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A leitura francesa de Kelsen (ou como interpretar mal um autor e fazer com que ele diga o que não diz)

The French reading of Kelsen (or how to misinterpret an author and make him say what he does not say)

Sacha Sydoryk

Resumo: Neste artigo, pretendo mostrar que, em França, a visão de Kelsen sobre Stufenbau é amplamente mal compreendida e que o seu nome está associado a um conceito específico de "hierarquia de normas" que nada tem a ver com os seus escritos. Na verdade, a doutrina jurídica francesa rejeita Kelsen como um todo, mas continua a utilizar uma versão de alguma forma modificada do conceito de Kelsen, chamada mais de "pirâmide de normas" em vez de "hierarquia de normas". Esta versão muito francesa do conceito é usada tanto como forma de legitimar a ordem jurídica como para criticar o positivismo jurídico como um todo, ignorando em grande parte o ponto original de Kelsen. A principal consequência é que, em França, o trabalho de Kelsen é maioritariamente restrito a este aspecto dos seus escritos, deixando-o quase sempre não lido e incompreendido quando o seu nome e conceitos são usados nas primeiras aulas de estudos jurídicos.

Palavras-chave: Doutrina Jurídica Francesa; Hierarquia de Normas; Filosofia Jurídica.

Abstract: In this paper, I aim to show that in France, Kelsen's vision of Stufenbau is widely misunderstood and that his name is associated with a specific concept of the "hierarchy of norms" that has nothing to do with his writings. Indeed, the French legal doctrine rejects Kelsen as a whole, but keeps on using a somehow modified version of Kelsen's concept, called rather "pyramid of norms" rather than "hierarchy of norms". This very French version of the concept is both used as a way to legitimate the legal order and to criticize legal positivism as a whole, missing far and wide Kelsen's original point. The main consequence is that in France, Kelsen's work is mostly restrained to this aspect of his writings, leaving him mostly unread and misunderstood when his name and concepts are used in the first classes of legal studies..

Keywords: French Legal Doctrine; Hierarchy of Norms; Pyramid of Norms; Legal Philosophy.

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THE FRENCH READING OF KELSEN (OR HOW TO MISINTERPRET AN AUTHOR AND MAKE HIM SAY WHAT HE DOES NOT SAY)

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Kelsen is one of the most important authors of the 20th century when it comes to legal philosophy (we'll use legal philosophy in a broad meaning, including what is sometimes called legal theory under that expression). For instance, Michel Troper dubbed him "one of the greatest legal scholars of the 20th century"[1]. However, in France, a particular phenomenon occurred: his work has been massively misunderstood in certain key points, but in the meantime his name is omnipresent and associated with the idea of a hierarchy of norms. This specific idea, and the associated concepts of validity and conformity, have the particularity to be presented to students during some of the first hours of class, as shown by the specific literature of first-year handbooks. However, although the name of Kelsen is used, although the words of the pure theory of law are used, the various concepts are not, in fact and in the majority of cases, those used by Kelsen. Kelsen is, then "a miskown classic[2]". This topic has already been discussed in the French literature (De Béchillon, 1994, p. 81-127), however the phenomenon remains, and seems to even have amplified.

This phenomenon does not stop at the doors of amphitheatres and at the first teaching about the legal order. The French legal doctrine is locked in a kelsenian prison. On the whole, French scholars are not kelsenian, but they still use the words of Kelsen. They constructed a representation of legal positivism, associated with a wrong reading of Kelsen, that they use to refute or criticize legal positivism.

This is this mythical Kelsen that we would like to explore here, and how it differs from the real one. The idea is to show the underlying differences between his real work and its reception in France, and how this mythical figure is still present and influences French legal doctrine and French legal teachings.

In order to do that, we'll mainly rely on two sources. The first one would be handbooks of introduction to law, whether public or private law. These books, although meant for students, represent the common background of the French legal doctrine about Kelsen's work. If an idea is present in a handbook, this idea is a part of the

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[1] « Hans Kelsen est reconnu comme l'un des plus grands juristes du XX^{e} siècle » : Troper.

[2] A Misknown Classic : Hans Kelsen is the title of a recently published book in France that aims to explain further Kelsen's work. Hochman, Magnon, & Ponsard (2019).

common knowledge and the common representation of what law is. The second one would be the occurrences of Kelsen's work in various law journals over the course of a set period, using the online versions to quickly check the use of Kelsen's name and work. These law journals represent a fair share of what constitutes legal doctrine and will show how Kelsen is used in scientific works.

Specifically, for the scope of this paper, I used three sources, deemed representative of the French legal doctrine, over the course of the year 2021. The three sources are law reviews available on Cairn, all law reviews edited by Dalloz, and all first-year handbooks edited by Dalloz. The representativeness of such a choice is obviously debatable. The rationale behind the choice of the year 2021 is quite simple: this is the last complete year at the time of doing this research. Nothing makes it peculiar in any way. The period could, obviously, be extended to the course of 5 or 10 years. It would, however, make things longer to analyze for a very similar result since nothing has changed recently that could make Kelsen's use different.

The choice of the various publishers also needs to be explained. Cairn online offers a collection on law journals that are more theoretical in nature. On the contrary, Dalloz is a French legal editor that publishes a lot of law reviews that are more practical. It also publishes handbooks[3]. All these platforms are fully online, allowing for an easy search of some keywords in the texts, specifically "Kelsen", "Pyramide des normes [pyramid of norms]" and "hiérarchie des normes [hierarchy of norms]". Those three expressions allowed checking for the actual mentions of Kelsen, and the actual mention of his concepts even when not mentioning his work directly and specifically, a point that will be specifically important afterward since Kelsen's concepts and representations are often used without any mention of his work. Alongside these main primary sources, I will also use some of the findings of my doctoral thesis (Sydoryk, 2023) in order to show how the French legal doctrine uses and understands Kelsen, and how it came to be this way. It should be noted that the history of how Kelsen's work came to be known in France and how the French legal doctrine received it is already documented (Herrera, 2006, p. 151-166; Herrera, 2007, p. 59-69; Jamin; Melleray, 2018; Pfersmann, 2012, p. 483-528; Pina, 2015, p. 373-392), so it will not be the focus of this paper. It is, however, necessary to explain these elements in order to understand how what is came to be.

1. Introduction of Kelsen's work in France

In France, Kelsen's work has been very seldom translated. And excepting the second edition of the Pure Theory of Law, most book's translations came late[4]. In French, no

[3] It should be noted that concerning handbooks, I did not limit myself to 2021 but to the last edition. It was, then, in practice, either 2021 or 2020.

[4] In alphabetical order: Controverse sur la théorie pure du droit (2005), La démocratie, sa nature, sa valeur (1988), Les fictions du droit (2013), Qu'est-ce que la justice (2012), Qui doit être le gardien de la Constitution (2006), Religion séculaire (2023), Théorie générale des normes (1999), Théorie générale du droit

Hauptprobleme and no *Allgemeine Staatslehre*... The French readers came to know Kelsen and his views in the late 1920s, through to long articles published in the *Public Law Review* [*Revue du droit public et de la science politique en France et à l'étranger*] (Kelsen, 1926, p. 561-646; Kelsen, 1928, p. 198-257), translated by his French disciple Charles Eisenman, who would go on translating the second edition of the *Pure Theory of Law*. Although some of his works were translated during the 1930s, either on international law or on the pure theory of law, most of these pieces remained unknown at a time when the spreading of ideas in law journals was limited. In 1940, an article translated about contracts and conventions (Kelsen, 1940, p. 33-76) seems to have left its mark on the private law side and is still mentioned as of today, but only on a fairly limited scale.

If the writings of Kelsen were limited in France, his main line of thinking were known to the French legal doctrine through the writing of Charles Eisenmann, his disciple, and Raymond Carré de Malberg or Léon Duguit, although the latters exposed Kelsen's thoughts with some bias in order to criticize them. It should also be noted that Kelsen's 1928 article mixes elements of legal theory and of political science. The French legal doctrine, on a whole, never really managed to dissociate the two elements and when constitutional review emerged in France, the idea of a hierarchy of norms was used to politically justify the legitimacy of such a review, of the Constitutional Council and of the legal doctrine studying its decisions.

Things changed in 1962 with the French publication of the second edition of the *Pure Theory of Law*, in one of the major legal publishers. Kelsen's views were now really easily available for the French reader. This fact, with the rise of constitutional review some 10 years later, made Kelsen one of the major scholars in legal studies. Undoubtedly, he already had an impact in France. But he was mostly rejected by private law scholar[5], and public law scholars only used him marginally, rather referring to other French positivists[6]. However, and still today, what Kelsen seems to be mostly known about in France… is the concept of *Stufenbau*, a concept invented by one of his disciples.

2. *Stufenbau* in France

The pure theory of law, as a body of doctrine, is far more than the *Stufenbau*. In France, however, this concept forged by Adolph Julius Merkl is associated with Kelsen, and Kelsen's work is even often reduced to it. It would be an understatement to say that Adolph Julius Merkl, in France, is less known than Kelsen. His work has not been translated, and the most exposure he got in France was in a very finely crafted

et de l'État (1997), Théorie pure du droit (1re éd., 1953, 2e éd., 1962), Une nouvelle science du politique (2021). For a list of articles translated as in 2015, see Pina (2015, 373-392).

[5] « Private law scholar never used Kelsen to challenge their idols. And Kelsen hardly ever exerted any influence upon them » : "Les privatistes n'ont jamais recouru à Kelsen pour démolir leurs idoles. Et Kelsen n'a quasiment exercé aucune influence sur eux », Jamin (2018, 40).

[6] Raymond Carré de Malberg and Marcel Waline, to name a few.

article (Bonnard, 1928, p 668-696) in the (French) *Public Law Review* of 1928, in which a Roger Bonnard, a German speaking French scholar, presented Merkl's ideas about the *Stufenbau* in order to criticize them. Bonnard considered that such an idea didn't work within the French legal framework. Carré de Malberg published a short book on the matter and arrived to the same conclusions (Carré de Malberg, 1933). The general idea of a hierarchy within the legal order existed before and in parallel of the *Stufenbau*. However, French legal scholars usually accepted a less logical and less strict hierarchy. For instance, some consider that there is a hierarchy of normative functions of the State (Carré de Malberg, 1933; De Béchillon, 1996).

After the diffusion of Kelsen's writings, during the 1970's and 1980's, the idea of *Stufenbau* became, in France, completely associated with Kelsen. So much that Merkl's name fell into oblivion. So much that the idea of *Stufenbau* is the only thing that remains from all the Pure Theory, associated with a misunderstanding and a strong rejection of the *Grundnorm* and a strong rejection of the idea of neutrality when describing positive law. For the average French legal scholar, Kelsen's work can be summarized by the *Stufenbau*, this idea being itself the embodiment of a legal positivism that must be rejected. Specifically so in the private law circles, the Pure Theory doctrine is sometimes confused with positivism as a whole, and Kelsen is used in a caricaturist way in order to reject every aspect of positivism[7], using a straw-man fallacy.

3. *Stufenbau*, Kelsen, and the Great Pyramid of the legal order

3.1 Stufenbau 101

In order to explain where some of the French legal doctrine went wrong in it's understanding of the *Stufenbau*, we need quickly explaining it, using here the *Pure Theory of Law* as a reference. Kelsen underlines the "hierarchical structure of the legal order" (Kelsen, 1967, p. 221), and that is the main idea behind the *Stufenbau*. "The norms of a legal order, whose common reason for their validity is this basic norm are not a complex of valid norms standing coordinatedly side by side, but form a hierarchical structure of super and subordinate norms" (Kelsen, 1967, p. 201). At the top, the basic norm – whatever it's nature[8] – allows to close the system.

This hierarchy, however, is just a hierarchy allowing the scholars, and more generally any jurist, to identify the existence of a norm within the legal order. For Kelsen, the hierarchy of norms is not a rule of conflict resolution. All things equal, either two norms are created by the same organ and the *lex posterior* maxim allows to rule in favour of the most recent norm (Kelsen, 1967, p. 206), or two norms are of different levels in the hierarchy, the lower norm cannot violate the superior one considering that its mere existence is based on the higher norm. If the lower norm exist, if it is

[7] An example of this is criticized here: Magnon (2009, 269-280).
[8] See in French Jestaedt (2019, 233-259).

valid, then it means that definition that it does not violate the higher norm (Kelsen, 1967, p. 208; 267). In that regard, strictly speaking, the hierarchy of norms is simply a way of understanding the dynamics of law, that is to say the way law is created. It is not, and was never primarily, a tool for solving conflicts between norms.

If the hierarchy of norms does not provide in itself for the resolution of conflicts between norms, it *can* provide an indirect answer *if*, and only *if*, the legal order determines it (Kelsen, 1967, p. 267). Here, the idea of conformity comes into play. If a norm is valid, but violated some other norms that it had to follow regarding its content, the legal order *can* provide for a procedure to remove said norm from the juridical order. It is never mandatory but only contingent. And the norm that must be followed is not necessarily a constitutional norm when it comes to the conformity of legislative norms. When it comes to constitutional review, the Constitution could very well mandate that the law should follow either another specific law, or an ordinance or a decree. It does not happen in practice for political reasons, but it is far from being technically impossible in Kelsen's system.

Thus, the *Stufenbau*, the hierarchy of norms, is only a tool used to identify the existence of a norm and the procedure of its creation. It is not connected in itself to the question of conformity, that forms a very different "hierarchy", if it even forms a hierarchy in Kelsen's mind. Indeed, he does not use the word when it comes to explaining the idea of conformity and of conflicts between norms.

3.2 The French concept of the "Pyramid" of norms

In France, the concept of *Stufenbau* is wholly understood as having been presented or even invented by Kelsen. Merkl is seldom mentioned. Furthermore, the translation of *Stufenbau*, in French, proved somewhat troublesome. Before the 1962 translation in French of the *Pure Theory of Law*, the word "*Stufenbau*" was generally translated by "creation of the law by degrees" ["formation du droit par degré"], following more or less the German idea[9]. Even Eisenmann seems to translate "*Stufenbaues*" by "hierarchical structure" in 1928 (Kelsen, 1928, p. 204). However, in 1962, Eisenmann reused a word he previously used in 1926 (Kelsen, 1926, p. 621) to translate "*Stufenbau*": "pyramid". It is an obvious reference not to the later pyramids of Egypt, the likes of Giza Pyramids, but of the earlier step pyramids, found in Egypt but also in other part of the world. It thus keeps the geometrical aspect of "*Stufenbau*". This word is used in addition to "hierarchy", but the former stuck outside of the legal theory circles. It is indeed easier to remember or to visualize the idea that the legal order is a triangular pyramid with at its top the Constitution, rather to follow Kelsen's finely detailed conceptions.

[9] It should be noted that I do not speak German and rely on what has been patiently explained to me.

If the use of "pyramid" did not really stick in 1926, the principles behind the pure theory not being yet a completely crafted conception and its diffusion in France being far from optimal, the word stuck after 1962 and the 1970s with the rediscovery of Kelsen's work in France through the development of constitutional scholarship.

Through the decades and up to today, with the rise of constitutional review and of constitutional law as a fully fledged academic field[10], the place occupied by the French constitution in the legal space augmented. It was now considered a full legal norm, that is a legal norm actually enforced in courts. It was then necessary to justify, other than by the existence of the Constitutional Council, the preeminence of the Constitution. The legal doctrine turned to Kelsen to use his various constructions, using rather his political writings to *justify* constitutional review than his more theoretical line of thoughts. In somewhat of a paradox, the idea of a hierarchy of norms that is a purely descriptive idea of how all dynamic normative systems work, it became a prescription that the lower norm *must* be in conformity to the *higher* one. This prescription is then enforced by the Constitutional court. From this, it derives that the Constitution is superior to the law not in that it prescribes the procedure to create statutes, but because *by construction* the statutes must respect every legal norm in the Constitution. From a *descriptive* proposition on how the law works, the hierarchy of norms became a *prescriptive* proposition, in contrary to Kelsen's (and Merkl's) writings.

Although the rest of Kelsen's ideas on legal science or on the legal order did not really pass into French legal doctrine[11], the idea that there is a legal pyramid, with the Constitution on top, then the statutes, then the decrees or ordinances, then the decisions of the courts. Classically, contracts and conventions are excluded from the hierarchy because they are, more often than not, not considered legal norms. If ever they are included, it is right before the court's decisions. The place of international law is also debated. On top of the Constitution or right below it? Legal doctrine cannot seem to settle, because the various national and international courts, specifically the ECJ and the ECHR, do not agree. The *Grundnorm* is usually absent from these reflections.

Today, this representation is largely dominant in both legal doctrine (article and first-year handbooks), but also for the courts and for the Parliament. Letting legal doctrine aside for the moment, the idea of the hierarchy of norms is present in the name of some statutes or ordinances. For example, the *ordonnance n° 2020-745 du 17 juin 2020 relative à la rationalisation de la hiérarchie des normes applicable aux documents d'urbanisme* [ordinance relating to the rationalization of the hierarchy of

[10] On those elements in the French legal doctrine fields, see Viala (2008, 519-526); Pfersmann (2008, 527-544).

[11] « There was no adoption, and even less any success, of the kelsenian's paradigm ». « Il n'y a eu de véritable imposition, et encore moins de succès, du paradigme kelsénien, au sens strict, pas plus en France qu'ailleurs et peut être un peu moins ici » : Herrera (2007, 59).

norms for urbanism planning documents] aims to simplify not the way planning documents, that is planning norms, are created, that is to say the condition of their validity, but the relationship of conformity between them. The idea is also used by the Council of State, who used the phrase to justify some aspects of his control. To come back to the legal doctrine, the use of Kelsen must be clearly distinguished, fist between the handbooks and the various articles, then between various legal disciplines.

3.2.1 The use of Kelsen in handbooks

The study of the use of Kelsen is first-year handbook is a fairly good representation of how, collectively, the French doctrine understands Kelsen. There is also a great difference between private and public law handbooks.

Generally speaking, in handbooks, Kelsen is associated with the idea of a pyramid of norms, as previously explained. However, in handbooks, it becomes even more simplified, and the concepts of validity and of conformity are mixed together, in a now usual phrase saying that "statutes must be in conformity to the constitution in order to be valid". There usually follows an enumeration of the various legal norms in the order in the hierarchy, sometimes with a little drawing of a pyramid.

There is, however, a difference in use between public and private law. In public law, Kelsen is used in both constitutional law handbook and administrative law handbooks, and even sometimes in fundamental rights handbooks, covering roughly the three years of the license degree. In each subject, the presentation varies a bit, but it is still present. In constitutional law, there is also usually another mention of Kelsen in passing, when talking about the models of constitutional court and the difference between the American system of supreme court and the European system based on Kelsen's ideas. This is, however, usually very dim.

The use of Kelsen is really different in private law handbooks. Indeed, the pyramid of norms only appear in first-year handbooks, and only when the handbook covers what is classically called "legal introduction". This class was classically taught by private law specialists, who in turn wrote the associated books. However, there is no mention of the pyramid of norms or of Kelsen in handbooks covering the rest of the first years of license classes[12]. The phrase "hierarchy of norms" is used in labor law handbooks, a subject usually studied at the third year, a very specific way. It refers to the way sub-statutory norms should be enforced by the court, with no bearing whatsoever on the validity of the conformity to such norms.

This general use of the "hierarchy of norms" goes to show that although public law scholars pretty much adhere to the representation they have of Kelsen, private law scholars do not. For them, this image of the pyramid is something that the students

[12] Topics about proof, private legal acts, civil status...

must know and understand, but only in so much as it is a general tool based on an old model. Indeed, the rejection of positivism is stronger in private law scholars, and this very rigid conception of the law is, in their eyes, a paragon of positivism. In public law, on the opposite, the pyramid of norms is studied and accepted, even when considered as an outdated model replaced by some for of pluralism or network.

3.2.2 The use of Kelsen in journal articles

The use of Kelsen in journal articles is, obviously, different. First of all, when the name "Kelsen" is used, it is usually in order to reference some of his actual work, either when studying positive law or in the field of legal philosophy. It appears in constitutional law, in administrative law but also in international law. Kelsen's name also appears in broader fields like psychoanalysis, because of Kelsen's ties to Freud, or in sociology of law, or other fields related to law but not studying positive legal norms per se. In those cases, Kelsen's name and writings are, usually, used correctly, either in order to use some elements from the pure theory to base a specific study, or to criticize some elements of his views.

When it comes to studying positive law, first of all, Kelsen's name is not often used. Most of the time, there is a simple mention to the hierarchy or the pyramid, unless talking about other points of Kelsen's work, but these other points are not really used in the study of positive law[13]. The lack of mention of Kelsen's name, but of the pyramid or the hierarchy of norms shows that the idea, obviously taken from his work, is now severed from its origin. At the very least, it shows that this specific idea initially borrowed to Kelsen found its way into the legal scholar's subconscious.

Furthermore, the difference between public and private law scholars is not as clear-cut as with handbooks. In most – not to say in all – cases, the idea of a hierarchy or of a pyramid of norms is not used in the way Kelsen intended, as shown previously. It is used only to signify that a norm considered lower must respect another one considered higher, because of its general category. It is also often mentioned to criticize this vision of the law, deemed to simplistic and often not followed by judges when it comes to the relationship between national and international law.

4. Conclusion

French legal doctrine is trapped in a Kelsenian prison. Although, as we just showed, it uses some of Kelsen's ideas when thinking about the legal order, although Kelsen's name is associated with an anchored idea, the legal doctrine as a whole rejects Kelsen. His idea of a pure theory of law, often misunderstood, is rejected. His vision of the *Stufenbau* and of the *Grundnorm* is also rejected. However, the legal doctrine

[13] This is the case with Kelsen's models of Constitutional courts.

constructed a theory based on Kelsen's work, and attributed to him, that has been considered the foundation of the legal order for the last 50 years or so.

Today, it is not possible in France to think about the law without Kelsen. It is possible to think the law with him or against him, but every analysis of the law on a theoretical scale will end up mentioning him, correctly or deforming his work, precisely because of this very French idea of the pyramid of norms that obviously does not convey the original meaning. This is not, in itself, an issue. It starts becoming one, however, when Kelsen's work is so misunderstood that his name becomes a sort of deterrent in a conversation, an insult even, solely based on a misconception of his works.

One is not obliged to like Kelsen. However, one his intellectually obliged to either understand what he said before talking about it, or simply to stop using him as a false reference. French legal doctrine would also gain a lot by dropping the reference to the pyramid of norms, either reintegrating the correct idea of *Stufenbau* from Kelsen's and Merkl's writing or finding some other way to explain the legal order. The confusion between a descriptive concept and a prescriptive, modified one, seems, however, a diriment fallacy.

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