CHAPTER 6

Revolution, *Lex Posterior* and *Lex Nova*

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I

Revolution and 'Lex Posterior'

It was the Pure Theory of law (PTL) which systematically introduced the problem of legal continuity, in connection with the subject of revolution. Even nowadays the problem remains within the parameters that have been established by the PTL, to which one must, therefore, return. As the PTL position I will take the one, defended by Merkl and Kelsen in particular, which, from the standpoint of state law,[1] argues that revolution, covering any 'unlawful' or 'transcendent' change in the constitution (in the positive law sense), implies the beginning of a new legal system (and of a new state) and that pre-revolution law and post-revolution law therefore form two distinct legal systems.

I should like, first of all, to look at an aspect, often neglected, but of which Merkl was acutely aware:[2] that of the relationship between the position of the PTL as far as revolution is concerned and the problem of the *lex posterior* or, more generally, of normative succession.

The fundamental point is the following: the position of the PTL can only be maintained if the latter succeeds in justifying the exclusion of the possibility of a norm which covers several successive constitutional sources, without any requirement that the procedures and terms established by them be observed, thus excluding, in particular, the possibility of a *constitutio posterior derogat priori* rule.

The first formulation of the PTL theses on revolution, which we owe to Merkl, fulfilled this requirement (insofar, at least, as customary norms are not considered). Merkl tries to demonstrate that the *lex posterior derogat priori* principle presupposes the unity of law: nobody will apply it in relation to the

laws of different states. It cannot therefore work as a criterion of unity: it would lead to a vicious circle. The knowledge basis (*Erkenntnisgrund*) of unity of law is the constitution. Moreover, the *lex posterior derogat priori* principle has no logical value: it is only 'the expression of a legal norm' and is 'conditioned by this norm in its logico-legal validity'.[3] The *normological principle*, in contrast, is that of *inderogability*.[4] Nor does temporal priority, in itself, give entitlement to prevalence. But among the characteristics of the legal order there is impenetrability (*Undurchdringlichkeit*).[5] If there is no *Derogationsnorm* (rule of derogation) determining the term of validity of the preceding norm, the new norm will be only an apparent one and the legislator only an apparent legislator.[6] This means that, except where there is a higher level *Derogationsnorm*, legal acts are laid down once and for all and this principle of being given once and for all (*Einfürallemalgegebenseins*)[7] is valid for all of them. 'The *Derogationsnorm*, and it alone, guarantees the unity of the changing legal system'.[8] Since the constitution is at the limit of the system, no 'transcendent' constitutional change may lead back to a *Derogationsnorm*. The constitution is the starting-point of the system; its original inderogability guarantees its fixed character.

The reservations aroused by Merkl's construction primarily concern his premises. To talk, within the framework of the PTL, of a normological (and therefore material) principle represents a contradiction in terms: it would require a practical reason which the PTL does not accept. The same is true for the principle of 'being given once and for all'. Besides, only the intended effects of the acts can be expressed through the latter, and the PTL is not a theory of claims of law. Furthermore, Merkl excludes—in the name of an 'impenetrability' that is rather too 'organicist'—the possibility that, in the absence of *Derogationsnorm*, the *lex posterior* might 'enter' the legal order, because its place is already filled by a constitutionally authorised norm. On the same basis, it would be possible to argue, in the name of any other equally well-founded, or unfounded, idea than that of 'impenetrability', that, the *lex posterior* also being constitutionally authorised, the *lex prior* cannot remain in place because its sphere has just been occupied.

On the other hand, the doctrine of the *Stufenbau* (levels structure), being a theory of creation and application of law, is also a theory of the validity process. The tracing of the positive process back up to the constitution raised the problem of determining the basis of its validity. As early as 1920, Kelsen was to answer this question by formulating the concept of *Ursprungnorm* (original norm)—or constitution in the logical sense, as far as state law is concerned—later baptised *Grundnorm* (basic norm).

Nevertheless, when an original or basic normative hypothesis is introduced, one moves up one level in the *Stufenbau* and, consequently, it becomes logically possible to unify several sources from the level immediately below, i.e., several constitutions, under an *Ursprungnorm* or *Grundnorm*. Nor is it any longer a case of a necessary original inderogability, since the whole question becomes that of knowing whether the *Grundnorm* is not, itself, the *Derogationsnorm*.

In 1920, Kelsen recognised the possibility of introducing the *lex posterior*

rule into the original norm, but he ultimately said that whether it is done or not is immaterial.[9] Merkl noted that the *Ursprungnorm* does not specify the *Stufenbau* and that, therefore, the possibility of changing particular norms can only be attributed to the original norm as a hypothesis, which may or may not materialise.[10] What is happening, however, is that both are thinking only with regard to the legal or infra-legal level. The constitutional level, according to the PTL, is not the potential, but the direct and present reference level of the *Grundnorm*. The problem is therefore not that of knowing if the *lex posterior derogat priori* principle in its full extent should be reconducted to the basic norm, but simply that of knowing if the basic hypothesis should not, or at least may not, be formulated in such a way as to include a *constitutio posterior derogat priori* principle, or so that it covers, in any case, several constitutions, whether or not they themselves provide for their replacement. For if that is the case, the positions of the PTL regarding revolution lead, themselves, into a vicious circle: it is stated that revolution implies presupposing a new basic norm and that it therefore marks the start of a new legal system; but one can only claim that revolution implies that a new basic norm is presupposed because the existence of two legal sytems is taken for granted.

Kelsen's answer is based on the relationships between validity and effectiveness and on the distinction between derogation and cessation of validity through loss of effectiveness.[11] Revolution would not derogate the preceding law, it would cause it to lose, overall, its effectiveness, and therefore its validity.[12] The norms of the former system which would remain applicable would do so only by reception.[13]

As far as this last point is concerned, one could retort—*quod erat demonstrandum*. On the other hand, the fact that a norm is no longer valid (*rectius*, in force) does not necessarily mean that it is 'outside' the legal system, as is proved by the fact that a norm at present in force may have its validity basis in a norm which is no longer so (in any case, even if the justifying norm remains in force, it is not its present 'validity' which is relevant but that of the pertinent moment for the intertemporal law).[14] Hence, even allowing that a revolution leads to loss of validity of all the positive norms in force until then, it still has to be asked if it is a legal order or only part of a legal order which ceases to be valid.

Nor do the positions held by Kelsen in relation to the *lex posterior* make any contribution which might be useful in moving out of the circle, even though they define alternative possibilities in formulating the *Grundnorm*. It is known that Kelsen's thinking wavered on this subject, which was a burden for him.[15] Having abandoned, as a result of Merkl's criticism, the qualification of the *lex posterior derogat priori* rule as a logico-legal principle,[16] having seemed for a moment to espouse Merkl's thesis of an original inderogability,[17] he was then to hesitate between reconducting the rule to the basic norm,[18] at least as long as the latter was to guarantee that what is stated as law might be understood to make sense,[19] and qualifying it as a strictly positive norm, no rule being valid if there is no source. It was this last conception which clearly prevailed at the end of the author's life.[20] It was to force him to accept the possibility of the co-

existence of conflicting norms, all of them valid, with the choice belonging to the applying organ.[21] If the first approach is taken, one has the right to ask why the principle should not cover the *constitutio posterior derogat priori* rule. If preference is given to the second, in addition to having to face insuperable difficulties, it becomes a question of knowing why it is not admissible to consider that the basic norm may, in any case, relate to at least two constitutions, both of them being sets of conflicting valid norms. Besides, the broadening of the principle of effectiveness which Kelsen was to make, relating it not only to the legal order considered as a whole, but also to each norm individually,[22] implies that the initial basis—a simple postulate of economy of thought[23]—is no longer sufficient. It is for this reason that Kelsen was to find himself obliged to introduce the principle of effectiveness into the *Grundnorm* itself.[24] Why not include, then, for this purpose, several successive constitutions ordered according to the criterion of effectiveness?[25] We need go no further.[26] One always returns to the main point: as soon as one moves up a level with reference to the constitution, the possibility emerges of formulating the basic norm in such a way that it relates to several successive constitutions. And the PTL does not have the instruments at its disposal to rule out that possibility.

In 1914, before creating the concept of *Ursprungnorm*, but already moving in that direction, Kelsen was stressing that 'the question of the validity of the last accepted norm as a presupposition of any legal knowledge is situated outside that legal knowledge' and that 'the choice of this starting-point is not, essentially, a legal matter, but a political one, and therefore inevitably seems, from the legal knowledge point of view, arbitrary'.[27] He gradually moved towards the opposite position: 'Its presupposition does not occur arbitrarily, in the sense that we would have the possibility of choosing among different basic norms. . . .'[28] The *Grundnorm* would in principle refer to the constitution that is historically the first.[29] Kelsen never managed, however, to justify the need for this reference. Raz has called attention to the fact that the historically first constitution is not necessarily (or normally) a single norm, nor even a single act.[30] The cases of devolution show that a constitution which is not historically the first may become the starting-point of a system.[31] Usually, after a revolution, the 'constitution' is preceded by preparatory or provisional norms: where is, therefore, the first constitution and how can a theory of the relationships within a process of this kind be formulated?[32] There are, moreover, situations where the idea of a historically first constitution clearly shows itself to be inapplicable: international law or the British system, for example.[33] Kelsen found himself compelled to recognise this and, after hesitating,[34] had to acknowledge that besides the 'situation of principle', where the basic norm would make immediate reference to a historically first constitution and only a mediate one to the order created in accordance with that constitution, there would be 'special cases' where the *Grundnorm* refers immediately to a whole legal order, the most obvious example being provided by international law.[35] There may be, furthermore, mixed situations where, together with an enacted constitution and legislation, custom is recognised as

a source. If, in this case, the basic norm refers to a plurality of acts (a plurality of customs), what will prevent it from also doing so in relation to an (unlimited) plurality of enacted constitutions? And what, if not the basic norm, is to establish the relationships between custom and enacted law in the 'mixed' orders?[36] Why should it not establish them among successive enacted constitutions?

Raz commented, quite rightly, that, in using the concept of historically first constitution, Kelsen is already taking for granted the unity of the legal system.[37] The construction of the *Grundnorm* as a simple gnoseological hypothesis implies that at the moment of its formulation the problem of its subject is raised, without any pre-determinable answer. The unavoidable result within the PTL is that of the arbitrariness with which the *Grundnorm* is formulated. Kelsen understood this at the beginning and Ross emphasised it long ago.[38]

In relation to what interests us for the moment, the vicious circle concerning the positions of the PTL on revolution is confirmed. Whilst being consistent with itself, the PTL, on the subject of revolution, could not have said anything other than what was said by Kelsen about the relationships between international law and municipal law: that continuity or discontinuity of pre-revolution law and post -revolution law corresponds to a question that 'legal science' is unable to resolve. And for the same reason: because it is a matter of choosing where to situate the basic norm—within international law or within municipal law and, as far as the latter is concerned, whether 'above' or 'below' revolution.

II

Lex Nova

There is, furthermore, in the *Stufenbau* theory, a contradiction that is highlighted by Alf Ross's 'constitutional puzzle'. The latter is well-known. What has perhaps been overlooked is that the argument based on the logical problem of self-reference was only complementary and that the main argument—in addition to that concerning the derivation relationship, which Hart was the first to criticise[39]—lay elsewhere. It is proved to be thus by the fact that the thesis of 'the inapplicability of norms on constitutional amendment to their own change' had already been formulated by Ross in the *Theorie der Rechtsquellen*, without his having made use in it of the idea of self-reference. The reasoning was as follows: Kelsen and Merkl had emphasised—and, according to Ross, demonstrated—that derogation is based on a *Derogationsnorm*, the latter having to belong, as any constitutive condition, to a level above that in which the derogated norm is situated, as well as the one which will replace it. The consequence of this is then unavoidable: 'The rules on constitutional change must necessarily be considered as constitution to the

power of two and a new instance must thus be presupposed.' They cannot be considered as being posed, but as presupposed, being identified with the *Grundnorm*. This is confirmed by the following: to conceive of the norms on constitutional amendment as being part of the constitution would lead to the paradox of self-obligation.[40] The argument based on self-reference was later to take on the role of this paradox in reasoning.

The same could be said of Ross as he himself said of Merkl: *konsequent bis zum Absurden*.[41] But coherence has a price: in order to avoid the conclusion, the major premise has to be removed. If it remains, in other words, if it is claimed that the conditions of legal production at a certain level, and therefore those of derogation, can only be situated at a higher level, the inevitable result for the PTL is that the norms on constitutional change can only belong to the basic norm (and those also on intertemporal law concerning the 'spheres of applicability' of the successive norms). This implies, as a corollary, that the norms on amendment established by the constitution are, by this very fact, of no value; and it further raises the following dilemma: either a basic norm is presupposed which includes rules of change (and which ones?) or it will have to be accepted that any change in the constitution becomes a 'transcendent' one, and that, whatever the change may be, it means a revolution in the legal sense of the term. In other words: not only can the PTL not exclude the introduction of the *lex posterior derogat priori* principle into the basic norm—whatever its extent—but, moreover, any amendment of the constitution could only be based on this principle, considered as included in the *Grundnorm*.

Within the *Stufenbau* doctrine, in accordance with the idea of a set of relationships of delegation of competence, the constitutive conditions of each level have to be established at a higher level, which implies that the norm authorising the derogation is situated at a level delegating both the derogating norm and the derogated norm. This requirement, however, is waived as soon as the constitution is concerned, since it is accepted that a delegated norm (the law of constitutional amendment) derogates the original constitution itself. Merkl perceived the difficulty and, probably in order to defend himself against Ross's criticism, suggested, in 1931,[42] a distinction, which Walter was to develop,[43] between the *Stufenbau* according to legal conditioning and the *Stufenbau* according to derogating strength: the laws of amendment would be subject to the constitution from the point of view of conditioning, but equivalent to it from the point of view of the derogating strength. This assumes, however, that the constitution can dispose of itself and shows that on the subject of the relationships between *Grundnorm* and constitution one is no longer thinking of a simple delegation of competence, but, without being aware of it, of that of competence on competence. Thus it is that the PTL has not, contrary to what it believed, been able to dispense with Haenel's old conception of *Kompetenz-Kompetenz*.[44]

But the fact is that the conception of a delegation of competence-competence, pure or full,[45] is a contradiction in terms, because, by definition, delegation would imply that the competence-competence belongs to the delegant, to the basic norm therefore, and, at the moment when the latter is

formulated, the competence delegated could, consequently, be delimited. A pure or full competence-competence is always arrogated. What has to be known is how the relationship between the revindication of competence-competence and the *Grundnorm* can then be built.

This will first of all bring us back to the problem of the arbitrariness of formulation of the *Grundnorm* in the PTL. This is greater than is thought. For example, when one wants to know why the Assembly of the Republic in Portugal is able to make laws, the answer may be either because this power is attributed to it by the constitution, or because a *Grundnorm* is presupposed which confers that power on it. Both answers are logically possible. Of course, the constitution claims to be the basis of the legislative power of the Assembly. But that is not sufficient, as is proved by Hart's example concerning the imaginary case of the Soviet Laws Validity Act, 1970,[46] and as is also shown by historical cases of 'title inversion' (let us recall that of the States-General of 1789). It is said that, in the Portuguese system, the power of the Assembly of the Republic has its basis in the constitution, not only because the latter claims to provide that basis, but also because the Assembly claims to exercise a power which is so based and not an original power and because legal practice (in its broad sense, which includes that of the Assembly) views this power thus. The systematicity of the law, from the point of view which might be called 'genealogical', depends as much on direct references as on what I have called 'reverse' references.

The systematicity of the law is not external to thought and it is not the introduction of a basic norm at the limit which would be enough to guarantee it—since the systemic relationships must already have been considered in order to know where to place this point of limit. 'Legal reality' takes on meaning only in so far as it is interpreted, legal practice thinks its own self through and the systematicity is only one (possible) result of such self-thinking.

On the other hand, the validating relationship, implied in that of empowering, is not a relationship of simple logical correspondence (Kelsen), but a relationship of justification. Norms are reasons, not reasons for action,[47] but rather reasons so that, from the standpoint of the claim attached to them, conduct, possible or actual, is considered to be licit, illicit, or due; and, at another level, so that other norms are considered to be valid or invalid. The duality of category does not take the form of causality and imputation, but of causality (or determination) and justification. In a certain modality, however, constituted by the systematicity of law, the two categories combine, as a justificatory determination: acts produce (legal) effects because, and in so far as, they justify them. It is in the chain of justificatory determination that the genealogical systematicity of law finds expression. Nevertheless, in order to maintain the chain, the active side of justification is insufficient. Appeal must not be made to other justifications and the latter must not be introduced in this way—it is necessary for the 'reverse' references to correspond to the direct references.[48]

Ultimately, however, the relationships between direct and 'reverse' reference are inverted. Given the absence of a source other than the original

source, there is no longer either a direct reference or a previous norm. The 'reverse' reference becomes constitutive, in the strict sense of the term. It is it which, calling for an original justification, constitutes the norm which is its expression and which will subsequently rejustify the act in a normative way. At the outset there is no delegation but 'arrogation' of competence. There is no *pouvoir constituant* hovering above positivity. It is created, or recreated, through being exercised. The original act is therefore constitutive of the norm which justifies it. This explains why it can define its own status.[49] And, on the other hand, the content of the norm (even if it is not 'complete') is defined by the acts which, in 'reverse', constitute it (and by those which successively make a mediate 'reverse' reference). Besides, Ross had already demonstrated that a path of this kind was necessary in order to avoid arbitrariness in formulating the basic norm.[50]

We have thus reached the concept of *lex nova*: an act with a normative meaning having a 'reverse' constitutive reference, which arrogates the competence-competence and which, therefore, defines its own status.

The idea of *lex nova* partially corresponds to the frequently used notion of the original act and this denomination is also appropriate for it. But I wished to stress the temporal dimension and the 'radical' newness which is introduced by an original act into the 'legal world'. It might be said that, from the original character point of view, *lex nova* or *lex originaria* are the opposite of *lex derivata* and that, from the point of view of newness, it is the opposite of *vetus lex*. The essential element, in any case, is the way in which the *lex nova* is instituted and the competence-competence that it claims.

The manner in which the competence-competence is arrogated varies, with two basic modalities being possible, which the cases of the United States and the United Kingdom illustrate, and to which two paradigms of the legal system correspond, the foundational paradigm and the non-foundational paradigm:[51] according to the first, the basic norm is constituted as an individual norm (as far as its subject is concerned), related to a determined constituent act or acts;[52] while in the second it is as a general norm,[53] the competence being claimed by and for all acts of a certain kind. In the second case, the acts situated at the limit, excepting the first, are mixed acts combining the qualities of *lex originaria* and of *lex derivata*. They define their own status but, given that the competence claimed is also claimed in favour of other acts, they can only, without the conception of competence being modified (without break, therefore), establish their relationships in a certain way. It is because the British system is of a non-foundational character that the idea of a historically first constitution cannot be applied to it.

Two final comments. Regarding the norm constituted by 'reverse' reference, I will refrain from saying more in this text. In particular, I have considered neither custom (which I would rather deal with again as non-systemic law, at least from the 'genealogical' point of view) nor, specifically, what can roughly speaking be called the role of the courts or of the acts of adjudication. I foresee, moreover, an objection which will consist in saying that, by means of the constitutive 'reverse' reference, the 'objective validity' of the law is put in

question. This is partially true—but it is preferable for it not to be hidden under an *Als-ob*. I will anyway very briefly answer that the 'in itself' is, for thought, only a limit placed on the infinite and that any law is in fact only a validity claim (in the sense of bindingness claim), with the peculiarity of being self-imposed, that is, a claim which, while it can be questioned, does not lend itself to dialogue, judging itself to be sufficiently justified for conducts to be imposed, if necessary by coercion. This basically corresponds to what we all know and is shown by problems such as those concerning political offences, conscientious objection, the right of dissension, the right to resistence and the right to revolution. It can be summed up in the fact that however just, democratic, respectful of basic rights, or 'virtuous' a legal system is, and however necessary the existence of the law is, the latter will always represent a form of intolerance—sometimes bearable, at other times unbearable.

III

Revolution, 'Lex Nova', 'Lex Posterior'

A revolution—without concerning ourselves here with defining the concept—implies, by its very nature, a *lex nova*. By definition, revolution cannot be justified by the law in force, against which it is directed. Even should there be provision for a right to insurrection, there will be limits, and, if these are exceeded, the preceding justification will no longer be able to function. In any case, the insurrectional procedures for legal production cannot be pre-defined, so that, whatever the case, a *lex nova* is introduced, which replaces the preceding one. How does this substitution differ, however, from a derogation? What is the distinction and the relationship between *lex nova* and *lex posterior*?

The concepts of *lex nova* and *lex posterior* start by being situated at different levels. The idea of *lex posterior* evidently assumes a temporal relationship between two acts, one being subsequent to the other. But a problem of derogation has also, at least, to be raised between them—whatever the solution may be—which, in its turn, requires two conditions: firstly, that between the normative meanings of the acts there is some kind of incompatibility; then, that there is a common level where a rule—formulated or to be obtained by integration—may be situated which defines the consequences of the incompatibility. It is this last condition which is expressed by Kelsen and Merkl when they state that the *lex posterior derogat priori* rule can function only within the same legal system. Between *leges novae*, in their specific function, conflicts may arise. However, from a neutral standpoint, these conflicts cannot be settled in a normative way. Because the purpose of each *lex nova* is to define unilaterally the conditions of legal production, there can be no common level of acceptability where a norm may be situated which would provide the criterion for the solution of the conflict: neither *lex posterior derogat priori,* nor

lex posterior derogat non priori. The conflicts which arise between *leges novae,* in their function of constituting the basic norm, are conflicts between validity claims or conflicts of legality. A revolution may lead to a compromise, but it cannot be submitted to arbitration. Between validity claims it is the facts which decide one way or another. Not in the sense of conceiving effectiveness as a condition of validity or, even less, of having to think of every effective order as being valid, but in the sense that the fact that a validity claim is effective, and more or less effective, or that it is not, or that it is no longer, is significant from a practical point of view.

If one takes the standpoint of an established *lex nova,* of an effective validity claim, no problem of derogation can be raised in relation to it either. The constitution of the basic norm implies, from the point of view of the validity claim of which it is the expression, and within its boundaries, that the legal production must be reconducted to that basic norm or, at least, subject to it. The *lex nova* institutes the *Können* and establishes its conditions. It therefore defines the conditions under which the *lex posterior derogat priori* principle will be able to function. It can exclude or include it in the basic norm, according to whether it adopts the foundational or the non-foundational paradigm. In the United Kingdom an Act of Parliament can derogate another Act of Parliament, in as much as it produces effects which are not that, by 'reverse' reference, of constituting the basic norm. But it cannot derogate the basic norm: not because the latter does not authorise it, but quite simply because the derogability would assume a meta-norm, which is outside the meaning of the constitutive *leges novae* of the basic norm. If the basic norm is individual, the constitutional norms will be able to be derogated in the conditions which the former establishes or authorises—in the framework, therefore, of its competence-competence—but the basic norm, which confers on an act this competence-competence, cannot be derogated, because that would also assume a meta-norm which is outside the sense of the *lex nova* constitutive of the basic norm. There lies the real meaning of what, according to Merkl, would appear to be an original inderogability. No question of derogation can even be raised.

This is not the right place to attempt a taxonomy of conflicts of legality. History provides us with many different examples. There are some in particular where claims having a minimum of effectiveness are engaged in long, drawn-out competition over a sphere of validity and there are some where a claim having a relatively stable effectiveness is succeeded by another which rapidly takes its place. It is this kind of situation that one thinks of when talking about revolution. However that may be, in those hypotheses where a claim which acquires effectiveness in the claimed sphere of validity replaces another which was previously in the same situation, matters can be considered from the standpoint of competition (for whatever length of time it has lasted) or from that of 'succession'.

From the succession point of view, taken *ex ante*, a revolution implies a break of legality and, consequently, a gap in legal continuity. *Ex ante*, there is no systemic unity between pre-revolution law and post-revolution law.

But one can also—and must—take an *ex-post* standpoint: that of the successive *lex nova*. And, here, matters become somewhat different.

It is practically impossible that after a break, however deep it may be, a part of the preceding law does not continue in force. In another study[54] I tried nevertheless to demonstrate that the questions raised by a break of legality and relating to the preceding law are not limited only to that of whether and how far the preceding law 'overstays in force'. There is also the question of the relevance of past force (validity) of past law'. If today (after the break) a case has to be decided which, according to the accepted criteria of intertemporal law, whatever they may be, is situated at a moment preceding the rupture, must the preceding law be applied, even if the relevant norm has not survived? And are previous jurisdictional and administrative acts and even private legal acts valid? It is not a matter of intertemporal law, but of a question that is preliminary to it. Moreover, the problem of the relevance of past force (validity) of past law conditions that of 'overstaying in force', because the present 'force' (validity) of a norm is justified by the 'force' (validity) of other norms in the past.

In certain cases, the subsequent law recognises the validity claim, as such, of the preceding law. In others, it does not recognise it. It might often be difficult to know what, in concrete terms, is the approach adopted, but the conceptual difference remains. And it can be said that the second position will always have as its basis a negative judgement on the criteria of legitimacy of the preceding power, basically an idea of usurpation, in the broad interpretation. The consequence is that, in the first hypothesis, the recognition of the past validity claim, in the past, implies that of the past 'force' of the preceding law, while in the second situation the new law has to provide the title of the, more or less broad, past relevant 'force' of the preceding law. This shows that the Kelsenian idea of reception is totally inadequate when there is recognition of the preceding law. And that, even if it were the opposite, a title always has to be found—be it reception or not—with retrospective sense.

However that is achieved, problems of derogation may arise, and do indeed arise, between law subsequent to and law preceding a break. Once the relevance of the past 'force' of the preceding law is recognised or given title, the past validity of certain norms justifies the potentially present or future validity of other norms. The 'force' of the latter will be terminated only by derogation, either at the time of the break, or subsequently.

As long as matters are seen from the point of view of conflict of legality, a validity claim attached to one *lex nova* is in opposition to a validity claim attached to another *lex nova*, both being conceived as original acts. Once the conflict is considered to be settled and the succession standpoint is taken *ex post*, the preceding *lex nova* becomes, from the point of view of the subsequent *lex nova, etus lex*. And the competence-competence which the *lex nova* arrogates to itself allows it to define the status of the *vetus lex* and its relationship to it. Among the *leges novae* there is no common level of acceptability. But if it is viewed from the standpoint of the latter, this establishes itself as the criterion of all the relationships, including that with other *leges novae*, which

become *vetera leges*. The basic norm constituted by the *lex nova* will not perhaps, in itself, be the sole criterion of unity of the legal system (a relative concept, besides, in the sense that it can have varying degrees of materialisation), but it provides the reference point for this unity—Kelsen spoke, at one moment, of an Archimedean point.[55]

The idea of continuity corresponds to an *ex ante* standpoint. From this standpoint, a *lex nova*, by introducing a break, always interrupts continuity. But, by reference to the *lex nova*, the status of the past law has to be defined, even in the past. And, *ex post*, the unity can be reconstituted, from the present towards the past, although as a new unity.[56] The point of reference will always be the *lex nova* and the competence-competence which it arrogates to itself. If the past validity claims are recognised, even through historical indifference, the basic norm which the *lex nova* constitutes will represent a meta-norm in relation to the basic norms which justify the preceding *leges novae*, which have become *vetera leges*. With or without recognition of past validity claims, under the single condition that there is the relevance, even though only partial, of the past 'force' of the preceding law, relationships of derogation can then be established within the unity reconstituted by the *lex nova*. And, in the case of recognition, the *lex nova* can even conceive of its relationships with the *vetera leges* as relationships of repeal. The conflict of legality can be converted *ex post* into derogation, the *lex nova* into *lex posterior*—but still remaining strictly *lex nova* in as much as it arrogates to itself the competence to derogate.

This is how both the circle of which the PTL accused the 'traditional doctrine', and the one into which it (the PTL itself) led, can be avoided. Derogation can occur only in the conditions established by *leges novae*. The *lex posterior derogat priori* principle cannot therefore, in itself, work as a criterion of unity. But neither is the formulation of the basic norm arbitrary. What may be in question is the matter of point of view: according to whether one starts from one or the other—*ex ante* or *ex post*—placing oneself at the standpoint of succession—the content itself and the unity of the legal system present themselves differently. There lies the area of choice: for legal doctrine the latter implies that its statements are conditioned by one standpoint, that of a validity claim; for the protagonists, a commitment.

NOTES

1 Still essentially within the framework of the PTL, Sander ('Das Faktum der Revolution und die Kontinuität der Rechtsordnung', *Zeitschrift für öffentliches Recht* 1 (1920–1) pp 193 ff), takes the strict viewpoint of the primacy of international law and asserts therefore the continuity of the legal order notwithstanding revolution. Merkl, in discussing his position, maintains that it is always possible to distinguish the problem of the *staatsrechtlicher Kontinuität* from that of the *völkerrechtlicher Kontinuität*. See 'Das Problem der Rechtskontinuität und die Forderung des einheitlichen rechtlichen Weltbildes' (1926), in *Die Wiener rechtstheoretische Schule, Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross,*

Verdross, Hans Klecatsky *et. al* (Frankfurt, 1968), pp 1284–5). Similarly, in essence, Rohatyn, 'Die juristische Theorie der Revolution', *Internationale Zeitschrift für Theorie des Rechts* 4 (1929–30) p 226.

2 As is shown by the subtitle of his first text (1918) on revolution: *Die Rechtseinheit des österreichischen Staates. Eine staatsrechtliche Untersuchung auf Grund der Lehre von der lex posterior* (*WrS* I, pp 1115 ff).

3 Ibid. p 1136.

4 'Die Unveränderlichkeit von Gesetzen—ein normlogisches Prinzip' (1917), *WrS* I, pp 1079 ff.

5 *Die Lehre von der Rechtskraft* (Leipzig–Vienna, 1923) p 234. Kelsen had already referred to it: 'Reichsgesetz und Landesgesetz nach österreichischer Verfassung', *Archiv des öffentlichen Rechts* 23 (1914) p 209.

6 Ibid. pp 232 ff.

7 'Die Unveränderlichkeit . . .', op. cit. p 1085.

8 *Die Lehre* . . . , op. cit. p 239.

9 *Das Problem der Souveränität und die Theorie des Völkerrechts,* 1920 (reprinted Tübingen, 1928) p 115, note 1.

10 *Die Lehre* . . ., op. cit. pp 240 ff.

11 E.g., *Das Problem* . . ., op. cit. pp 94 ff; *Reine Rechtslehre,* 2 (Leipzig–Vienna, 1960) pp 212 ff; 'Derogation' (1962), *WrS* II, p 1434.

12 *Reine Rechtslehre* 2, pp 212–15.

13 *Reine Rechtslehre* 2, p 213.

14 Which also renders inadmissible the distinction between a *momentary legal system* and a *non-momentary legal system*, established by Raz—'The identity of legal systems', *The Authority of Law* (Oxford, 1979) p 81, and *The Concept of a Legal System* 2, (Oxford, 1980) pp 34–5. What is said in the text also shows the importance of the problem of the place of the norms of intertemporal law in relation to constitutional norms, which I am not able to deal with in this text.

15 Felix Ermacora, 'Das Derogationsproblem im Lichte der Wienerschule', *Oesterreichische Zeitschrift für öffentliches Recht und Völkerrecht*, N.F. 11 (1961) pp 314 ff, and Stanley Paulson, 'The status of the lex posterior derogating rule', in *Essays on Kelsen,* Richard Tur and William Twining, eds (Oxford, 1986) pp 229 ff.

16 Such a qualification was made in 'Reichsgesetz . . .', op. cit. p 208.

17 *Das Problem* . . ., op. cit. pp 49 ff.

18 As a possibility in *Das Problem* . . ., op. cit. p 115, note 1.

19 In particular, 'Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus', 1928, *WrS* I, pp 295–9.

20 See especially 'Derogation', op. cit. pp 1429 ff, and *Allgemeine Theorie der Normen* (Vienna, 1979) pp 84 ff. See also *Allgemeine Staatslehre,* 1925 (reprinted Bad Homburg, 1966), pp 148–9.

21 Especially 'Derogation', op. cit. pp 1439–40, and *Allgemeine Theorie der Normen,* op. cit pp 166 ff. See also *Reine Rechtslehre* 2, op. cit. pp 26–7.

22 E.g., *Reine Rechtslehre* 1 (Leipzig–Vienna, 1934) p 72, and *Reine Rechtslehre* 2, op. cit. pp 216–19.

23 *Das Problem* . . ., op. cit. pp 98 ff.

24 *Reine Rechtslehre* 2, op. cit. p 219.

25 Kelsen maintains that, if one takes the point of view of the primacy of international law, the continuity of the state and of the legal order through revolutions is guaranteed by an international norm which embodies the principle of effectiveness, that is, which legitimises successful revolution (*Reine Rechtslehre* 2, op. cit. pp 222

and 336). So what is there to prevent a similar norm from being set up as a presupposition of the state legal order, even if one takes as a starting-point its primacy or if one does not take account of international law, all the more so as, in the hypothesis of the primacy of state law, this norm would anyway come to be part of internal law (*Reine Rechtslehre* 2, op. cit. p 340)?

26 Although the possible incidences of Kelsen's positions on the subject of the *lex posterior* on the formulation of the basic norm might go further. Thus, the idea that in the final analysis the choice of the norm to be applied, in the case of conflicting norms, comes under the discretion of the applying organ, would make a revision of the *Stufenbau* necessary (the role of the act of ajudication will, besides, always require it). This discretion is not 'in the nature of things', but depends on a norm of competence. On the other hand, choosing between the norms of one level is not included in the application of the law in relation to this level. The authorisation would therefore have to come at least from the level above. Ultimately the basic norm is reached. And it is curious how in this way the standpoint can be changed and one can move close to the domain of the doctrine of the rule of recognition. It is, however, a line of thought which I will not develop in this text.

27 'Reichsgesetz . . .', op. cit. p 217. See also pp 413–18.

28 *Reine Rechtslehre* 2, op. cit. p 204.

29 Ibid. pp 203–4.

30 *The Concept of aLegal System* 2, op. cit. p 101. See also 'Kelsen's theory of the basic norm', in *The Authority of Law,* op. cit. p 124.

31 *The Concept of a Legal System* 2, op. cit. p 102–3 and 'Kelsen's theory . . .', op. cit. pp 127–8. We analysed these cases in 'La revolución Portuguesa y la teoria de las fuentes del derecho', *Revista de Estudios Politicos,* 60–61 (Madrid, 1988), pp 581 ff. Kelsen becomes aware of the problem, but on what grounds, with the instruments at his disposal, can he describe as historically first the constitution which 'appears as valid for a sphere which beforehand was not the sphere of validity of a state constitution or of a state legal system based on it' (*Reine Rechtslehe* 2, op. cit. p 203)? On the ambiguity of this passage, see Finnis, 'Revolution and continuity of law', in *Oxford Essays in Jurisprudence,* A W B Simpson, ed (Oxford, 2nd Series, 1973) pp 51–2.

32 Merkl explicitly acknowledges that a 'plurality of constitutions in the positive law sense linked by legal continuity may be connected by a constitution (in the logico-legal sense) or, in other words, may receive their validity from each one in succession'. And he gives as an example the provisional constitution and the definitive constitution of the Austrian Republic (*Die Lehre . . .*, op. cit. p 209, note 1). Can it be said, however, that between a provisional constitution and a definitive constitution there is a relationship of derivation of validity? In the article mentioned in note 31 I tried to conceive of relationships of this kind (including the act of revolution itself, considered as a source, which may have parallels in the cases of devolution) through the idea of a reference to an original justification, which would guarantee continuity, although on particular terms. It is a point which I will not specifically consider in the text.

33 Hart, *The Concept of Law* (Oxford, 1961) pp 245–6.

34 *General Theory of Law and State* (Cambridge, Mass., 1945) p 126; 'Der Begriff der Rechtsordnung', *WrS* II (1958) p 1399.

35 *Reine Rechtslehre* 2, op. cit. pp 204 and 232–3.

36 *Reine Rechtslehre* 2, op. cit. p 233.

37 *The Concept of a Legal System* 2, op. cit. pp 100 ff. See also 'Kelsen's Theory . . .' p 214.

38 *Theorie der Rechtsquellen* (Leipzig–Vienna, 1929), *passim*, e.g. pp 261–2 and 356.
39 'Self-referring Laws', *Essays in Jurisprudence and Philosophy* (Oxford, 1983) pp 170 ff.
40 pp 356–7, 359 ff. The argument is also used in *On Law and Justice* (London, 1958) pp 80–1, and in 'On Self-reference and a "puzzle" in Constitutional Law', *Mind* LXXVIII, 309 (1969) pp 1 ff.
41 Ross, *Theorie* . . . op. cit. p 282.
42 'Prolegomena einer Theorie des rechtlichen Stufenbaues', *WrS* II, pp 1340 ff.
43 *Der Aufbau der Rechtsordnung* (Vienna, 1974) pp 55 ff.
44 'Die vertragsmässigen Elemente der Deutschen Reichsverfassung', *Studien zum Deutschen Staatsrecht* I (Leipzig, 1873) pp 145 ff; *Deutsches Staatsrecht* (Leipzig, 1892) pp 771 ff. Kelsen, who in 'Reichsgesetz . . .' had widely used the concepts of *Kompetenz-Kompetenz* and *Kompetenzhoheit*, criticises Haenel's thesis, starting from the idea of original inderogability . . . (*Das Problem* . . ., op. cit. pp 47 ff).
45 One can talk about competence-competence at intermediary levels, the latter being *derived, restricted* and *heteronomous* (e.g., the law, being based on the constitution, can establish competences). Ultimately, however, the competence-competence is *original, unlimited* (at least tending to be so) and *autonomous*. It is what I call *pure* or *full* competence-competence.
46 'Kelsen's Doctrine of the unity of law', *Oxford Essays in Jurisprudence* . . ., op. cit. pp 319 ff. I discussed this example in 'La Revolución . . .', op. cit. pp 581 ff.
47 v. Raz, *Practical Reason and Norms* (London, 1975), *passim*, and *The Morality of Freedom* (Oxford, 1986), pp 23 ff—to which I am here obviously indebted, in spite of differences; see also Hart, 'Commands and authoritative legal reasons', in *Essays on Bentham* (Oxford, 1982) pp 243 ff.
48 I summarised under this number, with corrections and specifications, ideas presented in my articles 'O problema da continuidade da ordem juridica e a Revolução Portuguesa', in *Boletim do Ministério da Justiça*, Lisbon, 345 (1985) and 'La Revolución . . .', op. cit.
49 The question of self-reference would have to be discussed here, but that would go beyond the feasible limits of this text.
50 Ross had maintained that legal knowledge proceeds both by deduction and by induction, that 'the *Grundnorm* allows itself to be understood as *Grundnorm* when it can be considered an abstraction of real coercive actions' and that the correlation between induction and deduction alone would be decisive for legal validity (*Theorie* . . ., op. cit. pp 281–2, see also *Towards a Realistic Jurisprudence* (Copenhagen, 1946) pp 73–4). I believe that the realism of the author caused him to qualify as induction what is not. But the distinction between direct and 'reverse' reference is a way of taking up again Ross's basic idea.
51 A distinction which (even without considering international law) will not necessarily coincide with that between rigid and flexible constitution: thus the *Statuto Albertino*, of 4 March 1848, of the State of Sardinia, and then of the Kingdom of Italy, was flexible and, nevertheless, foundational (except if that which justified the absolute power of the monarch continued to be considered as the basic norm). But the exact definition of the relationship between the two pairs of concepts would require a thorough analysis which would probably make it necessary to introduce elements which are not considered in the text.
52 Among the successive *leges novae, partial ruptures* may be established, in the foundational systems as well as in the non-foundational ones. It is a hypothesis which, for the sake of brevity, I will not consider here.

53 The qualification of a norm of this kind, as well as that of the British system, as a norm constituted by 'reverse' reference does not necessarily exclude it from also being a customary rule. But it is at least debatable that the authority resulting from this source would be sufficient to justify invalidity, or anything similar, from the point of view of the system, of a law aiming to limit 'future parliaments'.

54 'Inconstitucionalidade Pretérita', in *Nos Dez Anos da Constituição*, Jorge Miranda, ed (Lisbon, 1987) pp 267 ff.

55 'Reichsgesetz . . .', op. cit. p. 204.

56 Here I take up, with new elements, an idea expressed in 'O problema da continuidade . . .', op. cit.