end, the two works that Bobbio publishes at the beginning of the 1990s to some extent represent the final *seal* to his Kelsenian phase, a significant period which finishes years earlier. However, as Losano suggests[230], this is true only for Bobbio's reflections about the *legal theory* of Kelsen, for the latter continues to inspire the former on the *political* point of view as a theorist of state and democracy, by providing thorough valuable insights about two fundamental themes: peace and democracy[231].

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[227] Cf. *ivi*, p. 234: "due norme incompatibili, di pari livello e contemporanee, sono entrambe valide", however "l'applicazione dell'una al caso concreto esclude l'applicazione dell'altra".
[228] Cf. *ivi*, p. 237.
[229] Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 25.
[230] *Ivi*, p. 26.
[231] Cf. N. Bobbio, *Diritto e Potere. Saggi su Kelsen*, *cit.*, p. 11 ff. There Bobbio maintains that "[n]ella sua teoria dello Stato emergono due temi fondamentali, discutendo i quali, specie negli ultimi anni, ho tratto ispirazione, pur senza prefiggermelo, dal pensiero kelseniano, la democrazia e la pace: la democrazia, intesa come un insieme di regole destinate a permettere a un insieme di individui di prendere decisioni collettive

Coming to an end about Bobbio's legal positivism, one may observe that he reaches a final stance, that is, he *critically* accepts Kelsenian normativism, as one may grasp by particularly exploring two works of his: *Giusnaturalismo e positivismo giuridico* and *Dalla struttura alla funzione*, respectively publishes in 1965 and 1977[232]. Both volumes, along with the already analyzed *Teoria generale del diritto*, represent a significant reflection on legal positivism, which brings some critical remarks, adjustments, or developments in comparison to the theoretical framework depicted by Kelsen. Indeed, both pieces of work enrich the latter by encompassing, besides *structuralism*, *functionalism*. In other words, Bobbio implements his point of view by placing the study of the function of law in society alongside the logical-formal analysis of legal norms' *structure*.

This *integration* comes strong at the end of the 1960s, when Bobbio's most preeminent Kelsenism ends[233] and he culturally starts to get closer to *political* philosophy. Until that moment, which approximately coincides with the social movement of 1968, Bobbio keeps the Kelsenian distinction between law and legal science and, accordingly, assumes the *prescriptive* character of legal norms vs the *descriptive* character of jurisprudence's utterances by means of which legal scientists set forth the positive law (thereby reflecting the Kelsenian separation among legal norms and legal propositions). After that in 1967, Bobbio disentangles his view from this dichotomous, holding that even the theoretical language of Kelsen (aimed at building his theory), besides being descriptive, is to some extent sometimes *prescriptive*, in so far as it asks (or commands) jurists to formulate descriptive statements. In other words, Bobbio observes that the legal science imagined by Kelsen can also be *prescriptive* for it sets obligation for legal scientists[234].

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col massimo di consenso; la pace, in favore di quella forma di pacifismo che chiamo 'istituzionale', ovvero, usando una formula tipicamente kelseniana, la pace attraverso il diritto".

[232] See *Idem*, *Giusnaturalismo e positivismo giuridico*, Milano, Edizioni di Comunità, 1965, and *Idem*, *Dalla struttura alla funzione. Nuovi studi di teoria generale del diritto*, Milano, Edizioni di Comunità, 1977. Along with these references, another important one is *Idem*, *Il positivismo giuridico*, Torino, Giappichelli, 1961, where Bobbio points out multiple meanings of the expression *legal positivism*. Here I pick up two of them: from the point of view of the theory of legal order, it means that the law is a complete and coherent system, without gaps and contradictions. Under the lens of legal-scientific methodology, it asks jurists to merely carry out a declarative interpretation of legal norms, thus excluding, as Bobbio maintains, the creative function of judges. In my humble opinion, this last consideration is (at least partially) wrong, in so far as Kelsen, arguably the most iconic author for legal positivism, while envisioning an analytical-descriptive jurisprudence, since the 1920s claims a *creative* role for judges and over the years stresses the more and more their *constitutive* function. In this regard, then, Bobbio is true when stating that, to some extent, he *goes beyond* the same Kelsen (cf. *supra*).

[233] Indeed, this phase goes from the second postwar till the 1968. Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 29 ff., where the author illustrates the intensive work of Bobbio and his pupils in deepening many aspects of the Pure Theory of Law and especially his systematic nature. Likewise, Bobbio in *Idem*, *Dalla struttura alla funzione. Nuovi studi di teoria generale del diritto*, *cit.*, p. 8, holds that the 1960s are the years devoted "all'approfondimento dell'analisi strutturale […]". From that fertile analytical context other disciplines stem, as deontic logic, legal informatics, and even social cybernetic (as the logics of social programming), where the latter results as rather compatible with a *functional* theory of law.

[234] Cf. *Idem*, *Giusnaturalismo e positivismo giuridico*, *cit.*

Once again, the subtle boundary between normativity and reality, this time in the form of prescriptive vs descriptive statements, is involved and subject to Bobbio's critical appraisal: grasping this observation, once again, one may say that even in Kelsen the two spheres of being and ought to be, despite of the official Kelsenian stance (for which they should be clearly separated), in some respects *converge* between each other[235].

Then, after a few decades devoted to the concept of (legal) system, normative structures and hence *structuralism*, at the beginning of the 1970s a certain theoretical path, focused on the idea of legal order, reaches its conclusion[236]. In accordance with this evolution of thought, Bobbio deems correct defining the law, thus adopting a *functional* perspective, as a way of performing social control[237].

Where this evolution in his view stem from his own growing intellectual unsatisfaction, caused by the perceived need of a certain rupture with the traditional legal positivism which – even though extremely developed and accurate in its Kelsenian version – has its roots in the 19th century and, thus, Bobbio considers it being to some extent no more suitable to efficiently cope with the *modern social state* and society. Indeed, a social conception of state brings society to rethink its own political-legal setting and assumptions, so that the law, as a fundamental tool to rule society, changes in turn.

Therefore, besides the *repressive* function of the law, which Kelsen grounds on the *coercive element* of legal norms, that is, the applicable sanction through the mechanism of *imputability,* jurists begin to contemplate and illustrate the *promotional* function of the legal instrument, namely, the way in which state legal provisions can induce certain desired human conducts. In this renewed context, the state may be simultaneously seen as a punisher and a promoter. Accordingly, a systemic theory of law is by itself not enough anymore and the need to put *structuralism* side by side with *functionalism* is growingly set forth[238].

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[235] Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 30. There, Losano represents how in those years the neo-Kantian theme of the relations between be and ought to be is one of the priviledged object of philosophical and legal discussion.

[236] Bobbio also underlines how in that historical context there was not a real *legal* structuralism, which corresponded to the *lingusitic* structuralism (definitevly more developed and practiced). Indeed, jurists shows only their *intention* to experiment with *legal* structuralism, but without making real that option. In this sense, see N. Bobbio, *Studi per una teoria generale del diritto*, Torino, Giappichelli, 1970.

[237] Cf. N. Bobbio, *Dalla struttura alla funzione. Nuovi studi di teoria generale del diritto*, *cit*., p. 88, where Bobbio reckons "corretto definire il diritto, dal punto di vista funzionale, come forma di controllo e di direzione sociale". About the science of social 'managment' he recalls the work M. G. Losano, *Giuscibernetica*, Torino, Einaudi, 1969, p. 119 ff., where Losano also explores the topic of social programming in connection to the law.

[238] Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 32, where Losano underlines a significant trend in Bobbio's latest works, whereby the latter the more and more opposes Kelsen's systemic conception of law with the *sociological one* supported by (the second) Jhering, a theory in which (*ibidem*) "la funzione promozionale del diritto ha una posizione di particolare rilievo".

Indeed, one must be aware that in Bobbio's (last) perspective adopting the *function* of law as one of its fundamental elements does not entail the abandonment of the *structural* vision. Thus, his *functionalism* aims at completing (not fully substituting) his Kelsenian *normativism*, in so far as he conceives a *composite* explanatory framework for legal phenomena[239]. Sure enough, as Losano points out, while structuralism maintains its unaltered heuristic force, it needs to be complemented by a functional explanation of law, which in Kelsen's view totally lacks instead. Where this gap is a consequence of the Kelsenian methodological choice to focus on the formal-structure of law only, thereby avoiding (as far as the legal theory is concerned) its functional dimension[240] along with any kind of ethic-political evaluation of its contingent empirical contents.

Therefore, Bobbio eventually promotes both legal conceptions, depicting them as [a] *complementary*, but also very *different* [ones]. Indeed, he spotlights the *close connection* between, on the one hand, the structural theory of law and the legal point of view, on the other hand, the functional theory of law and the sociological point of view, while recalling Kelsen's choice of clearly excluding the latter from his Pure Theory of Law[241]. Likewise, at the end of the 1980s Bobbio holds that

> Gli elementi di questo universo [giuridico] messi in luce dall'analisi strutturale sono diversi da quelli che possono esser messi in luce dall'analisi funzionale. I due punti di vista non soltanto sono perfettamente compatibili, ma si integrano anche reciprocamente e in modo sempre utile[242].

Thereby, in some respects Bobbio anticipates that *epistemological re-foundation* of legal science that Ferrajoli will recall later (see *infra*, in the next chapter) and, at the same time, he comes closer to the theoretical path of his friend and colleague, Renato Treves, the pioneer of the Italian Sociology of Law[243].

There (*ivi*, pp. 32-33), Losano also stresses the special efforts carried out in those years by the Tourin school in studying and addressing the *promotional* role of law. Cf. R. V. Jhering, *Der Zweck im Recht*, Erster Band. Zweite umgearbeitete Auflage, Leipzig, Breitkopf & Härtel, 1884, Italian translation by M. G. Losano, *Lo scopo nel diritto*, Torino, Nino Aragno editore, 2014. This Italian volume is a valuable reference for it also presents an enlightening foreword by the editor (Losano), a detailed chronological reconstruction about Jhering's life and original works, as well as a list of their Italian translations.

[239] Cf. M. G. Losano, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 33.

[240] Cf. *ibidem*.

[241] Cf. N. Bobbio, *Dalla struttura alla funzione. Nuovi studi di teoria generale del diritto*, *cit.*, p. 90.

[242] Cf. N. Bobbio, *Teoria della norma giuridica*, and *Teoria dell'ordinamento giuridico*, Torino, Giappichelli, 1958 and 1960, Spanish translation by E. Rozo Acuña, *Teoría general del derecho*, Bogotá, Temis, 1987, p. ix ff.

[243] This second profile is highlighted by Losano, cf. *Idem*, "Il positivismo nell'evoluzione del pensiero di Norberto Bobbio", *cit.*, p. 33: "Il percorso teorico di Bobbio veniva così a convergere con quello dell'amico Treves, che in quegli anni stava introducendo la sociologia del diritto in Italia". See R. Treves and V. Ferrari, *L'insegnamento sociologico del diritto*, Milano, Edizioni di Comunità, 1976, and R. Treves, *Sociologia del diritto: origini, ricerche, problemi*, Torino, Einaudi, 1987. In the wake of Treves's teachings,

In the next chapter I will represent the most recent contemporary version of legal formalism, a stream of thought which arguably finds its last heir in Luigi Ferrajoli. Thus, I will devote my efforts to illustrate the most relevant features of his works in connection to his pyramidal setting and the hierarchical structure of the nomodynamic legal orders that he wants to explain and even orient. Moreover, there will be room for a comparison between Kelsen's theoretical framework and the one outlined by Ferrajoli, grasping some analogies and differences.

then, another giant in the scenario of philosophy and sociology of law, Vincenzo Ferrari, provides a masterpiece on the *functional* dimensions of law, which has been translated in many countries and that here I can only mention. See then V. Ferrari, *Funzioni del diritto: saggio critico-ricostruttivo*, Roma-Bari, Laterza, 1987.

SECOND CHAPTER

LUIGI FERRAJOLI

Summary: 2.1 *Introduction* – 2.2 *The axiomatic method and the meanings of 'Guarantism' in* Diritto e Ragione – 2.3 *The offspring of* Principia iuris: *Luigi Ferrajoli's formal theory of law and theory of democracy* – 2.4 *In the wake of Kelsen's thought: three aporias for the concept of sovereignty* – 2.5 *Some analogies and differences with Kelsen's Pure Theory of Law* – 2.6 *A few critical remarks: his legal theory as an exhortative discourse for jurists*.

"But as men, for the attaining of peace and
conservation of themselves thereby,
have made an artificial man,
which we call a Common-wealth;
so also have they made artificial chains,
called civil laws*, which they themselves,*
by mutual covenants, have fastened
at one end to the lips of that man, or assembly,
to whom they have given the sovereign power,
and at the other to their own ears"

HOBBES[*]

2.1 *Introduction*

In this second chapter I will deepen the most important tenets and features that inspire and characterise Luigi Ferrajoli's theoretical building, legal thought, and political philosophy.

Accordingly, I will firstly introduce his well-known *axiomatic* method, by means of which, since the early stages of his career, he purports to erect his formal theory of law.

Then, there will be room to depict several meanings that the Italian expression of "*garantismo"* evokes, at least those canvased by the same Ferrajoli in the late 1980s, when he publishes his first masterpiece. On the one hand, the word designates the *system* of substantial and procedural guarantees for the criminal law field that he reworks and shapes by drawing his systematic endeavour on the tradition of the legal Enlightenment. On the other hand, the second meaning entails a legal theory of *validity*, that takes its

[*] T. Hobbes, *Leviathan, or, The matter, forme, & power of a common-wealth ecclesiasticall and civil* / *Leviathan, sive de materia, forma et potestate civitatis ecclesiasticae et civilis*, London, printed for Andrew Crooke at the Green Dragon in St. Pauls Church-yard, 1651, ch. XXI, p. 130.

distance from the Kelsenian tradition in so far as it separates the latter from both the *effectiveness* and the *mere existence* of legal norms.

Whereafter, I will illustrate the *double* dimension that forms Ferrajoli's monumental theoretical construction, as presented in 2007 under the title *Principia iuris*. Hence, his formal theory of law, a huge apparatus of legal concepts and definitions, and his theory of democracy, that stems from the former thanks to an empirical-semantic interpretation and thus turns into a normative paradigm for the current constitutional democracies.

Subsequently, I will stress Ferrajoli's criticism about the problematic notion of *sovereignty*, whereby, in the wake of Kelsen, he points out three aporias that fatally affect, in his opinion, the concept at stake.

In the last part of this chapter, then, I will depict some crucial analogies and differences between the two major representatives of the *pyramidal* theoretical tradition, by also providing some critical remarks of Ferrajoli's stance.

2.2 *The axiomatic method and the meanings of 'Guarantism'*[244] *in* Diritto e ragione

During the years, Ferrajoli builds a *formal* legal theory of law through the *axiomatic method* (especially using the symbolic-mathematical language) to avoid as more as possible the vagueness and semantic uncertainty of legal terms and concepts, and thus to raise an accurate *explanatory* model for the current legal orders. For this purpose, his theory outlines categories, concepts, dichotomies, theoretical tools, and so on. Those form a sort of *conceptual apparatus* which, as he maintains, can describe, and explain these normative systems.

As I will explain in detail later, especially in the complete version proposed in *Principia iuris*, which considers all the normative dimensions – not only the criminal one – of a legal system, Ferrajoli's *formal* theory of law, if duly managed throughout an empirical-semantical interpretation, turns into his theory of *democracy*, that is, a *normative-axiomatic* model that aims at prescriptively orienting and guiding the reality of different legal orders, especially the current constitutional democracies, that are organised on different normative stages.

Taking a step back, one should consider that this (final) theoretical outcome, in terms of both dimensions, the explanatory and the prescriptive one, is the result of

[244] The original Italian word is '*garantismo*'. The corresponding term does not exist in standard (legal) English. I decided to adopt '*guarantism'* even though I am conscious that the concept implied in '*garantismo'* could be better expressed by referring to concepts such as '*rule of law*', '*constitutional guarantees*', and so on.

Ferrajoli's intellectual activity over almost four decades. He starts in the early 1970s following the path of his master Bobbio, at least to some extent[245]. His first book *Teoria assiomatizzata del diritto* is entirely devoted to the general theory of law. Ferrajoli conspicuously lays the *foundations* of his theory[246]. In that embryonic writing, he declares his intentions to build a whole formal theory of law leveraging the axiomatic *method* and provides (a first draft of) its *general* part. This way, he introduces the so-called *primitive terms* – namely, basic legal concept that allegedly do not need to be defined, a kind of *axioms* in fact – and a bundle of related *derived terms* – that stem from the former ones. Likewise, there he sets forth a series of *postulates* – intended as core theses on which he grounds his legal theory and that must be accepted as such – and *derived theses* – that he develops and draws from the former ones. All this conceptual material represents the first essential outline of his (future) theoretical construct.

In this early work, while he refers to future advances to further evolve his broad and ambitious theoretical project (*infra*), he already pinpoints a fundamental aspect that I deem relevant, thus assuming a clearer stance than Kelsen with this regard.

Indeed, he undoubtedly indicates that every (legal) theory, such as his own one, is grounded on a certain *ethic-political* option. So that, it entails a set of starting values, depending on the choices made by its theorist. In this sense, Ferrajoli does not pursue a *formal* theory in Kelsenian terms, that is, neutral. He rather stresses the importance to initially declare those ethic-political premises and then broadening the theory in a strictly *rigorous* way for it being useful and 'valid' in explanatory terms. In other words, those options must be kept at the beginning of a theoretical framework only, in the guise of postulates and definitions, while the further discourse must be *logically deduced* from

[245] See D. Zolo, *Ragione, diritto e morale nella teoria del garantismo*, in L. Gianformaggio (a cura di), *Le ragioni del garantismo. Discutendo con Luigi Ferrajoli*, Torino, Giappichelli, 1993, pp. 446-447, where Zolo, at the beginning of the 1990s, will frame Ferrajoli's legal thought by stating that "sembra restare fedele alle convinzioni epistemologiche che alla fine degli anni Sessanta lo avevano portato a progettare una 'teoria assiomatizzata del diritto', ispirata ai canoni del neopositivismo viennese e in particolare del logicismo hempeliano e carnapiano. In altre parole, la posizione di Ferrajoli sembrerebbe coincidere con quella della scuola italiana di 'teoria generale del diritto': una scuola che, richiamandosi ad alcuni saggi di Norberto Bobbio degli anni quaranta e soprattutto all'insegnamento di Uberto Scarpelli, coniuga l'empirismo logico viennese, la filosofia analitica anglosassone e il formalismo kelseniano nel tentativo di elaborare una scienza del diritto come rigorosa analisi del linguaggio giuridico, in quanto tale separata nettamente dalla sociologia del diritto, dalla teoria morale e dalla filosofia politica". Nonetheless, the same Zolo (*ivi*, p. 447) recommends paying attention to it since "in realtà le cose non sono così semplici". Although Ferrajoli comes "dalla più ortodossa letteratura neopositivistica della prima metà" of the 20th century, "accanto al registro dei riferimenti e soprattutto del lessico neopositivistico […] c'è nel saggio di Ferrajoli una sorta di costante contrappunto cautelativo che invita il lettore ad una lettura sofistica delle sue tesi epistemologiche".

[246] L. Ferrajoli, *Teoria assiomatizzata del diritto. Parte generale*, Milano, Giuffrè, 1970.

them. Otherwise, the theory would be compromised as ethically-politically biased and hence useless[247].

This embryonic framework, depicted in Ferrajoli's *Teoria assiomatizzata del diritto*, finds a significant development in 1989, when Ferrajoli gives birth to (one of) his masterpiece, that is, *Diritto e ragione. Teoria del garantismo penale*[248]. In this thorough work he sets forth his original theory of (criminal) *guarantism*. Here I reckon worthy to carry out an analysis of its pivotal points, in so far as it shows a broader theoretical scope, not limited to criminal law only. Hence, form my purposes I recall and illustrate the *three meanings* of what Ferrajoli calls '*garantismo*'[249].

Firstly, one can notice that *Diritto e ragione* outlines the desirable scenario, in terms of both substantial and procedural guarantees, of the *ideal* national criminal legal order. It draws a set of principles – many of them a re-elaboration of the ones consecrated during the Enlightenment and progressively incorporated into the modern constitutions and codifications – for which a legal system that (at least to a certain *degree*) applies them can be considered (more or less) *guarantist*, in the sense that within it the individual will be maximally protected from State powers (especially from the judiciary power and the risk of its arbitrary decisions)[250].

Thus, with its first meaning, *guarantism* designates a normative model of (criminal) law, typical of the modern *rule of law*, which is: epistemologically, a cognitive or minimum power system; politically, a protective technique suitable for minimizing

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[247] Dealing with the construction of a theory of law, understood as the elaboration of a system of legal concepts and tools capable of representing and explaining legal reality (or the various concrete legal experiences), and wishing to argue in favor of the *not exclusively* formal character of the Ferrajolian theory, see L. Ferrajoli, *Teoria assiomatizzata del diritto. Parte generale*, *cit.*, p. 8, where the author maintains that it is impossible to create a theory "'assolutamente' pura o neutrale nel senso in cui ritiene di esserlo, per esempio, la teoria generale del diritto di Hans Kelsen". Moreover, about ethical-political options, in *Idem*, *Diritto e ragione. Teoria del garantismo penale*, *cit.*, p. 919, he argues that "i valori non sono esorcizzabili: cacciati dalla porta rientrano dalla finestra. E in fondo è bene che sia così". As already emphasized, Ferrajoli seems to discard the idea of a neutral or a-political theory of law, i.e., not based on value options. The salient point and, at the same time, the condition that makes it possible to consider a theory as a useful legal construction for explanatory purposes, therefore not tainted or compromised, is that such choices have to be strictly and lucidly restricted "ai soli momenti iniziali della costruzione teorica", and that the chosen values, in the further developments of a theory, are held firmly in place, cf. *Idem*, *Teoria assiomatizzata del diritto. Parte generale*, *cit.*, p. 8. Again, he points out that (*ivi,* p. 9) "[l]'importante è che le scelte siano appunto limitate alle assunzioni introdotte con i postulati e con le definizioni, cioè siano scelte dichiarate ed argomentate come tali, e non siano invece introdotte nelle pieghe del discorso teorico, il quale deve essere dedotto logicamente dai postulati e dalle definizioni convenute. Ed ancor più importante è che si rimanga fedeli alle scelte operate […]".

[248] L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, *cit., passim*.

[249] See *Idem*, *Diritto e ragione. Teoria del garantismo penale*, *cit.*, p. 891. "Della parola 'garantismo' è (…) possibile distinguere tre significati, diversi ma tra loro connessi, che corrispondono ad altrettanti temi trattati nelle prime tre parti di questo libro ma che possono essere estesi a tutti i campi dell'ordinamento giuridico".

[250] In building his theory, Ferrajoli uses the *axiomatic method* and tries to avoid the semantic ambiguity, vagueness and factual indeterminacy of legal terms and concepts for the purpose of containing the *judicial discretion*, especially of the criminal judge, in such a way that does not lead to *arbitrariness*.

violence and maximizing freedom; juridically, a system of constraints imposed on the punitive power of the state to guarantee citizens' rights[251]. This paradigm is integrated by a list of ten axioms that should orient every current constitutional order: depending on the concrete degree of their application and/or effectiveness in each specific legal context, the rate of guarantism can be measured in it. Such axiological principles are[252]:

A1 *Nulla poena sine crimine*. Any criminal punishment should be consequential to a crime.

A2 *Nullum crimen sine lege* or principle of *legality*. A certain behaviour constitutes a crime so far as it is identified and qualified as a crime by the law.

A3 *Nulla lex (poenalis) sine necessitate*. In the legal qualification process of criminal cases, types of offence should be only established to protect (this being their legitimacy condition) assets considered as fundamental.

A4 *Nulla necessitas sine iniuria*. For criminal protection to be required, the conduct considered and the event that may ensue from it must (be able to) cause damage, an offense indeed, to the asset(s) considered fundamental and therefore worthy of criminal protection.

A5 *Nulla iniuria sine actione*. The relevant criminal behaviour must consist of a material-external action, with the exclusion of mere interior attitudes, ways of being or emotional-psychological conditions.

A6 *Nulla actio sine culpa* or principle of guilt or personal responsibility. For *guilt* should be intended the psychological nexus (fraud or negligence) through which is possible to ascribe a crime to its author(s).

A7 *Nulla culpa sine iudicio*. Only with a trial (assisted by substantive and procedural guarantees) is possible to ascertain whether a given subject is guilty – where for trial we should intend a judicial process through which the charge will be verified (or proven wrong).

A8 *Nullum iudicium sine accusatione*. There cannot be any criminal trial unless (at least) an accusatory hypothesis (indictment) is formulated by a body (typically the public prosecutor) separated from the judgmental one.

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[251] *Ibidem*.

[252] *Ivi*, p. 70: "Questi principi, qui ordinati e connessi sistematicamente, definiscono – con qualche forzatura linguistica – il modello *garantista* di diritto o di responsabilità penale, ovvero le regole del gioco fondamentali del diritto penale. Essi furono elaborati soprattutto dal pensiero giusnaturalistico dei secoli XVII e XVIII, che li concepì come principi politici, o morali o naturali di limitazione del potere penale altrimenti 'assoluto'. E sono stati successivamente incorporati, più o meno integralmente e rigorosamente, nelle costituzioni e nelle codificazioni degli ordinamenti evoluti, tramutandosi così in principi giuridici del moderno *stato di diritto*".

A9 *Nulla accusatio sine probatione*. Principle of the *burden of proof*, for which every charge, to be accepted and then considered verified, should be regarded as sufficiently proven – where evidence means the verification of the fact, hypothesized by the prosecutor and legally qualified as a crime.

A10 *Nulla probatio sine defensione*. This principle reflects the adversarial system, for which it is impossible to reach the full proof, necessary for the release of a guilty verdict, if the right of defence has not been recognized and guaranteed to the defendant, where *defence* is understood as the exercise of the right to contradict and to refute the accusation.

For the aims of this paper, it is relevant to underline that these deontic principles show a strong *interconnection* among themselves – which is tangible as every axiom of the list (except the first one) implies a legal concept expressed in the previous axiom. Indeed, as suggested by Ferrajoli, it is possible to isolate the fundamental ones from the derived ones and organise them in complex axiomatised systems or models.

> Questi principi, formulabili tutti nella forma di proposizioni implicative o condizionali, sono infatti tra loro collegati. È quindi possibile formalizzarli, isolare quelli fondamentali da quelli derivati e ordinarli entro sistemi o modelli assiomatizzati più o meno complessi ed esigenti a seconda di quelli da ciascuno inclusi od esclusi.[253]

Thus, already while attempting to build a model able to both explain and guide the (criminal) law and practices of advanced legal orders (about their ontological dimension, explained by the formal legal theory of Ferrajoli, see *infra*), the author sets up a dynamic among the axioms which reflects a *logical-hierarchical concatenation*, that already suggests and assumes a *pyramidal order*. Indeed, the other principles expressed in an axiomatic form can descend or derive from the principle of retribution and that of legality, depending on the complexity of the model to be constructed (the absolute most guarantistic paradigm will include all axioms or at least the ten axioms explained above).

But the geometric inspiration towards the pyramid, which to some extent can always be seen on Ferrajoli's theoretical background in accordance with the formalistic tradition of the Kelsenian model and its peculiar step-wise construction (*Stufenbau*) of the legal system (see *supra*, chapter one), is already real and touchable in *Diritto e ragione*

[253] *Ivi*, p. 67.

where Ferrajoli exposes (a particular portion of) his legal theory, which therein identifies the second meaning of the word *guarantism*[254].

The latter expression, indeed, would designate a *legal theory* of *validity* and *effectiveness* as distinct categories, not just between them, but even from the *mere existence* of norms[255].

According to Ferrajoli, a legal norm is *valid* when it satisfies *all* the rules on legal production, that is to say, not only those that establish the *formal* conditions of competence and procedure (the authority legitimated to issue that norm and the required procedures for this purpose), but also those that enshrine the *substantial* conditions and/or values of a certain legal order (fundamental rights, freedoms, assets, etc.)[256], namely, its *hierarchically* superior norms (as for instance the constitutional law or the general principles of international law, EU law, etc.). In this way, the superior (often constitutional) norms constrain the normative contents and meanings of prescriptive statements of lower grade, by establishing their *substantial conditions* of legitimacy. Only once both are satisfied, the substantive and the formal ones, a norm can be said to be valid.

On the other side, a norm simply *enters into force* or *exists* when it satisfies all the established *formal* rules on legal production but not the *substantial* constraints imposed by superior norms. In this case, it is substantially illegitimate and therefore invalid[257], although it might be effective (or not).

Effective law, instead, designates, according to Ferrajoli, all the "legal concrete experience" of a given legal order (or, more broadly, normative system), its normative reality and its legal practices (assuming the oppositions among legality – reality, law – fact). A norm is effective when it is observed (by the *social body*) by the *agents* engaged in its enforcement. It belongs to the *living law*, regardless its validity or even its mere existence.

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[254] The third meaning of *guarantism* deserves at least to be mentioned: it designates a *political philosophy* which demands to the State and the law a burden of *external* justification (i.e., from an *extra*-legal point of view, that is, from the point of view of moral philosophy) in relation to the assets whose protection they are preorder to, cf. *Diritto e ragione. Teoria del garantismo penale*, *cit*., p. 893. Particularly, in this perspective the political and legal institutions are built *by* and *for* man, for protecting and ensuring their fundamental rights and freedoms. Therefore, in these thoughts we can trace a Hobbesian reminiscence, typical of the *hetero-poietic* doctrines (see *supra*, footnote 178). In *Principia iuris,* Ferrajoli explains this political philosophy as the *identification* of the (constitutional) *rule of law*'s paradigm with the *democracy* model intended (not just in *formal* terms, but also) in *substantive* terms: for a norm to be *valid*, it is not sufficient that it complies with the norms, about *competence* and *procedure,* on legal production, but must also respect the *values* (as for instance the fundamental assets and freedoms) established and protected by the hierarchically superior legal norms.

[255] *Idem*, *Diritto e ragione. Teoria del garantismo penale*, *cit.*, p. 892.

[256] Ferrajoli will recently name the latter as *principia iuris et in iure* (*Idem*, *Principia iuris*, *cit.*, p. 861): "sono *principia iuris et in iure* i diritti fondamentali e gli altri principi di giustizia sanciti esplicitamente nelle costituzioni".

[257] Ferrajoli does not consider (or implicitly discards) the dichotomy between formal and substantive validity: in this perspective there can exist only a form of *full* validity.

In this further meaning the word *guarantism* reflects a theoretical approach that we can define as *hybrid*, because it could be either *normative* or *realistic*, depending on the specific point of view embraced and on the object of analysis considered, which keeps the ontological and the axiological dimension(s) separated *within* the juridical sphere. This kind of approach raises a crucial problem for legal theory: the *divarication* that in complex (nomodynamic) systems exists between normative plans and operational practices. At the same time, it allows to frame and explain this gap as *antinomy* and *lacunae* – a phenomenon to a certain extent physiological, but beyond this threshold pathological – that exists between the *validity* (and often ineffectiveness) of the former (the enshrined normative paradigms) and the *effectiveness* (and invalidity) of the latter (the operational practises). This theoretical setting grounds a theory of *divarication* among *normativity* and *reality*, valid law, and effective law[258]. Its critical perspective is not drawn from the external (ethical-political) point of view but is located within the internal (scientific-legal) dimension: this means that it is focused on the whole existing positive law, without forgetting antinomies, rather highlighting them, thus normatively delegitimizing, with respect to valid law, the illiberal aspects, and arbitrary moments of the effective law.

However, let's take a moment to consider all the following elements which Ferrajoli addresses in *Diritto e ragione* and so are already traceable therein: different normative levels (some lower, some higher), the concept of hierarchy as a fundamental criterion to order them, the idea of the legal phenomenon (the law) that can be seen in both ways, as a norm or as a fact, depending on the point of view (normative or realistic) and on its location in the system of the sources of law. Moreover, he deals with the different available *status* (and the correspondent applicable concepts) for a norm within a legal order (that may be *valid*, *effective*, *entered into force*…), and, in case, he explains the theory of divarications (an idea that Ferrajoli has fully developed in *Principia iuris* – I will deepen it *infra*).

Then, I think that all these elements certainly reflect, in the end, a vertical dimension, a hierarchical pyramidal order, thus proving Ferrajoli's geometrical inspiration and his tribute to Kelsen's *nomodynamics* (even if there are relevant divergences between the two authors, as for instance the way in which they differently conceive the legal category of *validity*, see *infra*). Indeed, this is even more true in so far as the former will also build an explanatory model for the legal orders, *qua* a formal theory of law, shaped on the aforementioned elements, that can turn into a prescriptive paradigm for the constitutional democracies, under certain conditions. The point here made, hence,

[258] In *Diritto e ragione*, for instance, Ferrajoli proposes a guarantistic theory of criminal law both normative and realistic: if it is related to a legal order's concrete operation, as expressed by its lower levels, allows to identify its aspects of validity and, especially, invalidity; otherwise, if oriented towards normative models sanctioned at the higher levels, can show the threshold of effectiveness and, especially, ineffectiveness.

which spatially frames Ferrajoli's theoretical vision, finds further confirmation in his next masterpiece.

2.3 *The offspring of* Principia iuris: *Luigi Ferrajoli's formal theory of law and theory of democracy*

Principia iuris, published by Ferrajoli after an intellectual gestation of almost forty years, is a remarkable theoretical effort to (re-)build both the *explanatory* and the *normative* model of contemporary constitutional democracies and to extend them to all fields of the legal orders (not just the criminal one), thus considering a more general and complete perspective. Indeed, his theorical construct is split-up in two: a *theory of law* (a formal legal theory) as a conceptual-theorical apparatus to understand and explain normative systems, and a *theory of democracy*, as a *normative paradigm* for the current constitutional democracies. The former is built by the *axiomatic method*[259], which is its *syntactic* dimension, conceived as a technique of conceptual "cleaning" for legal terms to avoid ambiguities, semantic uncertainties, and vagueness within legal language. Namely, it is a tool for conceptual clarification and simplification, logical control, critical analysis, theoretical innovation, and political and institutional planning. Thanks to it, Ferrajoli proposes a *rigorous* reconstruction of the theoretical lexicon of legal science, as this method involves the reorganization the concepts and theoretical statements through the *formalization* of the language in which they are expressed. Hence, it gives place to a new conceptual-theorical apparatus[260].

Moreover, with regard to its *object* and then its *semantic* dimension, Ferrajoli's *theory of law* is *formal* according to Bobbio's definition[261] as it analyses the *extrinsic structure* of law, without considering the values or ethical-political elements potentially

[259] His first embryonic attempt to construct a theory of law using the axiomatic method dates to L. Ferrajoli, *Teoria assiomatizzata del diritto: parte generale*, Milano, Giuffrè, 1970.

[260] *Idem*, *Principia iuris*, *cit*., pp. vi-vii, 52-60. As I will underline later, it could seem that the perspective of Ferrajoli, if adopted by legal operators, it could ensure (or better, allow to reach) *logically binding outcomes* in the application of legal norms and/or in judicial processes. Thus, a certain predictable order, the "certainty of law" and, thereby, a legitimate law (or as legitimate as possible). I will expose Zolo's realistic criticisms in this regard.

[261] Cf. N. Bobbio, *Studi sulla teoria generale*, *cit.*, p. vi, where he claims: "the general theory of law is a formal theory of law in the sense that it studies law in its normative structure, that is to say in its form independently of the values to which this structure serves and the content it contains". Bobbio himself specifies that the authorship of this idea is attributable to Kelsen and to his Pure Theory of Law, which is formal in the sense suggested here. However, as already pointed out, according to Ferrajoli his own theory of law is not *completely* formal in Kelsenian terms, considering the ethical-political assumptions that he states ground his theory (see *supra*, in this chapter).

included and enshrined in the norms[262], as well as the specific (normative) empirical contents that, time after time, the formally defined concepts can present when (they are) *related* to concrete legal orders (*infra*). Indeed, it only offers *formal* definitions and theories, able to explain the (*neutral-abstract) meanings* of considered legal concepts, then intended as *empty boxes*, regardless of the concrete contingent contents of law[263]. The latter are knowable – through the *purposes* and the *pragmatic* dimension of Ferrajoli's formal legal theory – only thanks to a (multiple) *empirical semantic interpretation* that can link these formal definitions, theories, and concepts to the concrete experience of normative phenomena, that are observable by three distinct points of view which allow to consider, analyse, and overcome three different divarication inside the juridical universe. We are now entering into the *purposes* and the *pragmatic* dimension of Ferrajoli's formal legal theory.

Indeed, Ferrajoli identifies, as peculiar traits of the universe on which the theory of law relates, three intentional connotations, corresponding to *three divarication* or separations between what *is* and what *ought to be*, respectively sought, detectable, and expressed by the *political philosophy*, the *sociology of law* and the *legal dogmatics*. Each of these different approaches to the law – as Ferrajoli argues – can produce a specific *empirical-semantic interpretation* of the formal theory of law (whose *purity* is

[262] Even though this qualification of Ferrajoli's theory is questionable because any *judgment* about the *validity* of a legal norm requires to also consider the *values* and *substantive contents* expressed by hierarchically superior norms: if the normative meanings ascribable to the lower norm clash with those higher normative levels that norm is invalid. Ferrajoli escapes from the criticality here highlighted arguing that only his theory of law is *formal* in the meaning explicated above, while his theory of *democracy* is not: the validity judgment would belong to this second sphere, where are permissible and required *empirical semantic interpretations* (*infra*) of the first theory, as well as speeches and judgements on *values*.

[263] L. Ferrajoli, *Principia iuris*, *cit*., p. 19: "è una teoria formale che si limita all'analisi dei concetti teorico-giuridici e delle loro relazioni sintattiche". The theses expressed in the theory "non ci dicono nulla intorno ai contingenti contenuti del diritto, se non sulla base di una loro interpretazione semantica" (*ibidem*). In this sense are *formal* "tutti i concetti elaborati dalla teoria, come norma, obbligo, divieto, diritti fondamentali, validità, costituzione e simili: le cui definizioni teoriche ci dicono che cosa sono le norme, gli obblighi, i divieti, i diritti fondamentali, la validità e l'effettività, e non già quali sono nei diversi ordinamenti, né quali devono essere, né come di fatto sono (o non sono) attuati effettivamente le norme, gli obblighi, i diritti fondamentali, le condizioni di validità, le leggi e le costituzioni. Queste nozioni sono perciò ideologicamente neutrali, cioè indipendenti da qualunque sistema di valori, siano questi interni o agli ordinamenti indagati. Ma è proprio il carattere formale della teoria che, con paradosso apparente, ne consente, a seconda dei punti di vista adottati e delle relative indagini empiriche o opzioni politiche, le diverse interpretazioni semantiche, ad opera non solo delle discipline giuridiche relative ai diversi ordinamenti, ma anche della sociologia del diritto e della filosofia della giustizia. La plausibilità della teoria nel suo insieme (e dei suoi singoli concetti e asserti) dipende precisamente dalla sua capacità esplicativa del suo oggetto di indagine: cioè dalla sua idoneità ad essere giustificata, e perciò adeguatamente interpretata, sul piano estensionale, dalle diverse e via più complesse esperienze deontiche e giuridiche e, sul piano intensionale, dai diversi tipi di discorsi empirici – giuridici, sociologici e filosoficopolitici – intorno al suo universo" (*ivi*, pp. 19-20).

the precondition for this to be possible). Where every interpretation can detect and analyse a particular dissociation[264].

The first gap is between what ought to be and what is *of* law, that is, between *morality* and *law*, *justice* and *validity*, external and internal legitimacy. It springs from the birth of modern law as a *positive* law, which finds its meta-norm of recognition in the principle of legality (existentially connected to the idea of authority) and not in its intrinsic justice. The separation between law and morality, as the mutual autonomy of the two spheres, is the very meaning of legal positivism[265]. This divergence concerns and stimulates both the axiological reflection of *moral-political philosophy*, which emanates from an *external* point of view to the legal order and argues about what legal norms and institutions *ought to be*, and the descriptive analysis offered by *legal science* from an *internal* perspective, which sees and analyses what (already) *is* positive law[266].

The second divergence goes between *validity* (or *rectius*: the normative plans established by legislator) and *effectiveness*, law and reality, norms and facts, legal ought

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[264] *Ivi*, p. 16. Consistent with this theorical setting see *Idem*, *Per una rifondazione epistemologica della teoria del diritto*, in P. Di Lucia (a cura di), *Assiomatica del normativo. Filosofia critica del diritto in Luigi Ferrajoli*, Milano, LED, 2011, pp. 15-32, where he states that (*ivi*, p. 19 ff.) "la teoria del diritto, proprio a causa del suo carattere formale e formalizzato, ammette *una triplice dimensione empirica o semantica*: (a) l'interpretazione offerta dall'indagine sui comportamenti regolati da norme, quale è sviluppata dalla *sociologia del diritto*; (b) l'interpretazione offerta dall'analisi delle norme giuridiche, quale è sviluppata dalla *scienza* e *dogmatica giuridica*; (c) l'interpretazione espressa dalla valutazione e progettazione del diritto, quale è proposta dalla *filosofia politica*. Ebbene, queste tre interpretazioni si configurano come altrettanti punti di vista sul diritto espressi da altrettante categorie fondamentali della teoria e della filosofia del diritto – il punto di vista dell'*effettività*, il punto di vista della *validità* e il punto di vista della *giustizia* – il secondo in rapporto di dover essere con il primo e il terzo in rapporto di dover essere con il secondo, in forza di altrettante divaricazioni deontiche tra dover essere ed essere del diritto positivo medesimo".

[265] *Idem*, *Principia iuris*, *cit*., p. 16. However, Ferrajoli states that this does not mean that law does not establish, by incorporating moral values or principles and does not entertain (an equivocal but very frequent formula) some "necessary conceptual relationship" with morality: such a hypothesis is absurd since every legislator – as evidenced by R. Alexy – gives a moral imprint to the norms he produces; otherwise said: every legal system expresses at least the morality (or the morals), whatever it is (or they are), of its legislators. While agreeing on such profiles, Ferrajoli takes care to underline the absence of a one-to-one nexus, on the one hand, between the morality and justice of a norm and, on the other, its juridicality and/or validity and/or belonging to an order. The formula mentioned above, that opposes the legal positivist prescriptive thesis of the separation between the juridical (internal) and ethical-political (external) sphere, has spread thanks to the work of R. Alexy, cf. *Idem*, *Begriff und Geltung des Rechts*, Freiburg, Alber, 1992, Italian translation by F. Fiore and introduction by G. Zagrebelsky, *Concetto e validità del diritto*, Torino, Einaudi, 1997, II, III, par. 1 and 2, pp. 18, 20, 24 and *passim*. In contradiction with Ferrajoli, the formula was taken up by A. García Figueroa, *Las tensiones de una teoría cuando se declara positivista, quiere ser crítica, pero parece neoconstitucionalista*, in M. Carbonell and P. Salazar (eds.), *Garantismo. Estudios sobre el pensamiento jurídico de Luigi Ferrajoli*, Madrid, Trotta, 2005, pp. 267-284.

[266] Ferrajoli, *Principia iuris*, *cit.*, p. 17. For a parallelism see *Idem*, *Per una rifondazione epistemologica della teoria del diritto*, *cit.*, p. 21, in which Ferrajoli affirms that even this divarication "riflette due punti di vista diversi e due diverse interpretazioni o modelli semantici della teoria: il punto di vista descrittivo interno della *scienza giuridica* che guarda e descrive il diritto positivo 'che è', e il punto di vista assiologico esterno della *filosofia della giustizia*, sia essa politica o morale, che guarda e valuta il diritto vigente e le istituzioni giuridiche dei vari ordinamenti come prodotti storici, politici e sociali, da costruire (o demolire), da difendere (o criticare) e da conservare (o trasformare)".

to be and concrete juridical experience. It is connected to the normative character of the same law with respect to the behaviours regulated by it, including the concrete functioning of the institutions and their apparatus of power. According to Ferrajoli, even this gap can be considered the result of a shift in the rules of recognition of law that occurred with the dissociation between norms formally issued by a legislator and effectiveness that took place with the passage from customary law to written law (which no longer aims to reflect social practices, but rather to direct them and/or modify them)[267]. This further divarication is also understandable by adopting two different approaches: the *legal science*'s one, which looks at legal phenomena identifying them with legal norms, and that of the *sociology of law*, which looks at the same phenomena but identifying them with the human behaviour regulated by legal norms[268].

The third deontic divarication, according to Ferrajoli, is the most important for legal science and arises with the advent of legal constitutionalism. In fact, with the incorporation into rigid constitutions of limits and substantial constraints to legislative production (as for instance fundamental rights) the law regulates itself[269], thus bringing *within* the same juridical sphere (of the legal order), the gap between law and realities, norms and facts, for which the same phenomenon can be considered at the same time as a fact regulated by hierarchically superior norms and a norm governing facts, practices,

[267] *Idem*, *Principia iuris*, *cit.*, pp. 17-18.

[268] *Idem*, *Per una rifondazione epistemologica della teoria del diritto*, *cit.*, p. 19. "La prima concezione è quella che caratterizza la teoria del diritto come teoria *normativa* e la scienza giuridica come scienza normativa, il cui oggetto è costituito dalle norme giuridiche e il cui metodo è l'interpretazione, ovvero l'analisi del linguaggio legale. La seconda è quella che caratterizza la teoria del diritto come teoria *realistica* e la scienza del diritto come scienza sociologica, il cui oggetto è ciò che di fatto accade e il cui metodo è l'indagine fattuale" (*Ivi*, p. 20). Ferrajoli recalls the distinction coined by Hart for which the first looks at existing law (*law in books*) from the internal point of view, while the second at living law (*law in action*) from the external point of view, cf. see H. L. A. Hart, *The Concept of Law*, Oxford, Clarendon, 1961, Italian translation by M. Cattaneo, *Il concetto di diritto*, Torino, Einaudi, 1965, ch. IV, par. 1, pp. 62-74, ch. V, par. 2, pp. 105-108 e ch. VI, par. 1, pp. 120-124. The first conception deals with norms, the second with facts. Therefore, "i riferimenti e le condizioni d'uso del termine 'vero' a proposito delle proposizioni giuridiche della dogmatica e di quelle fattuali della sociologia del diritto" are *different* (L. Ferrajoli, *Per una rifondazione epistemologica della teoria del diritto*, *cit.*, p. 20). Ferrajoli underlines how there is an irreducible (but also natural) divergence between dogmatic theses and sociological theses. They affirm different things, for this reason, although they are opposite, they are (or can be) *both true* without contradiction: one illustrates the normative *ought to be* (for example, the punishment of theft), the other its *being* or not effective (thefts are or are not punished in the considered order).

[269] This subjection of the law to the (superior) law (actually, not a new for the theoretical framework depicted by Kelsen, see *supra*, chapter one) according to Ferrajoli is accomplished with the *incorporation*, in *rigid constitutions*, of the ethical-political principles mainly elaborated by the Enlightenment thought. Ferrajoli calls them *principia iuris et in iure*, because in this process they have been also transformed from sources of *political* or *external* legitimacy into sources of *legal* or *internal* legitimation (or delegitimization). See *ivi*, pp. 24, 27-28: "Gran parte dei principi costituzionali positivizzati nelle costituzioni rigide – libertà, uguaglianza, persona, diritti umani, rappresentanza, separazione dei poteri, sfera pubblica e simili – sono infatti esattamente gli stessi che furono elaborati dal pensiero filosofico politico di tradizione illuminista. Solo che essi, una volta costituzionalizzati, cessano di essere soltanto principi assiologici esterni di filosofia politica e diventano anche principi giuridici interni al diritto – principia iuris et in iure – sopra ordinati a qualunque potere e perciò giuridicamente vincolanti nei confronti degli ordinamenti vigenti".

conducts or lower regulatory plans. It consists in the dissociation (within the law) between the *validity* and the *mere existence* of law, i.e., between what *ought to be*, for instance enshrined in the constitution, and what *is* of law, in this case, the concrete legal provisions enacted by the legislator to comply with that constitutional horizon. As illustrated previously, in this perspective a legal norm or decision (e.g., judicial, administrative, executive) is valid not only because it enters into force or a normative authority makes it, but because its contents satisfy and are consistent with the (constitutional) norms of superior hierarchical rank[270].

The author points out that in the constitutional rule of law this last gap produces a space for the *illegitimate law* (i.e., the *legally invalid law*). However, while it is true that this divarication represents the virtual and structural legal defect of every constitutional order, it would also be, according to Ferrajoli, its greatest political merit, since it signals the *limits* imposed on all (state or public) powers. As I mentioned before, it has allowed to transfer the gap between norms and facts *within* the same normative system. And this brings a great innovation: it is therefore possible that on the same phenomenon, precisely because it forms an entity to some extent *iridescent* depending on the assumed perspective, we can affirm opposite theses even if both are true[271].

Overcoming, at least in this respect, the Kelsenian solution (which borders, by clearly separating them, the study of the *facts regulated by norms* to sociology and that of *norms* to normativism) Ferrajoli argues that all observational discourses, either of legal dogmatics or sociology, belong indeed to the discourse on law that is proper to legal science. This would mean that the rigid constitutionalism, by introducing this third divarication and thus creating the space of *illegitimate law*, has conferred and asks to legal science a *critical* and *planning role*: the task of recording every undue contradiction between norms (*antinomy*) and highlighting each undue incompleteness or lack of norms (*lacunae*)[272].

In Ferrajoli's view, scholars can detect and analyse in a critical perspective each of the three divarications (or gaps) here illustrated by leveraging one of the diverse

[270] *Ivi*, p. 22. In almost identical terms already in *Idem*, *Principia iuris*, p. 17. See also *ivi*, p. 53, where Ferrajoli theorizes and explains the *multi-faceted nature* of normative phenomena (norms) in the *nomodynamic* systems, which can be considered at the same time as *norms* governing the acts or practices that are the subject of them and as *facts* regulated by superior normative acts. Ferrajoli underlines that it is precisely "questa ambivalenza semantica del proprio universo [ossia del diritto, dei fenomeni normativi] (...) che dev'essere fatta oggetto di analisi dalla teoria del diritto delle odierne democrazie costituzionali, articolate su più livelli normativi, onde dar conto delle antinomie, delle lacune e in generale della divaricazione che in esse virtualmente sussiste tra norme di livello inferiore e norme di livello superiore, e perciò dei profili di validità e d'invalidità delle prime e, correlativamente, di effettività e di ineffettività delle seconde".

[271] *Idem*, *Per una rifondazione epistemologica della teoria del diritto*, *cit.*, p. 22.

[272] *Ivi*, p. 23.

aforementioned approaches (and discourses) in studying the law[273]. Indeed, they may achieve this goal through the peculiar empirical-semantic interpretation of the formal theory of law that every single discipline provides. This way, Ferrajoli sets forth the *pragmatic* dimension of his *axiomatic* theory of law, which is closely connected to the other theoretical dimension in which he delves into.

The *theory of democracy* elaborated by Ferrajoli arises from this *triple* empirical semantic interpretation of his formal theory of law and represents the axiological-normative paradigm of today's constitutional democracies.

As far as this model is concerned, and especially with regard to the dissociation between the axiological horizon and the ontological dimension *within* the juridical sphere (i.e. the third illustrated divarication, between validity and mere existence of law), it is appropriate to briefly point out, at the end of this *excursus* on Ferrajoli's works, the *principles* that he identifies as remedies for avoiding and solving antinomies and lacunae within the legal orders, although they are criteria drawn from logic and therefore *external* to the law.

In a nomodynamic system of positive law the *principles of logic* are not always satisfied by the law, as it is quite evident: this happens whenever, developing the normative discourse on distinct levels, the legislator contradicts itself, thereby producing such vices and hence a variable physiological rate of illegitimate law.

As Ferrajoli explains, that is because those principles stem from deontic logic for inspiring the constitutional paradigm built with the theory, but they do not naturally belong

[273] These different approaches and discourses are (*Idem*, *Principia iuris*, *cit.*, p. 18): "accomunati dal medesimo oggetto, da gran parte dell'apparato concettuale teorico, e tuttavia diversi quanto ai contenuti, al ruolo critico nei confronti dell'esperienza giuridica e ai metodi di formazione dei loro concetti e asserti specifici: *a*) l'approccio della *filosofia politica normativa*, critico e progettuale nei riguardi dell'*essere del diritto* nel suo insieme, sulla base dei principi di *giustizia* che ne disegnano il *dover essere esterno* o *etico-politico*; *b*) l'approccio delle *discipline giuridiche positive*, che del diritto analizzano le divaricazioni tra il suo *essere legislativo* e le condizioni di *validità* dettate dal suo *dover essere interno* o *costituzionale*; *c*) l'approccio della *sociologia del diritto*, che del diritto indaga la divaricazione tra il suo *essere di fatto* e il suo grado di *effettività* rispetto al suo *dover essere di diritto*". See also *ivi*, p. 20, where Ferrajoli specifies that the theory of law is likely to receive different types of *semantic interpretation*: (1) the *realistic* one, "cioè dal punto di vista descrittivo esterno dell'*effettività* ad opera della sociologia del diritto"; (2) the *normative* one, "cioè dal punto di vista giuridico interno della *validità,* ad opera della dogmatica giuridica"; (3) the *axiological* one, "cioè dal punto di vista prescrittivo esterno della *giustizia*, ad opera della filosofia politica". He also points out that his *theory of constitutional democracy* – which he illustrates in the fourth part of *Principia iuris* –, while using many of the concepts of legal theory, "non è affatto una teoria formale, né perciò formalizzabile con l'impiego del linguaggio simbolico". Rather, it is "un'interpretazione di tipo assiologico del paradigma costituzionale formale elaborato dalla teoria del diritto", as well as the interpretations offered by legal dogmatics and sociology are semantic interpretations of the theory of law, of a normative and realistic type respectively. The theory of law elaborates most of the concepts used by the disciplines in question (the three approaches to the study of law), thereby revealing "una rilevanza pragmatica decisiva ai fini della giustificazione di molte delle tesi non solo giuridiche, ma anche assiologiche e sociologiche, che di tali concetti fanno uso".

to the juridical universe[274]. Indeed, according to him, they *should be* concretely *adopted* (by legislators, judges, legal actors-operators, etc.) to orient the law of constitutional democracies and solve any contrast or omission among different normative plans.

In his theory of law Ferrajoli identifies three *principia iuris tantum*, *unity*, *completeness*, and *consistency*, which must inspire every constitutional democracy: *external* to the law. These principles of *logic* – adopted by the theory – mark an axiological horizon, a normative paradigm that ultimately aims at guiding legal operators and scientists of every legal order with a rigid constitution, by stimulating the overcoming of antinomies and lacunae. Accordingly, they must try to *minimise* as much as possible that virtual and physiological rate of illegitimate law – which in every system will not fail to exist, however, due to the structural divergence between the validity and the mere existence of law, illustrated above[275].

Thus, emerges the *critical* role of legal science. In Ferrajoli's view jurisprudence has to find, measure and resolve (or at least favour the overcoming of) the *illogical parts* (in terms of normative contrasts) possibly present in a constitutional order, which reveal themselves in the form of *inconsistencies* and *incompleteness* among the different and hierarchically ordered normative plans.

Hence, the constitutional model, characterised by these various normative levels and, consequently, by the inevitable presence of antinomies and lacunae, according to Ferrajoli, postulates a legal science that is *not purely recognition* but in turn *critical* and *normative* about its object of analysis (for a comparison with Kelsen, see *infra*, in the next section). It means that both the theory of law and the legal dogmatics can no longer simply state – as Bobbio suggested[276]– what the law *is*. Rather, jurists should point out what the

[274] *Idem*, *Per una rifondazione epistemologica della teoria del diritto*, *cit.*, p. 25. On the principles drawn from deontic logic see also *ivi*, pp. 25-26: "Non consistono, in altre parole, in principi *interni* al diritto positivo, cioè in quelli che possiamo chiamare *principia iuris et in iure*, non essendo espressi né esplicitamente né implicitamente da norme giuridiche. Essi sono bensì *principia iuris tantum*, che impongono al diritto positivo, quali principi ad esso *esterni*, la logica che esso, di fatto, non ha ma che, di diritto, deve avere. Esprimono, in un ordinamento positivo o nomodinamico, il dover essere del diritto stabilito dal diritto medesimo, e cioè la normatività, nei confronti delle sue fonti, dei *principia iuris et in iure* stabiliti dalle norme di grado ad esse sopraordinato".

[275] More precisely and in detail see *Idem*, *Principia iuris*, *cit*., pp. 441-444, where he identifies (in a paragraph dedicated to the *syntax* of law) *unity*, *completeness,* and *consistency* as *iuris tantum* principles external to the law, which enunciate what *ought to be*, the axiological horizon of law. *Idem*, *cit*., pp. 861-862 "sono *principia iuris et in iure* i diritti fondamentali e gli altri principi di giustizia sanciti esplicitamente nelle costituzioni (…). Sono invece *principia iuris tantum* i principi logici, esterni al diritto positivo, che precludono antinomie e lacune rispetto ai *principia iuris et in iure*, imponendo il dovere dell'introduzione e del rispetto delle relative garanzie: in breve, il dovere della completezza e della coerenza in capo al legislatore, che in ultima analisi equivale al banale principio che il diritto costituzionalmente stabilito dev'essere rispettato – che *regulae servandae sunt* (o *ius servandum est*) – anche dai supremi poteri legislativi e di governo".

[276] Whereby legal positivism is characterized by the clear distinction between law as *fact* and law as *value*, between law as it *is* and law as it *should be*; and by the conviction that the jurist must deal only with the law in its *juridical being*, thus assuming a *neutral* (or *free from values*) *attitude* towards it.

law juridically *should be* and *should not be* (and concretely is not or it is). Ferrajoli's theoretical effort, as highlighted by Gianformaggio, takes up a *guarantistic role* in respect to the same law, by shedding light on the logical relations of coherence and completeness which can be satisfied only through the constitutional norms' observance by all the norms subordinate to them[277].

On these bases Ferrajoli has carried out – in the second volume of *Principia iuris*, entitled *Theory of democracy* – a *semantic interpretation* of his formal theory of law which, taking seriously what the law must be as it is formulated in the rigid constitutions of the advanced legal systems, constitutes a theory that is no longer formal, but *empirical* and *normative*, of constitutional democracy[278].

In his latest work, *Per una Costituzione della Terra*, to some extent Ferrajoli elevates this theory of democracy to a global level, linking his legal (and political) thought to the wider stream of *global constitutionalism* and, once again, to the value of peace[279]. In connection to these profiles and considering the complex relation between the international and the nation-state dimensions, I deem relevant to pinpoint Ferrajoli's stance about the problematic notion of *sovereignty*.

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[277] L. Gianformaggio, *Diritto e ragione tra essere e dover essere*, in L. Gianformaggio (a cura di), *Le ragioni del garantismo. Discutendo con Luigi Ferrajoli*, Giappichelli, Torino, 1993, pp. 25-48.

[278] L. Ferrajoli, *Per una rifondazione epistemologica della teoria del diritto*, *cit.*, p. 27. On the concept of *theory of democracy* see also *Principia iuris*, *cit*., pp. 29-30 where it is qualified as a *normative theory* since "tematizza il *dover essere giuridico,* in forza dei *principia iuris tantum*, degli ordinamenti e dei sistemi politici che si assumono (o si vogliono) democratici sulla base dei loro *principia iuris et in iure*"; in the second volume of his work Ferrajoli specifies "si produrrà insomma un mutamento dello statuto epistemolgico della teoria: non più analitica o formale, né perciò assiomatizzata [come la teoria del diritto], bensì descrittiva dei contenuti del paradigma costituzionale quale si è storicamente realizzato nelle odierne democrazie e, insieme, critica delle sue molte violazioni e inattuazioni, nonché normativa e progettuale in ordine alle tecniche di garanzia idonee a ripararle e alla possibili espansioni del suo ruolo garantista"; Ferrajoli's theory of democracy, rather than political, is a legal theory by virtue of its anchoring to legal – state and international – norms; let's consider, for instance, what happened with the subjection of the system of powers to the limits and constraints identified by the fundamental rights recognized in the constitution. Those that before were only external axiological principles of ethical-political nature, with their incorporation into the constitutional systems, become "principi di diritto positivo – *principia iuris et in iure*, appunto – interni all'ordinamento, ai quali si applicano i *principia iuris tantum* della completezza e della coerenza che impongono, a loro tutela, l'introduzione delle relative garanzie primarie e secondarie e la non introduzione o l'annullamento delle norme con essi in contrasto". He also points out (*ivi*, p. 20) that his *theory of constitutional democracy*, even while using many of the concepts of the legal theory, "non è affatto una teoria formale, né perciò formalizzabile con l'impiego del linguaggio simbolico"; it rather is "un'interpretazione di tipo assiologico del paradigma costituzionale formale elaborato dalla teoria del diritto", as well as semantic interpretations of the theory of law, of a normative and realistic type respectively, are those offered by dogmatic and legal sociology.

[279] L. Ferrajoli, *Per una Costituzione della Terra. L'umanità al bivio*, *cit*., *passim*. About his *global constitutionalism* see also *Democrazia senza Stato?*, in S. Labriola (a cura di), *Ripensare lo Stato*, Milano, Giuffrè, 2003, pp. 199-213; *Idem*, *Principia iuris. Teoria del diritto e della democrazia*, *cit*., vol. II, pp. 548-612; *Idem*, *Costituzione e globalizzazione*, in M. Bovero (a cura di), *Il futuro di Norberto Bobbio*, Roma-Bari, Laterza, 2011, pp. 118-133; *Idem*, *La democrazia attraverso i diritti. Il costituzionalismo garantista come modello teorico e come progetto politico*, Roma-Bari, Laterza, 2013, pp. 181-255; *Idem*, *Costituzionalismo oltre lo Stato*, Modena, Mucchi, 2017; *Idem*, *La costruzione della democrazia. Teoria del garantismo costituzionale*, Roma-Bari, Laterza, 2021, pp. 176-224 and pp. 394-450.

2.4 *In the wake of Kelsen's thought: three aporias for the concept of sovereignty*

Alongside the Kelsenian tradition of thought, when it comes to sovereignty, Ferrajoli shows his clear preference for the *internationalist* perspective.

As far as it is of interest in this section to emphasise, his work is illuminating in the part in which he offers a critical framing of the concept of 'sovereignty'. Indeed, he highlights three different aporias that inexorably invest it: firstly, he stigmatises it on the philosophical-legal level, considering it a "pre-modern relict that is at the origin of legal modernity and at the same time, with it, virtually in contrast"[280]. That is because it is a category of natural law that ends up contributing to the construction of the legal positivist vision of the State and the modern model of international law.

Secondly, Ferrajoli observes that the historical developments of the idea of sovereignty, understood as *potestas* free from constraints, *superiorem non recognoscens*, unfold in two distinct strands, which do not even coincide chronologically: on the one hand, there is its *internal* history, whereby it declines and collapses with the progressive affirmation of today's democracies and constitutional states of law; on the other hand, there is its *external* history, unfortunately still far from being concluded, whereby it has been progressively emphasised and absolutised, up to the peak reached in the first half of the last century on the occasion of the two world wars.

Finally, especially relevant here, there is the third aporia identified by Ferrajoli, which concerns the theory of law and relates to the unfortunate binomial 'law' – 'sovereignty'. In short, it consists of a structural and irreducible *antinomy* between the two concepts, and it takes places on both the *internal* and *external* legal fronts.

On the one hand, within the legal orders of contemporary democracies, sovereignty inevitably collides with the paradigm of the (constitutional) rule of law and cannot be reconciled with its assumption of *subjecting all powers to legal constraints* (i.e., the conceptual reverse of the idea of sovereignty as absolute power). On the other hand, Ferrajoli observes that this logical-conceptual contradiction there also exists on the *external* side (that is, in the *extra-state* dimension of law), by now safeguarded, albeit with difficulty and most of the time just formally, by international law. In the latter legal sphere, he holds, state sovereignty is (or at least *should be*) strongly compressed, weakened, and even resolved[281], given the supranational legal framework outlined by the

[280] Cf. L. Ferrajoli, *La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale*, *cit.*, pp. 8-9: "[r]elitto premoderno che è all'origine della modernità giuridica e insieme, con essa, virtualmente in contrasto" (translations are mine).

[281] Thus, finally overcoming that *realist fallacy* represented by the much invoked "principle of effectiveness" / "principio di effettività", thanks to a science of (international) law at last capable of exercising a *critical-normative* and *planning role*, cf. *ivi*, p. 56.

UN Charter of 1945 and the Universal Declaration of Human Rights of 1948, in which one can well recognise "an embryonic constitution of the world"[282].

Therefore, on a *legal theory* level, the assessment whereby sovereignty is now "an un-legal category" should not be surprising, after all[283]. The antinomy here examined, while it can be said to have been resolved in favour of 'law' in the *domestic* scenario of single state laws – since with the advent of today's constitutional democracies, the power is *bound* by the law and the law, through the various degrees of the normative system, restrains and regulates itself –, it continues to emerge in the *international* legal scenario, determining the prevarication of state sovereignty[284] to the detriment of law and the rights sanctioned in the acts of international law.

If it is true, as Ferrajoli claims, that "[i]n the rule of law there is hence no sovereign"[285], thus having been *internally* historicised the idea of sovereignty, *externally* this difficult but to some extent desirable process has not been accomplished yet.

Then, in my opinion, in order to make a project of *world constitutionalism* (more) real – as the one fostered and pursued by Ferrajoli from his *renewed* legal positivism –, a project that would (or promise to) give *effectiveness* to the fundamental charts of rights, so far largely disregarded, still, I deem it would be necessary to implement the internationalist perspective that Kelsen already outlined in the middle of the last century[286], strengthening the crucial role of international jurisdiction.

At the same time, at least with an important addition or change, picked up from Ferrajoli's repertoire: by also promoting a *critical* and *normative* role for the legal

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[282] Cf. *ivi*, p. 57: "[u]n'embrionale costituzione del mondo".

[283] Cf. *ivi*, p. 43, he states that the *crisis* of sovereignty "begins precisely, in its internal as well as its external dimension, at the very moment in which [sovereignty] enters into relation with the law, since of law it is the negation, just as law is its negation. (...) This is why the legal history of sovereignty is the history of an antinomy between two terms – law and sovereignty – that are logically incompatible and historically struggling with each other" / "inizia per l'appunto, nella sua dimensione interna come in quella esterna, nel momento stesso in cui essa entra in rapporto con il diritto, dato che del diritto essa è la negazione, così come il diritto è la sua negazione. (…) Per questo la storia giuridica della sovranità è la storia di un'antinomia tra due termini – diritto e sovranità – logicamente incompatibili e storicamente in lotta tra loro".

[284] A kind of prevarication notably represented by the violations of fundamental rights and peace perpetrated by states and the corresponding lack of adequate guarantees to avoid or sanction them.

[285] Cf. *ivi*, p. 44. Similarly, Zagrebelsky, in his celebrated *Il diritto mite*, evokes a "constitution without a sovereign" / "costituzione senza sovrano" to represent that in today's constitutional states of law, a *centre* of reference has been lost, cf. G. Zagrebelsky, *Il diritto mite*, Torino, Einaudi, 1992, pp. 8-11.

[286] A perspective identifiable with the strong *mitigation* of state sovereignty through the establishment or enhancement of an apparatus of *jurisdictional guarantees* capable of protecting political subjects and individuals against violations of peace and human rights. Cf. H. Kelsen, *Peace through Law*, *cit.*, *passim*, and footnote 148, where I have already stressed several different aspects of Kelsen's view about the *creative* role of international judges and his connected conception of the law as a body of norms which slowly and constantly evolves, being it a *dynamic system*. On the "removal" of the concept of sovereignty, understood as "the revolution in cultural consciousness that we first need" / "la rivoluzione della coscienza culturale di cui abbiamo per prima cosa bisogno", see H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, p. 469.

science, whether international or national, so that jurists would devote themselves to trace antinomies and legal gaps within the legal sphere, broadly intended, and thus to plan their overcoming[287].

Hence, by focusing on the main theoretical settings previously analysed and at stake here, in the next section I will carry out a comparison among what I reckon being the most significant aspects of both authors' theories, stressing some of their strengths and weaknesses and then looking for a *composite-integrated* pyramidal-hierarchical framework.

2.5 *Some analogies and differences with Kelsen's Pure Theory of Law*

As just stated, there is room for a critical correlation between Kelsen and Ferrajoli, with the purpose to underline some relevant analogies and differences between their theories[288]. As well known, the former is the father of the Pure Theory of Law (deeply

[287] Cf. L. Ferrajoli, *La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale*, *cit*., 57-58: "[i]t is therefore this world constitutionalism that today imposes itself on jurists as the axiological horizon of their work. This means, for the internationalist doctrine, freeing itself from the realist fallacy of the flattening of law to fact, which still continues to burden it in the form of the 'principle of effectiveness', and taking on as a scientific as well as political task the legal critique of the profiles of invalidity and incompleteness of the law as it exists today and the design of guarantees of future law" / "È dunque questo costituzionalismo mondiale che oggi s'impone ai giuristi come orizzonte assiologico del loro lavoro. Ciò significa, per la dottrina internazionalistica, liberarsi da quella fallacia realistica dell'appiattimento del diritto sul fatto che continua tuttora a pesare su di essa sotto forma di 'principio di effettività', ed assumere come compito scientifico oltre che politico la critica giuridica dei profili d'invalidità e d'incompletezza del diritto vigente e la progettazione delle garanzie del diritto futuro".

[288] For all that I will not discuss in the following pages, I refer to the valuable works of L. Ferrajoli, *La logica del diritto: Dieci aporie nell'opera di Hans Kelsen*, *cit.*, *passim*, and *Idem*, P. Di Lucia, L. Passerini Glazel, M. G. Losano, M. Barberis, P. Chiassoni, *et al.*, in P. Di Lucia and L. Passerini Glazel (a cura di), *Il dover essere del diritto. Un dibattito teorico sul diritto illegittimo a partire da Kelsen*, Torino, Giappichelli, 2020. Concerning the first piece of work, there Ferrajoli spotlights ten aporias that he holds would exist in Kelsen's theoretical framework. By raising a parallel with regard to several of those aporias (cf. L. Ferrajoli, *La logica del diritto: Dieci aporie nell'opera di Hans Kelsen*, *cit.*, pp. 61-239), in my thesis I consider of having implicitly addressed at least the following ones: A4, about Kelsen's conception of *validity* as the *mere existence* of legal norms and his (presumed) confusion between *validity* and *efficacy*; A5, entailing a criticism of the problematic (and polysemantic) notion of *fundamental norm*; A6, by means of which Ferrajoli stigmatises the progressive Kelsenian shift (under the influence of Merkl) from the *nomostatics* to the *nomodynamics*; A7 and A8, apropos of the alleged inapplicability of logics to the law and the illusion of a legal science conceived in merely descriptive-analytical terms; finally, regarding Kelsen's theory of democracy, A9, stressing the conceptual clash between the vision of political democracy intended as self-government and the creative role that Kelsen recognises to judges; A10, whereby Ferrajoli disapproves the Kelsenian exclusively *formal* conception of democracy (while he fosters the *identification* between the constitutional rule of law and the idea of *substantial* democracy). Nonetheless, Ferrajoli (cf. *ivi*, p. 239) concedes that the most significant part of Kelsen's legacy is represented by the very *formal* or *pure* character of his theory. Indeed, he states that (*ibidem*): "proprio grazie al suo carattere formale, il paradigma teorico multilivello espresso dallo *Stufenbau* kelseniano può svilupparsi ed espandersi in direzione di entrambe le sue dimensioni, quella dinamica o formale e quella statica o sostanziale". Praise

analysed in the first chapter), the founder of the formalistic legal tradition and arguably the most famous legal theorist of the past century[289]. The latter is the author of (criminal) 'guarantism' who eventually has been able to provide, at the beginning of this century and after a circa forty years "gestation", his axiomatic theory of law and his theory of democracy, where both works are entitled to be considered the most significant attempts to further develop the Kelsenian tradition, grounded on a pyramidal order. Hence, let us consider the following similarities and discrepancies.

Without going too far, one first strong analogy between Kelsen and Ferrajoli can be grasped around the problematic concept of (state) *sovereignty* just addressed, that both authors stigmatise as a modern construction emphasised with the raise of nation-states, which nowadays would be untenable.

The former, aiming at preserving the *theoretical unity* of the whole legal system[290], universally conceived, strongly underline the logical-theoretical impossibility to maintain state sovereignty within the wider legal framework characterised by the *primacy* of international law, whereby states can be imagined as partial bodies with a derived legitimacy only. Kelsen's *Stufenbaulehre*, indeed, reaches the peak of international law and the Prague author goes as far as to state that his Pure Theory of Law has *theoretically*

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and critical remarks about the work by Ferrajoli, to some extent *disruptive* with regard to Kelsen's works, are collected in the second reference here cited. There, many prominent authors engage with a critical comparison between Kelsen and Ferrajoli. See in particular the critical stance provided by P. Chiassoni, *Logica del diritto ed egemonia culturale*, in P. Di Lucia and L. Passerini Glazel (a cura di), *Il dover essere del diritto. Un dibattito teorico sul diritto illegittimo a partire da Kelsen*, *cit.*, pp. 45-64, where the author, besides analysing the presupposed ten aporias of Kelsen's theory set forth by Ferrajoli and focusing on the delicate problem of legal interpretation and jurisdiction (which is linked to the *creative* role of judges), he advocates that (*ivi*, pp. 45-47) Ferrajoli, through out the book at issue, carries out a radical, pervasive, theoretical, and axiological critiques of Kelsen's works, aiming at winning a sort of hegemonic intellectual war with his predecessor. According to Chiassoni, there would be at stake a struggle between the *guarantistic* paradigm of the former and the *normativistic* paradigm of the latter. On his part, in the volume's introduction Ferrajoli rejects Chiassoni's criticism of trying to theoretically discredit Kelsen's model, as well as the remarks of those authors (such as Barberis, Mastromartino, Passerini) who accuse him of *patricide*. See then L. Ferrajoli, *Logica del diritto, metodo assiomatico e garantismo. A partire da Kelsen*, in P. Di Lucia and L. Passerini Glazel (a cura di), *Il dover essere del diritto. Un dibattito teorico sul diritto illegittimo a partire da Kelsen*, *cit.*, p. 2 ff., where Ferrajoli points out that "[r]espingo fermamente queste interpretazioni del mio lavoro. Sono ben lontano dal ritenere che il pensiero di Kelsen non sia stato e non debba continuare ad essere il riferimento obbligato dei nostri studi di teoria del diritto. Quanto a me, concordo interamente con quanto afferma Giulio Itzcovich sul mio 'forte legame con Kelsen', del quale condivido l'approccio giuspositivista, l'anti-cognitivismo etico e il normativismo. Mi considero anzi più kelseniano della maggior parte degli attuali teorici del diritto". Cf. G. Itzcovich, *Kelsen politico*, in P. Di Lucia and L. Passerini Glazel (a cura di), *Il dover essere del diritto. Un dibattito teorico sul diritto illegittimo a partire da Kelsen*, *cit.*, pp. 65-78, and, for a thorough analysis of the ten aporias raised by Ferrajoli in Kelsen's view, M. G. Losano, *Con Kelsen, e oltre Kelsen*, in P. Di Lucia and L. Passerini Glazel (a cura di), *Il dover essere del diritto. Un dibattito teorico sul diritto illegittimo a partire da Kelsen*, *cit.*, pp. 27-36.

[289] As supported, for instance, by the eminent accounts mentioned in footnote 7.

[290] As I have illustrated in chapter one, at least until the 1930s, that *unity* is for Kelsen a *gnoseological* assumption, connected to the theory of knowledge of Kant, fundamental to *envision* and then to *know* the same object of legal science's analysis, that is, the law.

overcame the same idea of sovereignty (even though he is perfectly conscious that, on a political level, this ideal result is far from being achieved)[291].

Likewise, as highlighted in the previous section, Ferrajoli tackles that controversial notion and he even points out three aporias that sovereignty would raise under three different profiles: the philosophical-legal, the historical and the legal theory. Accordingly, he also advocates for the overcoming of it, embracing a clear internationalist perspective. Although he fosters a certain global constitutionalism[292], as indicated above, stressing more than Kelsen the role of a world legislator, while this latter arguably focuses more on the international customary law and on the role of supra-national judges, besides considering international treaties (however, all these three sources of law represent a distinct normative plan within the international legal order theorised by Kelsen).

Under the lens of politics, both authors take up and defend a democratic and pacifist view, in so far as they pursue the ideal of a global state or *civitas maxima*, in the wake of the Kantian tradition[293]. Concerning this mutual stance, Ferrajoli is clearer than Kelsen in pinpointing his own ethical-political option and placing it at the bottom of his theoretical building (thus adopting the so called *methodological* legal positivism, according to Scarpelli's teaching, for which, once established the starting subjective assumptions in terms of postulates or definitions, the theoretical discourse should be logically develop in a *rigorous* way)[294]. On the other hand, Kelsen aims at clearly distinguishing between his methodological setting, which asks for a completely *neutral* or *pure* approach in studying the law (according to the *static* part of his Pure Theory of Law, which brings to an extreme level the process of *formalisation* of legal concepts and categories), and his political vision, inspired by the cosmopolitan Kantian perspective indeed. Nonetheless, as Bobbio suggests (see *supra*, section 1.6) Kelsen has never fully resolved the latent *ambiguity*

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[291] On this subject, about the theoretical dissolution of sovereignty, I recall the in-depth analysis carried out in the first chapter, see the whole section 1.3 and footnotes 71, 76, 79.

[292] Cf. *supra*, in footnote 279.

[293] With regard to Kelsen, Kant, and the horizon of a *civitas maxima* or *Weltgemeinschaft*, cf. H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, p. 402, pp. 468-469, and *Idem*, H. Kelsen, *Concezione politica del mondo ed educazione*, *cit*., p. 43 ff. Especially, see *supra*, the whole section 1.3 and footnotes 77-79, 83. Concerning Ferrajoli and his Kantian posture, see his recent L. Ferrajoli, *Per una Costituzione della Terra. L'umanità al bivio*, *cit*., pp. 6-13 and footnotes 5-7 therein.

[294] As I have indicated earlier at the beginning of this chapter, especially in footnote 247, dealing with *Teoria assiomatizzata del diritto*. See then L. Ferrajoli, *Teoria assiomatizzata del diritto. Parte generale*, *cit.*, pp. 8-9, and *Idem*, *Diritto e ragione. Teoria del garantismo penale*, *cit.*, p. 919. See also U. Scarpelli, *Cos'è il positivismo giuridico*, Milano, Edizioni di Comunità, 1965, and *Idem*, "Il metodo giuridico", *Rivista di diritto processuale civile*, vol. 26, no. 4, 1971, pp. 553-574, where Scarpelli, showing how a certain (legal) methodology can amount to a form of *politics*, explains that (*ivi*, pp. 558-559): "[…] le proposizioni della metodologia direttiva assolv[ono] spesso la funzione di giudizi di valore, servendo ad affermare, con varia forza e portata, non soltanto che certe operazioni danno un certo risultato, ma il valore positivo del risultato, delle operazioni per arrivarci e del contesto in cui operazioni e risultato sono possibili. Una metodologia direttiva non è una semplice tecnica, è, adoperando la parola in un senso abbastanza lato, una politica, che mette in gioco insieme giudizi di valore e giudizi tecnici".

(where I would say *dialectic tension*) between normativity and reality, law and (factual) power, which to some extent is certainly present in his theoretical framework and especially in its most delicate (and maybe problematic) part, that is, the fundamental norm.

Another fundamental analogy between the two authors is easily detectable. It amounts to the doctrine of the *hierarchical structure* or *stepwise construction* of the legal order, which Kelsen draws from Merkl and entails a conception that regards the law as a *dynamic system*[295].

Considering the profiles highlighted in the previous sections of this chapter, one cannot but agree that Ferrajoli's theoretical construct is clearly conceived in pyramidal terms. Particularly, because in building his theory he adopts the fundamental Kelsenian tenet for which *the law regulates itself*, this generating the nomodynamics. However, I reckon that even the way in which he conceives the legal category of *validity*, as well as his theory of *divarication* where it depicts the gap, inside the legal sphere, among *different normative levels*, undoubtedly show this vertical and hierarchical perspective. Although the latter two profiles mark relevant differences in comparison with Kelsen's legal thought, as I will shortly illustrate.

Even with discrepancies, Ferrajoli's theoretical proposal to a greater or lesser extent reflects the way in which Kelsen *vertically* outlines the various sources of law of the whole legal experience (from national state law to the peak of international law), that is, the "stepwise" construction of the legal order. Indeed, the pyramidal inspiration of Ferrajoli, already traceable in *Diritto e ragione*, is absolutely evident in *Principia iuris*, where the author wholly addresses the nomodynamic dimension of present (constitutional) legal orders, ontologically integrated by several different normative levels.

Then, one may understand Bobbio's remarks about Ferrajoli's background of reference: he maintains that, as far as the general theory of law is concerned, the latter belongs to the tradition of *legal positivism* significantly represented by Kelsen, Hart, and the Italian positivism of the end of 20th century, although Ferrajoli proposes a critical or *reformed* legal positivism[296].

Finally, coming to stress some of the aforementioned differences, I focus my analysis on the legal concept of *validity*, the possibility to find *normative contrasts* within the legal system, and the role exercised by *logics* (if any) into the normative system.

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[295] I have extensively dealt with this topic in the first chapter. About the crucial contribution of Merkl, see footnote 9.

[296] Indeed, Ferrajoli distinguishes between *formal* and *substantial* validity of legal norms, and he points out that in those legal orders that recognize fundamental rights the traditionally *external* problem of the divergence between what the law *is* and what the law *ought to be* (i.e., the problem of *justice*) has turned into the *inner* problem of the divergence between effectiveness and normativeness *inside of* legal orders. As far as Ferrajoli's method and legal politics are concerned, Bobbio spotlights that the former is ascribable to *analytic philosophy* and the latter amounts to *political liberalism.*

For Kelsen, as I have extensively showed in the first chapter (see *supra*, section 1.2), a legal norm as such is *valid*, for the simple fact of its *existence* within the legal system, because it has been enacted by an empowered normative authority (whether it being a legislator, a government, a jurisdictional body or an administrative one), thus (he assumes) in accordance with the higher normative layers of that system and, ultimately, with the *fundamental norm* (which corresponds to the Kantian *idea*, applied by Kelsen to the legal universe, that organise and keep together all the elements belonging to a certain system). Hence, a legal norm is valid for it exists, and this happens in so far as it *belongs* to the legal system, where the latter is ontologically characterised by *unity*, *completeness*, and *coherence*, according to Kelsen. Therefore, while certain normative contrasts are conceivable (namely, among legal norms placed at the same hierarchical level, but in a way or in another "resolvable"), there is no room for *logical contradictions* therein[297]. Then, at least for the long-lasting version of the Pure Theory of Law (regardless of Kelsen's last *irrational* phase)[298], logics applies to legal norms.

Of a different stance, concerning these latter aspects, is Ferrajoli. As I have illustrated earlier (see *supra*, in this chapter, section 2.2), according to him, for a legal norm to be valid it must comply with some further *substantial* conditions, besides the *formal* ones. Indeed, it has to satisfy *all* its hierarchically superior norms, whether they regulate the process of legal production (enucleating the entitled normative authority and the concrete procedure for a norm to be correctly issued) or they establish the conditions of substantial legitimacy (as it is the case, for instance, of constitutional norms, whose normative meanings and value-contents have to be respected by lower norms, being them the fundamental parameter of legitimacy in the constitutional rule of law). Thereby, Ferrajoli separates *validity* from the *mere existence* (and from the contingent *effectiveness*) of legal norms, so that a norm might be existing and/or effective, even though not valid at all[299]. Hence, he theoretically reveals the presence of the *illegitimate law* inside the (constitutional) legal orders.

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[297] About normative contrasts and logical contradictions in Kelsen's view, see *supra*, footnote 156. Moreover, cf. H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale: contributo per una dottrina pura del diritto*, *cit.*, p. xxiv, where Carrino points out that Kelsen, in the early 1960s, besides normative contrasts, to some extent eventually admits the possibility of logical contradictions within the global legal system (which encompasses both, the international law and the domestic-state law), thus at least partially undermining its *unity* as a fundamental gnoseological assumption: "Nel caso di una contraddizione tra diritto internazionale e diritto statale, il postulato gnoseologico dell'unità, che determinava la coerenza e l'assenza di contraddizioni del sistema delle norme giuridiche, sembra in questo saggio del 1962 per lo meno perdere di smalto e vigore".

[298] I refer to his sceptical phase and posthumous work, H. Kelsen, *General Theory of Norms*, *cit.*, *passim*.

[299] Cf. L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, *cit.*, p. 892. See also M. Barberis, *Ferrajoli successore di Kelsen o Kelsen precursore di Ferrajoli?*, in P. Di Lucia and L. Passerini Glazel (a cura di), *Il dover essere del diritto. Un dibattito teorico sul diritto illegittimo a partire da Kelsen*, *cit.*, pp. 37-44, where Barberis, at least concerning the problematic category of legal *validity*, encounters a sort of *historical balance* between the two paradigmatic visions at stake, thereby to some extent answering to Chiassoni's worries about a possible challenge launched by Ferrajoli to the long-lasting hegemonic cultural

In other words, he clearly recognises the existence of normative contrasts and failings in those legal orders – i.d. *antinomies* and *lacunae*, regarded as peculiar phenomena that constitutional democracies especially might experiment. This portion (to some extent physiological) of *illegitimate law* determines a certain threshold of *legal illogicality*. Here one can grasp a salient discrepancy between Kelsen and Ferrajoli: while the former assumes, at least until his late sceptical phase, the *soundness* or *logicality* of the legal phenomenon (namely, all the juridical material that compounds the law as a legal system), whereby there is no logical contradiction in it, the latter spotlights the structural existence of antinomies and lacunae in the legal orders and hence denounces the presence of logical contradictions, even among their distinct normative levels. The distance between the two authors is bound to widen, given that the *later* Kelsen even denies the applicability of logic (and the principle of non-contradiction) to law.

Indeed, aiming at minimising the rate of *illegitimate law* as much as possible, Ferrajoli outlines the following setting and solution, that one may frames as a sort of evolution of the *classical* and *logicized* Pure Theory of Law: while he openly establishes the principles of *consistency*, *completeness*, and *unity* as fundamental for the constitutional paradigm (so far, one may catch a strong assonance with Kelsen's long-lasting logicism), he stresses that they are not "naturally" present in the legal field, they are drawn from deontic logic, instead. Therefore, he rather maintains that they should *inspire* in axiological terms the legal sphere of constitutional democracies[300], so that (hierarchical) logics or consistency, completeness, and unity can be implemented and guaranteed in those normative systems, clearly conceived in hierarchical terms[301].

In a nutshell, Ferrajoli proposes them as *remedies* to heal those endemic pathologies of nomodynamic legal orders: normative antinomies and lacunae.

Furthermore, carrying on the comparison between Kelsen and Ferrajoli, one may acknowledge various analogies and differences in the way in which the two authors here examined conceive their legal *formalism* or, even better, the *formality* of their distinct theories of law.

As I have extensively depicted in the first chapter, Kelsen narrows down the object of analysis of his Pure Theory of Law to the logical-formal legal structure only, at least as far as its *static* part is concerned. In this sense, he aims at studying the positive law as *it is*, without considering its possible empirical or value contents and without assessing

domination of Kelsen, but also undermining the presence of those dreaded aporias in the Kelsenian framework. Barberis, indeed, maintains that (*ivi*, p. 38) *both* authors actually are right and *coherent*: they just face a different (even if connected) object of analysis, depending on the considered context. In this sense, he argues, Kelsen copes with the law of a *legislative* state, according to an early 20th century conception, while Ferrajoli tackles the law of a *constitutional* state (or rule of law).

[300] Indeed, Ferrajoli qualifies them as *principia iuris tantum* and not *in iure*.

[301] *Idem*, *Principia iuris*, *cit*., p. 104: "La terza parte, intitolata Lo stato di diritto, è dedicata a quei sistemi giuridici che, per la loro articolazione su più livelli di norme tra loro in relazioni gerarchiche e per la conseguente soggezione alla legge di tutti i poteri normativi incluso quello legislativo, sono qualificabili come 'costituzionali' e 'garantisti'".

whether the law is just or unjust (he stresses the anti-ideological character of his theory, indeed). This theoretical setting, which has been also designated as *normative structuralism* or *normativism*, will strongly affect on the mid-twentieth century Italian scenario (see *supra*, section 1.6, where I especially deepen Bobbio's figure and works), thereby shaping, for at least a couple of decades, the way in which jurists intend the general theory of law – namely, in Kelsenian terms, as a *formal* discipline[302] – and also the consequent role assigned to legal science (*infra*).

Undoubtedly, Ferrajoli places his legal thought in the wake of this whole tradition, but at the same time he provides relevant "adjustments" or developments, to a certain extent also *exacerbating*, as Bobbio, the original formalistic stance of Kelsen (who, as one may remember, is complemented by an *anti*-formalistic tendency, or thrust, detectable in the *dynamic* part of his theoretical framework, see *supra* section 1.5). As previously pointed out in this chapter, in building his *formal* theory of law, a tremendous apparatus of conceptual tools and legal categories, Ferrajoli strictly preserves the *logicality* among the various postulates, *primitive* terms, theses, and definitions, thus providing a set of *formal* definitions and explanatory statements or formulations that, as such, neither highlights the concrete empirical contents of the law of a specific legal order nor illustrates the legal categories existing therein nor those that ought to exist to correspond to a given ideal of justice. These theoretical definitions rather aim at explaining what those legal concepts (such as *norm*, *obligation*, *prohibition*, *fundamental rights*, *validity*, *constitution* and so on) *abstractly* are. In this sense, the *purity* or *abstractness* of Ferrajoli's theory and legal categories is certainly unmatchable, I claim even beyond Kelsen's efforts and intentions (as long as the latter frames his own theory as *radically realistic*, see *supra*).

Nonetheless, I consider that Ferrajoli's first theoretical dimension (the *formal* one) is understandable in connection to the second one only, that is, his theory of *democracy*. As already clarified *supra* (see sections 2.2 and 2.3), the latter stems from a *triple empirical-semantic* interpretation of his axiomatic theory of law which the combined effort of the legal dogmatics, sociology of law, and political or moral philosophy can guarantee. This way, in Ferrajoli's view, depending on the approach each time used, a *renewed* legal science (epistemologically *re-founded*) can spotlight either the *particular meanings* attached to legal categories in a given legal order or the empirical normative contents of legal norms or the *gaps* among the various normative layers (e.g. among constitutional norms and legislative or regulatory provisions), between the legal sphere and the factual one, between the law as it *is* and the law as it *ought to be* in light of a

[302] See again N. Bobbio, *Studi sulla teoria generale*, *cit.*, p. vi, where he provides the following definition: "the general theory of law is a formal theory of law in the sense that it studies law in its normative structure, that is to say in its form independently of the values to which this structure serves and the content it contains".

certain ethical-political perspective or ideal of justice[303]. Therefore, one may argue that Ferrajoli's vision *loses* its formality only when (and in so far as) the axiomatic theory of law turns into the theory of democracy.

All considered, dealing with the idea of legal *formalism*, I glimpse some shades of difference between, on the one hand, the archetypal model designed by Kelsen and developed by Bobbio (ultimately towards *functionalism*), and, on the other hand, the more elaborated edition of it proposed by Ferrajoli.

The latter reaches the highest formal abstraction (of course, functional to later build his theory of democracy, that is, a normative paradigm for the current constitutional democracies) and purports to show the central role of the law (just consider how preeminent the principle of *legality* is in his view) and that of a (global) legislator[304]. Thus, in some respects, he separates the moment of *creation* from the *application* of law (where in Kelsen the two functions are almost always *simultaneously* exercised, see

[303] See again Ferrajoli, *Principia iuris*, *cit*., pp. 19-20, where he qualifies his theory of law as "una teoria formale che si limita all'analisi dei concetti teorico-giuridici e delle loro relazioni sintattiche". Its theses "non ci dicono nulla intorno ai contingenti contenuti del diritto, se non sulla base di una loro interpretazione semantica". Accordingly, they are *formal* "tutti i concetti elaborati dalla teoria, come norma, obbligo, divieto, diritti fondamentali, validità, costituzione e simili: le cui definizioni teoriche ci dicono che cosa sono le norme, gli obblighi, i divieti, i diritti fondamentali, la validità e l'effettività, e non già quali sono nei diversi ordinamenti, né quali devono essere, né come di fatto sono (o non sono) attuati effettivamente le norme, gli obblighi, i diritti fondamentali, le condizioni di validità, le leggi e le costituzioni. Queste nozioni sono perciò ideologicamente neutrali, cioè indipendenti da qualunque sistema di valori, siano questi interni o agli ordinamenti indagati. Ma è proprio il carattere formale della teoria che, con paradosso apparente, ne consente, a seconda dei punti di vista adottati e delle relative indagini empiriche o opzioni politiche, le diverse interpretazioni semantiche, ad opera non solo delle discipline giuridiche relative ai diversi ordinamenti, ma anche della sociologia del diritto e della filosofia della giustizia. La plausibilità della teoria nel suo insieme (e dei suoi singoli concetti e asserti) dipende precisamente dalla sua capacità esplicativa del suo oggetto di indagine: cioè dalla sua idoneità ad essere giustificata, e perciò adeguatamente interpretata, sul piano estensionale, dalle diverse e via più complesse esperienze deontiche e giuridiche e, sul piano intensionale, dai diversi tipi di discorsi empirici – giuridici, sociologici e filosoficopolitici – intorno al suo universo". Likewise in *Idem*, *Per una rifondazione epistemologica della teoria del diritto*, *cit*., p. 19 ff., where he holds that: "la teoria del diritto, proprio a causa del suo carattere formale e formalizzato, ammette *una triplice dimensione empirica o semantica*: (a) l'interpretazione offerta dall'indagine sui comportamenti regolati da norme, quale è sviluppata dalla *sociologia del diritto*; (b) l'interpretazione offerta dall'analisi delle norme giuridiche, quale è sviluppata dalla *scienza* e *dogmatica giuridica*; (c) l'interpretazione espressa dalla valutazione e progettazione del diritto, quale è proposta dalla *filosofia politica*. Ebbene, queste tre interpretazioni si configurano come altrettanti punti di vista sul diritto espressi da altrettante categorie fondamentali della teoria e della filosofia del diritto – il punto di vista dell'*effettività*, il punto di vista della *validità* e il punto di vista della *giustizia* – il secondo in rapporto di dover essere con il primo e il terzo in rapporto di dover essere con il secondo, in forza di altrettante divaricazioni deontiche tra dover essere ed essere del diritto positivo medesimo".

[304] Especially in his recent L. Ferrajoli, *Per una Costituzione della Terra. L'umanità al bivio*, *cit*., *passim*, but see also footnote 279 about Ferrajoli's *global constitutionalism*.

supra), so that judges cannot really create legal norms[305]. Indeed, their judicial *discretion* is (or should) strictly bound to avoid the risk of their potential *arbitrariness*.

Of a (partial) different stance is Kelsen, as I have emphasised in the first chapter (particularly, throughout section 1.5). Alongside the formalistic features set forth in his *nomostatics*, there are the *anti*-formalistic and, to some extent, *realistic* elements that the Prague author since the beginning of his classical phase theorizes in his *nomodynamics* and the more and more accentuates in his later works. Among these dynamic elements, the *creative* role of judges (and administrative authorities) is above all relevant. Indeed, Kelsen clearly states it, at least since the early 1920s, as far as *individual* legal norms are concerned, and subsequently, in the mid-1940s, he even recognises it with regard to *general* norms.

Thus, I reckon that their conception about legal formalism is not completely coincident, after all. Moreover, one may observe an overall difference in approach between the two authors here examined: while Kelsen directly separates formalistic and anti-formalistic elements *within* the same Pure Theory of Law, respectively leveraging the *static* part and the *dynamic* one of his theoretical framework, Ferrajoli seems to pursue a (rather different) separation between the abstract formalisation of legal categories and the concrete appreciation of their specific contingent meanings in a legal order throughout two distinct but connected theories.

One last profile I deem deserves to be briefly highlighted. It entails a significant difference between the authors at issue, concerning the way in which they envision the *legal science* and its *role* in facing the law.

On the one hand, as extensively illustrated above[306], Kelsen conceives jurisprudence in *analytical-descriptive* terms, asking the jurists to study the logical-formal structures of the positive law only, thus avoiding ethical-political value-judgements about the concrete contents of legal norms. This way, he pinpoints the anti-ideological character of (his) legal theory, aiming at fostering jurisprudence's status of *science*. In the wake of this line of thought, as far as the Italian scenario is concerned (see *supra* section 1.6), Bobbio largely embraces the Kelsenian *structuralism* (or *normativism*), thus orienting, at least for a couple of decades, the idea of legal science and the concrete

[305] In critical terms about the Kelsenian overlapping of legal creation and application and the consequent creative role of judges, see B. Pastore, *Su Ferrajoli e il "creazionismo giudiziario" di Kelsen*, in P. Di Lucia and L. Passerini Glazel (a cura di), *Il dover essere del diritto. Un dibattito teorico sul diritto illegittimo a partire da Kelsen*, *cit.*, pp. 231-240.

[306] I have devoted the whole section 1.4 to his analytical-descriptive view about the legal science, see then *supra* for further insights. There, I also analyse some changes in Kelsen's view over the years, with regard to the concrete function that jurists should carry out – first, a cognitive-rational function in shaping the very legal object, then, a mere descriptive and more passive one. Here I just recall H. Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, *cit.*, p. 53, where Kelsen indicates that "[l]egal theory thus becomes as exact a structural analysis of the positive law as possible, an analysis free of all ethics-political value-judgements".

activity of jurists (who recognise themselves into the analytical-legal philosophy) in rather identical terms, towards a general theory of law intended as a *formal discipline*[307].

On the other hand, although he comes from the same tradition of legal thought, Ferrajoli depicts and promotes legal science in *wider terms*. According to him, alongside its *descriptive* function, it must take on and perform a *critical-normative* role with respect to the law. Where this stance connects to the (previously highlighted) idea for which, with the introduction of constitutions in the legal orders, there is room for a certain structural rate of *illegitimate law*, that is, *discrepancies* or *divarications* among the various normative strands, normally pointed out as antinomies and lacunae (or failings). As already formerly stated, Ferrajoli claims the need of detecting and denouncing them, appealing to the aforementioned principles of deontic logics (which he designates as *principia iuris tantum*), with the purpose of *minimising* their presence as much as possible. Thus, legal scientists should not limit themselves to analyse and describe the legislator's *language*, they must spotlight normative contrasts and gaps, instead, thereby promoting and critically planning their overcoming[308].

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[307] Cf. N. Bobbio, *Studi sulla teoria generale del diritto*, *cit*., p. 33 and p. 37. See also footnotes 189 and 302, where I recall his definition of general theory of law.

[308] About the old dilemma of whether legal science should be *prescriptive* or *descriptive*, cf. L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, *cit.*, p. 108 ff., where he argues that legal science can be *both*, without loosing the status of *science*. Moreover, he suggests that the same contrast between *normativism* and *realism* (*ivi*, p. 110) is solvable "[…] tematizzando a livello teorico ed accertando volta a volta sul piano dogmatico e operativo questa divaricazione, in certa misura fisiologica, tra norme e fatti, tra normatività ed effettività, ovvero tra dover essere ed essere del diritto positivo. E può risolversi grazie alla doppia dimensione – descrittiva dell'essere del diritto e prescrittiva del suo dover essere giuridico – imposta alla teoria come all'analisi dogmatica proprio dal paradigma costituzionalistico su cui sono modellati i sistemi giuridici avanzati. Grazie a quel paradigma, infatti, i principi elaborati dalla teoria – primo tra tutti il principio di legalità – sono sia principi teorici che principi assiologici: sia principi scientifici sulla struttura normativa del diritto che principi prescrittivi della coerenza e della completezza […]". Furthermore, still emphasising the *normative* role of jurisprudence, especially in so far as it provides and develops prescriptive models in building a legal theory of *validity*, he spotlights that the legal science (*ivi*, pp. 111-112): "elabora, a partire dalla struttura a gradi del paradigma costituzionale e dai principi incorporati nei livelli superiori dell'ordinamento, modelli normativi nei riguardi dello stesso diritto, alla cui stregua sia possibile identificarne criticarne e risolverne, tramite idonee tecniche di garanzia, le antinomie e le lacune. Noi giuristi facciamo parte dell'universo normativo che descriviamo ed al quale siamo sottoposti; ma al tempo stesso contribuiamo, con le nostre stesse teorie, a produrlo, a modellarlo e a difenderlo, elaborando le tecniche di garanzia volte ad assicurarne l'effettività". Eventually, aiming at *taking constitutionalism seriously*, pinpoints this new role for legal scientists and hence stresses the fundamental functions that the theory of law and the legal dogmatics must respectively exercise (*ivi*, p. 113): "Il costituzionalismo preso sul serio, in quanto modello normativo e progettazione giuridica del diritto, conferisce insomma un ruolo nuovo alla scienza giuridica e insieme alle metodologie analitiche. In quanto sistema di principi volti a vincolare legislatore, esso esige infatti dalla teoria del diritto un ruolo costruttivo e progettuale, ossia l'elaborazione di modelli e di tecniche di garanzie volte a dare effettività ai principi costituzionali degli ordinamenti oggetto d'indagine, e perciò a rimuoverne le antinomie tramite procedure di invalidazione o di abrogazione e a colmarne le lacune tramite procedure di costrizione. Ed esige altresì un ruolo critico e una responsabilità civile e politica della dogmatica giuridica, richiedendo che l'interprete, sia esso giudice o giurista, accerti a sua volta le concrete antinomie e le concrete lacune, promuovendone il superamento per

This vision is not new for Ferrajoli's theoretical setting. Indeed, already in *Diritto e ragione* he claims for a *normative-evaluative* role of legal science, instead of a *merely* descriptive-contemplative one. Jurists, he argues, must not uncritically contemplate legal norms. Rather, they must evaluate and, where appropriate, criticise the positive law: either *externally*, from the point of view of ethics or justice, or *internally*, considering the constitutional *ought to be* enshrined in the fundamental charters. Where it is supplemented by those principles and values that before today's constitutional democracies were merely sources of *external* or *extra*-legal justification for the law and that, following their constitutionalisation, precisely identify the *legal* axiological horizon (not extra-legal only) and thus serve as legal parameters for assessing the degree, first and foremost, of *internal legitimacy* of legal norms and practices[309]. Moreover, as pointed out earlier (see *supra*, section 2.4), Ferrajoli expands the scope of this critical-normative role of legal scientists to an international scale, in connection to the wider stream of global (or world) constitutionalism[310].

In light of this comparison, for instance, one can grasp why Ferrajoli "reproaches" Bobbio for the long-lasting "freeze" of the newborn Italian constitution of 1948 (a surely

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il tramite delle garanzie esistenti ovvero per il tramite dell'introduzione di quelle elaborate dalla teoria. Esige, in breve, che quel 'rigore' come coerenza interna al linguaggio giuridico, che Bobbio difese nel suo classico saggio del 1950, sia perseguito non solo nella teoria e nella scienza, ma anche e soprattutto nell'ordinamento e nella pratica giuridica, tramite costanti trasformazioni del diritto vigente e senza che possiamo illuderci che esso possa mai essere pienamente realizzato".

[309] Cf. L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, *cit*., p. 914 and p. 921, about this *critical-normative* role envisioned and fostered by Ferrajoli for legal science and concerning a '*guarantistic'* theory of law which aims at criticising the existing positive law, a theory that he frames as *critical* legal positivism. There, at the level of *internal* criticism, he already holds: "Il compito del giurista, in una prospettiva giuspositivista di tipo critico, non è dunque quello di sistemare e rielaborare le norme dell'ordinamento onde avvalorarne una coerenza e una completezza che effettivamente non hanno, ma al contrario di esplicitare l'incoerenza e l'incompletezza mediante giudizi d'invalidità su quelle inferiori e correlativamente d'ineffettività su quelle superiori. È così che la critica del diritto positivo dal punto di vista del diritto positivo ha una funzione descrittiva delle sue antinomie e delle sue lacune e al tempo stesso prescrittiva della sua auto-riforma, mediante invalidazione delle prime e integrazione delle seconde". With regard to legal science's *responsability* in making critical remarks apropos the existing law and in designing the *future* law, see *Idem*, *Note critiche ed autocritiche intorno alla discussione su* Diritto e ragione, in L. Gianformaggio (a cura di), *Le ragioni del garantismo. Discutendo con Luigi Ferrajoli*, *cit*., p. 463: "se è vero che la scienza giuridica ha sempre svolto un ruolo attivo nell'elaborazione del diritto, perché mai – una volta riconosciuto che questo è fatto dagli uomini, secondo tecniche e modelli impartiti in buona parte dai giuristi – dovremmo sottrarla alla responsabilità della critica del diritto vigente e della progettazione del diritto futuro?".

[310] See again L. Ferrajoli, *La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale*, *cit*., 57-58: "[i]t is therefore this world constitutionalism that today imposes itself on jurists as the axiological horizon of their work. This means, for the internationalist doctrine, freeing itself from the realist fallacy of the flattening of law to fact, which still continues to burden it in the form of the 'principle of effectiveness', and taking on as a scientific as well as political task the legal critique of the profiles of invalidity and incompleteness of the law as it exists today and the design of guarantees of future law" (English translation is mine) / "È dunque questo costituzionalismo mondiale che oggi s'impone ai giuristi come orizzonte assiologico del loro lavoro. Ciò significa, per la dottrina internazionalistica, liberarsi da quella fallacia realistica dell'appiattimento del diritto sul fatto che continua tuttora a pesare su di essa sotto forma di 'principio di effettività', ed assumere come compito scientifico oltre che politico la critica giuridica dei profili d'invalidità e d'incompletezza del diritto vigente e la progettazione delle garanzie del diritto futuro".

illuminated legal outcome, with plenty of guarantees, fundamental freedoms and rights) which lasts several years in terms of lack of its (full) enforcement. An undesirable circumstance that the former (not exclusively, but) also explains with the influence carried out by the analytical-descriptive legal science on the *legal culture* of the time until the end of the 1960s, to some extent "guilty" of not having exercised a more *critical-normative active function* with respect to its object of study[311].

Eventually, what I have shown so far, in my opinion, once more proves that Ferrajoli (as far as his *formal* theory of law is concerned) grounds his theoretical thinking and imagination on a *formalistic*, *logical*, *vertical-hierarchical* model, well represented by the geometric shape of a *pyramid* – which mirrors the "step-wise" construction of legal orders – and largely inherited from Kelsen and his subsequent tradition. In his framework, the principles drawn from deontic logic, and especially the *coherence* criterion[312], are certainly conceived as fundamental criteria to improve the *logical tightness* and, hence, to reduce the *normative illegitimacy* within the hierarchical structure of the current legal orders (regardless of Kelsen's last "irrationalist" phase and his plea whereby logic cannot apply to law).

Comparing the two eminent authors, one may observe that there is a common formalistic-logical inspiration, with significant nuances of difference.

In the following pages of this thesis, there will be room for a critical appraisal of Ferrajoli's theoretical stance, at least for what I reckon to be the most salient aspects.

2.6 *A few critical remarks: his legal theory as an exhortative discourse for jurists*

[311] *Idem*, *La cultura giuridica nell'Italia del Novecento*, *cit*., p. 104, where Ferrajoli expresses his disconcertment: Bobbio's programme of the early 1950s comes shortly after the promulgation of the constitution, a fundamental charter which is in open *rupture* with much of the previous (fascist) legislation and should have prompted a great work of criticism, planning and reconstruction by the legal culture. He concludes: "from its very beginnings, Italian legal-analytical philosophy has been as advanced on the philosophical and methodological level as it has been backward on the theoretical-legal level" / "fin dai suoi esordi la filosofia giuridico-analitica italiana è stata tanto avanzata sul piano filosofico e metodologico quanto arretrata sul piano teorico-giuridico". Accordingly, Ferrajoli pinpoints that from the 1950s to the end of the 1960s, also due to the theoretical-methodological posture at issue, the Constitution remained a "dead letter" for most of its provisions, especially those concerning certain fundamental Republican institutions (such as the Constitutional Court, the supreme self-governing body of the judiciary, and territorial institutions as regions, respectively created in 1956, 1958, and during the 1970s only), as well as many significant social rights. Had the Italian legal culture been more critical-normative with respect to law and the legal sphere, the process of implementing the Constitution and the promises enshrined therein could have begun earlier and marked a *clearer break* with the pre-Republican order.

[312] The principle of *consistency* is enshrined, regarding Ferrajoli's axiomatised theory of law, among the *primitive* and the *derivative* terms, as well as among the *postulates* and the *derived theses*, or, in relation to his normative paradigm of constitutional democracy (Ferrajoli's theory of democracy), is pointed out as one of the *principia iuris tantum* that must be applied to the law for solving the possible normative antinomies detectable among the various normative plans of legal orders.

Coming to discuss the limits of the theoretical models proposed by Ferrajoli, I think it useful to start by mentioning his own critical warnings referred to the SG *guarantistic* model, outlined in *Diritto e ragione*, to then highlight Zolo's criticisms and ultimately some of my personal reflections, which address his larger theoretical framework.

Therefore, I firstly consider the SG system, as a *cognitive* model of identification of punishable deviance, Ferrajoli's first *guarantistic* paradigm of legal theory entirely set forth in 1989[313].

It must be said, concerning the degrees of truth and justice that the SG system allows to be achieved, the same Ferrajoli warns that in any case it does not ensure *substantial* justice, but *formal* justice only. The latter is seen as the *legal certainty* or *truth* of judicial decisions, namely as a legal definition technique and a judicial assessment method of criminal conducts that can *minimize* (even if not eliminate) arbitrary moments and elements in the field of criminal law. With the awareness that formal justice is also the necessary, though insufficient, assumption of any semblance of substantial justice[314].

According to Ferrajoli, the inclusion in the legal system of the guarantistic axioms (see *supra*, section 2.2), in the guise of criminal and procedural guarantees, is what characterizes the modern rule of law in criminal matters; but if, on the one hand, the degree of *guarantism* and hence, to some extent, the measure of justice of a legal order depends on the quantity, the quality and the degree of effectiveness of the principles so incorporated in it, on the other hand, however, Ferrajoli clearly recognizes that, although broad and extensive, the incorporation of moral principles or justice in the higher levels of a legal system always encounters *intrinsic limits*. And this means that a system of criminal prohibitions cannot ever be said to be wholly fair or justified[315].

Therefore, he acknowledges the *unbridgeable gap* between the SG system (ultimately, an ideal model) and the legal reality, since it is a type of hiatus always detectable between normative models and legal practices. He underlines how, in any case, the *rate* of guarantism that this model and its axioms allow to be reached is much greater than those of past and present legal orders that do not refer to these principles and axiomatic horizon. Hence, the option for this paradigm is justified and desirable, not

[313] L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, *cit*., *passim*.
[314] On the results his guarantistic system SG can reach see *Idem*, *Diritto e ragione. Teoria del garantismo penale*, *cit.*, 150-51: "In ogni caso esso non garantisce la *giustizia sostanziale*, che in senso assoluto non è di questo mondo e in senso relativo è questione (…) di contenuti legislativi e perciò di scelte politiche in ordine ai beni e agli interessi da tutelare penalmente e ai mezzi punitivi a tal fine giustificabili; ma solo la *giustizia formale*, cioè una tecnica di definizione legale e un metodo di accertamento giudiziale della devianza punibile che, se non escludono, quanto meno riducono al minimo i momenti potestativi e gli elementi di arbitrio nel diritto penale. Questa giustizia formale, coincidendo con la certezza o verità legale delle decisioni giurisdizionali, è però il presupposto necessario, anche se insufficiente, di qualunque parvenza di giustizia sostanziale".
[315] *Ivi*, p. 462.

because it ensures the attainment of *absolute values* (truth, justice, certainty, etc.), but because it brings *relatively better outcomes* than those guaranteed by other systems, in which the rate of guarantism can be variously weakened or even wither away (giving itself, in the latter case, a maximum authoritarian order or maximum criminal law)[316].

The (self-critical) clarification of Ferrajoli on his guarantistic model seems to meet the critical and certainly *more pragmatic* perspective of it offered by Danilo Zolo.

Reflecting upon the logic of the SG system, he argues that Ferrajoli himself, once he has defined with formal precision and with the assistance of logical symbolism the ten axioms of his model, admits that the SG system is *devoid of cogent logic* and that can at most perform a *regulatory function*[317]. Otherwise, assuming it as rigorously valid in logical or empirical terms, legal operators would be consequently forced to pursue the dangerous and illusory *utopia* of an *objectively true* criminal law[318].

The role, according to Zolo, which can legitimately be claimed by the axiomatised guarantistic model

> è che esso funzioni nei confronti dei giuristi e dei giudici come una sorta di parenetica della accuratezza linguistica, dell'accertamento scrupoloso dei presupposti legali del giudizio, della formulazione di ipotesi "plausibili", dell'esame attento delle prove e dei fatti da giudicare[319].

[316] *Idem*, *Note critiche ed autocritiche intorno alla discussione su* Diritto e ragione, in L. Gianformaggio (a cura di), *Le ragioni del garantismo. Discutendo con Luigi Ferrajoli*, *cit.*, p. 482. More widely on the functionalities of the SG system and the results that it allows to reach in terms of legal knowledge see *ivi*, p. 484.

[317] D. Zolo, *Ragione, diritto e morale nella teoria del garantismo*, in L. Gianformaggio (a cura di), *Le ragioni del garantismo. Discutendo con Luigi Ferrajoli, cit.*, p. 448. Zolo supports the existence of *three latent tensions* in Ferrajoli's theoretical framework (*ibidem*). Here I consider important to highlight the *first*, for which in the epistemological premises of *Diritto e ragione* there would be a considerable tension between Ferrajoli's *predilection for the purity* of logical categories (inherited from neo-positivism) and *his realistic admission* of logical incompleteness and weak prescriptive cogency of the models developed. Zolo questions the usefulness, especially in the field of social sciences, of building ideal models. According to him, raising this question is legitimate where it is recognized that they can neither reach satisfactory levels of formal rigor, nor get a practical effectiveness that is not that, difficult to define and ascertain, of regulatory limits of experience. There is the *risk* that these models, so *utopically pure*, fail to provide maxims of behaviour that can concretely direct the activity of practical operators. A risk that is exacerbated in the field of criminal jurisdiction, so far from the logical purity and rigor of the natural sciences. Therefore, to construct a *philosophically justified* theory of guarantism, he supports the opportunity of resorting to less pure and rigorous disciplines than logic and physics, such as, for example, psychology, hermeneutics, sociology, and anthropology (*Ivi*, pp. 448-449).

[318] Cf. *Ibidem.* In the sense of abandoning this utopian research, cf. the same L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, *cit.*, pp. 67-74.

[319] D. Zolo, *Ragione, diritto e morale nella teoria del garantismo*, in L. Gianformaggio (a cura di), *Le ragioni del garantismo. Discutendo con Luigi Ferrajoli, cit.*, p. 448. *Parenetica* in the proper sense of an *exhortative discourse*, in this case addressed to judges and jurists, so that they are *scrupulous* and *accurate* in the use of the language, in ascertaining the legal presuppositions of judgment, in the formulation of plausible hypotheses, in the examination of the evidence and the facts that are the object of judgment.

This purpose assigned by Zolo to the SG system, that is, simply representing an *exhortative paradigm* for legal operators, is reconciled with the consideration (as just seen, shared by Ferrajoli) that in (criminal) law any certainty is in the end a *relative* certainty[320]. Wanting to grasp the innovative and *reformed utilitarian* scope of Ferrajoli's axiomatic system, *freeing it* from the strict observance of logical and procedural constraints, Zolo makes the following point, which I consider in many regards acceptable and then shareable

> Il modello garantistico elaborato da Ferrajoli è dunque molto più un programma di politica del diritto – una "ideologia giuridica", che personalmente condivido senza alcuna riserva – che non un sistema di relazioni logiche e di vincoli procedurali che possa essere applicato con sicuri esiti garantistici alla produzione, all'interpretazione e alla amministrazione del diritto[321].

He therefore intends Ferrajoli's guarantistic construction more as a *legal ideology*, a shareable (or not) *legal policy agenda*, rather than a system of logical relations and procedural constraints applicable in law's production, interpretation, and administration, with sure guarantistic results. Hence, the *contribution* that it can offer to the reduction of punitive discretion and therefore to the defence of freedom consists in *its high capacity of ideological persuasion* and in *its moral suggestion*, rather than in its axiomatic rigor[322].

Personally, with regard to Ferrajoli's axiomatic proposal, I share Zolo's setting and critical review. Furthermore, I believe that his observations – formulated in the early 1990s apropos of *Diritto e ragione* and the SG model (especially dedicated to the criminal field) – can be nowadays extended to the *entire* subsequent theoretical construction of Ferrajoli. In fact, even in *Principia iuris* is tangible the *tension* between Ferrajoli's *predilection* for the *purity* of logical categories (inherited from Kelsen, as extensively pointed out throughout this work) and the (implicit) *admission* of the weak logical-prescriptive cogency that characterises the theoretical-axiomatic model proposed therein.

Let us consider, for instance, the principles he draws from deontic logic, especially *consistency* and *completeness*, and he conceives as cornerstones of his axiomatic theory. As illustrated in this chapter, although Ferrajoli frames them as *external* to the law and the related juridical universe, he claims they must inspire and guide the normative

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[320] See L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, *cit.*, p. 85, "naturalmente anche questa certezza di diritto penale minimo è sempre una *certezza relativa*, a causa dei limiti comunque intrinseci al concetto di verità processuale".

[321] D. Zolo, *Ragione, diritto e morale nella teoria del garantismo*, in L. Gianformaggio (a cura di), *Le ragioni del garantismo. Discutendo con Luigi Ferrajoli, cit.*, p. 448. Aiming at further stressing Zolo's opinion about Ferrajoli's SG system, I provide the following English translation of the quoted passage: "The guarantistic model elaborated by Ferrajoli is thus much more an agenda of legal policy – a 'legal ideology', which I personally share without reservation – than a system of logical relations and procedural constraints that can be applied with sure guarantistic outcomes to the production, interpretation and administration of law".

[322] *Ibidem*.

discourses on it, being them the (ideal, indeed) *remedies* that Ferrajoli identifies to face and overcome normative antinomies and lacunae, that is, the *illegitimate law* observable in today's constitutional democracies and which jurists must find and denounce.

Well, one cannot but agree that whenever he affirms the *inevitable presence* of a certain structural and virtual rate of illegitimate law in such systems, he is implicitly admitting the *relative* scope of functionality and results achievable through the adoption and application of his *principia iuris tantum* and, more generally, by means of his dual model of theoretical explanation and empirical prescription. In other words, the applicability of logics to legal norms cannot guarantee *absolute* results, although it may help in *improving* the overall logical tightness of a certain legal order's whole normative fabric: a surely desirable outcome, which to a greater or a lesser extent demands the dissemination of what Zolo designates as an *exhortative discourse*.

Therefore, the *principia iuris tantum* identified by Ferrajoli – the pivotal points of his axiomatic theory of law, which turns into a normative paradigm when it is empirically-semantically interpreted – will realistically be able to perform at most a *guiding-regulatory function* for legal operators who act in the current constitutional democracies and attempt to resolve as many normative antinomies and lacunae as possible. Then, in any case, such principles will never impose themselves by their logical-prescriptive cogency, offering sure results to interpreters, legislators, lawyers, or judges. Indeed, by analogy, resorting to an effective metaphor about *judicial syllogism* proposed by Pound[323], I observe that the (multiple) theoretical dimension of Ferrajoli is not a "token machine" in which jurists can insert, for instance, the contingent normative antinomies and gaps of a concrete legal order to solve them all and thus obtain a fully consistent and complete legal order. Consequently, I reckon that here Ferrajoli would arguably concede something to Kelsen and the way in which he carves a *creative* role for judges, concerning the (problematic) aspect of judicial interpretation, whether productive of legal norms or not. Indeed, one might notice that the desirable result of minimising the illegitimate law, once realised that Ferrajoli's model does not guarantee perfect or absolute results[324], can only be achieved through the necessary contribution of a, to some extent at least, *creative* judicial discretion, able to "adjust" that formal-conceptual process and/or fill the gap between a set of logical and legal principles (that form the guarantistic ideal model) and the factual dimension of legal practice.

Moreover, I believe that the same remark here made about Ferrajoli's *principia iuris tantum*, *mutatis mutandis*, can apply to all other terms, concepts, and elements integrating

[323] Cf. R. Pound, *The Spirit of the Common Law*, Francestown, Marshall Jones Company, 1921, Italian translation by G. Buttà, *Lo spirito della 'Common Law'*, Milano, Giuffrè, 1970, pp. 154-155, where the author pinpoints that the judge is not a "token machine" into which facts can be fed in order to automatically obtain judgments, if necessary by helping it with a few jolts in order to avoid jams and mishaps when the facts dropped into it show little capacity for adaptation.

[324] Since it cannot be *automatically* applied to the law and to the concrete legal experience, it works as an *exhortative discourse* for jurists only, indeed.

his formal theory of law, when it comes to measure their degree of logical-prescriptive cogency in the empirical dimension of the legal systems. Therefore, I hold that his *entire* developed theoretical construction is more (to retrieve Zolo's thought but *expanding its reach*) a shareable or not[325] *program of politics of law* or *legal ideology*.

An axiological agenda that, interpreting Ferrajoli's guarantistic proposal (which broadens its scope to global constitutionalism's outer reach), could be metaphorically described as an *illuminist beacon* that, in the nocturnal darkness of law, must guide lost sailors, to avoid their shipwreck on the shores of legal illegitimacy or, even worse, their drowning in the sea of arbitrariness. Once again, hence, I maintain that the contribution his entire theoretical building can give consists more in its high capacity of ideological persuasion and moral suggestion for legal actors than in its axiomatic rigor.

In addition, about the complex relation between the legal categories of validity and effectiveness, I make the following points.

Firstly, I hold that the circumstance whereby Kelsen requires a *certain degree* of effectiveness for a legal norm and a legal order to be valid does not imply the complete overlapping of the two notions, as Ferrajoli claims, instead. On the contrary, the two legal categories, even if functionally connected by Kelsen, preserve their own separate epistemological condition and meaning. Moreover, as I have sustained in the first chapter (section 1.5), the requirement at issue probably shows the existence of a *latent dialectic tension* in Kelsen's view, as far as his *nomodynamics* is concerned, between the opposite but touching spheres of normativity and reality, ought to be and be, law and factual power (although in his *nomostatics* he openly separates the elements of these couples, leveraging the distinction between *Sollen* and *Sein*). A tension that I do not necessarily consider a weakness, since it proves that Kelsen probably seeks a *balance* between a formal-idealistic stance and an empirical-realistic one, differently said, between his *static* and *dynamic* parts[326]. Picking up his words, formulated about something else, one may agree with this principle: "[t]he truth is in between"[327].

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[325] This option mainly depending on the ethical-political premises that, in the process of building and/or evaluating a (theorical) model, the individual decides to adopt or discard.

[326] Although over the years he progressively moves towards the empirical-realistic sphere, emphasizing more the dynamic elements of his theory.

[327] Kelsen sets forth this tenet, I reckon relying on a kind of *Platonism*, while dealing with opposite theories in the way of conceiving legal systems, whether grounded on the exclusive creation of the law by the courts or by the legal statutes. Cf. again H. Kelsen, *Pure Theory of Law*, *cit.*, p. 255: "[t]he theory that only the courts create law, a theory grown upon the soil of Anglo-American common law, is just as one-sided as the theory, grown on the soil of European-Continental statutory law, that the courts do not create law at all, but only apply already created law. The latter theory amounts to the view that only general legal norms exist, the former that only individual legal norms exist. The truth is in between. The courts do create law – usually individual law; but within a legal order that establishes a legislative organ, or that recognizes custom as law-creating fact, the courts do this by applying general law previously created by legislation or custom. The judicial decision is the continuation, not the beginning, of the law-creating process".

Again, concerning the alleged Kelsenian confusion (or aporia, to express it as Ferrajoli does) between the *validity* and the *mere existence* of legal norms (on the way in which Kelsen qualifies legal validity see *supra*, section 1.2).

After all, I deem true what Barberis points out: both eminent authors have in mind and devote their analytical efforts to a (partially) *different object*[328]. On the one hand, Kelsen inherits the legal positivistic conception of the 19th century state and then actually conceives a theory suitable for *the rule of law* of the first half of 20th century, namely, still a *legislative* state (much more than constitutional). On the other hand, Ferrajoli fully experiments with the massive embedding of fundamental charters in modern legal orders and then with the raise of legal constitutionalism. Thus, his own theory mainly comes *in light of* this processes of constitutionalisation and consequently is deeply focused on the set of guarantees and constraints established by constitutional provisions for binding the traditional state powers and thereby protecting individuals against their potential distortions and arbitrariness.

In this renewed framework, the Kelsenian conception of legal validity fades away, being it *historicised*, for validity cannot amount to the *mere existence* of norms within the legal order or system anymore, depending on whether their *belong* to it or not. Indeed, the *constitutional* rule of law, as Ferrajoli correctly observes, since its birth entails *substantial*, not merely formal, conditions for the *legitimacy* of legal norms, as the normative meanings and contents of constitutional dispositions surely are. Accordingly, for the lower legal norms to be valid, they must be in accordance, both formally and substantially, with the higher normative plans of their legal order, particularly, constitutional norms.

That being stated, however, it does not mean that Kelsen, dealing with a (partially) different legal context, commits a so called "aporia" when he depicts the legal validity of norms in terms of their *existence*. Thus, neither Kelsen nor Ferrajoli are wrong about this profile, for both conceptions are fully legitimate for their time and both authors show to be coherent.

A further criticism I believe can be addressed to Ferrajoli where he speaks of *epistemological re-foundation* of legal science[329]. Indeed, we can surely share the intent to recognize, promote and enhance a triple reading of the legal universe – thanks to the empirical-semantic interpretations offered respectively by legal dogmatics, sociology of law and political philosophy – and to foster communication and interaction among these distinct disciplinary approaches, with the aim of building an *integrated* approach in studying the normative phenomena.

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[328] Cf. again M. Barberis, *Ferrajoli successore di Kelsen o Kelsen precursore di Ferrajoli?*, in P. Di Lucia and L. Passerini Glazel (a cura di), *Il dover essere del diritto. Un dibattito teorico sul diritto illegittimo a partire da Kelsen*, *cit.*, pp. 37-44. See also my footnote 299.

[329] For instance, see L. Ferrajoli, *Per una rifondazione epistemologica della teoria del diritto*, *cit.*, pp. 15-32.

However, in pursuing this desirable end, Ferrajoli *remains anchored* to the pyramidal model (based on hierarchy, logic, and completeness), without questioning it. In other words, it does not conceive or omit to consider other models (such as the reticular one, *infra*) to explain and/or orient the legal-normative reality prescriptively. His theoretical-conceptual framework (also in a geometrical sense) always remains the same, when perhaps, to explain or guide other legal realities – such as the "judicial formant"[330] – would need a change of pace and mentality, therefore considering (or integrating his theory with) different (geometric) perspectives and models.

An epistemological re-foundation of legal science, therefore, to be truly so, would perhaps require a *rethinking* of the 20th century traditional illustrative paradigm of the legal-normative reality, with the appreciation of (re-)new alternative models, such as the reticular one.

Eventually, one can address a *structural* critique to Ferrajoli's pyramidal and formal conception of law, in so far as it is able to *fully* represent and explain the *civil law* legal systems only, especially the European constitutional democracies, where the written or code law enacted by the legislator still is the main source of law, while the judicial law, conversely, is less formally recognized or considered. Indeed, in the common law countries, where the *judge made law* and exists a different disposition of legal sources, pyramidal-vertical models "struggle", because of the huge distance between them and the concrete normative reality. Thus, their ability to explain the normative phenomena in that context results heavily reduced. Although Kelsen's theory represents a significant exception: since his *General Theory of Law and State*, indeed, he tries to expand the reach of his theory, by also encompassing the common law system and further emphasising the *creative* role of judges (cf. *supra*, chapter one).

Then, thanks to the analysis carried out so far, devoted to the pyramidal models of legal orders, by looking at today's complex legal scenario some critical questions arise: is this type of theorical construction, which (quite well) reflects and assumes as core parameters the *traditional state* organization, structure, and law, still suitable to the current and multiple normative reality? Can it explain and be applied to the social-normative complexity of the contemporary juridical pluralism? These issues become compelling if we consider all of today's *extra*-state sources of law and all the *actors* involved in the normative processes (and networks) who operate (alternatively or simultaneously) at a local, national, international, transnational, and global level[331].

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[330] Whereby jurisdictional acts are really sources of law, or transnational law and customary law. For the theory of *formants* see A. Gambaro and R. Sacco, *Sistemi giuridici comparati*, Utet, 2008.

[331] I think it is therefore appropriate to evaluate new reading patterns or paradigms of normative reality to (better) detect, explain and/or orient legal phenomena, with respect to which traditional models (such as the pyramidal one) have proved to be inadequate and, at least to a certain degree, blind. With the warning that these new models do not *necessarily* turn out to be better, more representative, or more advantageous than the previous models and that a *cohabitation* between them, maintaining profiles of one and the other, could

Reflecting upon these topics, I will move from the vertical-hierarchical perspective (of Kelsen and Ferrajoli) to consider different proposals and theoretical paths. In particular, I will deepen the (alleged) *transition* from the pyramid to the network.

Indeed, in light of the *recursive* crisis (see *infra*, chapter four) of the pyramidal model (as well as of the network paradigm), the need to *integrate* or *balance* it with other socio-legal theories or models comes forth: reticular theories could be the conceptual tool for improving it and building a more articulated general theory of law, even sociologically inspired.

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also be desirable. On the transformation of the legal world, which has gone from having only *one* center of reference to so *many* possible centers among which it is difficult to orient oneself, see H. Petersen, & H. Zahle (eds.), *Legal polycentricity. Consequences of pluralism in law*, Aldershot, Dartmouth, 1995, and A. Hirvonen (ed.), *Polycentricity: The Multiple Scenes of Law*, London, Pluto Press, 1998. Moreover, N. Irti, *Nichilismo giuridico*, Gius. Laterza & Figli Spa, 2014, who consequently underlines that today even the legal thought lives a condition of unease: indeed, it takes the risk and the pain of our time, which consists in proceeding without a center and without direction. Then, considering that the jurists are inside such a world, he argues they cannot treat it and manipulate it with the method of yesterday: it would be like opening the road with the tools of a world that no longer exists.

THIRD CHAPTER

THE THEORIES OF THE "NET"

Summary: 3.1 *Introduction* – 3.2 *François Ost and Michel Van de Kerchove: from the pyramid to the net?* – 3.3 *About the Actor-Network Theory of Bruno Latour, Michel Callon, and John Law* – 3.4 *Some thoughts and considerations about the network-paradigm. Towards a hybrid model?*

"Imagine a vast sheet of paper on which
straight Lines, Triangles, Squares,
Pentagons, Hexagons, and other figures,
instead of remaining fixed in their places,
move freely about, on or in the surface,
but without the power of rising above
or sinking below it, very much like shadows
—only hard and with luminous edges—and
you will then have a pretty correct notion
of my country and countrymen"

ABBOTT[*]

3.1 *Introduction*

In this third chapter I will examine what I deem to be the most salient network models, that come to the fore from the socio-legal field to compete in explaining the growingly complex scenario of legal sources. Where the more and more the latter can be represented in a *polycentric*, *widespread*, and *circular* way.

Coming from Luhmann's *functionalism* and theory of systems, passing through the *procedural-reflexive* approach of Teubner, Ost and Van de Kerchove set forth their own *dialectical theory of law*, addressing the alleged shift from the pyramid to the network. This way they cope with the recent legal transformations and their peculiar dynamics, pointing out a set of conceptual tools, especially some *alternative forms* of hierarchies, that may help in depicting them.

Subsequently, the *cartographic method* of Latour, Law, and Callon, well known as *Actor Network-theory*, will be illustrated, by giving preeminent attention to the way in which they conceive the notion of *actor*, as moving target immersed in a horizontal and reticular dimension. Precisely, aiming at describing the webs of connections detectable in

[*] E. A. Abbott, *Flatland. A Romance of Many Dimensions*, introduction by A. Lightman, electronic edition, Penguin Books, [1884]2002, p. 33.

the social world, they foster a *flat* perspective, which would be fundamental to grasp the circular relations among the actors (and actants) involved therein.

Without prejudice to the explanatory force of these reticular models, in the last part of this chapter I will weigh the chance to merge the most relevant acquisitions of both theoretical stances with some elements drawn from the traditional hierarchical paradigm, thus considering the opportunity of looking for *hybrid* or *composite* solutions.

3.2 *François Ost and Michel Van de Kerchove: from the pyramid to the net*?

In accordance with what just stated, to critically consider legal formalism (rather "closed"), by totally or partially undermining the model it expresses and thus superimposing a (relatively) new approach to its traditional vision, I will refer to the *The Dialectical Theory of Law* proposed by Ost and Van de Kerchove[332].

In this work, the two Belgian scholars present the most advanced and consolidated stage of a project of *re-foundation* – or at least of critical-organic rethinking – of the general theory of law.

Their theorical effort starts with the recognition of the *crisis* of the *Westphalia order* and, therefore, of the exclusive centrality of the state in the new international scenario of law and (*sub*-)[333] politics. This order is comprised within Kelsen's theoretical analysis, Hart's, Ross' as well as Ferrajoli's. It is frequently bespoken by the common sense of the jurists, and it flourishes in the spirit of the pyramid's metaphor. It remains on an Euclidean dimension of space for which the ultimate term of reference is always (and only) the Sovereign and from which a series of distinctions and dichotomies (even vertical ones, like the one between *above* and *below*) arises, gives life and reinforces innumerable hierarchies. In this model a Newtonian dynamic inspires the movement of normative bodies: the heaviest attract the lighter ones, and their hierarchical organization makes it possible to distinguish a centre from the peripheral points. The logic of this system is clearly Aristotelian: the minor moves under the major and the order (even conceptual) is *binary* (national/foreign, law/fact, etc.) with no possibility of conceiving a third alternative, i.e., nuances in the range between dichotomous terms[334].

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[332] F. Ost, & M. Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Bruxelles, Presses de l'Université Saint-Louis, 2002.

[333] The implicit reference is to the growing extra-institutional role exercised by transnational commercial companies in international decision-making and legal-regulatory processes.

[334] On the need to make room for a different and *multivalent* approach to develop the so-called *fuzzy* logic (or thinking) and thus reach *middle solutions* too (not only "yes or no" answers), see H. P. Glenn, *Transnational legal thought: Plato, Europe and beyond*, in M. Maduro, K. Tuori and S. Sankari (eds.), *Transnational law: rethinking European law and legal thinking*, Cambridge, Cambridge University Press, 2014, pp. 61-77.

However, the universe undergoes continuous modifications, due to many *factors* often ignored in those legal theories that still today inspire jurists (should the legal science consider and explain them, in order to fill the *current gap* between theoretical description and actual legal-normative phenomena). I refer to, for instance, the globalization of financial markets, economies and cultures, the society of information, the construction of the European Union, the weakening of the role and power of the State, the emergence of strong private powers (transnationals companies, lobbies, NGOs, etc.), the growing power of judicial power in terms of human rights, rampant multiculturalism within national contexts, the multiplication of individual actions and thrusts (as individuals or in the form of social aggregates), where all these elements contribute to determine a *widespread* and *polycentric* reality[335].

To fetch a major insight of such transformations in progress, Ost and Van de Kerchove outline the passage from kinds of power based on authority, hierarchies, and verticality towards conventional-negotiated, reticular, horizontal, and consensual forms, where the latter would be more civilized but also more complex[336]. They, therefore, start from the crisis of the pyramidal model (hierarchical, statist, positivist, monologic) long undisputed and shared by most legal doctrines, qualifying the current conjuncture as a moment of transition: unexplainable phenomena in the light of the traditional dominant paradigm occur and push for a structural revolution, which, after a period of clashes among different models, will lead to the consolidation of a new dominant model[337].

Recovering Thomas Kuhn's approach – which identifies the characteristics of a model in relation to its fundamental principles and values, a certain ideology and a set of images and metaphors illustrative of its intrinsic logic – the two authors expose their alternative paradigm by explaining its key elements as follows:

Basic principles: the postulates of rationality and sovereignty of the legislator are strongly *relativized*. They lose their supremacy over the principles of proportionality and subsidiarity, which have become crucial in the validation and interpretation of legal texts. The latter indeed produce the effect of subordinating the competence of a power, the validity of a norm and the sense of a prescriptive statement to conventional, comparative, and contextual judgments *ex post*.

Values: in contrast to the pyramidal paradigm – which pursues coherence, security and certainty, stability, and obedience – the network model sets creativity, flexibility,

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[335] On legal *polycentricity*, see again H. Petersen, & H. Zahle (eds.), *Legal polycentricity. Consequences of pluralism in law*, *cit.*, *passim*, and A. Hirvonen (ed.), *Polycentricity: The Multiple Scenes of Law*, *cit.*, *passim*, and N. Irti, *Nichilismo giuridico*, *cit*, *passim*.

[336] The two Belgian authors explicitly refer to the analysis of I. Ramonet, *Géopolitique du chaos*, Paris, Gallimard, 2001.

[337] F. Ost, & M. Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, *cit.*, pp. 11-14.

pluralism, lifelong learning and *mildness* as ideal and therefore desirable values, the latter understood as a propensity to the *coexistence* of different values, even opposite ones[338].

World vision: the traditional paradigm assumes a substantial rationalist and mechanical conception and a metaphysics of the subject whilst the network model is grounded on a relational and cybernetic conception which is connected to a pragmatism of communication and intersubjectivity: it thus outlines the complex and recursive dimension of generalized interactivity.

Images and metaphors: In addition to the significant metaphors of the pyramid and the net, the (dialectical?) clash between these paradigms is conveyed by other strong *iconic expressions*, such as the empire of law vs. the archipelago of the norm, legal person vs. multi-headed hydra, code vs. rhapsody, lion / eagle vs. chameleon, solid law vs. liquid law.

In the gradual construction of a *reticular* theory of law, Ost and van de Kerchove offer a reinterpretation of a doctrine of the sources of law presented by them in previous works[339]. Such doctrine is inspired by the images of *strange rings* and *tangled hierarchies*[340]. They are particularly interesting as they have an evocative power and they can offer a different point of view (relevant for the purposes of this paper) than the traditional one: they help to reflect in a *horizontal-circular*, *flat* way, rather than a linear-vertical perspective. The *strange ring,* in fact, designates a very *peculiar dynamic*, for which it is possible by climbing or descending the steps of a certain hierarchy, to find yourself at the *starting point*. Likewise, in regard to the juridical universe, it can manifest itself in rules that change themselves or that are recursive, as they produce infinite designs that are part of an obligatory plot that, however, cannot be foreseen. On the other side, the *tangled hierarchy* – which Douglas R. Hofstadter illustrates as a system in which a "strange ring" is found, is a more extended concept, that contains the first one and it indicates the relationship in which the upper and lower element command *each other* at the same time and in some way, (outside therefore a traditional hierarchy of power, for which only the superior commands the inferior). When applied to the legal universe, these two images become real conceptual tools, capable of explaining otherwise inexplicable concrete normative phenomena (as long as one remains anchored to the traditional theoretical approach). For instance, the tangled hierarchies (which in some ways we could also define "upside down") that occur when organs that are considered as inferior, recipients of a rule produced by a formally superior authority and/or called to recognize

[338] An attitude of *conviviality* proper of the general principles – structurally flexible and adaptable – and extraneous to the rules in the strict sense, expressing a hierarchical logic that leads only to the binomial inclusion / exclusion. On the concept of *mildness* see the famous essay by G. Zagrebelsky, *Il diritto mite*, *cit.*, *passim*.

[339] F. Ost, & M. Van de Kerchove, *Jalons pour une théorie critique du droit*, Bruxelles, Presses universitaires Saint-Louis, 1987, 1993, p. 210 ff.; M. Van de Kerchove, & F. Ost, *Le système juridique entre ordre et désordre*, Paris, Puf, 1988, p. 105 ff.

[340] Metaphors borrowed from D. R. Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid*, Hassocks Sussex, Harvester Press, 1979, Italian translation by B. Veit, B. Garofalo, G. Longo, G. Trautteur, and S. Termini, *Gödel, Escher, Bach. Un'eterna ghirlanda brillante: una fuga metaforica su menti e macchine nello spirito di Lewis Carroll*, Milano, Adelphi, 1984.

and/or to apply it, actually succeed in determining its fate, in terms of validity, application, modification, rejection, frustration, etc[341]. In this panorama, one can witness a complete *reversal* of the cornerstones of the *validation process* of legal norms, at least as professed by legal positivism: formal and unilateral (only the norm produced by the competent authority according to formally established procedures is valid), absolute and without contemplating intermediate solutions (the norm is completely valid or completely invalid), certainly hierarchized (the judgment of validity is formulated in relation to the superior validating norm)[342]. Indeed, the thesis of Ost and Van de Kerchove is the following: the process by which validity is recognized to the norms does not only take place based on formal requirements (competence and procedure), but also in the light of *empirical* and *axiological* conditions. For this reason, it is also configured as *plural* and *circular*, and it leads to *legitimate* rules to the extent that it is possible to absorb (new and) *different factors*, which come both from above and from *below*, as well as from the *incessant interaction* of all *actors* involved[343].

This alternative setting is the theoretical assumption used by the two Belgian scholars to reform the conventional doctrine by experimenting with three hypotheses:

1) Some form of *hierarchy* is maintained, but this criterion shows all its *limits* – discontinuity, incompleteness, alternation – for which the mechanism of subordination gives (at least partially) way to real forms of *coordination* and *collaboration*.

2) *Linearity* does not disappear completely, but is *relativized* and, therefore, it frequently coexists with *moments of circularity*, consisting of phenomena of ring closure or inversion of hierarchical relations.

3) The *pyramidal form* loses consistency since today's innumerable sources of law do not always find derivation from and justification in a single and sovereign centre.

The characteristics of the new legal universe are well represented through the textile figure of the network[344]. If in the "old" *pyramid* the motion is limited, because there is only a top-down movement, in the *network* every nodal centre is (or can be) relevant and

[341] See F. Ost, "Entre ordre et désordre: le jeu du droit. Discussion du paradigme autopoiétique appliqué au droit", *Archives de Philosophie du Droit*, vol. 31, 1986, p. 160, where it is possible to find the explicit reference to the *tangled hierarchies*.

[342] M. Van de Kerchove, & F. Ost, *Le droit ou les paradoxes du jeu*, Paris, Presses universitaires de France, 1992, Italian translation by S. Andrini, *Il diritto ovvero i paradossi del gioco*, Milano, Giuffrè, 1995, p. 129.

[343] For the aim of this thesis, Ost's and Van de Kerchove's thinking is a salient theoretical position that I share and will resume in connection with the ANT of Latour – it is not by chance that they speak, in the definition of the normative phenomenon, of *actors* present and involved in the empirical-social dimension – and to carry out my personal considerations on the subject, *infra*. Regarding this peculiar process of validation of norms, see ivi, p. 130; F. Ost, "Entre ordre et désordre: le jeu du droit. Discussion du paradigme autopoiétique appliqué au droit", *cit.*, pp. 158-59; *Idem*, *Essai de définition et de caractérisation de la validité juridique*, in F. Rigaux, G. Haarscher and P. Vassart (eds.), *Droit et pouvoir*, t. I: *La validité*, Bruxelles, Centre interuniversitaire de Philosophie du Droit, 1987, p. 97 ff.

[344] About images with an evocative power see F. Rigotti, *Il filo del pensiero: tessere, scrivere, pensare*, Il Mulino, Bologna, 2002.

no one is privileged. Moreover, while the concept of *system*[345] tends to imply a definition or delimitation of its own field and therefore a *closure* (sealing a dichotomous dynamic inside / outside), the network does not imply and does not require any kind of closure or delimitation (and therefore not even finiteness… can it aspire to infinity?). Given the ontological impossibility of finding *pure* or ideal models completely mirrored, Ost and Van de Kerchove take care to specify that in practice there are variously hierarchical types of networks and more or less open systems. This, besides representing an acceptable observation, is important because it opens the field to the search for *hybrid* models that can, together, contribute to explain (and/or orienting) the complexity of today's juridical and normative reality. In the intentions of the two Belgian scholars, in fact, recent changes in the normative universe do not demand (and therefore do not) legitimize a *total* paradigm shift in legal science, but rather a *mix* between the most effective and successful profiles, in representative-explanatory terms, of both models, pyramidal and reticular[346]. Although gradual and not radical, the transition from the pyramid to the network produces some *salient changes*: it goes from mere norms to *regulation* and from government to *governance*, where the emergence of the latter takes place in parallel with the passage from a state-centred world to a richer reality with many different centres in which a multitude of heterogeneous actors' acts.

Regulation, in the network model, is the new mechanism of "legal" production. The precept of the Sovereign (understood in a broad sense, as a political authority in charge of creating laws), in its unilateral, authoritarian, centralized being, leaves more and more room for a flexible, widespread, adaptable, often conventional-negotiating order (or maybe *rectius*: complex or agglomeration of *traditionally* disordered and entropic norms). This concept has its roots in Luhmann's systemic-functional theory, which explains the dynamics and procedures of the (sub) social spheres (such as politics, economics and law) that aim and contribute to maintain and/or restore, each exercising their own *function* and through mutual interactions and irritations, the *balance* of society (or a society) considered as a whole, and thus also of the (juridical-normative) powers present in the social dimension and threatened by disturbances[347]. The idea of *governance*

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[345] Taking a cue offered by V. Ferrari in *Idem*, *Diritto e società. Elementi di sociologia del diritto*, Laterza, Roma-Bari, 2004, p. 9, here I adopt the idea of Bertalanffy's *system*, understood as *a set of interacting elements*. See L. Von Bertalanffy, *General System Theory: Foundations, Development, Applications*, New York, G. Braziller, 1969, Italian translation by E. Bellone, *Teoria generale dei sistemi: fondamenti, sviluppo, applicazioni*, Milano, Mondadori, 1983.

[346] F. Ost, & M. Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, *cit.*, pp. 11-15, p. 22.

[347] N. Luhmann, *Rechtssystem und Rechtsdogmatik*, Stuttgart, W. Kohlhammer Verlag, 1974, Italian translation and introduction by A. Febbrajo, *Sistema giuridico e dogmatica giuridica*, Bologna, Il Mulino, 1978; *Idem*, *Soziale Systeme: Grundriß einer allgemeinen Theorie*, Frankfurt am Main, Suhrkamp Verlag, 1984, English translation by J. Bednarz, Jr., and D. Baecker, foreword by E. M. Knodt, *Social Systems*, Stanford, Stanford University Press, 1995; *Idem*, *The autopoiesis of social systems*, in F. R. Geyer and J. van der Zouwen (eds.), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-steering Systems*, London, Sage Publications, 1986, 172-192; *Idem*, *Das Recht der Gesellschaft*, Frankfurt am Main,

is structurally functional to the network model. In fact, it offers a conceptual abode to the mechanisms (and dynamics) of the search for *equilibrium* that come into being among sources of power (and law) which are at the same time competing and complementing[348]. This opens the door to the phenomenon of *self*-regulation. In the juridical field, functions attributable to the phenomenon of governance are those typically exercised by *independent authorities* (entities growing both from a numerical point of view and in terms of field of action) and from the *superior courts*[349]. Let's consider, in the latter case, how much the jurisprudence concurs *de facto* with the legislative formant – often in an innovative, not only reconnaissance or merely executive, way and as a binder to achieve a functional legal amalgam – to weave the juridical-normative fabric of an order, also in relation to and in close connection with other laws (and orders), such as the customary, transnational, international, supranational, etc. ones.

In light of the theoretical framework by Ost and Van de Kerchove, the difference between *government* and *governance* is stressed. The institutional dimension goes as per the *government* and it consists in the direction of policies and in the resolution of problems connected to the exercise of state sovereignty, and it is normally translated into the imposition of guidelines and principles of action through decisions taken by a centralized political authority. The *governance* has the nature of a *process,* through which it is possible to *coordinate* different actors (individuals or social groups, having a varied public or private, state, or extra-state configuration) to reach the goals discussed and *collectively* decided in polycentric, fragmented and uncertain contexts. Making this distinction is not just a rhetorical exercise, but it allows us to *problematize* the government paradigm (outlined by Weber) grounded on authority, hierarchy, and bureaucracy, emphasizing the existence of a *widespread* (or multi-centred) and *negotiated* process, characterized by incessant and partial adjustments, which rests on a (not closed) network of relations oriented to *coordination*[350]. A similar approach fits well with the trends (already mentioned above, regarding the *crisis* of the Westphalia order) of downsizing the role, functions, and structures of the State, often relegated to tasks, even if important,

Suhrkamp Verlag, 1993, English translation by K. A. Ziegert, introduction by R. Nobles and D. Schiff, in Fatima Kastner *et al.* (eds.), *Law as a social system*, Oxford-New York, Oxford University Press, 2004. For a theoretical framing of Luhmann see the worthy contribution of V. Ferrari, *Diritto e società*, *cit.*, pp. 10-13; more widely on *functionalism ivi*, pp. 61-66.

[348] *Ivi*, p. 56, Ferrari notes that in sociology of law (thus recalling an expression of Santos) the current world is described crossed by many "networks of inter-legality" in which each individual, regardless of the place where they live and from their status, finds themselves *immersed*. In this way a complex and prone to change horizon is envisaged, in which the many legal systems intertwine and clash themselves in alternating moments. It therefore seems inevitable to consider the *plurality* of legal systems, as *competing* entities, to regulate every concrete dimension.

[349] F. Ost, & M. Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, *cit.*, pp. 26-27.

[350] *Ivi*, pp. 26-29.

of planning, direction and coordination[351], for the benefit of other actors and peripheral centres (or entities among the lines and plans of the global network)[352].

To make this network dynamic easy and alive, and therefore to favour the meeting of distinct social spheres, the respectful and considerable dialogue of different logics, as well as the evolutionary fusion between heterogeneous forms of knowledge, a constant work of *translation* is needed for communication purposes. For the establishment of dialogic bridges, the achievement of compromises and coordinated actions, indeed, the preliminary ability to transfer the semantic and semiotic content of one language (or code) to another is required[353].

The last trait that connotes the reticular conception of the law of Ost and Van de Kerchove is the *dialectic*, intended as a method that leads to the interaction of usually distinct terms, highlighting the *points of contact* or *in common* among them. This way, each term is continually transformed and in turn transforms through the process of interaction and mutual *mediation*. This dynamic of interaction and therefore *reciprocal generation* (which can be well connected, by extensive analogy, to the *structural coupling* between the various social systems and to the process of *autopoiesis* theorized by Luhmann) allows us to identify *intermediate solutions* (or at least the third alternative between dichotomous terms)[354] and therefore, it is *the only one* that can give proper account of a complex reality like the present one. As pointed out by the two Belgian authors, the dialectic protects from the risky tendency to absolutize the positions in play[355].

It should be noted that their dialectical theory of law – perhaps precisely because it was developed in Europe – is able to explain the revolutions that took place in the (legal) source system with the advent of the European Union. Thanks to its last exposed characteristic, it can grasp and clarify the current relationships between different social (not only legal) systems.

According to the theoretical structure of the two Belgian thinkers and therefore with the reticular (explanatory) model, the considerations and the vision of another author, Cassese, deserve to be mentioned. Indeed, he illustrates an interesting parallelism between today's society and post-feudal medieval world (both seen, in this perspective,

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[351] See V. Ferrari, *Diritto e società*, *cit.*, p. 55, pp. 72-73.

[352] In this perspective, new (non-state) public intervention paradigms emerge, as for instance the phenomenon of the *committees*, as realities that allow the systematic consultation of different actors, whose difference is due to their heterogeneous origin, for the purpose of a *community* identification of problems and possible solutions. F. Ost, & M. Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, *cit.*, p. 30.

[353] For these purposes, the two Belgian authors support the adoptability of the *transcodage* category, developed by P. Lascoumes, see J. Chevallier *et al.* (eds.), *La gouvernementalité*, CURAPP, Paris, Puf, 1996.

[354] See note *supra*.

[355] F. Ost, & M. Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, *cit.*, p. 37.

under the microscope of reticular theory)[356] and he describes, in the light of the contemporary crisis of the (pyramidal) model of the state, the current legal systems in terms of *global public orders*. Each of these *governance centres*, according to him, is a tool with a network structure (not a hierarchical one), which presents itself as *an aggregate of general organizations and agreements* without the characteristics or categories typically associated with statehood (supremacy, sovereignty, a defined structure, a certain range, etc.), therefore not functional to solve the typical issues connected with sovereignty (such as representativeness, citizenship or democracy)[357]. Cassese argues that in such systems there would be different juridical elements – depending on the case, variously related (side by side, reciprocally dependent, integrated) – of heterogeneous nature (that is, of state, international and *supra*-national matrix), where the dominant role is exercised by the *administration* and not politics. This accounts for and legitimates their qualification in terms of global governance (and not government), informed by the procedural principles of the rule of law, due process of law, accountability, and fairness. Then, the path of global political power seems to be decidedly different compared to the one undertaken by national states: as pointed out by Marramao, indeed, the downfall of the Westphalia model (which can also be envisaged as the "decline of the Leviathan") has not at all triggered a trend of unification and uniformity in the direction of a *world state* (as imagined by Jünger) or of a *cosmopolitan republic* (as wished by Kant) but it has created a sort of *contracted hyperspace*, internally unbalanced and constitutionally refractory to any *reductio ad unum* based on the exclusive logic of sovereignty[358]. As the latter author observes, rather than an "imperial" world government, this would lead to the emergence of a "nuovo potere decentrato e deterritorializzato [che] dà luogo ad entità ibride, gerarchie flessibili, scambi fluidi e reti di comando modulari", which will give way to a "dominio globale, ormai fuoriuscito dallo schema centro-periferia", difficult to pinpoint[359].

In the next sections of this chapter, I will share my personal considerations and hypotheses, by firstly illustrating some ideas that I have elaborated while analysing the *Actor Network Theory* of Latour and Callon, especially in relation to the concept of *actor* and the peculiar *flat* dimension of their theoretical perspective. Secondly, thus raising connections between the respective reticular settings, reflecting on the theoretical effort made by Ost and Van de Kerchove and its powerful explanatory capacity for many of the current normative phenomena.

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[356] On the configuration of the post-feudal medieval order as an example of a *network* model see S. Cassese, *Le reti come figura organizzativa della collaborazione*, in *Idem*, *Lo spazio giuridico globale*, Roma-Bari, Laterza, 2003. On the configuration of the current political-legal space in reticular terms see *Idem*, "Gli Stati nella rete internazionale dei poteri pubblici", *Rivista trimestrale di diritto pubblico*, vol. 49, no. 2, 1999, pp. 321-330.

[357] *Idem*, *La crisi dello Stato*, Roma-Bari, Laterza, 2002.

[358] G. Marramao, *Passaggio a Occidente. Filosofia e globalizzazione*, Torino, Bollati Boringhieri, 2003, p. 43.

[359] *Ibidem.*

Can the legal phenomenon, the law and even a source of law, be considered an actor submerged in this network of inter-legality and different legal systems? Is it not therefore only the product of all the actors that interact in the reticular dimension, but is it in turn an actor that contributes to modify the reality and other nodes of the network?

3.3 *About the Actor-Network Theory of Bruno Latour, Michel Callon, and John Law*

Let's now consider some of the more significant aspects of a relevant and quite recent socio-legal theory, known as the *Actor Network Theory (ANT)*[360].

In light of its features, as a peculiar type of sociological reticular theory, it can be seen as an alternative answer, compared to other traditional theories, to better explain the current complexity of reality. For instance, the reality of legal orders and their miscellaneous sources of law, which (as pointed out earlier) more and more operate out of a vertical and hierarchical dimension, but even that of new global public orders (see Cassese, *supra*), grounded on the ideas of governance, polycentrism, collective and negotiating decision making, reticular-horizontal fields.

As a material-semiotic method – because it is grounded on the relations between things and between concepts, this theoretical and methodological approach is focused on *shifting networks of relationships*. Indeed, it sees social reality (in its every single element) as composed by *webs of connections* existing among *different actors* who operate in a *horizontal* perspective, not instead as the given product of some (hidden or not) social forces that operate in the background, being to a certain extent pre-existing and immune to change[361]. According to Latour, then, the task of the *critical* sociologist (who adheres to the *sociology of associations*, unlike the traditional one that belongs to the *sociology of the social*)[362] is to take nothing for granted, look for and then analyse at each

[360] For my purposes I mainly refer to B. Latour, *Reassembling the social: An introduction to actor-network-theory*, Oxford, Oxford university press, 2005.

[361] See *ivi*, pp. 4-5: "'society', far from being the context 'in which' everything is framed, should rather be construed as one of the many connecting elements circulating inside tiny conduits". Tracing the difference between *traditional* and *critical* sociology – in the latter Latour places the ANT – he argues that (*ivi*, p. 5) "the second position takes as the major puzzle to be solved what the first takes as its solution, namely the existence of specific social ties revealing the hidden presence of some specific social forces. In the alternative view, 'social' is not some glue that could fix everything including what the other glues cannot fix; it is *what* is glued together by many *other* types of connectors". He conceives sociology "as the *tracing of associations*", where the word *social* designates "*a type of connection* between things that are not themselves social" and, as a phenomenon, (*ivi*, p. 8) "it is visible only by the *traces* it leaves (under trials) when a *new* association is being produced between elements which themselves are in no way 'social'. (…) the second school claims to *resume* the work of connection and collection that was abruptly interrupted by the first".

[362] *Ivi*, p. 8: "Whereas, in the first approach, every activity – law, science, technology, religion, organization, politics, management, etc. – could be related to and explained by the same social aggregates *behind* all of them, in the second version of sociology there exists *nothing* behind those activities even though they might be linked in a way that does produce a society – *or doesn't* produce one. (…) To be social is no longer a

and every time the *traces* left by the *social* ("as a very peculiar movement of re-association and reassembling")[363] and by the various actors, especially in the dynamic moment of their interaction (even the conflictual one), with the phenomenon of social aggregation.

Indeed, according to ANT, the social scientist is no longer the one who sets a certain order authoritatively, defined the scope of acceptable entities, moulds the actors into what they *ought to be* or inserts some degrees of reflexivity to their mere action. Instead, adopting an ANT's slogan, scholars *must follow the same actors*, that is, to keep up with the innovations they advocate for, in order to try and learn from them about the essence of the collective existence produced by them, which methods they have developed to keep it together, and so on[364].

Based on the role that ANT asks to the social scientist and establishing a connection with the legal field, we will work with this idea. Why not assume that even the *normative phenomenon* (understood in a broad sense, as law, rule and/or source of law) can be *an actor,* and therefore a part or a *node* of the network? If this framework is acceptable, it consequently derives that the legal scientist (which focuses their attention on the normative phenomenon) should not claim to (exclusively) define what the law and/or a source of law is or is not. Indeed, they must learn from what is revealed as such.

At another point in his work, Latour defines ANT simply as an attempt to allow members of contemporary society to have as much margin as possible in *defining themselves*. Therefore, according to this theoretical setting, a possible scenario is the one in which today's actors can define their own connotation, extension and therefore essence in *almost* total autonomy (without definitions imposed from above), considering that "for scientific, political, and even moral reasons, it is crucial that enquirers do not in advance, and *in place* of the actors, define what sorts of building blocks the social world is made of"[365].

Then, we could ask ourselves provocatively: why not "allow" the law or legal sources, properly considered as actors, to define themselves? In the end, in clear connection to the theory of Ost and Van de Kerchove, this is what happens with the rules that *change themselves* or that are *recursive*, both explained by the image of the "strange rings". This happens even in a "tangled hierarchy", where superior and inferior norms influence and modify each other, in the process of formation, the reception and recognition of a rule. In this perspective, (legal) actors themselves would define their own characters and boundaries, their own law, i.e., the salient, effective, and "valid" normative phenomenon, in a totally *substantial* and not formal way (that is, outside the formal requirements for being a norm valid). We would thus have a *living law* that would be

safe and unproblematic property, it is a movement that may fail to trace any new connection and may fail to redesign any well-formed assemblage. (…) what is called 'social explanation' has become a counter-productive way to *interrupt* the movement of associations instead of resuming it".

[363] *Ivi*, p. 7.

[364] *Ivi*, p. 11-12.

[365] *Ivi*, p. 41.

traceable and observable (wanting to apply ANT to the juridical universe) not in its static, but in its *dynamic* moment, whenever there is *interaction* (conflict)[366] among the various legal actors (i.e., laws and sources of law) or it lives in the behaviours of the associates, moments both revealing its presence and essence. As for the *social connections* (e.g. the formation of social groups and aggregates), which, according to Latour, are revealed in the interaction of the same actors or associates, the "movements" or changes in law can be traced back with the interaction among legal sources, the clashes of norms and the same social actors and actants when they behave in ways that (conform or) deviate from the already established normative phenomena.

To justify the semantic extension of the term *actor* presented here, to further develop this framing and give an account of its also inevitable *heteronomous* dimension, it is crucial now to report the *definition* of actor coined by Latour: "An 'actor' in the hyphenated expression actor-network is not the source of an action but the moving target of a vast array of entities swarming toward it"[367].

This definition offers us a further perspective, configuring the actor also as a *centre of imputation*, that is, as the *object* of the actions of others.

Taking up the aforementioned idea, I think that a normative phenomenon – the law, a legal source, etc. – may well equally fit into this definition. Indeed, it can be well seen as a *moving target* and therefore as an *actor*, namely, as the centre towards which the thoughts, interests, and actions (of various nature) of different other actors involved flow. Such as, for instance, a certain number of associates, legal operators (lawyers, judges, magistrates), doctrinal writers, politicians, etc., who contribute, with their *oriented action* (i.e., directed towards that object of interest or action), to form it, characterize it, and shape it.

Embracing the suggested approach, thus applying that a specific sociological-reticular theory (ANT) to the juridical-normative world, would allow us to develop significant observations. It would entail the acknowledgement that that particular actor embodied in the normative phenomenon (a certain law or source of law) is *continuously and liquidly defined by (its interaction with) the other actors* (mentioned above) and therefore it cannot even live or exist without them (if we accept the idea that defining – i.e. setting the limits of – something involves the process of identifying its fundamental features and therefore the extension of it).

Therefore, the law as a legal actor does not pre-exist as something given (as Latour would say of the *social* or the *social dimension*) and reveals itself in the connections,

[366] For Latour (*ivi*, p. 30) *controversies* offer an essential resource for the scientist to make social connections traceable. Thus, similarly to Ost and van de Kerchove, he values the *dialectical* dimension of the encounter / conflict (in particular, in the formation and interaction of the various social groups).

[367] *Ivi*, p. 46. Note how Latour understands the concept of *action* by placing it in a reticular perspective (*ivi*, p. 44): "Action is not done under the full control of consciousness; action should rather be felt as a node, a knot, and a conglomerate of many surprising sets of agencies that have to be slowly disentangled. It is this venerable source of uncertainty that we wish to render vivid again in the odd expression of actor-network".

interactions, movements that it entertains with the other actors/actants present in the context of reference and that happen in the socio-legal sphere for the thrusts of the various other social actors that converge towards it, namely, in the context of "the vast range of entities swarming towards it".

Another interesting prompt offered by ANT and relevant to my reasoning is its *horizontal dimension*, intended as a theoretical-explanatory horizon that can offer an alternative and relevant perspective to explain the current socio-normative reality, compared to the traditional vertical pyramidal perspective.

Indeed, always assuming the purpose of tracing social connections and borrowing a metaphor from cartography, Latour states that "ANT has tried to render the social world as *flat* as possible in order to ensure that the establishment of any new link is clearly visible"[368]. It could be worthy to *transfer* this geometric approach to the legal world, with special regard to the multiple and heterogeneous sources of law that exist today. Indeed, to conceive the socio-legal world in a *flat* (boundless) perspective – everything on the same level – it would perhaps *allow us to see* the creation of every new juridical connection, every new relevant legal constraint, every act or fact productive of norms, rather than confuse or lose them in the (closed) pyramid of hierarchies and different normative plans (implied by the paradigm of nomodynamic legal orders of today's constitutional democracies – see Ferrajoli *supra*).

At the same time, few clarifications are needed. By leveraging the distinction between descriptive or prescriptive point of view, I reckon important to pinpoint the potential scope and use of ANT, as well as of the conceptual tools developed by Ost and Van de Kerchove, into the legal discourse and for the legal science.

3.4 *Some thoughts and considerations about the network-paradigm. Towards a hybrid model?*

I reckon that this alternative approach could therefore be useful in an *observational-descriptive* perspective to grasp what happens in the socio-legal-normative reality, so as to be able to develop explanatory hypothesis concerning a certain juridical phenomenon (where, how, when it was born and developed, etc.) without necessarily being influenced by the order imposed by hierarchies or by hierarchical constraints, but also being able to *complement* the pyramidal model offering a *joint explanation* of the current normative reality. Therefore, I suggest, it can offer, not in a *prescriptive-axiological* key, but from a *descriptive-observational* point of view, a different and rich perspective on the considered phenomenon, precisely for

[368] *Ivi*, p. 16.

placing it on a horizontal (flat) dimension, thus allowing to see and highlight in a new, original way its possible movements and (inter)connections.

From a critical *external* point of view, it could be worth to notice that this horizontal dimension out a purely explanatory logic or perspective (that means considering these phenomena in a horizontal perspective only to identify them and explain them better) would have a *disruptive effect*: if it is true that the normative *hierarchy* is functional to the concept of *supremacy* of one source over another and therefore to the *preservation* of (at least privileged parts of) an order[369], adopting the *axiological* vision for which all the sources *should be* placed and considered in a *flat* dimension would disrupt the conservative mechanism guaranteed by hierarchy. Thus, this would favour the extreme and frenetic "evolution" of normative systems and legal orders to the detriment of any other preservative end. Since, in this scenario, would probably prevail only those norms which, in a certain space and time, reflect the most widespread and shared social practices, i.e., the common social sentiment, or the will (perhaps even very divergent) of the various governance centres spread across the network. The problem therein would be that this dynamic will occur *without* any kind of *durable legal constraint* and without this creative normative process finding *limits* in the lists of principles, rights and freedoms traditionally sanctioned by constitutions (or laws endowed with superordinate privileged position), reaching a situation in which the latter assets will not be "untouchable".

Would the conception of the horizontal dimension in a *prescriptive* way therefore lead to the risk of a *sensationalist drift*? Would it be "law" only what the social body, we could say the *majority*, would feel as such at a given historical moment? Or what would be expressed, from time to time and perhaps in contrast, by the various centres of power-governance scattered in the network?

I reckon that this occurrence, in an ethical-political dimension and for guarantistic reasons *undesirable*, would lead to a *purely liquid order*, without any safeguard or guarantee: any new normative phenomenon, indeed, if it had sufficient strength and consent would be able to establish itself to the point of overwhelming and nullifying other (legal) phenomena and actors (dimensionally less significant or temporarily less considered) and regardless of any historically established *value*, with all due respect to fundamental rights and freedoms (life, physical integrity, freedom of expression, etc.).

Not even the categories of the *strange rings* and the *tangled hierarchies* illustrated by Ost and Van de Kerchove in their *dialectical theory of law* can be useful for an *external* critical reflection, since they are placed in a purely *descriptive* and *observational* dimension, like the one offered by the network model. Indeed, the two conceptual tools simply allow to analyse those peculiar phenomena which *occur* in the legal reality (or inter-realities): they *explain* the dynamics of norms that modify *themselves* or even other

[369] By clarifying which one is superordinate and therefore worthy of respect or restoration in the event of normative conflicts or violations.

superior norms. Consequently, they cannot serve to guarantee or preserve *fundamental legal cores* against possible illiberal and totalitarian (normative) thrusts and motions.

Concluding this ethical-political detour, I think it is important to stress that *hierarchy*, conceived of in traditional terms and *at least to a certain extent*, remains functional and therefore necessary to keep alive the existing orders (not just the statal ones), their sets of values and fundamental principles (i.e. the legacy of fundamental rights and freedoms) and, in the end, the human being (otherwise doomed to be rejected into the State of Nature, prey to his appetites, that is, in a *purely horizontal society*, without guarantistic ordering criteria that can protect those fundamental assets historically acquired)[370].

That said, from a sociological and descriptive point of view, I would like to stress the following points:

1) Even considering its crisis (due to the weakening of the State and the dawning of a more and more heterogenous reality), the pyramidal model can, with some *adjustments* in light of the reticular social-legal theories, still play an important (even crucial) role in explaining the current and future normative phenomena.

2) Then, one may see the *opportunity* to also adopt a reticular *flat* perspective for its significant *descriptive* and *explanatory* capacity, since it allows us to observe and account for the current *interlegality* of cross systems, the complex legal reality of today – often widespread in reticular structures – and generally the normative phenomena from *another perspective*. This way, thus, is possible to grasp aspects that would otherwise be unobservable.

As a result of my reflections, I concur with the realistic consideration carried out by Ost and Van de Kerchove[371]. The transformations underway do not demand and do not legitimize a *total paradigm shift* in socio-legal science.

Indeed, the vertical-hierarchical model today is still quite suitable to legal orders (traditionally intended and except for common law systems), because of the persistent presence of the State and prevalence of its law among the different normative sources, even if the situation could rapidly change. Dealing with possible future scenarios, I reckon that the formal law sources (official and hierarchically ordered), to the extent that *national-sovereign-oriented thrusts* will become stronger, will continue to have greater

[370] In this sense, from a *prescriptive axiological* point of view, I would envision societies *mainly* regulated by means of nomodynamic orders – which structurally operate on several normative levels and hopefully take the form of constitutional democracies –, based (at least in part, but not only) on the hierarchical principle to solve the (always possible) antinomies and, above all, to preserve those *contents* of (ethical-political) *values* sanctioned at the higher levels of the order against possible illiberal and authoritarian (even normative) social thrusts.

[371] F. Ost, & M. Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, *cit.*, pp. 15, 22.

importance compared to other "alternative" sources (as well as transnational and supranational law, customary law, judicial law, etc.), often "forcibly" brought back (from the point of view of the legal-theoretical arrangement) in the traditional pyramidal structure and design of the State. Reticular models and ANT, therefore, with their horizontal relational approach, will probably not be able, by themself, to *completely* explain and fit into a still – to some extent – *state centric* reality. Nonetheless, they can exercise a crucial role in *implementing* the pyramidal model wherever the latter is not able to represent or explain the new complexity of socio-legal reality and particular normative phenomena.

Then, while observing that the two theoretical paradigms here analysed, the pyramid and the net, experiment a sort of *structural crisis* which entails their *dialectic coexistence* and their *recursive appearance* over the decades (on this subject, considering the chance to apply categories drawn from the philosophy of science, see *infra*, in the last chapter), I think that it would be relevant to try and build a *hybrid model* from the previous ones, which allows the pyramid to theoretically *merge* with the network and vice-versa.

Hence, efforts should be made to develop, outside of a binary logic and embracing instead a multivalent approach, a *composite* solution between the two paradigms, a *tertium genus*, to better disclose and represent the current reality. This way, their long-lasting crisis will perhaps be resolved and overcame.

Following this suggestion, to visualize the complexity of normative reality and provide an image suitable to represent this new composite model, I would like to convey a metaphor regarding the *Solar System* and its planets: the Sun as the still centre and fundamental core – representing, for instance, the inalienable rights and freedoms of mankind – attracts all other celestial bodies – standing for any other normative phenomenon and legal actor. This multidimensional environment, which represents a polycentric and widespread reality with many nodes of governance, spread from the centre to periphery, but also contemplates opposite movements in turn. Every planet and satellite with their own orbit and axes, like the different paths and motions that the normative phenomena might carry out. Moreover, the solar system does not stop other planets or systems from existing, namely, it is not exhaustive, indeed it embraces diversity. Even though every celestial body, every planet which belongs to this system, needs the Sun as a fundamental core to find its own balance, to receive vital energy, to avoid clashes with others.

FOURTH CHAPTER

THE DIALECTIC CO-PRESENCE

Summary: 4.1 *Introduction* – 4.2 *Globalisation vs de-globalisation. Net vs pyramid?* – 4.3 *Hints of jurisdictional pyramids and networks: the multilevel protection of fundamental rights and nomophylactic function* – 4.4 *"Flares" of Thomas Kuhn's philosophy of science, with some adjustments, in law, as a social science* – 4.5 *The recursive crisis and the dialectical coexistence between the pyramid and the net*.

"SOCRATES
Well now, are we still pregnant and in labour
with anything about knowledge,
or have we given birth to everything?

THEAETETUS
Yes, indeed, Socrates;
actually you've got me to say more
than I had in me"

PLATO*

4.1 *Introduction*

In this last chapter I will consider three different dimensions to assess the explanatory suitability of the theoretical paradigms previously addressed.

Accordingly, I will weigh their iconic force by considering, firstly, the economic sphere, in light of its strong *interdependence* with other sub-social spheres, as politics and the law. Particularly, I will focus on both the process of *globalisation* and its opposite one, that is, *de-globalisation*, aiming at spotlighting how economic transformation can affect the legal sphere, whether at state or global level, and the actors involved therein. This way, once presented the main outcomes of both processes and carried out a critical analysis of Cassese's posture, I will set forth my considerations about which theoretical model can better catch the essence of either a *globalised* market and legal space, which seems to spread in polycentric terms and in a horizontal perspective, or a *de-globalised* world, which comes back to more traditional forms of concentration of (normative) powers and vertical distribution in the hierarchy of sources of law.

* Plato, *Theaetetus*, translation with notes by John McDowell, Oxford, Clarendon Press, [1973]1999, 210b-c.

Secondly, I will check the sphere of *jurisdiction* to provide some kind of *spatial suggestions*, whether detecting pyramidal forms in the way in which a certain kind of judiciary is organised or accomplishes its function; or observing reticular inclinations of judges and/or network structures in the way in which they interact and entertain a (often difficult) *dialogue* among Courts. Concerning this profile, I will develop my analysis and thoughts in light of the *multilevel* safeguarding of human rights, shedding light on the fundamental *nomophylactic* function that national Supreme Courts and the Court of Justice of the European Union must carry out in the European legal scenario.

Thirdly and finally, I will critically gather some categories stem from the philosophy of science of Kuhn, especially the one of *paradigmatic crisis*, to show that the *dialectic clash* between the pyramid and the net, at least for the legal theory and the legal science (where both focus on the law, as an artificial and historical "object"), entails different results and features with comparison to the ones achievable in the natural sciences' realms. Indeed, I will stress a sort of *functional balance* between the two models at stake, whereby each one preserves its own explanatory force, by leveraging their historical recursiveness and *dialectical co-presence*.

The latter is indeed *le fil rouge* which runs through the entire chapter and to some extent unveils my conclusion: both theoretical paradigms, the pyramid, and the net, dialectically coexist in the legal field and in legal scientists' speculations. In particular, by means of the triple dimension here considered, I will show that each model can successfully carry out a representative function, all depending on the single concrete normative phenomenon to be illustrated.

4.2 *Globalisation vs de-globalisation. Net vs. pyramid?*

Eminent authors of the past have already spotlighted and tackled either the crucial and fertile interaction among the various (sub-)social spheres that compound our social world[372] or the mutual influence that legal and economical dimensions exercise among

[372] As one may easily grasp, first and foremost, I refer to Luhmann's *functionalist-systemic* perspective and his idea of a *structural coupling* among the different sub-social spheres, whereby the latter, each one carrying out a distinct function, reciprocally interact and "irritate" themselves, this way prompting one another in their *separate* evolutive process. Curious enough, indeed, in Luhmann's view these reciprocal "irritations" and interactions among the social fields cannot lead to hybrids, contaminations, and intersections of any kind. In short, the social spheres' boundaries are strongly defined and impervious. Cf. again N. Luhmann, *Social Systems*, *cit*., *passim*; *Idem*, *The autopoiesis of social systems*, in F. R. Geyer and J. van der Zouwen (eds.), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-steering Systems*, *cit*., *passim*; N. Luhmann, *Law as a social system*, *cit*., *passim*; *Idem*, *Sistema giuridico e dogmatica giuridica*, *cit*., *passim*.

each other[373]. Inevitably, many others in current time still cope with this relevant topic, even expanding its scope and experimenting new tools of legal analysis[374].

Accordingly, one cannot but agree in considering the strong influence that economical changes can produce over the socio-legal reality, that in turn can bind or release – by means of its legal statutes, normative acts (as judicial and administrative decisions) or even through its self-restraining processes[375] – markets, firms, various actors and economical subjects which operate in a multi-level framework.

Hence, one may share the idea that as economics transforms, so it does the law and the normative phenomena. Therefore, in light of the undisputed close relation that exists between law and economics, in this section I deem enlightening to weigh the explanatory capacity of both macro-models previously addressed in this thesis, the pyramidal and reticular ones, by connecting the analysis of the legal phenomenon (with special regard to the way in which the sources of law and the forms of power place themselves in the legal space, broadly intended) to a pair of world-wide economical processes that over the last decades have been characterising and affecting the economical realm, for sure, but consequently even society as whole. This way, producing significant effects on cultural dynamics, politics (and the idea of sovereignty), legal culture and theory, ultimately, the normative sphere.

The processes I refer to constitute one the opposite of the other, that is, two sides of the same coin: globalisation and de-globalisation. Here I consider them as two *exemplary*

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[373] For this latter dynamic, especially see the works of Max Weber, as the classic M. Weber, *Die Protestantische Ethik Und Der Geist Des Kapitalismus*, Tübingen, Mohr, 1934, English translation by T. Parsons, introduction by A. Giddens, *The Protestant Ethic and the Spirit of Capitalism*, London, Routledge, 2001, and, in particular, for his most comprehensive account, M. Weber, *Wirtschaft Und Gesellschaft*, Zweite vermehrte Auflage, Tübingen, J.C.B. Mohr-Siebeck, 1925, part 1, English translation by A.M. Henderson and T. Parsons, introduction by T. Parsons, in T. Parsons (ed.), *Max Weber: The Theory of Social and Economic Organization*, New York, Oxford University Press, 1947. There Parsons, in his introduction (*ivi*, p. 5-6), points out that Weber, who studies both "the history of legal institutions" and "their social and economic setting", "strongly emphasize[s] the dependence of law on its economic and technological background".

[374] For instance, one may consider one of the most significant exponents of the Economic Analysis of Law, eminent jurist, judge and professor, Richard Posner. See then R. A. Posner, *Economic Analysis of Law*, Boston, Little Brown, 1973; *Idem*, "Utilitarianism, Economics and Legal Theory", *Journal of Legal Studies*, vol. 8, no. 1, 1979, pp. 103-140; *Idem*, *The Economics of Justice*, Cambridge MA, Harvard University Press, 1981; *Idem*, *The Problems of Jurisprudence*, Cambridge MA, Harvard University Press, 1990; *Idem*, *Overcoming Law*, Cambridge MA, Harvard University Press, 1995. For the Italian scenario, about the crisis of states and their economic sovereignty, thus depicting the raise of a (new) *global legal space*, there are the works of Sabino Cassese, see *infra* apropos of *globalization*.

[375] From a *bottom-up* perspective, concerning the sociology of constitutional law and the possibility of constitutional processes *without states*, see G. Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, in C. Joerges, I. J. Sand and G. Teubner (eds.), *Transnational governance and constitutionalism*, Oxford-Portland Oregon, Hart Publishing, 2004, pp. 3-28, where the illustrious scholar undermines the central role of state law, indeed, fostering the idea whereby the legal phenomenon is *self-producing* and, although it might seem paradoxical, *self-grounding*. In similar terms, cf. *Idem*, *Constitutional Framgments. Societal Constitutionalism and Globalization,* Oxford, Oxford University Press, 2012.

models of relevant economic developments or trends that affect the complex of society on a large scale. Consequently, I present their main empirical features and elements, but also the theoretical reasons that, in my opinion, ground the association here supported, on the one hand, between globalisation and the net, on the other hand, between de-globalisation and the pyramid.

Starting with an image, dealing with a *globalised* world means facing a reality that is strongly *interconnected* and increasingly observable in a *flat* perspective, where the *vertical* distribution of powers and normative sources loses its predominancy (although does not disappear).

Accordingly, in this scenario one may notice, at various levels and with changing intensity, distinct but interconnected realities, such as: several administrative-regulative authorities (as points of *governance* and *regulation*, see *supra*, section 3.2) to some extent alternatives to states – in so far as they foster the overcoming of traditional state *government* and *legislation*, existing and operating at the crossroads of increasingly intertwined and communicating normative systems; plenty of *private actors* which operate in (at least partially) liberalised markets, the more and more establishing *negotiated* and *technical* forms of (commercial) interaction which seem to significantly downsize or even undermine the pre-eminence of *public* legal frameworks and *political* instruments; again, sources of law located *in between* (often interacting) legal orders, whereby the resulting norms are observable, comprehensible, and interpretable in a *network* (or *multiple networks*) of legal connections only.

In the framework of *globalisation*, then, one can grasp an increasingly *horizontal* and *differently* hierarchical perspective (since the criterion of hierarchy persists, but takes on new forms)[376], where administrative decentralisation, de-regulatory processes and above all *polycentrism* in decision-making, that operate at various levels and often outside the usual vertical hierarchical logic[377], are the rule.

Some authors frame this wide phenomenon in a rather narrow temporal context, arguing that it mainly starts at the beginning of the 1990s to inspire and characterise the social, political, and economical reality (we should add, hence, the legal one) for at least a couple of decades. Others point out that the process of *globalisation* should be viewed as a recursive long-lasting movement, distinguished for its high and low "tides"[378].

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[376] About the existence of possible *alternative* hierarchies, see the points made by Ost and Van de Kerchove in the previous chapter, section 3.2, who detect and illustrate the particular figures of the *strange rings* and *tangled hierarchies*.

[377] So that elements of socio-legal and economic reality communicate, interact, and can even *change each other* regardless of their location in the overall system, for example, when a custom or regulatory practice over time comes to modify the normative interpretation of a legal provision.

[378] For a semantic reference of the term *globalisation*, see the work of A. Giannuli, *Appunti per una discussione su Modernità, Modernizzazione, Globalizzazione*, ebook, 2012, pp. 4-5, who, however, circumscribes the phenomenon to the period of social, political, and economic transformations that started

Thus, considering its last expansive and stimulating historical phase, one may detect these further aspects and phenomena that shows how it has contributed (at least until recently, *infra*) to shape a more *widespread* and *polycentric* reality[379].

Here I recall the following profiles: a progressive interdependence on a global scale of financial markets and economies; the corresponding attempt, albeit largely unsuccessful, to amalgamate cultures, bring societies closer together and develop political integration processes; the strengthening of Internet along with Artificial Intelligence, of information technologies and thus the capillary dissemination of a growing mass of data in the *network* of the digital universe. In addition, I reiterate the downsizing of the state role (even though only in some "virtuous" contexts) and, conversely, the strengthening of private entities or actors in the *extra*-state context (transnational companies, NGOs, lobbies, etc.). As well as a greater regulatory-administrative decentralisation, also operated thanks to territorially dislocated bodies of governance (for instance, the independent administrative authorities)[380]. In addition, I would point out the *judicialization*[381] of politics (here intended as the technical administration of judges and

in particular in the early 1990s. From a definitional perspective, I consider the more "inclusive" and "open" contributions of C. Crouch, *Identità perdute. Globalizzazione e nazionalismo*, Bari-Roma, Laterza, 2019, and F. Della Porta, *Una breve storia della globalizzazione*, Dueville, Ronzani, 2021, to be more appropriate and therefore preferable. The former (C. Crouch, *Identità perdute. Globalizzazione e nazionalismo*, *cit*., p. 7) employs the term to describe the "development in good parts of the planet of relatively unrestricted economic relations, but this process has wider social and political implications. People from different cultures come to stand next to each other and national systems of economic governance are severely challenged. Disruptions of various kinds – economic, cultural, and political – accompany globalisation (...)" (English translation is mine) / "sviluppo in buone parte del pianeta di relazioni economiche relativamente senza restrizioni, ma questo processo comporta implicazioni sociali e politiche più ampie. Persone di diversa cultura vengono a trovarsi l'una accanto all'altra e i sistemi nazionali di governo dell'economia sono messi a dura prova. Sconvolgimenti di varia natura – economici, culturali e politici – accompagnano la globalizzazione (…)". The second author (F. Della Porta, *Una breve storia della globalizzazione*, *cit*., pp. 12-13), an advocate of a *discrete* view of globalisation, characterises it as an alternating and recurring long-term process, with *ebbs* and *flows*.

[379] About the observable *polycentrism* of legal orders, see S. Cassese, "Poteri indipendenti, Stati, relazioni ultrastatali", *Il Foro Italiano*, vol. 119, no. 1, 1996, pp. 7/8-13/14. More widely on *legal polycentrism*, cf. H. Petersen, & H. Zahle (eds.), *Legal polycentricity. Consequences of pluralism in law*, *cit.*, *passim*, and A. Hirvonen (ed.), *Polycentricity: The Multiple Scenes of Law*, *cit.*, *passim*, and N. Irti, *Nichilismo giuridico*, *cit*., *passim*.

[380] See S. Cassese, "Poteri indipendenti, Stati, relazioni ultrastatali", *cit.*, p. 7/8, where he observes that, considering the crisis of state (*infra*): "[...] a world crowded with states and national governments is now joined by another, crowded with independent authorities. [...] One can state that we are witnessing, in modern legal systems, a dualization of normative power, one part of which is retained by parliament, while another part is attributed to independent authorities [...]" (English translation is mine) / "[…] a un mondo affollato di Stati e di governi nazionali, se ne aggiunge ora un altro, affollato di autorità indipendenti. […] Si può dire che si assiste, negli ordinamenti moderni, ad una dualizzazione del potere normativo, una parte del quale viene conservate dal parlamento, mentre un'altra parte viene attribuita ad autorità indipendenti […]".

[381] On this polisemantic expression I recall the useful work of H. Rayner and B. Voutat, "La judiciarisation à l'épreuve de la démocratie directe. L'interdiction de construire des minarets en Suisse", English translation by Sarah-Louise Raillard, "Judicialisation and Direct Democracy. Switzerland's Ban on Minaret Construction", *Revue française de science politique*, vol. 64, no. 4, 2014, pp. 689-709. There, the authors analyse the various meanings of the expression and set forth the raise of "juristocracy".

officials overruling political actors), which has sometimes occurred in some branches of law. Finally, globalisation has brought certain gusts of multiculturalism within traditional state formations.

All considered, to further represent and analyse the process under examination, I catch some linguistic hints, ideas, and considerations that come from an eminent Italian jurist, Sabino Cassese, even providing a critical appraisal of his stance about this topic. Especially, I focus on the fascinating, but to some extent misleading or even unsuitable concept of "public arena", that he fosters as a sort of new desirable paradigm.

Hence, one may notice that since the late 1990s Cassese represents the *crisis of state* as the fundamental political institution. A domestic predicament the more and more investing state sovereignty, especially the economical one, in favour of the emergence or the strengthening of independent authorities, international public powers (*infra*), and especially economical-private actors which growingly operate and interact in the *net* of a scenario of "global governance" depicted as "global legal space"[382]. Indeed, with markets *deregulation* and the consequent weakening of state role, he observes as bilateral, multilateral, and supranational regulations progressively substitute the traditional state rules. This way, he envisions that the crisis at issue, which affects on states' *unity* and economical sovereignty, leads towards a "unitary result, the constitution of *ultra-national* orders, *networked* rather than hierarchical"[383].

Therefore, as already underlined, coping with these transformations, states to some extent take up and carry out a diminished role. Indeed, their traditional form of *government* (or politics) turns into a sort of (shared) *global governance*, where both international public powers (and institutions) and above all *worldwide economics* really rule on states[384]. Accordingly with this analysis, Cassese emphasises the way in which states are *immersed* in an international *network* (once again, this figure) of international public powers (thereby suggesting a certain passivity on their part)[385]. Where absolute

[382] Cf. S. Cassese, *La crisi dello Stato*, *cit*., *passim*; *Idem, Lo spazio giuridico globale*, *cit*., *passim*; *Idem*, *Oltre lo Stato*, Roma-Bari, Laterza, 2006. In this latter work, while he still considers unstoppable the economical globalization, he wonders if a global law can survive. See also, where he stresses the metaphor of the *net*, *Idem*, *Le reti come figura organizzativa della collaborazione*, in S. Cassese, *Lo spazio giuridico globale*, *cit*., pp. 21-26; *Idem*, "Poteri indipendenti, Stati, relazioni ultrastatali", *cit.*, *passim*; *Idem*, "Gli Stati nella rete internazionale dei poteri pubblici", *cit.*, *passim*.

[383] English translation and italics are mine. Cf. *Idem*, "Poteri indipendenti, Stati, relazioni ultrastatali", *cit.*, p. 7/8: "La crisi dell'unità degli Stati e quella della loro sovranità economica convergono verso un risultato unitario, la costituzione di ordini ultranazionali, costituiti in rete piuttosto che in gerarchie".

[384] Cassese describes this dynamic as the sovereignty of economics on states, see S. Cassese, *La crisi dello Stato*, *cit.*, p. 36 ff.

[385] See again *Idem*, "Gli Stati nella rete internazionale dei poteri pubblici", *cit.*, *passim*, also in *Idem*, *La crisi dello Stato*, *cit.*, pp. 54-66.

protagonists are private actors that harshly compete among each other in this global market and legal space, which he, rather surprisingly, ultimately conceives as a "public arena"[386].

Then, while Cassese's thorough analysis, at least for the considered period of *globalisation*, is largely sharable regarding the features described so far, that is, in descriptive terms, I deem useful to make some critical remarks about the way he chooses to represent a *global legal space* or market, namely, the image of *public arena*.

Cassese, in emphasising the decisive impact of *economic* globalisation which he considers by now irreversible (unlike *legal* globalisation, regarded as precarious instead)[387], although in an international framework supported by *public* institutions, seems to heavily rely on the *conflictual* and *selfish* free interaction of private actors, in some ways implicitly recalling Smith's *invisible hand* mechanism and thus the autonomous attainment of a providential balance by the general (one may say, *global*) economic system[388]. So, why does he represent this *arena* as a *public* one, thus overlooking one side of the coin, if the main relevant subjects which interact therein are *private* actors? As it is the case for the law, which is increasingly being transformed into *negotiated* forms – of private autonomy, indeed – and *technical* ones, which must be administered within the framework of global governance, rather than being left to the legal production of politics, as traditionally occurs.

About this profile, I already anticipate that, in my opinion, it would be better to use the adjective *composite*, to signify both the recalibration of the public sphere to the advantage of economic-private's one and a dimension in which both the private and public poles find new paths for their *coexistence* (the one not existing without the other).

Moreover, one may detect that, even though Cassese very frequently recalls the metaphor of the *network* (in his *Lo spazio giuridico globale* he even provides an in-depth analysis of the concept and its semantics, besides spotlighting networks that in the past have been relevant as *organisational figures* and explaining their *morphologies*)[389], he ultimately, and to some extent surprisingly, prefers to evoke a *public arena* to depict the globalised framework[390].

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[386] Cf. *ivi*, pp. 74-136, where Cassese outlines this "public arena" as a new potential paradigm for states. Moreover, he depicts the shift from the State to the UE in terms of the multilevel public organization.

[387] See *Idem*, *Oltre lo Stato*, *cit*., *passim*.

[388] Cf. A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, Basil, Printed for J.J. Tourneisen and J.L. Legrand, 1791.

[389] Cf. S. Cassese, *Le reti come figura organizzativa della collaborazione*, in *Idem*, *Lo spazio giuridico globale*, *cit*., pp. 21-26. Thereby, the author implicitly attests to the *historical recursiveness* of this explanatory paradigm, a point that is especially relevant for the considerations I will draw in the last section of this chapter (see *infra*, section 4.5). About Cassese's reference to the *network*, see again *Idem*, "Gli Stati nella rete internazionale dei poteri pubblici", *cit.*, *passim*, also in *Idem*, *La crisi dello Stato*, *cit.*, pp. 54-66.

[390] That also is the reason for which I reckon it is better to address his thought while dealing with the process of globalization, instead of framing it within the field of reticular theories, previously addressed in the third chapter.

In my opinion, the "arena" is a context in which the *relations* among the actors involved, mainly private stakeholders, are not clearly defined and thus not well representable (while the suitability to represent is a condition that an explanatory model, a paradigm, should pursue, at least to some extent). As a matter of fact, this image does not render a clear spatial perspective, neither horizontal nor vertical, so that the actors involved are rather *generically* or *chaotically* placed in this competitive space[391]. Furthermore, it does not seem to reserve room for international *cooperation*, while for Cassese the latter seems to be important[392].

Then, one may agree that the chosen metaphor, which in some respects reduces the globalised world to a purely *agonistic* context, undoubtedly presents pro and cons.

On the one hand, the image of an arena is certainly instrumental in illustrating and in some way incentivising the meeting or clash among the various stakeholders that, at different levels, mutually interact while pursuing their own goals. In short words, it well depicts and fosters the competitive dynamics among economical actors.

However, on the other hand, it misleadingly suggests the almost complete absence or inexistence of a regulative framework that can discipline, orient, and thus protect participants' behaviours (thereby, outlining a context very different from Cassese's *global legal space*), except for the implicit norm binding everyone to obey the will of the "imperator" or "absolute sovereign" who rules that specific arena. Consequently, this concept sketches an exclusively warlike universe, whereby little or no space at all is allowed for *other types* of relations (e.g., cooperative or conciliatory, more devoted to the coexistence of the actors involved), that in a globalised framework certainly may exist.

Moreover, it clearly highlights the *risk* that the predominant economic interests of the most powerful private actors (such as the *big firms*), will crush the physiological (healthy and protective) space held by *public institutions*, thus reducing the whole interaction in the global market to a gladiatorial fight. In which the public authorities, idly observing the spectacle, can at most decide, at the end of the clash, on the life or death (whether to spare or not) of one of the actors involved in this strenuous fight to the economical death.

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[391] Unless Cassese really wants to represent this *randomness* and the *arbitrariness* of relations in a globalised world. Actually, in S. Cassese, *La crisi dello Stato*, *cit.*, *passim*, the author observes a *multilevel* (hence, *hierarchical*?) and *networked* dimension, characterised by a *spatial indefiniteness* of public powers, so they are neither well located nor defined, although he speaks of a *structural interdependence* between them. In some ways, he seems to conceive globalised space as a *hybrid* of the pyramid and network models, although he does not make this explicit. Only by taking this further step, thus *explicitly* leveraging distinct features of both these models to compound a third hybrid, I believe, could the descriptive elements of his analysis finally be, at least partially, theoretically illustrated.

[392] Cf. S. Cassese, *Lo spazio giuridico globale*, pp. 3-20, where indeed he describes a *global legal order* in terms of *cooperation* without (state) sovereignty, inhabited by organisations that appear to lack *univocal centres* of reference.

All considered, I deem more effective leveraging a different expression to define the idea of globalised market and legal space (if any), whereby I suggest a *composite shared space*. This way, one can envision a *space* or context that, while surely allows for the *dialectical encounter* among the different participating actors (although they must follow a certain normative framework in it to competitively interact), even contemplates *heterogeneous* relations among them, as their "peaceful" coexistence in a climate of collaboration, concordance, and international cooperation. Still, I must admit, the word space is rather undefined and does not clarify or represent the way in which actors place themselves through it (whether vertically or horizontally or in further different terms), thus it leaves open different possibilities.

However, it also may be defined as *shared* in so far as the various actors existing and operating therein *participate in governing and ruling* that space (etymologically, they *divide* space *together*), without being it necessarily *public*, as a common place or *agora* surely are. Eventually, in light of the heterogenous nature of the same actors, both public and private, I call it *composite*[393], exactly for depicting the simultaneous *co-presence* of public institutions (domestic and international) and private economic actors, numerically far superior today.

One last profile, concerning Cassese's view, I think it deserves to be addressed, as a final critical remark and coming to explicit the model that I reckon the most suitable to deeply represent the processes of *globalisastion.*

One may notice that, despite Cassese describes a global legal order in terms of *cooperation without* (state) *sovereignty*, inhabited by organisations that appear to *lack univocal centres* of reference, in the end, he places the European Union at *the centre* of global governance[394], to the detriment of his continuous references to the *network* (which instead is structurally diffuse, polycentric and horizontally oriented, so that, if one accords prevalence to a *particular node*, is then accentuating its superiority-verticality over the others, thus re-proposing the figure of the pyramid). Thus, one can ultimately consider that his vision remains, to some extent, *monocentric*, as he identifies a very *privileged point* in the global network and, in the end, he lacks to draw the consideration that underlies his whole analysis: the *network* model is the best theoretical instrument to represent that kind of *globalised scenario*, that here I frame as *composite shared space*.

As already pointed out early in this section, indeed, I assess that, under the lens of the legal sphere, either the process of g*lobalisation* or its results are better explainable leveraging the network models illustrated in the previous chapter. On the one hand, indeed, the *dialectical theory of law* provided by Ost and Van de Kerchove is at least

[393] Picking up a word employed by the same Cassese with regard to the same European Union, which he conceives as a *composite* public organization, cf. *Idem, La crisi dello Stato*, *cit.*, pp. 67-73, and where he deals with the *composite* legal orders of the past or *composite* nation-states, cf. S. Cassese, *Lo spazio giuridico globale*, pp. 55-81.
[394] See respectively *Ivi*, pp. 3-21, pp. 55-81.

suitable to explain a more *widespread*, *polycentric*, and *decentralised* legal reality, better observable adopting a *horizontal* perspective. Where this theory is also able to account for the contingent dialectical relations that actors may experiment with and to appreciate *mildness* as the coexistence of different values, even opposite ones (a principle not uncommon in a global context occasionally inspired by multiculturalism and legal pluralism). On the other hand, even the material-semiotic method traceable to Latour, Callon, and Law, can significantly contribute. Sure enough, it allows to *detect* the webs of (legal) connections intertwined among the multiple actors that globally interact and exchange, by means of that *cartographic* approach, the ANT, that renders "the social world as *flat* as possible […]"[395].

All that being stated, accordingly to what I have introduced earlier in this section, there is the other side of the coin to consider, that is, the opposite trend characterising globalisation: de-globalisation. In recent years, indeed, the society is witnessing again processes of centralisation of power, the revival of nationalisms and a loss (or impoverishment) of supra-national collective identities (as it is happening to the much reviled "common European identity"), to the benefit of local egos[396].

By briefly presenting the main features of globalisation's last waning phase, I will shed light on the reasons why the pyramidal model, extensively addressed in the first chapters, can be the ideal tool for illustrating a, to some extent at least, *renewed* hierarchical-vertical way to conceive the relations of power and politics, hence the economical dynamics, and then the normative frameworks of the current legal orders.

In support of the consideration that the current juncture incorporates a phase of de-globalisation, I recall the observations of Giannuli, who highlights the significant *gap* between the actual processes underway and the neo-liberalist predictions associated with the idea of a globalised world[397].

For instance, he spotlights that the "decay" of nation states has only partly taken place, without homogeneity, and the devolution of sovereignty (as power) to supranational bodies has only occurred in certain contexts, such as Europe, but not in others (consider the Far Eastern side of the world). As a further discrepancy, he also points out that "the unification of financial markets and telecommunication networks has not been matched by a similar political unification of the world; on the contrary, there has

[395] Cf. B. Latour, *Reassembling the social: An introduction to actor-network-theory*, *cit*., p. 16, where he holds that: "ANT has tried to render the social world as *flat* as possible in order to ensure that the establishment of any new link is clearly visible".
[396] On renewed nationalism and the growing thrust in favour of sovereignty see, for instance, G. M. Flick, "I diritti fondamentali e il multilevel: delusioni e speranze", in *AIC*, no. 2, 2019, pp. 155-168, especially pp. 161-162.
[397] A. Giannuli, *Appunti per una discussione su Modernità, Modernizzazione, Globalizzazione*, *cit*., pp. 8-11.

been a regression from this point of view"[398]. Not to mention again the lack of *effectiveness* that often affects international legal institutions and their founding legal acts.

Moreover, Giannuli questions the reasons why, in certain contexts, after reaching a certain level of economic development, "the social, political and cultural processes that characterised the European experience first and the North American experience afterwards" are not becoming reality[399]. At the same time, he underlines the "fragility" of the transplantation practices of the Euro-American model of liberal-democracy, which has proven not to be the "magic formula" for all the countries in the world[400].

In the same direction is Crouch, who emphasises that "an epic clash between globalisation and a resurrected nationalism" is taking place, capable of transforming "identities and political conflicts all over the world"[401]. At the same time, thus restating the need of enhancing and strengthening supranational democratic institutions, he warns that, in order to avoid a chaotic drift, it is possible to exercise some form of control "over a world characterised by ever-increasing interdependence only through the development of democratic identities and institutions of governance capable of reaching beyond the dimension of the nation-state"[402].

In light of this framework, in order to balance or correct the imbalances here highlighted generated by the process of globalisation[403], currently undergoing a crisis or *slowdown*[404], *en passant*, one might stress the importance of downsizing or rethinking the

[398] *Ivi*, p. 9: "[a]ll'unificazione dei mercati finanziari e delle reti di telecomunicazione non ha corrisposto una analoga unificazione politica del Mondo, anzi, al contrario, si registra un regresso da questo punto di vista" (English translations are mine).
[399] *Ivi*, p. 15: "[i] processi sociali, politici e culturali che hanno caratterizzato l'esperienza europea prima e nord-americana dopo".
[400] *Ivi*, p. 36, where Giannuli, with great figurative force, states that: "[t]he globalisation project was a letter that the West sent to the rest of the World, identified as a lagging or "imperfect West". That letter was rejected at the sender and obliges us to a profound rethinking not only of that project but of the theories on which it was based and of the very idea of modernity that underpinned it" / "Il progetto di globalizzazione è stata una lettera che l'Occidente ha mandato al resto del Mondo, individuato come "Occidente imperfetto" o in ritardo. Quella lettera è stata respinta al mittente e ci obbliga ad un ripensamento profondo non solo di quel progetto ma delle teorie su cui esso si fondava e della stessa idea di modernità che era alla base".
[401] See C. Crouch, *Identità perdute. Globalizzazione e nazionalismo*, *cit*., p. 7.
[402] *Ivi*, p. 7, Crouch observes that "uno scontro epico tra globalizzazione e un risuscitato nazionalismo" is taking place, capable of transforming "le identità e i conflitti politici in tutto il mondo". Moreover, he suggests that, in order to avoid a chaotic drift, it is possible to exercise some form of control (*ivi*, p. 10) "su un mondo caratterizzato da un'interdipendenza sempre maggiore solo attraverso lo sviluppo di identità e istituzioni democratiche e di governo in grado di spingersi oltre la dimensione dello Stato-nazione".
[403] Indeed, Crouch (*ivi*, p. 11) maintains the need to "reform the guise that this process has taken on" / "riformare le sembianze che questo processo ha assunto", while standing for globalisation and against the new uprisings of authoritarian nationalism.
[404] As previously stated, I find Della Porta's point of view shareable where he distinguishes among *rising* and *falling* phases of the globalisation process, whereby the latter is historically conceived as a long-term process, cf. F. Della Porta, *Una breve storia della globalizzazione*, *cit*., pp. 12-13.

concept of sovereignty, traditionally anchored to the idea of the nation-state[405]; strengthening the supranational identities and democratic institutions (as well as participatory practices), implementing the *guarantees* that assist global legal institutions, so as to increase their *effectiveness* and allow the construction of a truly peaceful world horizon that respects fundamental rights[406]. As they would be certainly relevant achievements to improve and adjust the process of globalisation.

Picking up the thread, accordingly to the second descriptive hypothesis set forth in this section, here I spotlight that in moments of crisis or phases of *degrowth* that accompany the process of globalisation (which is therefore de-globalisation), the *pyramid* regains iconic force and returns to be a significant theoretical-explicative reference, in a certain way even inspirational, of the reality of political and juridical institutions, especially state ones[407].

As it has become evident in recent times, according to the authors cited above, a series of social, political, economic, legal, and cultural processes have, to some extent undermined, not without consequences, globalisation as it was imagined by neo-liberalism. Thus, resulting in a bitter response (but not necessarily fatal) to both the myth of the *global network*, the valorisation of spontaneous and atypical (since *bottom-up*) regulatory processes, and the dogma of interdependence between markets, peoples, identities, and cultures. These recent trends include the weakening of supranational identities and streams of political integration, economic-financial crises and related unemployment, the "anthropological" loss of individuals and workers in an increasingly competitive, depersonalised, and virtual world, the rekindling of nationalisms[408] and

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[405] Where, as Zagrebelsky claims in his renowned work *Idem*, *Il diritto mite*, *cit.*, pp. 8-11, in the constitutional rule of law to be *Sovereign* is at most the *Constitution*, understood as *a system of constraints and guarantees* erected to protect citizens and institutions against the *arbitrary* exercise of power. Moreover, on the need to go *beyond* the category of *nation*, as not being intimately essential to the democratic order, since it does not integrate a community that *precedes* politics, but represents its *contingent product*, as well as stressing the urgency to *revive politics* behind the globalised markets, see J. Habermas, *Die postnationale Konstellation: politische Essays*, Frankfurt am Main, Suhrkamp, 1998, English translation and introduction by Max Pensky, in Max Pensky (ed.), *The postnational constellation: political essays*, Cambridge, Massachusetts, MIT Press, 2001. For an Italian collection of Habermas' essays, cf. J. Habermas, & L. Ceppa (a cura di), *La costellazione postnazionale: mercato globale, nazioni e democrazia*, Milano, Feltrinelli, 1999.

[406]Be they of man or of the "Earth". In support of this desirable and urgent horizon are the recent works of Ferrajoli, which can be inserted, as extensively proven in the second chapter (see, for instance, footnote 279), in the framework of *global constitutionalism*, see L. Ferrajoli, *Per una Costituzione della Terra. L'umanità al bivio*, *cit*., *passim*.

[407] When, however, understood in an original and supranational sense, the pyramid theoretical model implies the existence of *a single* global legal order (on the level of legal theory) and *should favour* the constitution (on the political level, unfortunately still a long way off) of what Kelsen calls the *federal* or *world* state (see *supra*, chapter one).

[408] These include, for example, the fight against migratory movements and the free circulation of people, restrictive policies that reaffirm the modern "myth" of state sovereignty, and the assertion of state prerogatives and powers at the expense of international organisations and their controlling agents, thus fostering rearmament processes, human rights violations, and belligerent behaviour.

thus, a new emphasis on the figure of the nation-state. There is also the structural and pathological *lack* of effectiveness of the control and sanction mechanisms envisaged at the international level against the violations of fundamental rights and peace, as well as a revived state *mono-centrism*, which thrusts again towards the centralisation of political-normative prerogatives.

In light of this scenario, under the lens of legal theory, hence, one can discern a renewed relevance of the criteria of logical coherence and hierarchy, understood in a traditional sense, considering the retrieved *vertical distribution* in the organisation of the system of the sources of law (which also implies a certain *top-down* approach). This goes hand in hand with a greater "closure" of the normative system and a legal production that predominantly takes place according to the most usual state forms. Furthermore, recalling Ferrajoli's theory of democracy, from a *prescriptive* point of view, one may hold that especially in a *de-globalised* framework those principles drawn from deontic logic should inspire and be applied to the *multi-level normative dynamics* of the current legal orders, being them considered whether at national or supranational level, with the aim to reduce their structural rate of *illegitimate law*. Within this framework, I reckon that the figure of the pyramid re-emerges.

A clarification is perhaps needed. In spite of the "label" (and consequent criticism) that is often attributed to the pyramid model, and while it is true that it is well suitable to represent the typical state organisation of the sources of law, the "step-wise" construction of the legal system actually rises to the summit of international law. Indeed, its traditional vertical hierarchies, as well as the whole pyramidal theoretical building, in Kelsen's setting and so today, Ferrajoli's, do not act as a bulwark and shield for the nation-state paradigm and the modern concept of sovereignty (as it has been abundantly pointed out above, see chapters 1 and 2). *On the contrary*, the model at issue is based on the *rejection* of statism as an ideological conception, so that both authors define a merely *derived* legitimacy of states. They do so in function of an "exclusive" sovereignty of the international order (the so-called *monist* thesis), an order which today is supported by several global legal institutions. Where their broader purpose, as previously illustrated, is to represent, at the level of the theory of law, "the unity of the universal legal system"[409] and to foster, at the level of political reflection, the (renewed) Kantian project of universal pacification through the union of people[410].

[409] Cf. again H. Kelsen, *Lineamenti di dottrina pura del diritto*, *cit.*, p. 168: "l'unità del sistema giuridico universale". See also *Ivi*, p. 154, where he holds that the international law and the various state laws integrate "a unitary system of norms", at the same time stating the *primacy* of the former over the latter (*Ivi*, p. 163). Exactly because he frames the State as "a partial legal order derived from international law", by conceiving it as an "organ of the international legal community" (*Ivi*, p. 166), he pushes for the overcoming of "[t]he dogma of state sovereignty" (*Ivi*, p. 159) on a political, factual and organizational level, whose "theoretical dissolution" (*Ivi*, p. 168), according to Kelsen, has already been reached and is one of the most salient results of his Pure Theory of law.

[410] See section 1.3 and footnote 77.

Then, together with the pyramidal model of which they are part, the main profiles of it here recalled, in my opinion, again appear suitable to mirror (and potentially even orient) most of the dynamics and processes that in recent years characterise the reality of legal orders and intertwined normative systems, so far immersed in the last *waning phase* of globalisation. Hence, the pyramid might be more apt than the network to explain *de-globalisation*, as an economical-political and legal context characterised, as stressed above, among others, by the revival of nationalisms and a (state) organisation of power and legal sources that is predominantly hierarchical, vertically distributed, and it tends to be centralised.

Therefore, coming to assess the explanatory capacity of both theoretical paradigms addressed in this thesis under the lens, as far as this section is concerned, of some of the most relevant economical processes of the last decades, one may draw the following considerations.

Seeing globalisation in *dynamic* terms – whereby it is a phenomenon subject to *fluctuations* of different magnitude[411] – and recalling the *mutual conditional relation* between law and economics, I maintain that both theoretical models here considered can perform an adequate representative function of today's legal orders and regulatory systems, with a greater prevalence of only one of them depending on whether the rate of *global interdependence* is more or less high (determined to a large extent, but not only, by the phenomena traceable to economic globalisation)[412] in the concrete and specific historical juncture under consideration.

Accordingly, on the one hand, at times of greater vigour of the globalised space and of the *functional interconnection* between economic, political and socio-legal agents (albeit with all the shortcomings or glitches previously underlined) the network paradigm can deploy greater iconic force, since it represents *administrative polycentrism* (of the many *nodes* of *governance*), *decentralisation* in regards to the centre of power historically

[411] Where its moments of "crisis", often regarded as *de-globalisation*, can be understood as the negative or "waning" side of a long-term process that as such can also recover or improve. In this sense, as already highlighted above, the framework offered by Della Porta, an advocate of a *discrete view* of globalisation, is relevant. Cf. F. Della Porta, *Una breve storia della globalizzazione*, *cit*., pp. 12-13.

[412] The gradual overcoming or at least downsizing of the concept of sovereignty in the modern sense, intimately linked to the essence of the nation-state, would certainly help in this regard. This is because such a notion, as Ferrajoli argues (see *supra*, section 2.4) integrates a triple aporia, on the political, philosophical-legal, and theoretical-legal levels, which acts as an (almost) insurmountable obstacle to the progress of a global constitutionalism. Such an occurrence, the resolution of the concept in question, would strengthen the global legal institutions: first and foremost, the UN, but without forgetting the growing role exercised by a jurisprudence with a *universal vocation*, in so far as it pursues the observance and protection of the fundamental rights of man and the planet. In this perspective, one might even imagine a *universal jurisdiction* at the top of a global pyramid, rather than a traditional sovereign or legislator. Embracing the "monist" approach already advocated by Kelsen since the 1920s (see *supra*, sections 1.2 and 1.3), in favour of a single unitary legal order, it would undoubtedly make more real that global order described by Bauman, i.e., "a consensual and plausibly sustainable order of peaceful coexistence on a planetary scale, the UN Charter", cf. Z. Bauman, *Oltre le nazioni. L'Europa tra sovranità e solidarietà*, Bari, Laterza, 2019, p. 11.

represented by the state, and the *multiple connections* that can be horizontally observed and traced among the various *actors*, both individual and collective, operating and interacting in a *global network*.

On the other hand, at a time like the present, when there is a resurgence of nationalism and local pride, and when states often rekindle and claim their full sovereignty, instead of devolving competences and pouring significant portions of it into supranational organisations, I reckon that the pyramid model rediscovers a remarkable representative efficacy. This is because it illustrates a hierarchy of the sources of law in the *orthodox-vertical* sense, and it greatly portraits the state configuration as well as the typical logic of the nation-state, generally inspired by normative *mono-centrism*. Although the model in question, with apparent paradox, has an *ultra*-state vocation, as already pointed out, for Kelsen theorises it to ascend to the highest "degrees" of international law.

Hence, depending on the concrete economical-legal juncture and considered context, as well as on the normative phenomena that the observer aims at (emphasising and therefore) representing, one of the two paradigms will exercise a stronger illustrative force. Then, one may already notice the way in which their dialectically interact and compete, being both valuable resources for the legal thought and the whole jurisprudence. Without prejudice to the possibility for the legal science of developing further models, arguably characterised by a *composite* or *hybrid essence*[413].

Eventually, reflecting on a desirable *axiological* horizon, while dealing with an almost more or less globalised world, thus alternatively explainable by reticular or pyramidal or even composite approaches, one may reconsider that Kelsenian idea of a *unitarian* conception of the legal system (and space)[414], possibly inspired by the *art of mutual coexistence* as depicted by Bauman – that is, the most important *legacy* that Europe can leave to an interdependent and globalised world so that it can aspire to fulfil that Kantian ideal of the unification of mankind and universal peace[415]. Where either at the top of a global pyramid or in the most relevant node of a worldwide network a *universal* legislation or even jurisdiction, devoted to the safeguarding of peace and fundamental rights, can be placed and enshrined.

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[413] Indeed, there is probably room to envision and create *hybrid* or *composite* explanatory models, that may bring together the most salient features of the previous paradigms, as well as presenting original traits.

[414] Constructed not necessarily only according to the "step-wise" construction of the legal order – thereby suggesting a possible departure from the so called formalistic legal tradition and thus a partial transformation of Kelsen's and Ferrajoli's geometric idea.

[415] *Ivi*, pp. 17-18: "[…] è impossibile sopravvalutare l'eredità che noi europei possiamo dare al mondo che si globalizza rapidamente. È questo ciò che occorre, più di ogni altra cosa, a un mondo globalizzato, a un mondo di interdipendenza universale, affinché esso possa aspirare a quella che Immanuel Kant chiamò la *allgemeine Vereinigung der Menschheit*, l''unificazione generale dell'umanità', e, per estensione, alla pace universale, mondiale. Questo lascito è la forma storicamente assunta dalla cultura europea, ed è anche il nostro odierno contributo ad essa".

In the next section, as pointed out earlier in this chapter, I will concisely address the *jurisdictional* dimension to provide some kinds of *spatial suggestions*, both reticular and pyramidal.

4.3 *Hints of jurisdictional pyramids and networks: the multilevel protection of fundamental rights and nomophylactic function*

Besides economical processes that can directly affect the legal sphere, as the ones taken into account in the previous section, there are several other mechanisms and normative phenomena that have been transforming contemporary law, to some extent contributing to shape a more *polycentric* and *widespread* legal reality (see *supra*, third chapter, where I have illustrated plenty of them). I refer to either forms of transnational customary law (for instance, *lex mercatoria*), regulations enacted by independent administrative authorities, whether located at domestic or supranational level, the (dominant) role of multinational enterprises, forms of *soft law*, and so on[416].

That being stated, I deem that a further particular element of transformation of contemporary law is especially relevant to visualise a certain portrait of jurisdiction. That comes to the fore since the second half of the 20th century in so far as the legal recognition of *fundamental rights*, whether at a national, international or supranational degree, keeps on growing steadily. This way, I purport to spotlight the way in which some judges – particularly, but not only the national Supreme Courts – are *placed* and *interact* among each other in the so-called *multilevel* system of safeguarding of fundamental rights. Thus, one might also grasp the geometrical *appearances* they take on in carrying out (as far as they can) the essential function of assuring the *uniform* or *harmonic* interpretation and application of the law (defined as *nomophylactic*, *infra*), while the legal phenomenon today is the outcome of a rather chaotic intersection among various sources of law differently located.

In a nutshell, I look at the *multilevel* protection of fundamental rights, another transformative factor of the contemporary legal reality, since it entails an increasingly complex (and to some extent "disordered") scenario for the sources of law, at least in this

[416] In addition to the works already recalled on this topic, see the valuable production in G. Teubner (ed.), *Global Law Without a State*, Aldershot, Dartmouth, 1997; D. Zolo, *Globalizzazione. Una mappa dei problemi*, Roma-Bari, Laterza, 2004; M. G. Losano, "Diritto turbolento. Alla ricerca di nuovi paradigmi nei rapporti fra diritti nazionali e normative sovrastatali", *Riv. intern. filos. diritto*, vol. 82, no. 3, 2005, pp. 403-430; B. Pastore, *Interpreti e fonti nell'esperienza giuridica contemporanea*, Padova, Cedam, 2014, and *Idem*, "Sul disordine delle fonti del diritto (inter)nazionale", *Diritto & Questioni Pubbliche*, vol. 17, no. 1, 2017, pp. 13-30.

specific scope, and hence it is a challenging field that *unveils* the role and the spatial-functional characteristics of courts, especially the most preeminent ones[417].

As anticipated, in the aftermath of the Second World War, a legal process of recognition of fundamental rights begins and progresses, variously at regional, national, international and supranational level, so that a *multilevel* legal shelter starts to be shaped[418]. Through the enactment of several fundamental *charters of rights* by global and regional state organisations, a dynamic of progressive *acknowledgement* of fundamental rights, as they were conceived and recognised by international and supranational law, occurs. On the one hand, these documents refer to those vital prerogatives enshrined in constitutional dispositions at national level, on the other hand, several domestic constitutions somehow recall these charters of international and supranational law. Thereby, in this climate of mutual recognition, one may notice "a plot of *cross-references* by means of which, today, the identification, enforcement, and protection of fundamental rights can only occur at the *intersection* of national, international, and supranational sources of law"[419].

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[417] For this aim, in this paper I will mainly focus on the European context, reflecting on the interaction among the national Supreme Courts, domestic judges, and the supranational courts existing therein, in connection with the *nomophylactic* function that they should exercise. I propose to expand this field of analysis in a future work by further considering non-European law and jurisdictions. About this allegedly "disordered" scenario of legal sources that sanction fundamental rights see P. Parolari, "Tutela giudiziale dei diritti fondamentali nel contesto europeo: il 'dialogo' tra le corti nel disordine delle fonti", *Diritto & Questioni Pubbliche*, vol. 17, no. 1, 2017, pp. 31-58; furthermore, the whole opening monographic section of the same issue is devoted to this broad topic and stresses the "disorder" at stake considering different themes of analysis, presenting contributions by Mazzarese, Pastore, Rossetti, and Itzcovich. See also C. Pinelli, *Il difficile coordinamento tra le Corti nella tutela multilivello europea*, in G. Bronzini and V. Piccone (eds.), *La carta e le Corti. I diritti fondamentali nella giurisprudenza europea multilivello*, Taranto, Chimienti editore, 2007, pp. 303-310. Moreover, concerning the *multilevel protection* of fundamental rights, in critical terms cf. G. M. Flick, "I diritti fondamentali e il multilevel: delusioni e speranze", *cit.*, pp. 155-168, in more trustful and enthusiastic terms see the thorough intervention of P. Gianniti, "Il ruolo delle Corti Supreme nell'attuale sistema multilivello", *Trabajo, Persona, Derecho, Mercado*, no. 4, 2021, pp. 27-30, which I will focus on in this section to suggest the aforementioned *visual representations* of jurisdiction, as far as the *multilevel* safeguarding is concerned.

[418] According to the expression largely widespread in the scientific literature and in the universe of legal acts, Parolari originally refers to the phenomenon at issue as *a multilevel system* of fundamental rights' protection, see P. Parolari, *Culture, diritto, diritti. Diversità culturale e diritti fondamentali negli stati costituzionali di diritto*, Torino, Giappichelli, 2016. More recently, to depict the rather "confused" distribution of legal sources in this field – indeed La Torre designates it as the "confusion of the network of the sources of law", cf. M. La Torre, "Autunno della sovranità. Comunità europea e pluralismo giuridico", *Ragion pratica*, no. 12, 1999, pp. 187-210 –, she prefers the idea of normative *polycentrism*, leveraging the work of Petersen and Zahle (that I have quoted in the third chapter), cf. P. Parolari, "Tutela giudiziale dei diritti fondamentali nel contesto europeo: il 'dialogo' tra le corti nel disordine delle fonti", *Diritto & Questioni Pubbliche*, p. 33. This way, she aims at avoiding the recurrent image of *hierarchical order* that the most widespread expression surely evokes and implies. However, I deem, it is not a case that *multilevel* safeguarding is the way in which most of the jurisprudence and legal actors normally outlines that legal protection. As I will point out, indeed, the latter can develop (with a certain effort) in horizontal terms, but mainly it spreads vertically.

[419] Cf. *Ivi*, pp. 33-34. English translation and italics are mine.

Hence, the transformative factor of contemporary law here considered, namely, the *multilevel* safeguarding of fundamental rights, while to some extent asks for the *integration* of these different legal sources[420] to improve and strengthen itself, it brings, along with a certain *polycentrism*, a complex and rather "disordered" network of normative poles, as previously highlighted[421]. In this framework, some authors highlight that the traditional way of conceiving the relations among legal sources in hierarchical terms (only) goes into *crisis*[422], although they simultaneously stress that *both models*, the pyramid and the net, *contribute* to illustrate the complexity of contemporary law and must therefore be placed *side by side* in this endeavour to represent it[423].

All considered, this complex and rather "disordered" scenario of source of law erected over the years by a large number of heterogeneous authorities and organisations in the field of fundamental rights' protection, which grounds the so called *multilevel* safeguarding, it requires a crucial role of normative *harmonisation* and *coordination* which necessarily involve judges[424], especially the Supreme Courts of the *intertwined* legal orders (*infra*), in the process of interpreting and applying the law[425]. Where this essential function, in my opinion, ultimately entails a *systematic vision*. Although the legal system at stake, apropos of fundamental rights and far from the (broader) traditional one, presents peculiar features, arguably being it *open*, with "fuzzy" or "liquid" boundaries, rather *incomplete* and potentially full of *normative contrasts* (as the

[420] In this sense, see A. Ruggeri, *I diritti fondamentali tra carte internazionali e costituzione (dalla forza delle fonti alle ragioni dell'interpretazione)*, in M. Vogliotti (a cura di), *Il tramonto della modernità giuridica*, Torino, Giappichelli, 2008, pp. 146-181.

[421] P. Parolari, "Tutela giudiziale dei diritti fondamentali nel contesto europeo: il 'dialogo' tra le corti nel disordine delle fonti", *cit.*, p. 34.

[422] *Ibidem*. Cf. M. Vogliotti (a cura di), *Il tramonto della modernità giuridica*, *cit.*, *passim*. See also P. Grossi, *Crisi delle fonti e nuovi orizzonti del diritto*, Napoli, Satura Editrice, 2009, where the eminent jurist even talks about *crisis* of the sources of law. I reckon that this expression might underlie a significant *connection* with what I will set forth in the next section, concerning the complex and long-lasting relation between the pyramid and the net, that I consider being *dialectical* and *recursive* (*infra*).

[423] Cf. P. Parolari, "Tutela giudiziale dei diritti fondamentali nel contesto europeo: il 'dialogo' tra le corti nel disordine delle fonti", *cit.*, pp. 34-35, where the author makes the following shareable point: "it is widely shared that, in order to account for the transformations in contemporary law, it is necessary to place alongside the pyramid model of Kelsen's *Stufenbau* the new model that François Ost and Michel van de Kerchove have called the 'network paradigm' / è opinione largamente condivisa che, per rendere conto delle trasformazioni del diritto contemporaneo, sia necessario affiancare al modello piramidale dello *Stufenbau* kelseniano quel nuovo modello che François Ost e Michel van de Kerchove hanno definito 'paradigma della rete'" (English translation is mine). *En passant*, I notice that this consideration is perfectly in line with the theoretical stance set forth and defended in this thesis, which amounts to a particular form of *co-presence* between the two paradigms examined here, that it will be further clarified and developed in the last part of my work.

[424] In this sense, P. Parolari, "Tutela giudiziale dei diritti fondamentali nel contesto europeo: il 'dialogo' tra le corti nel disordine delle fonti", *cit.*, p. 35, where the author spotlights the need of *integrating* the theory of sources with a theory of *judicial interpretation*. Likewise, Vogliotti points out the essential role that judges must fulfill in the process of "building the new legal order, by creating channels of communication and coordination among different legal spaces" (English translation is mine), cf. M. Vogliotti, "Il giudice al tempo dello scontro tra paradigmi", in *Diritto penale contemporaneo*, 2 novembre 2016, pp. 1-18.

[425] P. Gianniti, "Il ruolo delle Corti Supreme nell'attuale sistema multilivello", *cit*., p. 29.

"dialogue" sometimes difficult among courts can show, *infra*). Therefore, the preeminent task of judges come to the fore[426].

In this legal panorama, indeed, the more and more demanding, they have to entertain a (possibly fruitful) *dialogue* with each other, while discussing on the contents and limits of fundamental rights and identifying the criteria by means of which *to order* their legal sources[427]. A fundamental dialogue that, as I will soon underline, unfortunately is far to be achieved, but still is necessary to promote and strengthen.

Then, having provided a theoretical background of reference on the topic at stake, I take a deeper look at the European context and the interaction among national and supranational Supreme Courts, thus stressing their potential *nomophylactic* function and depicting the forms they may assume and the broader context in which they are immersed, either in pyramidal or in reticular terms. In this endeavour I will also leverage the analysis of Gianniti (in some respects enthusiastic), surely a distinguished witness of the ongoing jurisdictional processes[428]. This way, tracing some clues from his perspective, I will make some critical remarks, thus at least partially unveiling the "state of art" of these dynamics.

Hence, when dealing with the *multilevel* protection of human rights in Europe, one should note the existence of three different kind of legal orders, at least. Which compete in disciplining this delicate, but vital field, being them somehow *functionally intertwined* in light of those normative cross-references highlighted *supra*. Then, the legal order of every European state that at the same time is part of both the European Union and the European Convention of Human Rights experiment with *three distinct systems* of protection, each one with its own fundamental charter of rights and Supreme Court[429].

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[426] Referring again to Cassese and a work of his precisely focused on the growingly complex role that today judges must take on, see S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Roma, Donzelli Editore, 2009, p. 10 ff. There, he emphasises that both kinds of relations, the mutual *integration* between domestic, international, and supranational law, as well as the existing *coordination* among courts operating in their respective legal spaces are grounded on exclusively *judge-made* doctrines, such as the one of *counter-limits, interposed norms*, *equivalent* protection, etc. With this regard, one may grasp some assonances with the idea of "judge-made system" fostered by C. Pinelli, *Il difficile coordinamento tra le Corti nella tutela multilivello europea*, in G. Bronzini and V. Piccone (eds.), *La carta e le Corti. I diritti fondamentali nella giurisprudenza europea multilivello*, *cit*., 304 ff. For an in-depth analysis of the aforementioned doctrines see again P. Parolari, "Tutela giudiziale dei diritti fondamentali nel contesto europeo: il 'dialogo' tra le corti nel disordine delle fonti", *cit.*, pp. 39-49.

[427] P. Parolari, "Tutela giudiziale dei diritti fondamentali nel contesto europeo: il 'dialogo' tra le corti nel disordine delle fonti", *cit.*, p. 36, where Parolari stresses that "the 'dialogue' among the courts concerning the construction of a possible 'new order' of sources is actually at least as important as that on the content of individual rights, because it constitutes a logical antecedent laden with profound implications and consequences for the protection of such rights / il 'dialogo' tra le corti in merito alla costruzione di un possibile 'nuovo ordine' delle fonti è in realtà importante almeno quanto quello sul merito dei singoli diritti, perché ne costituisce un antecedente logico carico di implicazioni e ricadute profonde sulla tutela dei diritti stessi".

[428] He carries it out in the already quoted P. Gianniti, "Il ruolo delle Corti Supreme nell'attuale sistema multilivello", *cit*., *passim*.

[429] At a *national* level, made up by a State Constitution and a Constitutional Court, at an *international* level supported by the European Convention of Human Rights and the connected European Court of Human

This way, as formerly stated, the problem of *legal certainty* emerges and raises a serious issue of harmonisation and coordination of these multiple sources of law: a problem that Gianniti, among others, aims at overcoming through the essential *nomophylactic* function that national and supranational Supreme Courts can exercise[430].

Coming to define it, one may appreciate the origin of the word *nomophylactic*, where in ancient Greece it represents the task of *guarding* the *law* and its *stability*, carried out by judges[431]. Today, taking for instance the case of the European Court of Justice, this function must typically correspond the need to ensure the uniform interpretation and application of European Union law in all member states. Moreover, under the methodological lens, one can depict it as an approach of judicial *precedent formation*, in so far as the various Supreme Courts must fulfil that need just highlighted, each one in its own legal system, to pursue and protect the principle of equality in each society[432].

One may wonder whether the *nomophylactic* function, in Europe traditionally demanded to the disparate national Supreme Courts, changes its features as far as the *multilevel* protection of human rights is concerned or not. Concerning this profile, the concrete case of the Italian Supreme Court (which deals with civil and criminal jurisdictions), illustrated by Gianniti, is relevant and enlightening, for it shows at least two transformations: the first concerns the *content* of the function, the second invests the *position* of the Court in the (reticular) scenario shared with its counterparts in Europe[433].

Under the first aspect, the "new" *nomophylactic* function of the Italian Supreme Court must guarantee the *uniform* interpretation of the Italian domestic law in accordance with three different *normative fabrics* (the constitutional, the international, the supranational) as they are interpreted by their respective jurisdictional supreme authorities. This way, the Supreme Court must ensure the domestic normative compliance

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Rights, at a *supranational* level, The Charter of Fundamental Rights of the European Union and the Court of Justice of the European Union. About the distribution of jurisdictional power within each sphere of protection Gianniti admits that (cf. *ivi*, p. 27) every (jurisdictional) system has "una propria corte di vertice", that is, a Court placed at *the top*. So that, despite his manifest reference to the metaphor of an *archipelago of norms*, I deem that in his words underlies a subtle but significant reference to the *vertical* spatial dimension. More on this *infra*.

[430] Cf. *ivi*, pp. 27-28: "[a]i giorni nostri, ordinamento nazionale, ordinamento convenzionale e ordinamento europeo sono ordinamenti che continuano ad essere tra loro distinti, ma che *comunicano*. In questa prospettiva, occorre domandarsi se la nomofilachia delle corti supreme, nazionali ed europee, possa essere un antidoto all'odierna crisi della certezza del diritto" (italics are mine). I reckon that here Gianniti shows an implicit reference to *network*, to some extent envisioning a sort of *dialectical polycentrism* between the legal orders at stake.

[431] Cf. P. Gianniti, "Il ruolo delle Corti Supreme nell'attuale sistema multilivello", *cit*., p. 28: "Il vocabolo 'nomofilachia', di origine greca, è composto dalle parole *nomos* (regola) e *filachia* (custode) e con esso si indicava, ai tempi dell'antica Grecia, la funzione svolta dai magistrati incaricati di custodire la stabilità della legislazione".

[432] *Ibidem*. In this sense see also *ivi*, p. 30: "le corti supreme nazionali sono chiamate ad essere garanti della tendenziale uniforme interpretazione del diritto in vista della sua applicazione a tutela del generale principio di uguaglianza".

[433] *Ivi*, pp. 28-29.

with the decisions made by the European Court of Human Rights and the Court of Justice of the European Union.

Under the second profile, the Italian Supreme Court changes its *position*, whereby "today is placed in an extended and complex *network* of relations with such European Supreme Courts". Here Gianniti arguably says more than he claims, when he points out that, by giving away a portion of its own sovereignty, it "ceased to be the *endpoint* of jurisdiction" [434]. Then, one might ask, which is the *endpoint* of jurisdiction? If the Italian *Supreme* Court exercise its *nomophylactic* function in relation to *lower* courts, which court, international or supranational, stands *above* or *beyond* it? I deem that a further clue of a certain *vertical-hierarchical* extension of this jurisdiction, even in relation to the *multilevel* protection of human rights, here can be found (more on this *infra*).

Despite of the two significant transformations just highlighted, Gianniti argues in favour of the *strengthening* of the *nomophylactic* function demanded to the Italian Supreme Court, in light of the consequent *supranational* role that it has taken on. Thus, by stressing that the homologous national Supreme Courts of the state members of the European Union are equally involved in achieving this essential function, he claims that the Italian Supreme Court turns into a fundamental *interlocutor* of European Supreme Courts, so that it *participates* to the enforcement of those rights that will enter the supranational "circuit" of protection[435]. Where, as one may observe *en passant*, the idea of *circuit* amounts to a *close perimeter*, to some extent nearer to a *flat system* than to an *open network* (which results without clear boundaries, incomplete, and with rather peculiar forms of hierarchy, as highlighted in the third chapter).

In any case, I deem also relevant gathering in Gianniti's words the implicit reference to the idea of an *indispensable dialogue* among Supreme Courts, that hopefully should be fostered, enhanced, and harmonised (a common thought shared by many authors, as I will shortly emphasise). With a further metaphor, that to some extent recalls the *cartographic* approach of Latour, he also maintains that the Italian Supreme Court "stands at the *crossroads of a system*, which in matters of fundamental rights *is not hierarchical, but multilevel*, and which, for that very reason, triggers a *circularity* of rulings between the courts of the various jurisdictions"[436]. While here it is rather clear and appreciable the

[434] Cf. *Ivi*, p. 29: "[r]ispetto alla nuova posizione, la Corte di cassazione è oggi inserita in una estesa e articolata *rete* di relazioni con le suddette corti supreme europee: in questo contesto, nuovo rispetto al passato, essa ha ceduto una quota della sua tradizionale supremazia, in quanto ha cessato di essere il *punto finale* della giurisdizione". English translation and italics are mine.

[435] *Ibidem*. There Gianniti observes: "[…] la Corte, come d'altronde si verifica anche per le corti supreme nazionali degli Stati membri dell'Unione, ha assunto una dimensione sovranazionale, in quanto è divenuta interlocutrice delle corti supreme europee e, così facendo, partecipa ai processi di concretizzazione di diritti, destinati ad entrare nel circuito sovranazionale[…]".

[436] Cf. *ibidem*: "la Corte si trova al *crocevia di un sistema*, che in materia di diritti fondamentali *non è gerarchizzato, ma multilivello* e che, proprio per tale ragione, innesca una *circolarità* di pronunce tra le corti dei diversi ordinamenti" (italics are mine).

formal reference to some tenets of the network's paradigm, especially the concept of *circularity* (instead of *linearity*), one may find a rather evident contradiction, that allow us to set forth a *logical-semantic argument* which directly refers to the expression *multilevel*.

Indeed, I deem rather implausible to disentangle a *multilevel* dimension from the idea of *hierarchy*. Stating that this system of protection "is not hierarchical, but multilevel" is as much inconsistent as saying that something *is not horizontal, but it is flat*. Moreover, while it is true that there exist many different forms of hierarchies (here I recall the "strange rings" and "disentangled hierarchies" pointed out by Ost and Van de Kerchove, see *supra*, third chapter), I argue that the very concept of *multilevel* cannot abandon the traditional concept of *vertical* hierarchy to keep its proper rational meaning. Indeed, how could one spatially distinguish the *various* levels if not by distributing them vertically? Otherwise, they would all be on the same level, and then it would be more correct to speak of *single level* protection of human rights. Something that seems very far from the multiple and multidimensional normative reality sketched so far. Which also spreads *vertically*.

Nonetheless, without prejudice to the critical remarks made here (which will ground the *spatial images* and metaphors that I will shortly suggest), one cannot but agree with the conclusion reached by Gianniti in so far as he emphasises the crucial role, at least in the human rights field, that national Supreme Courts must perform in governing the *multilevel* system of legal sources, thus providing *lower* courts with thorough and precise *guidelines* that should support them in avoiding normative contrasts and ensuring solid interpretations of domestic law. This way, the European Supreme Courts can and must really help in improving and guaranteeing the European rate of *legal certainty*, that in current times is quite in crisis[437].

Hence, I leverage Gianniti's analysis, which can surely represent many relevant aspects about the way in which these Courts operate and the position they assume in this complex scenario, to draw the following considerations.

As I have anticipated in some former passages, besides making plenty of references to the mutual *communication* among Supreme Courts, the *network* of relations in which they are involved (or immersed), the *circularity* of their pronouncements, and so on, he openly mentions the jurisdictional *summit* presents within each European system of protection, the judiciary's *endpoint* formerly fulfilled by the Italian Supreme Court, and the *higher position* recognised to it by the Italian constitutional legal order in comparison with the *other* Italian Supreme Courts that exist for the administrative and accounting sectors[438]. All considered, I reckon that in his descriptive stance he embraces *both* spatial dimensions, horizontal and vertical, and the related theoretical paradigms, by *explicitly* referring to the network, in which the European Supreme Courts are immersed, and by *implicitly* recognising the existence of a vertical development of jurisdiction. One may

[437] *Ibidem*.
[438] *Ivi*, p. 30.

detect it by looking at what lies beneath Gianniti's words, since the matters of words… matters, as Bobbio suggested three decades ago[439].

Thus, in light of the *cross-references* between the three normative systems of *multilevel* protection of human rights, that to some extent functionally *connect* these orders, and by looking at the European Supreme Courts' interaction and position, I observe that one may depict this multiple dynamics as a form of *dialectical relation* that both, on the one hand, lives in a *network* of horizontal and circular connections, traceable to the idea of *legal polycentrism*, and, on the other hand, spreads vertically, entailing a hierarchy that is particularly viewable as far as the jurisdictions of national Supreme Courts in concerned, but also considering the *nomophylactic* function of the Court of Justice, whereby the latter largely trickles down and spills over to all European Union countries. Therefore, even leveraging the metaphor of the (European) *archipelago* recalled by Gianniti, I see that those normative systems and jurisdictional bodies that exist therein are not *flat islands*, after all. Rather, they amount to a kind of *promontories* or *mountains* by the sea, variously high and dominant, that can somehow even interact with each other. In this image, the element that connect them all and allow their "dialogue" (even if often difficult) is *water*, the liquid matter that surrounds and encircles these promontory islands, holding them together while distinguishing them. Thus, I hold it represents *dialectics* in its incessantly flowing.

Also, in this (mainly jurisdictional) framework, then, the explanatory capacity of both theoretical paradigms here at stake, the pyramid and the net, is activated and comes to the fore. This way, as I will further argument and explain in the next section, one may already notice that they *dialectically coexist*.

Eventually, casting a realistic glance, I wish to briefly illustrate some of the reasons why, to date, the aforementioned *dialogue* between the Supreme Courts involved in human rights' protection is as much needed as often difficult and harbinger of obstacles.

On the one hand, in connection to the *nomophylactic* function, Gianniti stresses the huge amount of workload that (at least) the Italian Supreme Court must yearly cope with, to the point that, under these circumstances, he seriously doubts its suitability to preserve coherent guidelines and *externally* manifest unambiguous and consistent orientations. Besides, he points out that in the Italian constitutional order there exist more than one Supreme Courts (as explained above), so that it may be the *paradoxical* case that in human rights' field different kinds of *nomophylactic* functions emerge, thereby largely "betraying" the original purpose that underlies the same function: ensuring the *uniform* interpretation and application of domestic law in accordance with both national, international, and supranational legal orders. Moreover, in the same Italian context, while national Supreme Courts can have a dialogue with their foreign homologous, they do not

[439] N. Bobbio, *Teoria generale del diritto*, p. 106.

really have legal tools to *mutually harmonise* their stances, even when core values are involved[440].

Other authors agree with the importance of having judges that dialogue with each other and, as far as the Supreme Courts are concerned, carry out the *nomophylactic* task. Nonetheless, the are plenty of doubts concerning, for instance, the *efficacy* of those judge-made doctrines (recalled *supra*) in putting order in this growingly complex legal experience[441]. Furthermore, in a plot of intertwined normative systems, at a national, international, and supranational level, the mechanism of normative *cross-references*, which implies rather *generic* landmarks, inevitably emphasises the increasing role of judges and judicial interpretation (as previously highlighted), especially in looking for *solid criteria* whenever normative contrasts arise[442].

Even though, in Parolari's opinion, this is exactly what today lacks most. Since judges often outline fundamental rights in *different terms*, without foreseeing *adequate parameters* to solve consequent potential antinomies. Thereby, hierarchical relations appear shifting and uncertain, and the opinions of legal actors (first and foremost, judges) "[…] are often different depending on the court that expresses them"[443]. Parolari also explains the absence of a hierarchical criterion able to orient those normative interactions with a certain *political impasse* that since the mid 20th century has regarded the redefinition, fragmentation, and redistribution of *sovereignty* among multiple *extra*-state subjects and institutions. She traces a similar *impasse* in several Courts decisions, both at national, international, and supranational level, whenever judges assume a *defensive* attitude, being more focused on protecting their own competences than providing a greater safeguard for fundamental rights, thus showing a degree of rivalry[444]. Moreover, one may grasp a significant obstacle in the circumstance that those judge-made doctrines, which help in creating a given balance (even if delicate) between the European Courts and their related normative systems, to some extents are the outcome of *unilateral* stances. Therefore, in case of strong disagreement among judges, they can also be overturned by a different Court within the same European *multilevel* system of

[440] Cf. P. Gianniti, "Il ruolo delle Corti Supreme nell'attuale sistema multilivello", *cit*., p. 30. The author suggests a couple of measures that could improve the state of things: firstly, introducing "filters" and thus reducing the hypotheses of appeals to the Italian Supreme Court, so that it may focus on the *general* jurisdictional orientations only; secondly, he basically asks for the recognition of its *preeminent* role, hence, hierarchically *superior*, with regard to the other two Italian Supreme Courts, so that it can guide them all. Again, this time concerning Gianniti's reform suggestions, one may detect that, in his words, a *top-down* reasoning and the *pyramidal* form of hierarchy remerge.

[441] P. Parolari, "Tutela giudiziale dei diritti fondamentali nel contesto europeo: il 'dialogo' tra le corti nel disordine delle fonti", *cit.*, p. 36.

[442] *Ivi*, p. 37.

[443] *Ivi*, p. 39. Cf. R. Bin, "L'interpretazione conforme. Due o tre cose che so di lei", *Rivista AIC*, no. 1, 2015, pp. 1-13, where the author (*ivi*, p. 4) maintains that "è nella natura stessa del sistema pluricentrico che possano convivere opinioni diverse circa la tipologia delle relazioni tra atti normativi provenienti da sottoinsiemi diversi: le opinioni differiscono a seconda dell'ordinamento a cui appartiene l'organo che le esprime".

[444] P. Parolari, "Tutela giudiziale dei diritti fondamentali nel contesto europeo: il 'dialogo' tra le corti nel disordine delle fonti", *cit.*, pp. 52-53.

protection. This way, the desired *dialogue* between courts proves to be "an ambivalent practice that, on the one hand, has often contributed to trigger a virtuous circle in raising the protection standards of some fundamental rights, on the other hand, it has not avoided 'self-defensive' dynamics yet […]"[445].

Even Flick agrees with the need to significantly improve the *dialogue* among the Supreme Courts in the European context here highlighted, even though he raises several criticisms about the very mechanism of the *multilevel* protection[446], ultimately expressing a strong pessimism, in light of an extremely complex normative framework[447].

Furthermore, by stressing the absence of precise landmarks, in terms of *framework rules*, de Vergottini observes that this wished dialogue "remains without a clear compass of reference"[448].

However, I consider that however difficult and demanding it may be, this *jurisdictional dialogue* should certainly be promoted, without indulging in pessimism, at the same time emphasising the fundamental *nomophylactic* role of the Supreme Courts within the European sphere. Since higher judges surely can and must provide the necessary work of *harmonisation* and further *integration* of the different intertwined normative spheres, especially in the field of human rights' protection.

After all, dialogue, sometimes challenging, is at the bottom of every dialectical relation. Where the latter promotes the clash, but also fosters the encounter among even opposite positions, as the legal stances supported by the courts might are.

4.4 *"Flares" of Thomas Kuhn's philosophy of science, with some adjustments, in law, as a social science*

The following lines, as the whole theoretical endeavour carried out in this thesis, ride between the theoretical tradition of legal formalism, clearly identifiable with the paradigm

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[445] Cf. *ivi*, p. 53, where indeed she frames the dialogue among Courts as "[…] una pratica ambivalente che, se da un lato ha spesso contribuito ad innescare un circolo virtuoso nell'innalzamento degli standard di tutela di alcuni diritti fondamentali, dall'altro non sembra ancora riuscire a sottrarsi a dinamiche 'autodifensive'".

[446] Cf. G. M. Flick, "I diritti fondamentali e il multilevel: delusioni e speranze", *cit.*, p. 159, where he holds that: "la filosofia di fondo del costituzionalismo *multilevel*, al di là delle effettive intenzioni, 'svaluta i testi normativi ed esalta l'opera delle Corti': tra le pieghe, emerge qualche residuo di pregiudizio antiparlamentare e antilegislativo".

[447] *Ivi*, p. 167: "Al momento il pessimismo è più facile dell'ottimismo: 'troppi' diritti; 'troppi' giudici; troppe complicazioni (e quindi inevitabilmente troppe varianti e troppa dottrina); non si capisce più granchè. Si conferma cioè il dubbio che il ricorso al metodo e al procedimento, attraverso il tecnicismo esasperato dell'interpretazione, si risolva in realtà in un ostacolo (forse voluto, almeno in parte) al merito e al conseguimento del risultato che all'apparenza si vuol raggiungere".

[448] G. de Vergottini, *Oltre il dialogo tra le corti. Giudici, diritto straniero, comparazione*, Bologna, il Mulino, 2010, 37 ff.

of the *pyramid* as the idea of a hierarchically vertically structured normative system, and that stream of thought with a nodal and diffused imprint, distinctly socio-legal, which prefers the *network* as its effigy and expresses itself horizontally and polycentrically.

The ultimate goal here is to assess, in the sphere of legal science and with regard to its problems, methods of investigation and achievable results, whether in the last half-century there has really been a *transition* from one speculative approach to the other, in other words, whether there has been a *paradigm shift* in legal thought, capable of reorienting the community of jurists and, in particular, that of legal theorists, according to the Thomas Kuhn's terminology and conceptual framework of philosophy of science.

The real possibility of applying the aforementioned and some other Kuhnian categories, such as the notions of *anomaly* and *crisis*, to law, a social science that addresses normative phenomena (ontologically different from their natural counterparts), is thus subjected to an ambitious examination. A number of critical insights and *adjustments* are proposed to make such semantic-conceptual *transferability* fruitful in the sphere of legal reflection. A particular condition of *crisis*, both *structural* and *recursive*, is revealed at the outcome of this analysis. A peculiar crisis, I maintain, that influences the existing dynamics between the paradigms of the *pyramid* and the *network*, in such a way that one can depict, as I do, that interaction in terms of *dialectical co-presence*.

Consequently, one may observe how *both* theoretical models considered here, depending on the normative objects to be represented and the context of reference, maintain a distinct explanatory value in the contemporary legal landscape.

Then, in light of these purposes, I start my reasoning by recalling the point made by Ost and Van de Kerchove, about the alleged shift at stake.

As a result of their analysis, given the ontological impossibility of finding *pure* theoretical models capable of fully reflecting reality, Ost and Van de Kerchove acknowledge that there are, in practice, *variously hierarchical* types of networks and *more or less open* systems. In the writer's opinion, this observation is shareable, and it opens up the possibility of enucleating *hybrid* models that are potentially capable, in the face of a joint effort, of illustrating a greater number of profiles of the complex and heterogeneous contemporary legal reality in furtherance of its reflection with greater verisimilitude (if not also, *conducive* in prescriptive terms, towards a desirable horizon)[449]. According to the two Belgian authors, as already emphasised in the third chapter, the recent transformations that have taken place in the legal universe do not require (and, therefore, do not even legitimise) a *radical change* of paradigm (a so-called *paradigm shift*) in the legal science, but rather call for a *combination* or *mixture* of the

[449] In this sense, the desirable horizon I refer to encompasses universal respect for fundamental rights and peace, whether this is achieved through the pyramid model erected by Kelsen and then developed by Ferrajoli through his look at global constitutionalism; or the agency of the functional interaction of this paradigm with the most recent reticular one, in the face of a *hybrid mixture* between the two.

most successful and effective aspects, in representative-explicative terms, of the two theoretical approaches examined here[450].

On the basis of these considerations, alongside the network model, one can reconsider the explanatory capacity of the pyramid with regard to many aspects and dynamics that characterise the life of legal systems and, generally, the dynamics of the socio-legal reality, as well as its *instrumentality* in an axiological key to theoretically ground and strengthen global legal institutions in terms of *guarantees* (and therefore *effectiveness*).

In these pages, hence, the *interaction* between the paradigms of the network and the pyramid will be further highlighted, specifying its characteristics and at the same time highlighting its appropriateness, in an attempt to decline it according to certain categories drawn from the Philosophy of Science.

As just mentioned, the considerations expressed in this section are in line with Ost's and Van de Kerchove's shareable stance, whereby a so-called *paradigmatic shift*, in its radicality, does not seem to have (yet) taken place or even impose itself on the legal science contemporary panorama.

They take their cue from Thomas Kuhn's philosophy of science and from the notions elaborated by the same author in his famous work *The Structure of Scientific Revolutions*[451].

Aiming at addressing the question whether it is possible to apply to the law, as a social science, the principles illustrated by Kuhn to the purpose of representing the exemplary interaction between the pyramid and the network, one must carefully examine Kuhn's conceptual framework to respond, adopting a critical-problematic approach and thus making appropriate *adjustments*.

While some of these categories are well suited to the legal sphere, such as the idea of *paradigm* or *anomaly*[452], others are challenging to be entirely applied, such as the

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[450] F. Ost et M. Van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit*, *cit.*, p. 37. The (supposed) *transition* from the pyramid to the network, although it is *gradual*, not radical (for which it would perhaps be more appropriate to speak of a *co-presence* of theoretical models, according to an originally dialectical dynamic, see below) represents some weighty changes, such as the passage from *legal statutes* to *regulation* and from *government* to *governance*. Regulation would integrate the new mechanism of legal production: untied from the centrality of the sovereign state's precepts, it favours a more flexible, diffuse, adaptable and often negotiated regulation. Governance, while it is structurally functional to the reticular paradigm, offers a conceptual landing place for the dynamics that aim to find a balance between the various sources of law and power, which compete and complement each other at the same time. This allows for the phenomena of *self-regulation*, in the legal field ascribable, for instance, to the *governance* exercised by the *independent authorities* (in Italy, the Independent Administrative Authorities) and, sometimes, by the Superior Courts placed at the *apex* of the jurisdictional complexes of the various states and international organisations. See *Ivi*, p. 26 ff.

[451] T. Kuhn, *The structure of scientific revolutions*, Chicago, Chicago University Press, 1962, Italian translation by A. Carugo, *La struttura delle rivoluzioni scientifiche*, Torino, Einaudi, 1969.

[452] Cfr. T. Kuhn, *La struttura delle rivoluzioni scientifiche*, *cit.*, p. 10 and p. 29, where he defines *paradigms* as, respectively, "conquiste scientifiche universalmente riconosciute, le quali, per un certo periodo,

concept of *crisis* (and its alleged *universal effects*) or the Kuhnian *leitmotif* of the scientific evolution through *paradigmatic leaps* or revolutions that overcome and subvert the previous dominant model. The legal applicability of these latter concepts, indeed, rises certain perplexities.

Hereafter, I call attention over a few critical issues through the following series of observations.

In a first profile, the ontological difference between *natural* and *artificial* phenomena is highlighted. Kuhn, a historian of science, turns his diachronic analysis to scientific theories and paradigms of the natural sciences (physics, chemistry, biology, etc.) that focus on natural facts or phenomena that are (generally considered) empirically verifiable and stable[453].

On the contrary, law – understood in a broad sense, as the set of laws produced by an authority appointed for this purpose, but also of judicial rulings and decisions, administrative acts, customs, etc. –is a complex of *artificial* phenomena (acts or facts), historically produced in a given period with the necessary and essential participation of men, performing as legislators, judges, officials, jurist-technicians, or otherwise. This artificial output, the law[454], that comes out of men and history is intrinsically contingent in its forms and content; it is different and changeable as the legal space-time context

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forniscono un modello di problemi e soluzioni accettabili a coloro che praticano un certo campo di ricerca" and as functional works "per un certo periodo di tempo a definire implicitamente i problemi ed i metodi legittimi in un determinato campo di ricerca per numerose generazioni di scienziati". Those are united by at least two characteristics: being able to offer *results* sufficiently *new* to attract a stable group of proselytes, and at the same time guaranteeing their sufficient *openness* so that this group, erected on new foundations, can devote itself to solving all kinds of problems. For the framing of *anomaly* see *infra*.

[453] While questioning whether "l'esperienza sensibile [sia] davvero immutabile e neutra" and whether theories are really only "interpretazioni umane di date inequivocabili", in expressing hope for "ricuperare un regno in cui l'esperienza è di nuovo stabile una volta per tutte", and whether theories are really only human interpretations of unambiguous dates, in expressing the hope of "ricuperare un regno in cui l'esperienza è di nuovo stabile una volta per tutte" (*ivi*, p. 155), Kuhn affirms the impossibility of departing, at least entirely, from the epistemological viewpoint that has long dominated Western philosophy, although he questions its full effectiveness. To a certain extent, therefore, he is forced to accept the idea that natural phenomena – sensory experience – are immutable, neutral objects, while theories about them are (only) human interpretations of unambiguous data. Without thereby lapsing into a form of *naive realism*, it is believed here that sensory experience (for some, the *pieces* or *fragments* of the world) retains a certain essential *stability* and identity, while it is rather the observations, interpretations and heterogeneous data derived from experience that (may) be divergent and discrepant from one another. On this and other profiles (especially with regard to *incommensurability*, see below) see the valuable contribution of Claudio Sarra, who develops themes addressed here along sometimes different paths, cf. C. Sarra, *Scoprire l'incommensurabile*, in C. Sarra and F. Reggio (a cura di), *Diritto, metodologia giuridica e composizione del conflitto*, Padua, Primiceri, 2020, p. 219 ff.

[454] This refers to a *heteropoietic*, Hobbesian conception whereby legal and political institutins are *artifices* constructed by men and for men in order to safeguard their fundamental rights and freedoms. See T. Hobbes, *Leviatano*, *cit*., p. 3, where a vision of the state is disclosed, not as an end or value in itself, but as a human artifice, "poiché con l'arte è creato quel gran Leviatano chiamato uno stato, il quale non è che un uomo artificiale, benché di maggiore statura e forza del naturale, per la protezione e difesa del quale fu concepito".

varies (one may appreciate, for instance, the differences between *common-law* and *civil-law* legal systems or within the same system over the decades). Thus, a *quid* devoted to generating certainty and stability in the social order, but that at the same time becomes obsolete and it is diachronically modifiable.

Along and in connection with a historical perspective, thus considering the legal-normative scenario as an artificial, changing and (slowly, yet) constantly evolving complex of phenomena, it is plausible that, depending on the period considered, a certain theoretical paradigm is more suitable and fitting than other to represent the complexity of legal reality. However, this does not necessarily entail – otherwise it would be a *non sequitur* – that the preceding, in the light of the emergence of a new model, loses *ipso facto* and *in toto* its conceptual meaning and descriptive value for the legal field. More simply, as normative phenomena change, it may lose greater or lesser iconic force, as its *topicality* is reduced. Moreover, this implies that a paradigm that has remained *latent* for a certain lapse of time may also *return* to assume an illustrative role if those (legally salient) phenomena either reappear, even so in different forms; or thereon they have never really disappeared; or, in any case, other similar and compatible phenomena (with the *rediscovered* exemplary framework) can be found. This is the idea I advocate for in relation to legal science, about the *recursiveness* of paradigms. This is why the archetypes of the pyramid and the network both maintain, in a diachronic key and albeit to varying degrees depending on the juncture considered, an explanatory scope and function.

On a closer look, for example, the *network*, theorised in recent years by Ost and Van de Kerchove, does not integrate a new reference, since, as Cassese[455] sharply observes, this model already hinged the post-feudal medieval reality on itself. Its *return*, if anything, identifies a *revolution* in the etymological (not Kuhnian) sense, i.e. a reversal or return (in whole or in part) to the starting point[456]. The network is thus an *exemplum* that has returned, not only to appear in the legal philosophical thought, but also to *compete* in the sphere of law and legal theory in order to explain and even guide the work of jurists (suggesting alternative methods, perspectives, problems and solutions to those of the pyramid...). Therefore, also because of this competitive dynamic and the *recursiveness* here clarified, one can trace the existence of a *dialectical co-presence* between the paradigms at issue.

The third striking aspect is the diversity of the objects to which the natural and social sciences refer that makes difficult, as one may argues, for the law of

[455] See again S. Cassese, *Le reti come figura organizzativa della collaborazione*, in *Idem*, *Lo spazio giuridico globale*, *cit*., pp. 21-26. As previously highlighted in this chapter, the author implicitly attests to the *historical recursiveness* of the network paradigm. About Cassese's reference to the *network*, see also *Idem*, "Gli Stati nella rete internazionale dei poteri pubblici", *cit.*, *passim*, also in *Idem*, *La crisi dello Stato*, *cit.*, pp. 54-66.

[456] This linguistic cue was formulated on the occasion of the "Quaderni del dottorato 2.0: seminario esplorativo" meeting in Padua last 18 November 2022, by Prof. Paolo Moro, to whom I owe a heartfelt thanks.

incommensurability, as explicated by Kuhn[457] with regard to the natural sciences, to be *transferable* to law. In particular, the renowned scholar holds that at the outcome of a scientific revolution (implying a *paradigm shift*) there would be a categorical incompatibility between the old and the new reference model, to the detriment of the possibility of *commensurate* their magnitudes and properties.

However, one might claim that in the philosophical and sociological branches of legal science, a scientific revolution – in the Kuhnian sense – has not occurred, precisely because the pyramid and the network have preserved and show certain *points of contact* and interaction, by virtue of which they are to some extent *compatible* and *measurable*. In fact, both exemplary figures belong to a geometrically figured space, adopt (differently) hierarchical criteria and are (variously) capable of representing, explaining, and in turn expressing themselves according to (pairs of) opposing but related elements. One can grasp the *binomials of features* common to the two models: vertical-horizontal, linear-circular, concentrated-diffuse, monocentric-polycentric, centralised-decentralised, and so on. They live and they are *kept together in unity* throughout the *dialectics* that also inspires and characterises the dialogical interaction between the paradigms in question and their related traditions of thought (extensively examined in this thesis). To *disconnect* the elements that connote these binomials, as well as, by extension, the theoretical models that express themselves through them, would produce senseless, even *tragic* consequences[458].

For these reasons, it seems unlikely, in the sphere of legal reflection, that the theoretical tradition generated following the (new) appearance of the network is *incommensurable*[459] and, therefore, radically incompatible with the so called *formalistic* legal tradition, which was particularly in vogue in 20th-century legal science, the heyday of the pyramid paradigm.

These models, if not perfectly compatible or reconcilable, can at least *tolerate* (*commensurate* and perhaps even *integrate* – see the binomials of characteristics just indicated) each other. This is why, it should be noted again, *both maintain* a role and a distinct explanatory capacity in the legal thought, even though they are differently

[457] The differences produced by the succession of distinct paradigms, Kuhn asserts, are between them "tanto necessarie quanto irriconciliabili" (T. Kuhn, *La struttura*, *cit*., p. 131) and "l'accoglimento di un nuovo paradigma spesso richiede una nuova definizione di tutta la scienza corrispondente" (cit., p. 132). Again, he concludes sharply: "l'accoglimento di un nuovo paradigma spesso richiede una nuova definizione di tutta la scienza corrispondente" (*ibidem*).

[458] C. Sarra, *Scoprire l'incommensurabile*, in C. Sarra and F. Reggio (a cura di), *Diritto, metodologia giuridica e composizione del conflitto*, *cit.*, p. 225.

[459] In the Kuhnian sense, but also according to the meaning specified by C. Sarra, *Scoprire l'incommensurabile*, *cit*., p. 222, "come impossibilità di trovare una (unità di) misura comune". Indeed, in the case examined here, neither of the two situations illustrated by the author arise: the elements in play seem to express properties that can be represented with *homogeneous* units of measurement and, moreover, the (com-)measurement of the paradigms in question does not seem unreasonable.

activated and effective depending on the context of reference and the various normative phenomena that may form the object of analysis[460].

Finally, it should be noted that phenomena such as polycentrism, widespread power, as well as the heterogeneity and horizontality of the contemporary sources of law may be considered significant *anomalies* in the Kuhnian sense, since they are harsh to explain within the framework of the pyramid (indeed, they do not integrate mere *puzzles* that can be solved in that given regime of *normal science*). In this sense, they are clearly *symptomatic* of the manifestation (and continuation) of a *paradigmatic crisis* within the legal science, which to a certain extent affects the traditional pyramidal structure of the 20th century (undoubtedly newly counterbalanced by the network, being it still seeable, but *blurry*)[461]. Nonetheless, the *crisis* at issue does not seem to have been resolved, or about to be resolved, in favour of either the reticular or the pyramidal model.

Consequently, in light of the reasons here provided and the further *adjustments* invoked apropos of the Kuhnian discourse, I deem necessary to clarify the meaning associated with the concept of *crisis*, spotlighting the *state* of the paradigmatic dynamic between the two pivotal models of legal thought for a robust closure.

4.5 *The recursive crisis and the dialectical coexistence between the pyramid and the net*

The two theoretical traditions addressed throughout this thesis, as pointed out earlier, are both *alive* and still well represented within the legal thought[462], to the point of entertaining a sort of dialectical competition. In fact, if on the one hand the reticular theories succeed in explaining the normative phenomena that elude the comprehension of the pyramid – and faithfully reflect the essence of innovative disciplines, such as legal informatics[463], which are necessarily *nodal* –, on the other hand they fail to explain those profiles, mentioned earlier and certainly more orthodox, that are still massively present in the articulations of today's constitutional democracies. First and foremost, a

[460] For instance, the pyramid model is better suited to illustrate the traditional articulation of the legal system (according to Kelsen's) and thus the hierarchy of sources in a vertical sense, the centralisation and concentration of power (state monocentrism) and so on. On the other hand, the *network* excels in representing the dynamics of regulatory and administrative polycentrism, decentralisation, the diffusion of power, the interpenetration of extra-state legal sources into the orthodox panorama of sources, etc.

[461] Cfr. T. Kuhn, *La struttura*, *cit.*, p. 108 ff., p. 24. Therefore, these are not mere anomalies, i.e. discrepancies with respect to the reference paradigm, but factors capable of activating mechanisms of *extraordinary* science and determining a state of *crisis* of legal science that, however, takes on a different (non-Kuhnian) meaning that will be specified at the end of this contribution.

[462] As I have extensively showed, especially in former chapters.

[463] For a comprehensive and accurate stance on *legal informatics* see P. Moro, *Etica, diritto e tecnologia: percorsi dell'informatica giuridica contemporanea*, Milano, FrancoAngeli, 2021, and *Idem*, *Topica digitale e ricerca del diritto. Metodologia e informatica giuridica nell'era dell''infosourcing'*, Torino, Giappichelli, 2015; on the functional connection between legal informatics and the methodology of judicial decisions see also *Idem*, *L'informatica forense. Verità e metodo*, Cinisello Balsamo, San Paolo Edizioni, 2006.

certain spatial distribution of the sources of law, that does not have completely lost its *vertical-hierarchical* orientation.

Accordingly, one may detect that the network has not *in toto* overwhelmed the legal culture, nor entirely supplanted the iconic-explicative force of the pyramid, bringing about a Kuhnian revolution through a *paradigmatic leap*.

Rather, as anticipated, the pyramid and the network models generate a prolonged situation of *crisis*, which, however, takes on a peculiar meaning with respect to that outlined *by Kuhn: I foresee* that it will not (necessarily) lead to the victory of one paradigm over the other. Hence, the *corrective* suggested is the following: the golden Kuhnian rule – whereby the outcome of the exemplary clash would inexorably be almost unanimously accepted by the scientific community as the victorious *new* paradigm, thus obliterating the defeated *previous* paradigm without any appeal – does not apply to the law, as a social science, and to the crisis here highlighted[464].

Besides, due to the historical *recursiveness* of the two archetypes, which, like karst seas, fill up and drain according to the motions of the legal-philosophical thought, I hold that this dynamic amounts to an atypical Kuhnian crisis, since it is *structural* and potentially permanent[465].

Thereby, I shed light on a situation of *confrontation* between the pyramid and the network, which seems not to be resolved in favour of one or the other effigy, but it rather implies the *co-presence* of the two different theoretical perspectives, thanks to a proper *dialectical dynamic*[466].

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[464] In the opposite direction, see T. Kuhn, *La struttura*, *cit.*, p. 111 ff., for whom "la transizione da un paradigma in crisi ad uno nuovo, dal quale possa emergere una nuova tradizione di scienza normale, è tutt'altro che è un processo cumulativo […]. È piuttosto una ricostruzione del campo su nuove basi […]". Here, I object to the radical nature of the thesis in question and, for the arguments illustrated, its inadmissibility for legal science.

[465] On closer inspection, in his discourse, Kuhn contemplates the (albeit rare) possibility of the *peaceful coexistence* of distinct paradigms at an advanced stage of science, cf. T. Kuhn, *La struttura*, *cit.*, p. 12. Similarly, he admits that "può esistere una specie di ricerca scientifica senza paradigmi o almeno senza paradigmi così univoci e così vincolanti […]" (*ivi*, p. 31) and, speaking on the subject of the social sciences, he questions which sectors of this branch of science have already acquired definitive paradigms (*ivi*, p. 33). Finally, in the Kuhnian sense, a continuation of the regime of science could also be argued for legal science, since this "porta in definitiva soltanto al riconoscimento di anomalie e di crisi" (*ivi*, p. 152). Essentially, it would be the complementary converse of the *atypical* structural crisis made explicit in the text: two sides of the same coin.

[466] On the concept of διαλεκτική, see F. Montanari, *Vocabolario della lingua greca*, Torino, Loescher Editore, [1995]2003. In different terms, cf. E. Berti, *Contraddizione e dialettica: negli antichi e nei moderni*, Palermo, L'Epos società editrice, 1987. To grasp the dialectical interaction between the pyramid and the net one may find enlightening the *ludic analogy* made by Alf Ross, cf. *Idem*, *On law and justice*, p. 21, where he indicates the *necessary concomitance* of both players in a chess game: "A single person cannot pursue the goal 'to win at chess'. The actions which are included in 'playing chess' can only be performed in interaction with another person. Each player has his part to play, but this part has meaning only on the condition that the second player also plays his part". Concerning the *main locus* of legal experience where

Consequently, for the law, as a social science, scientific development would be *cumulative* – where the elimination of useless, obsolete, inadequate *contributions* or contents, etc., takes place over time through the dialectical confrontation of the various formants of law – and not "by leaps and bounds", as it occurs instead, according to Kuhn's approach, for scientific revolutions in the natural sciences.

In conclusion, one cannot but agree that the legal science still contemplates and refers to both paradigms, drawing on their respective explanatory (and prescriptive) contributions depending on the historical period and the normative phenomena from time to time under consideration.

the dialectical principle manifests itself and lives in the *linguistic* clash among opposite parties, see F. Cavalla, "Della possibilità di fondare la logica giudiziaria sulla struttura del principio di non contraddizione. Saggio introduttivo", *Verifiche*, vol. 1, no. 1, 1983, pp. 5-38, and *Idem*, *Retorica processo verità*, Milano, FrancoAngeli, 2008. On the figure of *Socrates* acting as a lawyer and being the dialectical actor *par excellence*, see P. Moro, *Socrate avvocato. Introduzione all''Apologia di Socrate' di Platone*, Pordenone, Libreria Al Segno Editrice, 2018; setting forth a conception of law where the latter consists of a *dialogic composition* which is grounded on the harmonious ordering of an agonistic and regulative principle of intersubjective relations see *Idem*, *Alle origini del nómos nella Grecia classica: una prospettiva della legge per il presente*, Milano, FrancoAngeli, 2014. Eventually, about the *original meaning* of *dialectics* see the thorough analysis carried out by P. Sommaggio, *Contraddittorio*, *Contraddittorio Giudizio Mediazione. La danza del demone mediano*, Milano, FrancoAngeli, 2012, where the author pinpoints that *dialectics* is *what holds together*, while distinguishing them, *opposite but related terms*. All considered, recalling the value of *mildness*, which Ost and Van de Kerchove (see *supra*, third chapter) locate as a fundamental tenet of their *dialectical theory of law*, understood as a *propensity* for the *coexistence* of different, even diametrically opposite, value positions, one may easily grasp a certain assonance with the ancient principle here spotlighted.

Final remarks

Throughout this dissertation I explore the most towering theoretical models that in the legal science's panorama can be found, regarded as powerful tools to represent, and often even drive, the configuration of legal systems and the essence of normative phenomena.

In particular, the first part of the present work engages with the tradition of the so-called *legal formalism*, which progressively shapes the pyramid paradigm. Accordingly, I carry out an in-depth analysis mainly devoted to Hans Kelsen's thought and works. Thereby, I highlight several different aspects of his stance, from the most "classical" profiles to those *dynamic* theoretical elements that led him to experience a certain *dialectical tension* between the spheres of normativity and reality and thus to manifest, as I claim, a *latent anti-formalism*. This is also supported by the Kelsenian readings offered by Renato Treves and, more recently, by Pierluigi Chiassoni, who even speaks of *realistic normativism* when he deals with the theorist of the Pure Theory of Law.

I also examine Bobbio's point of view, who eventually revises his own Kelsenian normativism, thus achieving a composite posture between structuralism and functionalism. Finally, concerning the pyramidal constructions, this paper illustrates Luigi Ferrajoli's theoretical proposal, considering him as the current leading exponent of this legal tradition and the undisputed Kelsen's heir. His main contributions are here diachronically addressed: the multiple meanings of the term *guarantism*, as they are outlined in *Diritto e Ragione*, his theory of *legal validity*, which distinguishes the latter from both the effectiveness and the mere existence of norms, and his masterpiece *Principia iuris*, in which Ferrajoli fully develops both the formal theory of law and the theory of democracy. Where the two theoretical dimensions have become preeminent references for legal scientists and hence for the configuration of current democracies and today's nomodynamic legal orders.

Moreover, I provide a *critical comparison* between the major authors just highlighted, Kelsen and Ferrajoli, pointing out a number of salient detectable similarities and differences in their theoretical settings. This way, I devote a particular focus on the legal category of validity, the "step-wise" construction of the legal system, which reaches the peak of international law; the problematic notion of sovereignty; the meaning of formalism and the role of legal science, whether analytical-descriptive or critical-normative, with respect to its object of analysis.

Besides, this dissertation digs for the alleged *paradigm shift* that, within jurisprudence, would benefit the network to the detriment of the pyramid, whereby, in an increasingly widespread, polycentric, and horizontal normative context, a nodal illustration of legal reality would seem to be preferred. Accordingly, I look at some of the most salient network theories which in recent decades have come to the fore especially in the socio-legal field, thus examining their applicability to the legal world. Hence, I mainly

consider the *dialectical theory of law* of François Ost and Michel Van de Kerchove, and the *Actor-Network-Theory* (ANT) of Bruno Latour, John Law, and Michel Callon. This way, the evocative power of such approaches from a descriptive-observational point of view is emphasised, in order to grasp some peculiar normative phenomena (e.g., the 'strange rings' or the 'disentangled hierarchies') otherwise difficult to explain within the traditional pyramidal perspective.

At the same time, I stress the desirability of searching for *hybrid* or *composite* models that assimilate features of the two already existing and/or even bring new distinctive profiles. Since, no current paradigm turns out to be *completely* capable of autonomously depicting legal reality in all its facets.

Moreover, *le fil rouge* which runs through the entire last chapter is the purpose of spotlighting the existing *dialectical relation* between the paradigms at stake. Therefore, I weigh up a triple dimension that may ground this stance: firstly, by stressing the close nexus between law and economics, I take into account *globalisation* and its waning phase (*de-globalisation*) to respectively explain these processes either in reticular or pyramidal terms. In this framework I also analyse the points made by Sabino Cassese, even providing a critical appraisal of them, thus suggesting envisioning a *composite shared space*, as far as a global market and the connected legal space are concerned.

Secondly, casting a glance to the jurisdictional sphere in the European context, I address the peculiar normative phenomenon of the *multilevel* safeguarding of fundamental rights. This way, I underline the crucial role of judges, especially the national Supreme Courts, in so far as they must perform a much-needed *nomophylactic* function. Then, I also show the multiple forms that their mutual interaction and renewed position may take on, explaining them with the original *composite image* of the archipelago of mountains by the sea, where the normative systems and jurisdictional bodies are kept together, although separated, by the incessant flowing of the sea: dialectics.

Lastly, I critically ponder the applicability in the field of the law, as a social science, of certain categories drawn from the philosophy of science of Thomas Kuhn, particularly the notion of *crisis* among paradigms. Hence, as far as the legal science is concerned, I observe the *historical recursiveness* and thus the cyclical alternation of the pyramid and the network, opting for framing their relation in terms of *structural crisis* which unleashes a fertile explanatory dynamic.

Coming to an end, I maintain that *both* theoretical paradigms, the pyramid and the net, *dialectically coexist* in the legal field and in legal scientists' endeavours. Each model, hence, can successfully carry out a representative function, thus retaining its own explanatory and driving force, even when it mutually interacts with the other. All depending on the single concrete normative phenomenon to be illustrated and on the given context of analysis.

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