

KELSEN, THE NEW INVERTED PYRAMID AND THE CLASSICS OF CONSTITUTIONAL LAW

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The present study overhauls Hans Kelsen's thesis of the traditional normative pyramid, in order to accommodate the most outstanding doctrinal contributions of the last century to it. For the purpose, the Essay proceeds as follows: (i) the shortcomings of the first version of the pyramid, found in Kelsen's Pure Theory of Law and on Adolf Merkl's contributions, are detected; (ii) new key concepts of the Aristotelian-Thomistic metaphysics are introduced, this will allow us to upgrade the theory of the staggered legal system; (iii) unity and order of the legal system are briefly analyzed; (iv) a staggered legal pyramid is redesigned, with a gradual reduction of the juridical space; and finally, (v) the theories of Kelsen, Merkl, and several of the most influential doctrinarians of law (e.g., Jhering, Radbruch, Rorty, Ross, Kelsen, Holmes, Hägerström, Olivecrona, Hart, MacCormick, Dworkin, among others) are tested, to see if their ideas fit in the new theory.

This upgrade of the traditional theory arises from a significant shift in the philosophical basis. The first pyramid was elaborated by Kelsen and Merkl under the tenets of neo-Kantian metaphysics. On the other hand, the methodology and the basic ideas behind this study are those of the Aristotelian-Thomistic metaphysics. It moves from an idealistic metaphysics to a traditional realistic metaphysics, so neglected in recent centuries. The inverted pyramid theory, formulated here, is the product of many previous works. Many of them have been published in different international journals.

Keywords: theory of law; pure theory of law; first principles; juridical realism; natural law; sociological approach of law; juridical being.

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1. The Forgotten Levels in the Traditional Normative Pyramid

Usually attributed to Hans Kelsen is the famous *Stufenbautheorie* (theory of stepped construction), also called “theory of hierarchical order of structure” or “normative pyramid.” In spite of this belief, the doctrine is originally from Adolf Merkl and this is why Kelsen described him as “cofounder” of Pure Theory of Law (hereinafter PTL) and a “as a real genius of law science thinking.” However, it is true that the professor of Prague fully assumed the developments of his disciple because they fit neatly within the postulates of his Pure Theory.¹

As it is known, PTL novelty does not lie in finding the hierarchy of norms, that being an old idea that several lawyers have worked on, like Ernst Rudolf Bierling.² The

¹ Kelsen considered the contribution of his disciple as “an essential part” of Pure Theory of Law (see Hans Kelsen, *Reichsgesetz und Landesgesetz nach österreichischer Verfassung*, 32(3) Archiv des öffentlichen Rechts 390 (1914)). For further discussion of this issue, see, e.g., Wolf-Dietrich Grussmann, *Adolf Julius Merkl, Leben und Werk* (Vienna: Manz, 1989); Gabriele Kucsko-Stadlmayer, *La Contribución de Adolf Merkl a la Teoría Pura del Derecho*, 55(244) Revista de la Facultad de Derecho de México 243, 243–245 (2005); Stanley L. Paulson, *How Merkl’s Stufenbaulehre Informs Kelsen’s Concept of Law*, 21 Revus 29 (2013); and Adolf J. Merkl: *Werk und Wirksamkeit* (R. Walter (ed.), Vienna: Manz, 1990).

² See Ernst Rudolf Bierling, *Juristische Prinzipienlehre* (Tübingen: Scientia, 1894).

peculiarity about this theory is its “purity,” its attempt to justify the right for the right, always understood in monistic, regulatory, and positivist terms. From this formal perspective norms were ordered, so that the upper ones – especially the *Grundnorm* located in the vertex – conferred to the lower norms unity, grounds, and validity.³ In general, the elements of its theory were perfectly assembled in the pyramid. However, a loose end was left: it was never resolved what the bases of validity of the *Grundnorm* were. In this specific point Kelsen wandered through several paths without success until its Pure Theory of Law got contaminated with “meta-legal” elements, non-positivist norms that gave validity to the system.

The PTL reached a remarkable reputation globally although it was not always well understood. In different parts of the world PTL was welcomed but certain peculiarities were always remarked.⁴ At the same time, since the beginning it was the target of several attacks. Some of the most frequent points of criticism were:

- (i) Its formal and normative conception of law is shown too disconnected from reality. It is based on a flimsy positive norm concept⁵ which leads to a legalistic nihilism;⁶
- (ii) The problematic Kelsen monism in which State and law, subjective and objective right, public and private law, national and international law, etc. are identified;⁷
- (iii) A poor foundation of why the supreme norm is valid.⁸ Basically, the law cannot be justified by the same law;⁹

³ See Hans Kelsen, *Adolf Merkl Zu Seinem Siebzigsten Geburtstag, am 23 März 1960*, 10 *Österreichische Zeitschrift für Öffentliches Recht* 228 (1960).

⁴ See Joel I. Colón-Ríos, *Kelsen en Nueva Zelanda in Ecos de Kelsen: vida, obra y controversias* (G.A. Ramírez Cleves (ed.), Bogotá: Universidad Externado de Colombia, 2012); Stuart Hargreaves, *Of Rights & Review: The American, Kelsen, & New Commonwealth Models*, 1 *Canadian Student Law Review* 1 (2006); Christoph Kletzer, *The Role and Reception of the Work of Hans Kelsen in the United Kingdom in Hans Kelsen anderswo – Hans Kelsen Abroad* 133 (R. Walter et al. (eds.), Vienna: Manz, 2010) (hereinafter *Hans Kelsen Anderswo*); Iain Stewart, *Kelsen’s Reception in Australasia in Hans Kelsen Anderswo*, at 311; Jeremy Telman, *The Reception of Hans Kelsen’s Legal Theory in the United States: A Sociological Model*, 24 *L’Observateur des Nations Unis* 1 (2008).

⁵ See Brian Bix, *Kelsen and Normativity Revisited*, University of Minnesota Law School, Legal Studies Research Paper 13-27 (2013).

⁶ Tomas Berkmanas, *Schmitt v. (?) Kelsen: The Total State of Exception Posited for the Total Regulation of Life*, 3(2) *Baltic Journal of Law & Politics* 98 (2010).

⁷ About international law problems, see Peter Langford & Ian Bryan, *Hans Kelsen’s Theory of Legal Monism: A Critical Engagement with the Emerging Legal Order of the 1920s*, 14(1) *Journal of the History of International Law* 51 (2012); about objective and subjective right identification, see Enrico Pattaro, *Hans Kelsen’s Normativist Reductionism*, 21(2) *Ratio Juris* 268 (2008); about the identification with the State, see Alexander Somek, *Stateless Law: Kelsen’s Conception and its Limits*, 26(4) *Oxford Journal of Legal Studies* 753 (2006); Torben Spaak, *Kelsen on Monism and Dualism in Basic Concepts of Public International Law – Monism & Dualism* 322 (M. Novakovic (ed.), Belgrade: Alter Doo, 2013).

⁸ See Stanley L. Paulson, *On the Puzzle Surrounding Hans Kelsen’s Basic Norm*, 13(3) *Ratio Juris* 279 (2000).

⁹ See Michael S. Green, *Kelsen, Quietism, and the Rule of Recognition in The Rule of Recognition and the U.S. Constitution* 351 (M. Adler & K.E. Himma (eds.), Oxford: Oxford University Press, 2008); András Jakab, *Problems of the Stufenbaulehre: Kelsen’s Failure to Derive the Validity of a Norm from Another Norm*, 20(1) *Canadian Journal of Law and Jurisprudence* 35 (2007).

(iv) The legal order conceived by Kelsen was absolutely dissociated from human aims: moral, natural rights, social values, etc.¹⁰ Also, it was dissociated from social issues and historical issues, etc.¹¹ considered as meta-legal elements. In fact, Kelsen repeatedly attacked *iusnaturalists*, who never accepted that positive norm could be justified by itself.

As expected, those who formulated their criticism of the PTL wished to overcome the shortcomings by introducing new concepts, rules or principles, they felt Kelsen had neglected.¹² One of the most influential Kelsen's doctrine reviews was made by Herbert L.A. Hart,¹³ the Oxford professor who introduced the rule of recognition concept by which, citizens, judges, and other officials were the ones who attributed validity to a particular system of rules in social practice. Then his renowned pupils introduced new non-positive elements (norms not approved by the authority), to serve as sources, guidelines or limits to the legal order. In particular, Ronald Dworkin said that legal order consisted of policies, rules, and principles that were generic prescriptions which involved justice, fairness, and any other morality dimension. Neil MacCormick spoke about the reasonableness of the norm, which has to be logically consistent and, also, internally and externally justified. Under some of these assumptions Robert Alexy's *theory of speech* was developed.

John Finnis also addressed the reasonableness of the norm but from a broader Natural law scope, which include human aims, tendencies, and natural inclinations.¹⁴ Johannes Messner also analyzed the existential aims of human beings,¹⁵ like many others naturalists thinkers. As it is known, Kelsen was decidedly *antifinalist*¹⁶ (against human purposes, human aims, etc.) and he harshly attacked natural law principles.

During the 20th century and even since the 19th century, the right values role began to matter. The legal axiology had a study of his own developed by authors from different schools (e.g., Robert Alexy, Luigi Caiani, Josef Esser, Andrés Ollero, Luis Prieto Sanchís, Reinhold Zippelius) even before general principles of law doctrine

¹⁰ See Antonio Araújo, *Solução final do homicida em série no positivismo jurídico de Hans Kelsen*, 1(1) Revista Superior de Justiça 230 (2011); Frank Haldemann, *Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law*, 18(2) Ratio Juris 162 (2005).

¹¹ See Jeremy Telman, *A Path Not Taken: Hans Kelsen's Pure Theory of Law in the Land of the Legal Realists in Hans Kelsen Anderswo*, at 353.

¹² Here we mention only synthetically the contributions of the authors. In Chapter 4, we will talk, in a more detail way, about these contributions and we will make the respective citations.

¹³ See Herbert L.A. Hart, *Kelsen Visited*, 10(4) UCLA Legal Review 709 (1963).

¹⁴ See John Finnis, *Simposio Internazionale Evangelium Vitae e Diritto* 96 (Rome: Pontificia Università della Santa Croce, 1996).

¹⁵ See Johannes Messner, *Das Naturrecht: Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik* (6th ed., Vienna; Munich; Innsbruck: Tyrolia, 1966).

¹⁶ About Kelsen's antifinalism, see Carlos J. Errázuriz, *La teoría pura del derecho de Hans Kelsen* 97 (Pamplona: Eunsa, 1986).

had taken deep roots in the law theory. None of these general values and principles managed to fit in the PTL.

At the same time, with the arrival of sociology, law sociological studies (the study of legal “reality” in each particular society) became strong. North American and Scandinavian realism had a good microphone to shout to the world that law was just what judges decided (Oliver Wendell Holmes), that emotions of the moment decided what law was (Richard Rorty), independently of what *Grundnorm* said. To Kelsen reality was quite far away. Faithful to neo-Kantians doctrines, Kelsen sharply separated what is (*Sein*) and what should be (*Sollen*), in which law “fitted” well.

The mix of all these 20th century theories lead to the neo-constitutionalist movement that probably was considered as “new” for its desire of overcoming Kelsen’s constitutionalist view. The form, which is the norm’s written text, will be considered as a mere “instrument” to achieve genuine human rights, values or aims.

As a final result we see Kelsen’s normative pyramid being attacked from above and below. The apex of the pyramid has been the center of the most forceful and persistent attacks. In one way or another, authors have demanded a rational justification for the ultimate foundations of law (in the version of the *rule of recognition*, of the reasonableness technique, of principles, values, aims, etc.). The positivist pyramid forgot that human reason was above norms. Others have attacked it from below, where law is more specific, more concrete. This attack has come from the sociology of law and from the North American and Scandinavian realism, for which all theoretical constructions of the legal order are empty words incapables of discovering that law is about facts. And it’s true: Kelsen forgot to lay its pyramid on reality.

The *pars destruens* of the PTL is already written. Here we will focus on save Kelsen’s achievements on a new construction.

2. Key Concepts for the “Upgrade”

Kelsen tried to develop PTL by building it from the neo-Kantian metaphysics basis well Known by him, but didn’t go much farther. If we want to gather and overcome its successes¹⁷ we necessarily have to appeal to a complete philosophy that can provide us with new concepts. Only then we could finish Kelsen’s ideals of giving law a foundation, order, and unity. For the effect, we found no better basis than that provided by the old and traditional Aristotelian-Thomistic metaphysic.

Let’s briefly compare the main features of both metaphysics.¹⁸ Kant and his followers considered reality as a chaos, a *noumeno* unreachable by reason; the

¹⁷ We are not proposing here a new pyramid raised from zero forgetting Kelsen’s success, as it has been done in certain occasions. An example of this is found in Rafael Domingo, *La pirámide del derecho global*, 60 *Persona y Derecho* 29 (2009); where Kelsen’s ideas are not taken into account: no hierarchical levels of norms are established, neither the validity of norms is mentioned.

¹⁸ For a comprehensive study of Kelsen’s neo-Kantian bases and its problems, see Errázuriz 1986, at 39–42, 578–579, and Juan Riofrío, *De la pirámide de Kelsen a la pirámide invertida*, 2(2) *Revista Direitos Emergentes na Sociedade Global* 436 (2013).

“thing-in-itself” is quite distant from the “thing-in-myself”; therefore, the “being” and the “ought to be” (that is the only box in which law fits well) are two distinct and incommunicable universes. This sharp division does not exist in traditional metaphysics, where knowledge comes from contact with reality: what eyes, nose, ears, etc. perceive is what is known. This previous lack of communication has left sequels: as the chaotic reality is no longer consistent, it is not possible to talk about a strong causality in the cosmos. Thus, Kant’s philosophy will lose the strong notion of the four classical causes of the world (formal, efficient, material, and final cause), staying only with the formal cause, where the form has always an intellectual nature. If the cosmos looks unreachable, it falls inevitably into a subjectivism bordering on idealism and causality becomes formal logic. Many contemporary philosophers who studied it fell into subjectivism.

This explains why the PTL successes came mainly by the formal cause: Kelsen was a great formalist due to the great philosophical basis he came up with. It is also understood why he strongly opposed human final aims. The aristotelic moderate realism believes there is a formal cause but not unique for everything that exists. The material, efficient, and the final cause are all attached to each other. Finally and talking about Kant’s thought, the lack of communication between the intellect and the world caused a lack of knowledge about the cosmos metaphysical characteristics. Kant’s followers will no longer speak about “potency,” the great concept that Aristotle used in order to solve several of the most important Greek paradoxes: the knowledge, the time, and the movement problems. For the neo-Kantians the time, the movement, and the changes of the universe will be reduced to an unintelligible chaos.

Here is our commitment: to rescue the metaphysical concepts of being, potency, causality, unity, and order, aligned to the legal doctrine, with them, to lunge against the legal pyramid in order to rebuild it.

2.1. Juridical Being

Throughout the centuries the notion of law has suffered several breakdowns. The three most important are the following: 1) Aristotle and his contemporaries understood “law” as *dikáion*, as “the fair,” “the equal.” This first meaning is far from what we now understand as a subjective right (ability to) or Objective Law (norm). In Rome “law” will continue to be understood as “the fair” and such meaning will continue until the 13th century with Thomas Aquinas, who clearly will state this as the first notion of *ius*.¹⁹ The fair will continue to involve certain equality between what is given and what is due: the law does not ask for more, does not ask for less; 2) In the 14th century during the Franciscan scholastic a change in the meaning of *ius* was detected. Law will no longer be understood as “the fair,” but as some power to require the fair. The coming

¹⁹ Aquinas will collect the tradition by pointing out that the word *ius* was assigned first to mean the same fair thing (*Summa Theologica* II-II, q. 57, a. 1, ad 1).

generations will often forget the last part of the phrase and will simply look at the “law” as “the power to require something”; 3) Also, in the Modern Age a change in language dissociated from the notion of fair will take strength, the concept of fair will be gradually forgotten. Amid the absolutism, the citizen will feel that his/her rights are being limited by the omnipotent law, so the notion of law will tend to be confused with *what the law allows*, and with the law itself.²⁰ Therefore, in the mid-20th century Bender believed it feasible to summarize the main notions of *ius* in three: law as a right, law as a norm, and law as *res iusta*.²¹

If today you ask a person on the street what is the definition of law, he/she will probably answer that law is the written rule, or the ability to do something, or something like that. It is easier to answer to this other question: what is there in this world with a strong legal flavor? The written rule, a sales contract, the rights of people. Well, from these historical notions and the common sense, we get to know what elements are part of the juridical being. Note there an interesting fact: none of the elements mentioned above are alien to a legal relationship.²² Without a legal relationship the law remains just as a postulate, the contract just a dead letter, and there is no right at all. “Juridical” and “law” are not exactly the same though the two concepts are mutually implied.²³ All the juridical has to do with *law*, it is like the big environment in which it lives. The “juridical being” is everything that has to do with the *law-written norm*, with the *law as a right to*, with the *law as a fair thing*, and the legal relationship elements. Everything has to be *juridical*.

Like the law, the juridical exists only within a legal relationship or in reference to it. So, the following examples have a “juridical being” (they are, they occur within reality, they legally exist): the owner of his/her own, the debtor’s right, the legal assets, the causes of right, the aims, and values of the regulation, the facts that generate legal effects, etc. On the other hand, all that is out of the legal relationship lacks of “juridical being.” The dead or Robinson Crusoe’s inner thoughts are outside the law, outside the legal, because they are unrelated to any relationship.

²⁰ About the historical notion of law, see Juan Riofrío, *Noción de derecho en la metafísica tomista*, 26 Cuadernos Electrónicos de Filosofía del Derecho 373 (2012).

²¹ Ludovicus Bender, *Philosophia iuris* 62–70 (2nd ed., Roma: Officium Libri Catholici, 1955).

²² We understand the legal relationship as a complementary relationship that exists between two individuals on one thing, where one is the owner and the other one is the debtor. Another common definition is the one found in Carlos Mouchet & Ricardo Zorraquín Becú, *Introducción al Derecho* 122 (Buenos Aires: Abeledo-Perrot, 1967). They conceived the legal relationship as the link established between people (rights holders), as a result of an event (juridical fact) around which a norm signs it specific consequences.

²³ The Latin word *ius*, comes from the word *ius* or *iuris*, that means law. However, the scope of applicability of “the juridical” has been extended because of its use and today the meaning of the word goes beyond the word “law.”

2.2. Juridical Potency

The “potency” was the great concept used by Aristotle to resolve many of the most important Greek paradoxes.²⁴ The ancient Greek philosophers were amazed by the movement observed in nature, so they tried to explain it. Heraclitus of Ephesus found in this ever-present change the explanation of the beginning of everything. Parmenides of Elea, with its rigid conception of the unique and unchangeable being, denied the change and relegated it to the realm of appearance: the being “is,” the not-being “is not” and both are incommunicable.²⁵ Aristotle struck a balance between the two philosophers: he realized that there was not an absolute novelty in change, because in all changes there is something that goes from a particular state to another one related to that first state, like water that goes from cold to hot. It could be exemplified by saying that neither an animal nor an infant know how to solve math problems but the difference between both is that the animal will never be capable of solving a math problems while the child can be taught how to solve them. Or like a piece of wood that is not a statue but can become one if an artist starts working on it, on the other hand, this will never happen with water or with air.

“Potency” is something able of being something else. A boy is in potency of being an architect; the sight is in potency because it has the capacity to see. “Intelligence” and “will” are supreme potencies because they have the capacity to understand and love anything. If something had no “potency” at all, it could never be anything else. Humans are not expected to become frogs or gods, because these do not correspond to their nature. Each person hopes to “be happy,” “to understand,” “to love”... to be fulfilled (fulfill his bodily and spiritually potencies), go as far as his/her abilities allow him/her. The human capacities are limited by their physical and spiritual potencies: these are the ones that determine the aims and purposes we can propose to ourselves. This is the reason why the potencies of our nature are the ones to establish the only juridical aims that may exist; only after this natural demarcation the constitution, the law, the will of every person could concrete those aims in so many ways.

Molding the philosophical term for legal science, we can say that “juridical potency” is something that has the capacity of entering into a legal relationship. We would say this concept *includes a set of possibilities that are open to a certain reality*. If something or someone can be part of a legal relationship, then, someone or something has a juridical potential: it is a juridical good or a law subject that are in potency. A passerby is in “juridical potency” of being a consumer until the moment he buys the pizza offered by someone to him; then he will no longer be in “potency of being a consumer” and he will obtain a specific “juridical being.” The concept can also be used for things. A galena stone lying on the road is in “juridical potency” of

²⁴ Polo would even said that the distinction potency-act, which is the most important contribution of Aristotle and at the same time, a powerful way to resolve difficulties; in Leonardo Polo, *Introducción a la filosofía* 45 (Pamplona: Eunsa, 1995).

²⁵ See Parmenides, *On Nature* in *De Logos a Physis: Estudio sobre el Poema de Parménides* 28 (J. Solana Dueso (ed.), Zaragoza: Mira Editores, 2006).

belonging to someone until a person takes it and claims it as its own, and then the rest shall respect such domain.

The notion of “juridical potency” may refer to a particular potential effect (e.g., the owner of a house can sell it) or to all the possible effects (e.g., the house can be sold, rented, destroyed, remodeled, etc.). For the following analysis juridical potency will be understood with all its possible effects.

The juridical being and the juridical potency are two presuppositions and two co-principles of legal relationship, juridical dynamism,²⁶ and “juridical space.” The “juridical space” is the result of totting up both concepts, which will be addressed below.

2.3. Juridical, Anti-Juridical, and A-Juridical Space

Jurisprudence is defined by Domicio Ulpiano as *iusti atque iniusti scientia* (*Digest I*, 1, 10). However, what is of most interest to a lawyer is to know and understand what “the fair” is; the understanding of the unfair will also be useful, but only to define “the fair” and to figure out what is a fair solution to an anti-juridical behavior. This set of fair chances, may be occurring in that moment (act) or that may have the possibility to occur (potency), form the juridical space. Therefore, we have defined the *juridical space* as the result of the *juridical being* plus the *juridical potency*.

Each individual juridical space is not infinite, since the human being is not infinite. His/her physical, juridical, economical, possibilities are limited. His/her possibilities are limited by his/her own nature (e.g., he/she can't fly, has trouble getting to the truth), by his/her own circumstances, by his/her own conceptions and also by his/her own decisions. In other words, reality, reason, and the exercise of will establish the boundaries between the juridical and the anti-juridical.

A single man has a big potential juridical space: he has millions of potential women at his fingertips; but none right now, but none real. If he marries, he will change the multitude of potential women to a real woman. He will reduce his potential juridical space, but he will enlarge his juridical reality. In short, the person's juridical space is a space of freedom: is the sum of all legitimate options (not unfair) a person can have under certain circumstances.

The juridical space is a flexible concept applied to persons, things, positions, powers, laws, facts, fictions, etc. We have already seen examples of how it is applied to persons. Also, it can be applied to things, likely to be tied to one or more legal relationships: a metal table that once belonged to John can tomorrow belong to Peter or can enter to a mercantile trust, or can be sold as scrap for melting. The table has a diverse set of legal possibilities. The same happens with public positions, public functions or public powers; they all have their own juridical space (their own sets of legitimate competences and faculties) and will be delimited by the laws of the place. The Constituent Power will have a broader juridical space than the Legislative

²⁶ About the juridical dynamism, see Juan Riofrío, *Ser y tiempo jurídicos*, 5(2) *Revista de Filosofia do Direito do Estado e da Sociedade* 118 (2014).

Power; and this last one will have a broader juridical space than the Executive Power (in theory).

Legal rules often leave large potential juridical spaces among its letters: when indeterminate legal concepts are used, when not all the specifications are mentioned (loopholes), or when permissive and open norms are used. These potential juridical spaces will be filled or concretized by doctrine, practice, and jurisprudence. As seen, the concept of juridical space is very versatile and can be applied to any reality related to law: people, positions, goods, rules... and also to the legal system.

Beyond the juridical space there is the anti-juridical space. The concept "anti-juridical" was outlined by Rudolf von Jhering, who understood the law as the result of a struggle intended to achieve social peace (e.g., 1872, cap. 1). Human activities that disrupt social peace, that damage juridical interests and attempt against the protected interests of the system, must be understood as "anti-juridical"²⁷ activities. The concept of "anti-juridical" is understood by Jhering as the conduct that goes against the legal system; this concept must be understood in positivist terms. On the other hand, we understand the concept of "anti-juridical" broadly as: the conduct that goes against the law-*res iusta*, the written norm, the subjective right and the broad concept of legal system we will outline later.

Finally, there is a third space, the a-juridical space, which includes all things never related to law. The following are examples of this third space: angels, purgatory souls, demons, etiquette norms, dreams of the night, irrational or absolutely devoid of all common sense things, and, in general, all real or ideal beings that have no significance to law. Unlike the fair and the unfair actions, the a-juridical actions produce no legal effects.

2.4. Juridical Causes

The cause is the real principle by which something proceeds depending on the being.²⁸ What comes from the cause (the effect) is always real and is actually subordinate to the cause. Without a cause the effect "is not," does not exist, does not occur in reality; every effect requires a causal foundation. Therefore, if law exists, it must have its metaphysical causes.

In another study we have identified the "sources of law" (usually reduced to the written norm, the custom, the jurisprudence, the doctrine, etc.) with the metaphysical causes of law.²⁹ Here we show that the original meaning of law was the product of the four classical causes:

²⁷ Rudolf von Jhering, *Der Kampf ums Recht* VI-69 (Vienna: Manz, 1872); this author has the merit of having demarcated the anti-juridical element from the notion of guilt, which represented a breakthrough for criminal science.

²⁸ See Jesús García López, *Lecciones de Metafísica Tomista* 281 (Pamplona: Eunsa, 1995).

²⁹ Here we only offer a few brief comments on causation, the minimum necessary to later address the issue of the legal system; for further discussions, see, e.g., Juan Riofrío, *Las causas metafísicas como fuentes del derecho*, 15 *Revista Telemática de Filosofía del Derecho* 259 (2012).

(i) The intrinsic formal cause of law is being an accidental form (not a substantial form). It also has other extrinsic formal causes (or samples) like the written norm or the legal transactions.

(ii) The material cause of law (materiality) is being an *intellectual habit*. When the habit is acquired the law arises. On the other hand, when habits are not acquired by people, by ignorance or forgetfulness, the law disappears. This explains, among other things, the disuse of the law, the extinctive prescription of rights and the fact that a common mistake produced certain legal effects.

The law form can play in several entities, so the individuals (as they have the habit in their minds) and the objects (intellectually known) of that legal relationship also constitute material cause of law. Written texts gather up the fair form are also called material sources or documentaries. Examples of these are public deeds of the sale of immoveable property or the official gazette where laws are published.

(iii) There are four types of efficient causes of law: evidence, legal conceptions,³⁰ legal facts, and human volitional actions. The first two are essentially of an intellectual nature. Facts are outside the mind and the legal action corresponds to the will that sanctions laws, gives rulings, arranges businesses, publicly and privately acts. All these elements are sources of law.

(iv) The aim is the ultimate reason by which other causes operate. The law has also its aims that are the same as the human being aims; and these aims can only be what its potencies allow them to be. But aims have their own hierarchy: this is the reason why "middle aims" and "final aims" exist. Middle aims are not justified unless final aims exist; the firsts are instruments for something more important. Without an ultimate reason the human being will be a useless passion that lives toiling in mindless whims, as Sartre would say. The immediate aim of the *res iusta* is to determine the payment of "the fair"; its middle aim is the realization of the common weal; and its final aim is human happiness.

Aims define what assets, values, and legal principles are. According to a metaphysical postulate, the aim seen by the intelligence is the good that pursues the will.³¹ In addition, "good" is considered "value" meaning that it deserves esteem.³² As for the

³⁰ We found different knowledge in the juridical conceptions: (i) a simple and common knowledge, like the sudden law based on the evidence, culture, tradition, custom, the knowledge that come from the juridical experience and the common opinion; (ii) a more articulate thought, like the juridical doctrine, doctors' opinions, interpretations of law developed with sophisticated hermeneutical techniques; and (iii) an understanding that takes into account the data of faith, which is also called juridical theology when it is scientific. Juridical concepts can be true or false. In the last case there is an "error of law" capable of generating certain effects similar – but not identical – to the true sources of law. But as the extremely unfair is never going to be law, there is no extremely unfair "common error" and this would never generate similar effects to the law. For further discussion of this issue, see, e.g., Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, 1(5) *Süddeutsche Juristen-Zeitung* 105 (1946).

³¹ See García López 1997, at 281.

³² In the juridical doctrine, Hervada noted that the value is the estimation of the being as of the good, which obeys to a real and objective dimension of being. See Javier Hervada, *Lecciones propedéuticas de filosofía del derecho* 68 (3rd ed., Pamplona: Euns, 2000).

legal principles, these are reason postulates that reaffirm law aims, assets, and values (that can only be human aims, assets, and values). All these things belong to the *legal conception* of each society.

Once we have defined these concepts, although very briefly, we are able to get back to the great issue of the structure of the legal system.

3. The Structure of the Legal System

3.1. Notion

The notion of legal system depends on the concept of law. The people who identify the concept of law with the written norm tend to understand the legal system as the “set of legal rules” that govern in a particular place at a particular time; or as the way in which such rules are hierarchical. The people who identify the concept of law with the subjective rights will see the legal system as the final sum of individual’s rights. The people who identify the concept of law with “the fair” will relate the legal system with a fair social system.

A legal relationship involves an integrated view of the concepts above exposed; by which, the mentioned and other elements come into play: the subjective rights of the individuals, “the fair,” its causes (e.g., the written norm, the traditions, etc.)... From the point of view of this holistic vision the legal system would be the set of legal relationships of a society, caused by common sources of law.

3.2. Unity and Order

Regardless of the most convenient definition for legal system, it seems indisputable that a “system” should have some “order.” A good definition of order can be found in Santiago Ramírez, for whom the order is essentially a relationship between various things that can be different and unequal, but that have some convenience between them. These unequal and different things are related, primarily, to something unique that comes first, that is, to an inception; the correlation or coordination between the different members of each order is secondary, and depends on the fundamental relationship of all to the principle, to the inception.³³ As it is shown, the notion of order requires the presence of an ordering principle.

The order and unity can be given by any of the four classical causes (formal, efficient, material, and final cause). However, each cause generates an order of diverse nature and perfection.³⁴ The basic order is one that comes by the way of the *material cause* and is the result of the juxtaposition of objects made of the same material. It is the unity of the whole; the same as the one that exists in a trash can full of papers. That would

³³ See Santiago María Ramírez, *De ordine placita quaedam thomistica* 16 (Salamanca: San Esteban, 1963).

³⁴ Here we collect only a few conclusions of a larger study that we have done about the unity and the order causes of the legal system.

be the legal system resulting from juxtaposing a set of rules, rights, legal transactions, etc.³⁵ This order of simple aggregation is pretty basic and easy to destroy.

A certain unity and order is also achieved by the way of legal formality, where the fair is usually done after the example – the form – of a pattern.³⁶ A legal system can be generated from a model, form an exemplary norm (e.g., the Constitution) to which the entire system must be formally adapted. That is the concept of unit raised by Kelsen.³⁷ But in practical life this unity of the legal system becomes more an aspiration than a reality, as the facts show the existence of ineffective and contradictory norms, loopholes, exceptional cases, etc. Certainly we are before a bigger unit that goes beyond the physical things, although it is still equated with mere aggregation, as the whole grains having the same shape.

The legal system principle of unity and order is more palpable when it comes by the way of the efficient cause, by the agents that are constantly creating law. If there are more independent producers of law, there will be less unity; on the other hand, if there is only one commander, there will be a greater unity on law, a single and unquestionable legal system. Several authors will speak of the efficient cause, starting from their own point of view. A paradigmatic case comes from Kelsen who early in his career considered that the production of law was a “meta-legal” issue; he attributed the unity of the legal system to the State’s will (this was for him the final point of imputation of the legal effects). However, his position was changing gradually and the “monodynamic” came to justify the unity of the system.³⁸

But, as it is understood in classical philosophy, the final cause is the cause that unifies and orders the most. It is also called *causa causarum*, that means the cause of causes, because it is an “end” that guides other causes. The end moves the agent, the agent educe the form, and the form organizes matter. Each order has a final cause. There is no order without an end, and there is no legal system without a human aim.

Several of these basic metaphysical notions were constantly attacked by Kelsen, who was “decidedly anti-finalist.”³⁹ However, it is unthinkable an order without

³⁵ Often the law is defined as “a set of coactive juridical norms,” even though it has its share of truth; it is not entirely correct. The law has a much higher order than the material.

³⁶ Remember that the exemplar cause is sort of a formal cause (it is an extrinsic formal cause). In this regard, see Riofrío 2012, *Las causas metafísicas...*, at 259, 266–307.

³⁷ Errázuriz’s words about Kelsen’s formal unity are significant: the uniqueness of Pure Theory is the role that attributes that hierarchy, treating it according to its formalistic approach, and according to the problems of the unit and the foundation of validity of law. See Errázuriz 1986, at 233.

³⁸ In 1913 Kelsen already spoke about the becoming of the norm. See Hans Kelsen, *Zur Lehre vom öffentlichen Rechtsgeschäft*, 31(1) Archiv des öffentlichen Rechts 53 (1913). In the next year he will present the function of the basic norm in this process. See Kelsen 1914, at 202–245, 390–438. The same thing is going to be more widely exposed in Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: J.C.B. Mohr, 1920). In the preface of Austrian Public Law, the PTL’s new perspective was being recorded by Kelsen. See at last Hans Kelsen, *Hauptprobleme der Staatsrechtslehre: entwickelt aus der Lehre vom Rechtssatze* (Tübingen: J.C.B. Mohr, 1923).

³⁹ See Errázuriz 1986, at 97.

a beginning or an end. Whoever understands well the metaphysical axioms cannot conceive a legal system without ends or aims. The years will pass and PTL will enter into a sort of crisis and new movements that highlight the main role that human aims play in law will appear (like the neo-constitutionalist movement). The form, the written text of the norm (even the constitution) will be understood as an “instrument” to achieve the true rights of individuals. Neo-constitutionalism removes the accents of the law’s formal cause – sometimes forgotten – and puts them into the final cause, which for its defenders is supposed to hold the supremacy.⁴⁰ For these reasons, Kelsen will only be history at the end of the 20th century.

In general, nowadays, the existence of some law and legal system aims is widely accepted. It is discussed, however, what they are and what kind of nature they have. Positivists will keep saying that the only legal aim is the objective end of the written norm – the fundamental law; others anchor the aims in social values, in the “general will,” or in other rare elements that Kelsen will described as “meta-legal” and will only give a relative unity to the legal system. More problems will have those who see the law in subjectivist terms; people from the atomistic view will be in danger of falling into an anarchism that will not accept any law or authority that can bring unity to the legal system (forgetting the unity and order that provides the common efficient causality). On the other hand, people who support the view of natural law will tend to give a strong order and unity to the system by holding it part of human nature (in the natural aims, inclinations, powers, etc. depending on the author);⁴¹ but if they neglect other principles of unity and order, they will have rendered a bad service to law with a reductionist doctrine.

At this point metaphysics casts light: if the law is eminently human and, as we saw earlier, the human being can not have more aims than the ones that his/her spiritual and corporeal potencies allowed him/her, then, the ultimate aims of law cannot be other than the same aims that are allowed for the human nature. Food is not an individual right protected by positive law because the constitution, the society or the general will say so: it is protected by positive law because it is dictated so by human nature. It should be added, moreover, that not all potencies are equally important: the loss of an eye is not equal to the loss of a finger, or it is not equal to the serenity to think or the ability to love. A living being who lacks intelligence is not a human being, but it is an animal or a plant. The hierarchy of human aims derives from the hierarchy of natural potencies, the same happens with the legal aims.

More relationships can be added to the indissoluble metaphysical relationship between act (being) and potency, and between human potencies and human aims.

⁴⁰ The most extreme neo-constitutionalists even accept that the Constitution can be interpreted against the same constitution, to safeguard social values and the individual rights. For further discussions of this issue, see, e.g., Juan A. García Amado, *Derechos y pretextos. Elementos de crítica del neoconstitucionalismo* in *Teoría del neoconstitucionalismo: ensayos escogidos* 237, 242 (M. Carbonell Sánchez (ed.), Madrid: Trotta, 2007).

⁴¹ See Domingo 2009, who conceives the legal system as a pyramid of persons.

Human aims determine what man appreciates, what is worth, his/her personal, social, and legal “values.” Both aims and values are the ones to determine the first principles of human actions and also both determine legal rules. The once called *Riofrío’s formula* (that connects human being-potencies-aims-values-principles-rules) was extracted from here; this formula constitutes the ordering principle of the legal system.

In short, the legal system inherently has a “unity of order.” This unity is mainly given by: (i) the strong unity of the human person; (ii) the unity of the cosmos, in which legal assets are found; (iii) the “human being-potencies-aims-values-principles-rules” formula; (iv) the hierarchy of potencies, resulting in the hierarchy of law aims, values, and principles. Furthermore, there are also other elements that unify and order national systems, like: (v) the generalized juridical concepts; (vi) the abstract and general juridical action, like the constitution; and, (vii) the higher effective authorities.

3.3. The Juridical Space of Legal System

It is mentioned that legal space was the sum of the juridical being and the juridical potency, in other words, it is formed by the set of actual and potential fair possibilities that opens to a reality. Applied to the legal system we would have the juridical space as the sum of what is currently in effect, of what is now juridical, and of what could possibly be.

If the question is posed in absolute terms, as when for example citizens confer originative power to an assembly so one can enact a new constitution, it will be noted that the juridical space of a constituent assembly is quite broad: the limits that they would have would be those set by human potencies, law aims, assets, values, and principles, taking into account also the circumstances (e.g., the ignorance and prejudice of the assembly members, the acquired rights and the obligations of the people). It would be unfair that the constituent would send a citizen to fly with the afternoon winds because he/she is not a bird; it also would be unfair in the name of justice prohibit a citizen to think because this is a very lofty aim nor should enshrine torture as a fundamental value, nor should establish the principle *in dubio contra reo*. All these actions are outside the primary juridical space delineated by Riofrío’s formula.

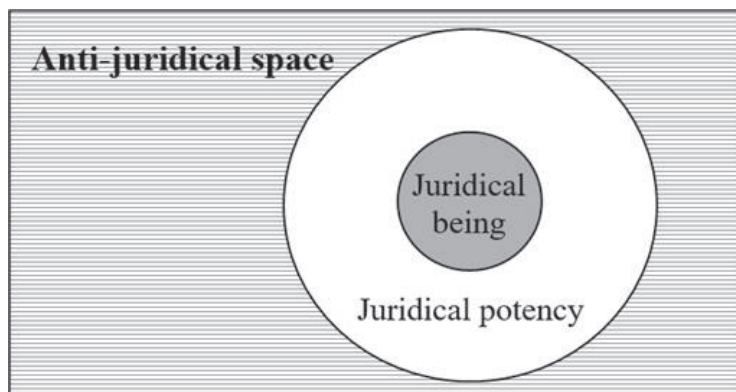
Sometimes constituents suffer from idealism: they write in a thin paper beautiful things that will never be able to perform, or will be carried into effect in a modest way after many years: the right to full employment, to peace, to psychological tranquility, to universal access to the Internet... Constitutions have a lot of potential juridical space. Something similar happens with lower laws, with open aims and indeterminate legal concepts. In general, the law enforcement agents and judges will be in charge of solving the problem left by the legal gap caused by the indeterminate written rule.

In general, the highest norms of the legal system have a bigger potential juridical space, but they also have less legal being because – speaking in proportional terms –

in reality they are less met. On the other hand, in everyday life lower norms are more enforced.

These three mentioned spaces (the anti-juridical, the juridical being, and the potentially juridical) can be plotted in a rather simple way:

Fig. 1: Juridical Space



Note that the *a-legal space* is not plotted here, the *a-legal space* comprises those things unrelated to law, either directly or indirectly (e.g., angels, dreams, unintelligible, and contradictory norms, etc.). An essential element of law is rationality, is something does not look rational: it is neither part of the juridical space nor part of the anti-juridical space. What things would shape the a-juridical space of the legal system? If we make a comparison with Fuller's⁴² eight routes of failure for any legal system, here we can say that the following are not at all related to law: (i) the mere absence of rules or written norms; (ii) the secret norms or the norms that have not been published yet, because they lack an element of its essence (the enactment) for them to exist; (iii) the total lack of clarity of the legislation that makes the law to become an incomprehensible text, an irrational text; (iv) some retroactive legislation that becomes inconsistent; (v) contradictory laws that become irrational; (vi) norms that require impossible behaviors or actions that are beyond the real power of the people governed by them, these rules become unrealistic; (vii) the unstable legislation (e.g., the daily review of written norms), which due to their inconsistency are unable to be assumed by the intelligence of most of the governed; (viii) the contradictions that arises between mandates of the various authorities which makes impossible the compliance with the conflicting rules. Unlike the fair or unfair acts and regulations (which are in the juridical or in the anti-juridical space), these eight elements of the

⁴² See Lon L. Fuller, *The Morality of Law* 33–38 (New Haven: Yale University Press, 1964); in which Fuller's legal system fails.

a-juridical space do not produce any juridical effect. For example, the enactment of an unintelligible law will not have any effect until a “clarification” law is enacted (which would actually be a new law with new power). Maybe the person or persons who promulgated this rule may be guilty of some civil or criminal liability, or maybe a big legal chaos can be triggered in the system with serious detriment to the safety of people; no matter what the scenario is, the rule itself (the rational precept) will not generate any effect; only the harmful action of the legislator will caused sort of effects. The absolutely irrational, unrealistic, inconsistent or nonexistent norm will never be part of the “legal system.”

With these premises now we can understand how the inverted pyramid is staggered.

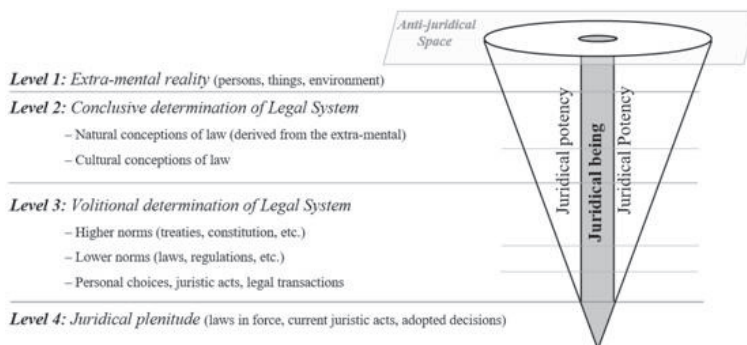
4. The Inverted Pyramid

4.1. Introduction to the Inverted Pyramid

Let’s continue with the example of the originative Constituent Power. An assembly with such power can choose from a monarchy or a democratic state; once it makes a choice then the potential legal space is reduced: so if it chooses to form a democratic state, the state will no longer have the potency of being a monarchy. After choosing democracy they must figure out whether to establish direct or indirect elections; if they choose direct elections, then the indirect elections will be excluded. The possibilities will continue to narrow as more decisions are taken. Later, a legislator will dictate an electoral law, and then, an administrative body will regulate the when and where to vote and will establish the voting prerequisites (e.g., showing the ID, voting in secret behind the amphora, etc.). The juridical space will become very small. The high and fundamental value of democracy will be reduced to the right-duty to stand for elections on a specific day, at a specific time, on the table number 576, carrying an identification document so the citizen can mark the ballot. That is real democracy. This shows how a bigger number of legal options can produce a bigger reduction of the juridical space.

Kelsen and Merkl tried to reflect by means of a graphic how higher norms underlie and prevail over lower norms; and how the first ones bestow unity to the legal system. These two thinkers showed the legal system as a pyramid where the prevailing norms are above and the hierarchically lower are below. It seems to us that if the pyramid is drawn backwards, it shows us something else that Kelsen’s pyramid cannot: the juridical space, “the being” and, “the potency.” The pyramid would look like this:

Fig. 2: Inverted Legal Pyramid



The inverted pyramid is more eloquent than Kelsen-Merkel's pyramid. It collects the successes of the PTL but is also represents in a better way: the legal system higher norms are more abstract, have a broader juridical space, and therefore have more possibilities of legal determination. In contrast, lower norms, subordinated to the higher ones, always move in a narrower juridical space. The juristic acts and the legal relationships will have less juridical space, since these have already been concretized in the juridical reality (they are already in act).

It is also clear that the space is full of *legal being* only in the last level. The remaining general rules will leave many of its aspects without specifying and remain only in potency of being reality. The juridical being is at the apex (where decisions in force, current legal transactions and juristic acts, are found) and in its upward projection, because only there higher rules (e.g., the constitution, treaties, etc.) have effectively caused the law. The rest of spaces will remain in potency because these norms have not been the cause of the *juridical being*.

In addition, the inverted pyramid highlights that lower norms cannot get out of the juridical space left by the higher norm: it is the higher norm the one that delimitates the juridical space of the lower norm. The graph also shows how other sources of law (neglected by Kelsen) are integrated: human nature, reality of things, facts, legal concepts, labeling, etc. In contrast to the PTL claims, it is clear that the law is neither the only nor the primary cause of law.

The inverted pyramid is based on better metaphysical concepts than those used by Kelsen. He used some metaphysical concepts that allowed him to develop a doctrinaire thought by the formal cause, but, on the other hand, these neglected the other metaphysical causes. This new theory should demonstrate that the hierarchy of norms must be justified by the four causes: the formal, the efficient, the material, and the final cause. Although this deserves further explanation, now we can only observe that it is clear that the norms set cannot prevail over the generalized juridical

conceptions because norms have to be understood by an intellect that has already had such conceptions. If the norms are not known they cannot be fulfilled.

Down below we will look more closely at the different levels of the legal system, and we will compare them with the most relevant constitutional doctrine.

4.2. The Inverted Pyramid Levels

As the graph shows, there are four major levels in the legal system. On the contrary, Kelsen only talked about the normative level. Here we attempt to complete his theory by incorporating the contributions of other leading jurists.

4.2.1. First Level

Legal realism's first basic idea is that the legal system is an order of things, people, and real circumstances. This is why the first, highest and broadest level of the inverted pyramid is made up by the absolute juridical space of people, things and the environment. All the fair possibilities that nature offers to these three key elements of every legal relationship are included in the first level. This level has four characteristic features:

(i) *The necessity.* Things are what they are, persons are who they are, and the environment is what it is. We are on an inexorable, necessary, and unavoidable level. The reality does not depend on our imagination, or on our view of the cosmos, or on our will. How we desire to have a gold mine in the courtyard of our house but that doesn't mean we will actually have one! Thinking about this level Cicero said that the law was not the product of will, but it was a fact of nature. *Initium iuris est a natura profectum.*⁴³

(ii) *Forced delimitation.* Human nature is limited: Peter cannot open his arms and fly away like a bird, he cannot run as fast as a cheetah, or lay chicken eggs because his nature does not allow him. At the same time, we cannot pretend that a thing can act beyond its nature: we cannot use a table as drilling tool, or a phone to sail the sea, and we cannot use the hammer as cooking tool. The same happens with the physical environment, which comprises things and people. We are facing natural and forced boundaries that limit law. Therefore the demands that go beyond the human nature are not juridical: *ad impossibilia nemo tenetur.*

(iii) *The amplitude.* If we take from the legal system the demands and constraints imposed by different legal cultures and laws, legal transaction, juristic acts, etc. we will see that, *a priori*, the nature of things and people allows many things that later will be banned or limited by positive law. Therefore, the first level of the inverted

⁴³ Cicero, *De inventione, De optimo genere oratorum, Topica* (H.M. Hubbell (trans.), Cambridge, Mass.: Harvard University Press, 1949), II, 53. From a metaphysical perspective, Rafael María de Balbín notes that nature in the sense used by the metaphysics of being, from the natural law, is essence, the original synthesis of fundamental features that determine the character of a reality (paraphrasing Rafael María de Balbín, *La relación jurídica natural* 133 (Pamplona: Eunsa, 1985)).

pyramid contains the broadest juridical space; the remaining juridical levels can only ratify or concretize the possibilities offered by the extra-mental reality.

(iv) *The order.* Who on a clear summer night sees the stars twinkling in the sky will admire its order, the cadence of its movement that walk slowly from one end of the horizon to the opposite, until the night goes by. Not everything is random, not everything is collision, uncertainty or contingency. The spectacle of a peaceful night proves it. Scientists have discovered that the universe, from the very beginning, maintains some well aligned constants and without them life would not have been possible. All experimental sciences that study things, people, and the environment presume that there is some sort of order in the subject studied; there are some laws to discover. We have seen that from the metaphysical point of view there are four constitutive causes of reality: the formal, the efficient, the material, and the final cause, within which the most important is the *causarum cause* or final cause. We also saw that there is no order without final aim, and that the aim is delimited by the potencies of each nature: each corporal or spiritual potency defines the possibilities of each being and the degree of plenitude that it can reach. The aim of blind mole is not to look at the stars because it lacks the physical potency of sight; neither can it observe most living animals because its vision is very limited. But the human being can reach the sky, for him/her the sky is part of his/her aims.⁴⁴

Domicio Ulpiano seems to have referred to this level of the legal system, when in a controversial phrase he said that beasts and humans had a common law.⁴⁵ Many natural law advocates will rush to discredit the Ulpiano's thesis, to clarify that natural law is not an animal law that moves by necessity but a rule for people that moves by reason. Being true the above mentioned – because where there is no reason, there is no right, – it worth rescuing some truth discovered by Ulpiano. He does not look at the entire legal system but only on the first and most necessary of all four levels: the extra-mental reality, whose general order will then be materialized by the intelligence and the human will.⁴⁶

⁴⁴ We have here only mentioned how the final cause orders by its importance, but the own should be said of the other causes. For example, the material cause also establishes a value hierarchy: clearly a golden coin does not worth the same as one hundred kilos of gold.

⁴⁵ At the very beginning of the *Digest*, Domicio Ulpiano specifically stated that “Natural law is that which teaches to all animals, for this law is not peculiar to the human race, but affects all creatures which deduce their origin from the sea or the land and it is also common to birds. From it proceeds the union of male and female which we designate as marriage; hence also arises the procreation of children and the bringing up of the same; for we see that all animals, and even wild beasts, appear to be acquainted with this law” (*Digest*, I, 1, 1, 3).

⁴⁶ Ulpiano will be the one that says that only humans have rights and obligations as they are the only endowed with reason, he will affirm that *nec enim potest animal injuria fecisse quod sensu caret* (*Digest*, I, 1, 3). See Francisco X. González Díaz Lombardo, *Compendio de historia del derecho y del estado* 130 (México: Lumusa, 2004).

4.2.2. *Second Level. Aims, Values, Principles, "Rule of Recognition"*

The second level of the pyramid consists of the knowledge that the human intellect has of reality, as this knowledge is used to determine what the law is. Here we find the legal knowledge of the world, the "honest beliefs," the conceptions we have of what fair means.

Two are the rational limits: a) *Real Limits*: human intelligence has to know the reality, because that is its foundation. No one can think that he is selling three hectares of land when he is giving a glass of water instead, or that he is buying food when somebody gives him a book. Reality limits law concepts; b) *Functional Limitations*: there are other limits imposed by reason, which can be more or less acute, more or less ignorant, more or less seasoned. Intelligence determines the juridical space of reality because it will never be able to know it in all its dimensions but only in a partial way:⁴⁷ there will always be new things to discover, intelligence can always meet new legal possibilities offered by reality.

Drawing a parallel to the Albertine doctrine of the three levels of natural law,⁴⁸ a detailed view⁴⁹ of three hierarchical blocks of the inverted pyramid's second level will be made:

(i) In the first place we can find the immediate *knowledge of extra-mental reality* (people, things, and environment), because without this knowledge there is no possibility of reasoning or other intellectual conclusion. For the existence of conclusive reasoning, first there must be a judgment, and for the existence of a judgment there must be some notions of reality captured by simple apprehension. The logical order of knowledge is the following: notions, judgments, reasoning. Extra-mental reality must be known in order to assimilate it, judge it, reason about it, and decide about it;

(ii) The knowledge of extra-mental reality allows the first type of conclusions, which form the *natural juridical conception*. For example, whoever understands the limited nature of the radio spectrum immediately concludes the meaning of scarce resource and the special State's powers to distribute frequencies. Ignoring these legal fundamental issues would strike a major blow to law, because this is where legal reflection begins. Without the knowledge of human aims, human freedom is reduced to whim, to passion, to a useless passion; on the contrary, a good knowledge of reality gives wings to law and to freedom. *Veritas liberabit vos*.

⁴⁷ However, the intelligence will be able to know its essential features, it will be able to reach a true knowledge – though always perfectible – and to make a sage evaluation of what is fair.

⁴⁸ Alberto Magno in the *Summa de Bono* distinguished three types of natural law: the *essentialiter* law, which are the first practical principles; the *subpositive* law, which are the immediate conclusions related to the first principles; and the *particulariter* law, which are the individual determinations due to the positive will of the legislator (see Albertus Magnus, *S. Alberti Magni Quaestiones de Bono* (H. Kühle (ed.), Bonn: Sumptibus Petri Hanstein, 1933), tractatus V, q. 1, q. 3).

⁴⁹ In other study we watch more closely what juridical conceptions are (conceptions which form the second level of the pyramid) and how they work. See Riofrío 2012, *Las causas metafísicas...*, at 259, 271–281. Here we make a tripartite classification of law concepts.

The natural juridical conception presupposes knowledge of extra-mental reality, of the “being,” of the nature and of the potentialities of *things and people*. From this knowledge the possible aims of each entity are deduced (“what are things good for;” “why do people exist?”). Then the person will objectively evaluate his/her being, will weigh his/her objective value to more being, more perfection, more value, metaphysics say and this person will prioritize everything according to their value. The hierarchy of potencies, aims, values, and principles are crucial to arrive to a legal system concept.

It is worthwhile to recall the result that brings the relationship between being-potency-aims-assets-values-principles-rules, and it is worthwhile to emphasize again that these aims, assets, values, and principles have their basis in natural reality and intelligence. These remain as knowledge of the juridical conceptions, and it is from there that they order the entire legal system. There is no order without an aim. This is axiomatic. In all order (including the legal system), the aim is the first to be captured and the latest to take place; the aim is the justification for considering something as good, as a legal value, and shows where general principles of law should aim. It is true that the order of this level (which has a mental nature) leaves wide juridical spaces; even though it remains as “order.” If it was not, legal system would never be organized;

(iii) Finally, we have the *cultural juridical conception*, which consists of the set of conclusions extracted when we relate the three types of knowledge: a) the natural juridical conception; b) the knowledge of juristic actions of the human being, that is, of juristic acts and decisions that have been adopted over time; here we could find the subjective aims and values that each person and society has set out to achieve; and, c) the opinions, questions, theories, feelings, intuitions, intellectual options, etc., which usually appear more in the most educated people and in the most literate societies.

In the first half of the 20th century it gained notoriety with Rudolf Stammler’s conception of natural law, who saw it as an a permanent ideal “with variable content,”⁵⁰ because he noted the existence of legal precepts that, under certain empirical circumstances, contain a theory of a correct law.⁵¹ His thesis assumed that: as natural sciences were dedicated to study the cause-effect relationship in reality, legal sciences were concerned about the aim-means relationship. The law was in the sphere of human aims. The influence of Stammler in natural law was great.⁵² His

⁵⁰ See Rudolf Stammler, *Die Lehre vom richtigen Recht* 185 (Berlin, 1902).

⁵¹ *Id.* at 181–183.

⁵² Stammler’s idea entered to the public debate and received many clarifications. Georges Renard, for example, will speak about a “natural law with a progressive content,” while others will prefer the formula of a “natural law of changing and progressive implementation.” For further discussions of this issue, see Erminius Stanislaus Duzy, *Philosophy of Social Change According to the Principles of Saint Thomas* (Washington D.C.: Catholic University of America Press, 1944) and Jacques Leclercq, *Leçons de droit naturel. Vol. 1: Le fondement du droit et de la société* 45–57 (Namur: Wesmael-Charlier, 1947).

doctrine had something true. From the inverted pyramid perspective, we find that the first aims-assets-values-juridical principles belong to natural law conception, which is more stable (because it derives from the knowledge of the extra-mental reality) than the cultural conception (because the content of the latter one is more variable). And even more variable will be the third level of the inverted pyramid, although it inevitably depends on juridical concepts (because *no one can want what is unknown*), it is less stable because it depends on the fickle will: the will is certainly less stable than the intelligence.

Hart discovered several intellectual floors in the legal system. In his attempt to overcome Kelsen radical positivism, he saw a minimum content of natural law (comparable to natural law conception) followed by a system of primary rules that contain the prevailing obligations in society (this level would match the cultural conceptions). The aforementioned social rules would be generated by a secondary cardinal rule: *the rule of recognition*. This rule reveals its existence (*is shown*) in social practice, as officials (including judges) and other citizens ascribe validity to a certain set of norms. This is a validity test of a particular legal system that consists of the official part and on the social habits part.⁵³ Hart students (e.g., Dworkin, Finnis, MacCormick) and then many others (e.g., Carlos Nino, Joseph Raz, Scott J. Shapiro) will submit the *rule of recognition* to criticism and will polish it because, despite being a central element in Hart's theory, it is poorly outlined in his writings. In any case, we rescue the idea that this legal level cannot be judged by the same instance of the law, instead it requires a higher level of abstract order, also based on the culture and social behavior of each society. Moreover, the mere abstraction of an eternal law (of an abstract natural law) will remain as a futile pipe dream if it does not come back down to earth. It is necessary to have a cultural conception of law, and not forgetting the other levels of the legal pyramid.

The most renowned disciple of Hart (who also succeeded him in the chair of philosophy of law) will be the one to develop several aspects of the different levels of the legal system,⁵⁴ through a strong criticism of his teacher. Dworkin criticized his teacher on the grounds that the rule of recognition was simply a *pedigree test*, where the only thing evaluated was whether the source was correct (in fact, when Hart talked about the *rule of recognition*, he only linked it to parliament laws and jurisprudence). However, Dworkin noted that lawyers give principles validity on the grounds that their content is valid and not by the fact of coming from a particular source: for society killing is illicit not because it is banned by the legislator but because the act is rejected by society. For him these abstract principles are the ones that underlie the legal system, ensuring its consistency and completeness of the normative

⁵³ These concepts are principally found in Herbert L.A. Hart & Tony Honoré, *Causation in the Law* (Oxford: Clarendon Press, 1959).

⁵⁴ See Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985).

system. Dworkin's law principles fit into the second level of the inverted pyramid, especially as cultural conceptions because of their strong cultural imprint.

Dworkin distinguished three types of standards: (i) a set of base *principles*, understood as generic prescriptions that contain imperatives of justice, of impartiality or, in general, of morality; (ii) *policies* that are generic rules intended to establish the economic, social or political aims; and, (iii) *rules* or specific provisions. We note that the last ones are standards that have their metaphysical origin in the human will (they require a volitional decision of the authority) and therefore they fit into the third level of the legal system that we'll talk later.

Another of Hart's outstanding students was MacCormick, who is seen as an eclectic synthesis between the extreme theories of the master and Dworkin. MacCormick emphasized the need of reasonableness of legal decisions. It must be pointed out that we are not dealing with the common notion of "reasonable" because the word has a specific meaning within its theory.⁵⁵ For MacCormick a decision is reasonable only if: (i) it is logically consistent, that is, if it is easily proven by using the formal logic; and, (ii) it is internally and externally "fair." Internal justice takes place when the decision applies equally to all; external justice takes place when the norm falls under the legal system and the world. This "reasonableness" criterion developed by MacCormick (1978), as well as other "reasonableness" criteria are juridical conceptions that fit perfectly into the second level of the inverted pyramid.

In the last decades authors like Alexy, Prieto Sanchís, Saavedra, Esser, Ollero, or Caiani have concentrated efforts on developing a procedure or "pure" legal method that allows the operator of the law to "refine"⁵⁶ the raw material of the current norms, the same process that happens with crude oil converted to gasoline through a refining process or with the beet juice refined to extract sugar. Some will be concerned about developing postulates of the old legal interpretation, while others will go further and, under the influence of the Vienna School, will form the Analytical Jurists Movement that study intellectual operations that synthesize the law, the same that are assembled on the structure of language. Such logical, methodological, and linguistic postulates are licit legal conceptions, which do not operate without the pre-existence of a natural juridical conception.

Alexy's theory of legal argumentation has brought a significant contribution to the theory. The author points out that it is an essential property of the discourse theory that this procedure is not a decision or negotiation process but an argumentation process (paraphrasing Alexy⁵⁷). Both types of procedures fit (within the juridical

⁵⁵ See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978).

⁵⁶ The metaphor is mentioned in Luis Recaséns Siches, *Experiencia jurídica, naturaleza de la cosa, y lógica "razonable"* (México: Fondo de Cultura Económica & UNAM, 1971).

⁵⁷ Robert Alexy, *Los principales elementos de mi filosofía del derecho*, 32 DOXA, Cuadernos de Filosofía del Derecho 67 (2009).

conceptions) into inverted pyramid: legal transactions or rules that concrete the open juridical spaces (when there are several possible fair options) and the argumentative procedure that concludes in only one fair option. It is worth to note that the famous theory that submits aims, assets, values, etc. to the weighting and proportionality seems more applicable to open juridical spaces where the dealing process prevails and where the fair will be determined; rather than closed spaces where the argument only allows one conclusion.⁵⁸

From those authors who deny that “any content can be law,”⁵⁹ it is worth to rescue the common idea that all law must submit to some kind of rational argument: there is an absolute need to based formal decisions in rational justifications. *The reason is the highest intentional floor of the legal system.* But we should not forget that there is no possible rational discourse without a known extra-mental reality: the reasoning – also the legal reasoning – is a concatenation of judgments; judgments are a concatenation of concepts; and concepts are abstracted from the reality known through the senses.

4.2.3. Third Level

The third level of the inverted pyramid is composed by the rules or legal norms (laws, regulations, customs, legal precedents, legal transactions, personal choices, etc.) taken directly or indirectly by human will. The constitutional era has nested these rules, putting the constitution into the head of the pyramid. Also, it has created the concept of “constitutional block” – a little diffuse concept, by the way – that either includes certain hierarchy rules or includes norms with main contents.

The “will” always reduces the juridical space of the juridical conceptions. Among the multiple choices that intelligence presents (e.g., you can drive on the right or left road) the will chooses only one (e.g., driving by the right road). It is always about a concretion of the juridical space, because no one can love the unknown. As the people of the Middle Ages said, “the will is the appetite of intelligence.” If we want “the fair” to prevail, the will must not interfere in the obvious dictates of juridical conceptions, much less in the nature of extra-mental reality: no one can prohibit the stones from falling, nor punish the innocent, or killing persons that committed a misdemeanor, etc. These kinds of sanctions – that unfortunately we know – would not be juristic acts but unfair acts.

In any case, both the good and bad will concrete the superior law. Who signs a lease should henceforth lend out the house, and who damages the house creates a specific obligation to repair it. But the unfair will do not concrete the law like the

⁵⁸ We do not deny the viability of ponder, in abstract, the various claims, interests, principles, etc. as intellectual method that helps to find a juridical solution. However, the fact of balancing all possible options to see which outweighs is more typical for the private negotiation and the legislative policy, rather than the legal interpretation.

⁵⁹ This is one of Kelsen’s main thesis found in Hans Kelsen, *Reine Rechtslehre* (Vienna: Österreich, 1934).

right will. Decisions contrary to law are doomed to fail, while the right decisions tend to prevail.

This sector of the pyramid is the most studied by radical positivists, who tend to draw some right conclusions about law, though perhaps under a deficient justification. Kelsen dedicated his analysis especially to this part of the pyramid. His sectorized study led him towards extreme positions, until his last stage in which he fell into a voluntarist imperativism, expressing his emphatic thesis that said that there can be “no imperative without emperor.”⁶⁰

The fact that integrated into the pyramid is a rationality grounded in reality keeps us away from any voluntarist conception of law, and also keeps us away from a relativism and an extreme autopoietic theory of law capable of turning around “anything into law.”⁶¹ A healthy will can only choose one of the licit options that the intellect presents us. But sometimes will can be perverted and opts for unfair actions; it can even coerce intellect so it cannot reflect much about the legitimate but what human appetites urge it. Who murders someone, steals something or insults somebody does not think so much about what “fair” is, but in him/her quenches, his/her anger, and other passions. A bad will stifles an honest procedure of reasoning and prevents it from freedom, which depends on the truth.

At this level the legal decisions show some degree of generality. The specific decisions that concrete the juridical space by fulfilling the law belong to the fourth level. Similarly, only the general transactions comply with the degree of abstraction characteristic of the second level, which does not happen with specific transactions.

4.2.4. Fourth Level

The fourth level of the inverted pyramid has been clearly differentiated by the legal sociology since the very beginning of this science. Eugen Ehrlich will oppose the legal law to the living law,⁶² which is the one that comes from the consciousness and social practice. Years later Max Weber will collect this opposition and develop his anti-positivist method interpretive of reality.⁶³

The last level of the inverted pyramid is *pure actuality*, in a metaphysical sense: it is the most performed of legal system, it lacks potential juridical space; it is the final term of the juridical movement. There we can find the measure already measured of law, which is due today and now in the legal relationship, the norm in terms of effectiveness. There is the true democracy, election law and other regulations that

⁶⁰ For further discussion of this issue, see his posthumous work, Hans Kelsen, *Allgemeine Theorie der Normen* (Vienna: Manz, 1979). After seeing such a voluntarist conception, Alfred Verdross, *La filosofía del derecho del mundo occidental* (México: UNAM, Centro de Estudios Filosóficos, 1962); will state that Kelsen has returned to the nominalist field of Ockham.

⁶¹ See Niklas Luhmann, *Theory of Society* (R. Barrett (trans.), Stanford: Stanford University Press, 2012).

⁶² Eugen Ehrlich, *Grundlegung der Soziologies des Rechts* (München: Duncker & Humblot, 1913).

⁶³ See Max Weber, *Wirtschaft und Gesellschaft* (Tübingen: J.C.B. Mohr, 1925).

have been effective, the implemented norms of the 576 polling station, condensed in the *current right* of a single vote that lies in the line painted on the ballot.

In legal terms, this is the stair of the effectiveness of the law; a goal aspired by the positivists and natural law followers. The fourth level is formed by simple acts, and by juristic acts, decisions, and legal transactions that cause legal effects in reality. Here you cannot find anything general.

This level full of *juridical plenitude* is the one that has captured the attention of the American legal realism (Jerome Frank, Oliver Wendell Holmes, Karl N. Llewellyn, etc.) and the Scandinavian legal realism (Axel Hägerström, Karl Olivecrona, Alf Ross, etc.) followers. If only this stair of the pyramid is seen, then it is inferred that “the general propositions do not decide concrete cases” (citing Holmes, in *Lochner v. New York*, 198 U.S. 45, 76 (1905)), or that the law is a matter of social facts (paraphrasing Olivecrona⁶⁴), or that the abstract notions of subjective right or legal duties are mere psychological entities, provided with social efficiency insofar as they are able to promote feelings of obligation on citizens.⁶⁵ Under these currents, we should emphasize that this last stair (where we found specific cases, applied laws, and acquired rights) is given only insofar as conceptions and specific legal proceedings ideas have existed previously (ergo, concrete thoughts and acts of the will) that prefigure in the law in a certain way.

Luigi Ferrajoli and his neo-constitutionalist partners also seem to focus their attention on this stair of the pyramid. They proclaim a “State of rights,” opposing to the *leitmotiv* of the “State of law.” They are more concerned about ensuring the enforceability of the subjective rights rather than justifying its enforceability.⁶⁶

4.3. Terminological and Methodological Remarks

Keeping our eyes on the entire body of the inverted pyramid we can solve a small terminological conflict: why some authors are accused of “positivist” (by a sector of the doctrine), of “realistic” (by other sector), and by “metaphysical” (by the rest), all at the same time? Consider, for example, Hebert Hart and Norberto Bobbio who tried to overcome the radical positivism of Kelsen, and who are considered by a large sector as distinguished representatives of the extreme positivism. Another example is Ferrajoli who considers himself framed within the “critical positivism,” although some claim to have “proven” his *iusnaturalists betas*.⁶⁷ Opinions also vary among those who accept “the moral correctness” of written norms: Alexy expressly denies being

⁶⁴ Karl Olivecrona, *Law as Fact* 25–27 (London: Oxford University Press, 1939).

⁶⁵ See Axel Hägerström, *Filosofiskt Lexikon* (A. Ahlberg (ed.), 3rd ed., Stockholm: Natur och Kultur, 1951).

⁶⁶ See Manuel Atienza, *Sobre Ferrajoli y la superación del positivismo jurídico* in *La teoría del derecho en el paradigma constitucional* 133, 151–152 (G. Pisarello & R. García Manrique (eds.), Madrid: Fundación Coloquio Jurídico Europeo, 2009).

⁶⁷ *Id.* at 146–147.

positivist by accepting such correction,⁶⁸ while Dworkin, having spent hundreds pages to explain how morality is a moderator standard of constitutional law, prevents considering himself *iusnaturalist*.⁶⁹

At the bottom, the problem seems to lie with the approach from which it is judged: who embed his/her thoughts in any place of the pyramid will tend to see those above as “metaphysical” and those below as exaggerated “realistic.” Thus, Hart, Dworkin, and Alexy will be *iusnaturalists* for those who judge from below or compare it to Kelsen, because the three accept a higher cultural conception (a certain “moral”)⁷⁰ which limits the positive law. But for those who admit natural legal concepts (in its natural law version or not), Dworkin, Alexy, and Hart will be very positivist, because it is judged from a higher instance. But cultural conceptions are also a form of positive law; the sociologist Weber considered himself as anti-positivist while studying reality. And the American and Scandinavian legal realists considered that the rest of doctrines were “idealistic” or “metaphysical” because they just looked at the upper echelons of the legal pyramid and not to the effective reality.

In addition, the inverted pyramid evidences that there are two possible methods to study the law: a inductive method that goes from the bottom and moves upwards, from the particular to the general (as it was used by contemporary realism); and a deductive method that goes from the top to the bottom, from the universal to the concrete (as the used by Dworkin, Finnis or MacCormick). Probably a mixture of both methods is the best way of ensuring accurate results, both to develop any theory of law and to pass a sentence on yesterday’s robbery.

Conclusion

Considering the above we draw the following conclusions:

1. Merkl and Kelsen’s theory of stepped construction was able to justify the order and unity of the legal system, in a partial way. The theory only talked about the

⁶⁸ See Alexy 2009.

⁶⁹ Although it has rarely been admitted some sort of attachment to the natural law, usually he avoids the issue. For further discussion of this issue, see, e.g., Ronald Dworkin, *Freedom’s Law* (Cambridge, Mass.: Harvard University Press, 1996).

⁷⁰ It is about the moral of the majority. Relativism is palpable in these authors. For example, Alexy will claim that a norm can only find universal approval in a speech if the consequences of their general observance concerning the satisfaction of the interests of each of the individuals can be accepted by all; the norms that will be accepted by all in an ideal speech will be the only correct and, therefore, valid (paraphrasing Alexy 2009, at 72–73). Universality depends on the social opinion; it is not based on the knowledge of reality. However, when it comes the time to justify human rights, the same authors will moderate their relativism, looking for something *more universal* than mere opinion. So Alexy will say: who recognizes the other as an independent, recognizes him/her as a person. Who recognized him/her as a person, attributes him/her dignity. Who attributes him/her dignity, recognizes his/her human rights. And with that we have reached the goal of foundation (*Id.* at 79). Here he skips from the common opinion to a real justification.

normative level, neglecting the levels of reality and juridical conceptions. Also, it only talked about a unit that came by the formal and efficient cause, forgetting that there is also a material and final order.

2. Leaving aside the neo-Kantian metaphysics and talking about the traditional realist metaphysics of Aristotle and Aquinas we have acquired new concepts. For law applications we have the following definitions:

a) The *juridical being* is something that exists in reality and is related to law, to legal relationship or to its causes (e.g., the written norm in force, the current contract, etc.);

b) The juridical potency is something that is not yet related to the law or to the legal relationship, but is capable of entering into such relationship. In other words, it is a set of fair possibilities that are open to a certain reality;

c) *The juridical space* is the result of adding the juridical being and the juridical potency; is all that is fair, present or potentially. The opposite is the unfair or the anti-juridical. Therefore, outside the juridical space we can find the anti-juridical space. There is also the a-juridical space constituted by the absolutely irrational, by the limits of the legal system identified by Fuller;

d) *The juridical causes* are the four traditional metaphysical causes (formal, efficient, material, and final cause), when juridical being is produced. They are identified with the sources of law.

3. The legal system has an order generated by juridical causes, and especially by the *causa causarum* (final cause). This system shows a stepped order in four levels, which progressively diminishes the juridical potency. This is the inverted pyramid: the staged reduction of the juridical space.

4. The first level of the order is the extra-mental reality (things and people). It is determined by the potentialities offered by nature, which are the ones that mark the possible aims. *A priori* the general aims of the law are not determined by the constitution but by the human nature and its potencies, which are the ones that set the aims and values of law. There is a being-potencies-aims-values-principles-rules relationship. The constituent cannot “create” out of nothing, or either “transgresses” them, but it only can “concrete” those preexisting aims, values, and principles.

5. The second level of the legal system specifies the previous level in a cognitive way. Here we find what society knows about human nature, the environment, the cosmos, and all the extra-mental reality. We also find in this level the abstract legal knowledge (aims, social values, general principles, etc.), more or less polished, that people have. Hart, Dworkin, MacCormick, Alexy, and many others have analyzed several aspects of this level of the legal system.

5. The third level is formed by the block of positive norms, which were analyzed by Kelsen and Merkl. They constitute a reduction of the society’s mental juridical space (ergo the second level), because a man only wants things he knows: unknown things cannot be wanted, neither decided, nor enacted.

6. The last level of the legal system is only about the “juridical being”: it is the law already done, the most current of the system. It itself lacks potential juridical space. Ehrlich, Weber, and the sociologists of law have dedicated their studies to this level, the same as the American legal realist school (Holmes, Frank, Llewellyn, etc.) and the Scandinavian legal realism (Hägerström, Olivecrona, Ross, etc.). Some neo-constitutionalists such as Ferrajoli also seem to get focus on this step of the legal system.

7. Consequently, it has been shown how the theory of the inverted pyramid is able to integrate much of the doctrinal progress made on the legal system, which no longer fit well into the traditional Kelsen and Merkl’s pyramid.

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