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Between holism and realism: H. Kelsen's two theories of legal conflicts

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Abstract. H. Kelsen's pure theory of law, which emerged as a key reference point for the development of modern legal positivism in the 20th century, has had a profound impact on jurisprudence and philosophical theory of norms. A significant aspect of Kelsen's theory, particularly his theory of normative conflicts, underwent substantial evolution throughout his career. However, domestic legal literature has yet to explore Kelsen's theory of normative conflicts in depth, and his later, realist version remains largely unexamined. The purpose of this study is to reconstruct the two primary theories of normative conflicts developed by Kelsen at different stages of his work, as well as his theory of hierarchical conflicts. Additionally, we aim to evaluate the validity of criticisms directed at these theories in foreign scientific literature. To achieve this, we analyzed H. Kelsen's writings from various periods and reviewed subsequent scholarly contributions that focus on his theory of normative conflicts. This study delineates two versions of Kelsen's theory – holistic and realistic – illustrating their methodological foundations and demonstrating the role of conflicts between norms at different levels within the hierarchical structure of legal order. This structure remains consistent across both historical versions of the pure theory of law. Based on our analysis of critical literature, we identify vulnerabilities in the main arguments against the realist definition of normative conflict and against the doctrine of “alternative authorization” associated with the theory of hierarchical conflicts.

Key words: conflict of norms, collision of norms, H. Kelsen, pure theory of law, hierarchical structure of legal order, derogation, alternative authorization

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**Между холизмом и реализмом:
две теории юридических коллизий Г. Кельзена**

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Аннотация. Чистое учение о праве Г. Кельзена, ставшее в XX в. точкой отсчета для развития современного юридического позитивизма, оказало большое влияние на юриспруденцию и философскую теорию норм. Важной частью кельзеновской теории норм, причем частью радикально менявшейся в течение жизни правоведа, стала его теория нормативных коллизий. Вместе с тем в отечественной юридической литературе до настоящего времени не представлены исследования кельзеновской теории нормативных конфликтов, а ее поздний, реалистический вариант практически неизвестен. Цель исследования заключается в том, чтобы реконструировать две основные теории нормативных конфликтов, разработанные Кельзеном в разное время, а также его теорию иерархических коллизий и оценить корректность критики данных теорий, представленной в иностранной научной литературе. Проанализированы работы Г. Кельзена, написанные в разное время, а также научные работы последующих авторов, посвященные его теории нормативных коллизий. В результате реконструированы два варианта кельзеновской теории нормативных коллизий – холистический и реалистический, показаны их методологические основания, а также показана роль коллизий норм разного уровня в теории ступенчатой структуры правопорядка, одинаковая для обеих исторических версий чистого учения о праве. Показана уязвимость основных критических аргументов против реалистического определения нормативного конфликта и против доктрины «альтернативного уполномочивания», связанной с теорией иерархических коллизий.

Ключевые слова: конфликт норм, коллизия норм, Г. Кельзен, чистое учение о праве, ступенчатая структура правопорядка, дерогация, альтернативное уполномочивание

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Introduction

In the scientific literature, Kelsen's pure theory of law is often referred to as "normativism" (Paulson, 1993), which emphasizes the role of norms in the ontology of law. One of the classic problems in norm theory is the issue of normative conflicts or

collisions – situations where the requirements of two norms within the same normative system are incompatible. This problem manifests at various levels of theoretical research, ranging from ethical dilemmas (moral conflicts) (Razin, 2014) and issues in deontic logic (Alchourrón, 1991), to questions in law enforcement theory (Petrov, 2017), as well as in legal practice. H. Kelsen developed pure theory of law over six decades of active scholarly work, during which some aspects of this theory underwent significant changes¹. One such aspect is the theory of normative conflicts, which changed several times within different versions of the pure theory of law, particularly, the classical and late (skeptical) versions. The differences between these versions stem from variation in their philosophical foundations and the implications for the logic, epistemology, and ontology of law.

Particular attention is required for conflicts between norms at different levels within the famous “pyramid of norms”, as described by A. Merkl and H. Kelsen’s theory of the hierarchical structure of legal order. From the standpoint of the pure theory of law, such hierarchical conflicts represent a distinct legal phenomenon, explained by the doctrine of “alternative authorization”.

Classical theory: Holism

The idea of the unity and completeness of the legal system, like many other legal concepts, can be traced back at least to the European schools of Roman law, beginning with the Glossators (Muromtsev, 1886:27–29). F.C. von Savigny vividly expresses this position in the first volume of his *System of Modern Roman Law*:

“The totality of [Roman] law-sources... forms a whole, which is destined for the solution of every problem arising in the province of law. In order that it may be adapted to this end, we must make two requisitions upon it: Unity and Completeness... The faulty conditions of that whole, which may be likened to the defects of the single laws, have reference to the two requisitions made above. If Unity is wanting we have a *contradiction* to remove – if Completeness, we have a *gap* to fill up. Properly speaking both admit of being referred to one common fundamental conception; for it is in all cases the restoration of the Unity which we seek: negatively by the removal of contradictions, positively by the filling of the gaps” (Savigny, 2011:417–418).

The concept of conflict: A neo-Kantian interpretation

The classical version² of the pure theory of law, based on neo-Kantian epistemology (Didikin, 2022), regarded the legal order is not something that exists independently; rather it is the result of cognitive activity, a specific interpretation of facts predetermined by a certain category of knowledge (in this case, the basic norm), which is viewed as a transcendental-logical postulate (Kelsen, 2015b:167–168; Kelsen, 2005:116–117; Kelsen, 2015a:250–256). The properties of consistency and

¹ On the periodization of the development of the pure doctrine of law, see the discussion by K. Heidemann and S. Paulson (Heidemann, 1997; Paulson, 1998; Heidemann, 1999; Paulson, 1999).

² The classical version is presented in the works of 1922–1960 (Paulson, 1998:161; Antonov, 2013).

coherence, inherent to human thinking, entail the unity and coherence of the legal system it produces. According to Kelsen, “unity is expressed also by the fact that a legal order may be described in rules of law that do not contradict each other. To be sure, it is undeniable, that legal organs may create conflicting norms” (Kelsen, 2015a:256). A collision of norms is defined as a situation in which “one norm prescribes a certain behavior, and another norm prescribes another behavior incompatible with the first” (Kelsen, 2015a:256). Given that Kelsen interpreted the concept of a legal norm broadly to include not only general rules intended for repeated application but also individual prescriptions such as judicial decisions (Kelsen, 2005: 37–38), his definition of normative conflict was considered applicable to clashes between individual norms (prescriptions) as well.

It is important to note that such a conflict of norms can exist only in empirical normative material that has not been processed by legal science. In the process of legal cognition (interpretation) of norms, all conflicts can and should be resolved, “since the cognition of law, like any cognition, seeks to understand its subject as a meaningful whole and to describe it in a noncontradictory statements” (Kelsen, 2015a:257). A normative conflict is not equivalent to a logical contradiction because a logical contradiction can only exist between judgments that, unlike norms, can be true or false. Each norm corresponds to a normative proposition describing it, which is formulated by legal science. These normative propositions can be true or false.

Since the legal system reconstructed through legal cognition is integral and consistent, the assumption of a conflict of norms within it would imply a logical contradiction among normative propositions that describe these norms as parts of this unified system. Thus, the logical law of non-contradiction is also indirectly applicable to legal norms (Kelsen, 2015a:256–257). A “conflict of norms” or “conflict of duties” exists only as a phenomenon of the individual psyche, but not as a legal phenomenon (Kelsen, 2005:375, 408–410).

Resolution of conflicts through interpretation

From the perspective of the Austrian jurist, conflicts of norms at the same level and conflicts arising between norms of different levels within the legal system have different natures and mechanisms for resolution (Kelsen, 2015a:257). We will examine the latter category of normative conflicts separately below.

The scholar identifies the well-known rule that a later norm overrides an earlier norm (*lex posterior derogat priori*) as a general principle of resolving conflicts among norms at the same level. Kelsen argues that this principle is inherently contained within the relevant authority of the norm-setting body (Kelsen, 2015a:257), and it is equally applicable to conflicts between norms established in different ways when there is no formal hierarchy between them (Kelsen, 2015a:258).

Conflicts among norms established simultaneously, such as those created by the same law, can be resolved through two methods of harmonizing their meanings.

The first method of consistent interpretation applies when there is only a partial conflict between norms. In this case, one norm is interpreted as a general rule, while the other is viewed as an exception to that rule. For example, between the two norms “Any person who commits intentional theft of another’s property shall be punished” and “Persons under fourteen years of age shall not be punished”, the first norm is seen as a general rule, and the second as an exception that limits it (Kelsen, 2015a:258). This approach aligns with the traditional principle that a special rule takes precedence over a general one.

The second method for resolving conflicts among norms within a single law involves granting discretion to the law enforcer in making a decision. For instance, when faced with the rules “A person who has caused harm through negligence shall be punished” and “A person who has caused harm through negligence shall not be punished”, the law enforcer has the discretion to apply either rule (Kelsen, 2015a:258). From a political-legal standpoint, this method of resolving conflicts may not be considered desirable; however, from an external perspective, it represents a feasible way for the law enforcer to navigate normative conflict³.

If these methods for resolving normative conflicts prove impossible to apply, Kelsen suggests that it may be appropriate to assess the norm-setting act as subjectively and objectively meaningless (in the relevant parts), thereby indicating that it does not actually establish any norms (Kelsen, 2015a:258–259).

The resolution of conflicts, according to Kelsen, is possible and necessary not only for general norms but also for individual norms, such as incompatible judicial decisions made regarding the same issue (for example, decisions on the satisfaction or rejection of a claim). In such cases, Kelsen asserts that the conflict is resolved “by giving the executive organ the choice between the two decisions” (Kelsen, 2015a:259).

For individual norms, this method of conflict resolution is further justified by the principle of effectiveness, which holds that an unexecuted (ineffective) norm loses its validity (Kelsen, 2015a:260–269). In instances where two judicial decisions conflict, enforcing one will result in the non-enforcement of the other, ultimately leading to the invalidity of the latter (Kelsen, 2015a:258–259). Additionally, a conflict within a single judgment renders that legal act meaningless (Kelsen, 2015a:259).

It is worth noting that Kelsen does not address in detail the resolution of conflicts among individual norms from other sources. It can be inferred that he might allow for alternative methods of resolving normative conflicts for some norms, such as those found in civil law contracts. For instance, he may endorse applying the rule of priority for later norms or interpreting conflicting clauses within a contract as general and special.

³ It is important to note that this situation, viewed as a negative consequence of the conflict of norms, aligns with the provisions outlined in subparagraph “и” Article 3 of the Methodology of the Russian Government Order No. 96 dated February 26, 2010, regarding the Anti-Corruption Expert Examination of Legal Acts and Draft Laws. This provision establishes that “normative conflicts are contradictions, including internal contradictions, between norms that create the possibility for state bodies, local governments or organizations (and their officials) to arbitrarily choose which norms to apply in a particular case”.

Late legal theory: Realism

The realistic approach to the concept of normative conflict assumes the real, rather than imaginary, existence of legislative conflicts. A significant contribution to its development has been made by representatives of continental (or psychological) legal realism (Timoshina, Vasil'eva, Kondurov & Kraevsky, 2023:101–296), particularly, the Danish jurist A. Ross. A distinctive interpretation of this set of ideas is represented by the more recent expressive concept of norms proposed by E. Bulygin and C.E. Alchourrón (Alchourrón & Bulygin, 2013).

From the realist perspective, the very formulation of the question regarding conflicts of laws presupposes that incompatible norm from both laws are valid. Realists evaluate the postulate of consistency within the legal system as a fiction and emphasize the distinction between a contradiction in the strict (logical) sense and normative conflict, which has a pragmatic nature (Ross, 1968:28–29; Ross, 2019:149–153).

The concept of conflict: A realist interpretation

The later version of H. Kelsen's theory, encompassing works written from 1960 to 1973 (the year of the jurist's death), is referred to as "realistic" or "skeptical" in subsequent scholarly literature. "Realism" is associated with a rejection of neo-Kantianism, an engagement with the ideas of analytic philosophy, and a rapprochement with continental realist legal theories (Kraevsky, 2015). Meanwhile, "skepticism" pertains to the criticism of the applicability of classical logic to law (Raz, 1976; Hartney, 1991; Paulson, 1992). The ideas from this period are articulated by Kelsen in his posthumously published work, *General Theory of Norms* (Kelsen, 1991), as well as a series of articles on logic and norms that preceded this publication⁴.

It is also noteworthy that the realist approach to normative conflicts was first articulated in Kelsen's works from the early 1940s, particularly in his work *The Legal Theory of Agreement* (Kelsen, 2009). Thus, to some extent, the "realist turn" of the 1960s was built upon earlier ideas of the Austrian jurist⁵.

1. *The concept of conflict of norms.* According to the later version of the pure doctrine of law, "a conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated" (Kelsen, 2024b:250)⁶.

⁴ In particular, these are the articles *Derogation*, *On the Concept of Norm*, *Law and Logic*, *Law and Logic again* and *On the Practical Syllogism*. Translations of these articles have been published in Russian (Kelsen, 2024a).

⁵ S.L. Paulson proposes an alternative periodization of Kelsen's conflict theory based on an analysis of the Austrian jurist's evolving approach to the *lex posterior derogat priori* rule. He views the period from the mid-1920s to 1960 as representing a unified position (Paulson, 1986). However, his analysis does not account for the ambiguity in the wording of Kelsen's first *Pure Theory of Law* of 1934 and his 1941 work, *The Legal Theory of Agreement*.

⁶ This definition differs somewhat from Kelsen's characterization of the conflict of norms in relation to the issue of derogation. Kelsen states, "A conflict exists between two norms when there is incompatibility between that which each norm decrees to be obligatory, and the principle *lex posterior derogat priori* is not applicable" (Kelsen, 1991:108).

In various works, Kelsen reiterates that “the existence of norm conflicts cannot be doubted” (Kelsen, 2024b:252; Kelsen, 2024c:210; Kelsen, 1991:124), rejecting the analogy between normative conflict and logical contradiction. Both conflicting norms are valid and exist as actual components of the legal system until one is abolished (derogated). In contrast, of the two judgments that enter into a logical contradiction, only one can be true; the second one does not become false at some point but is initially false. A normative conflict can be more appropriately compared “to two forces acting on one point in opposite directions” (Kelsen, 2024b:252–253; Kelsen, 2024c:211–213; Kelsen, 1991:124–125).

Conflicts can arise not only within a single normative system but also between different systems. However, a conflicting norm can resolve such a conflict only by derogating one of the two conflicting norms that belong to the same system. In this sense, a legal order can establish a derogation rule to abolish its norm that does not align with morality, but it cannot abolish a moral norm that conflicts with law (Kelsen, 2024b:254; Kelsen, 1991: 126).

Depending on the relationship between conflicting norms in their content, conflicts can be bilateral or unilateral, total or partial, possible or necessary (Kelsen, 2024b:250–252; Kelsen, 1991:123–124).

Kelsen’s proposed realist interpretation of normative conflicts has faced criticism from various perspectives by the British legal philosophers J. Raz and J.W. Harris, as well as by Italian jurist B. Celano.

2. *Criticism of B. Celano.* As interpreted by Celano, Kelsen’s ‘late’ conflict theory suggests that normative conflicts (1) are not logical contradictions; (2) have nothing in common (do not reflect, are not analogous to, and cannot be described with reference to) with logical contradictions; and (3) cannot be resolved by appealing to the logical law of non-contradiction (Celano, 1998:346). While he agrees with the first and third points, Celano focuses his criticism on somewhat vague second point, attempting to justify the incorrectness of the claim that “logical contradiction is completely distinct from normative conflict” (Celano, 1998:351).

From our perspective, the question of how significant the degree of difference and inadmissible analogy between these notions is somewhat scholastic due to the differing contexts in which Kelsen’s and Celano’s discuss this problem. At the same time, it is worth noting Celano’s main argument against Kelsen’s position. He contends that Kelsen’s definition of the conflict of norms – pointing to the violation of one norm as a result of possible or necessary compliance with or application of another – presupposes the notion of logical contradiction⁷: “If, however, the fact that two norms conflict with one another entails that they prescribe incompatible acts, and if the acts are incompatible because, and to the extent that, carrying out both of them is logically impossible, then it is not true that a norm conflict in no sense ‘presents’ a logical contradiction” (Celano, 1998: 352). The scholar concludes that Kelsen’s thesis – that there is no need to invoke logical contradiction to define normative conflict – “is simply false in light of Kelsen’s own definition of the concept of norm conflict” (Celano, 1998:353).

⁷ In brief, this thesis was articulated by O. Weinberger (Weinberger, 1986: 195) prior to Celano.

In fact, it is Celano's assertion that is mistaken, since Kelsen's definition of "incompatibility" does not reference a logical contradiction in any of its versions. Moreover, not every normative conflict (according to Kelsen's definition) corresponds to a *logical* contradiction between required states of affairs. Kelsen distinguishes between logical and factual (physical) incompatibility of judgments, labeling these conflicts as logical and teleological respectively (Kelsen, 2009:256–257). For example, the statements "the sun rises in the East" and "the sun does not rise in the East" are logically incompatible because one asserts and the other denies the same predicate. In contrast, the statements "the sun rises in the East" and "the sun rises in the West" are only factually incompatible due to the existing laws of physics. Similarly, there is no logical contradiction between the statements "you must mail the letter" and "you must burn the letter", although their simultaneous fulfillment is physically impossible; thus, the precepts "you must mail the letter" and "you must burn the letter" conflict with each other.

Another possible example involves one norm that prohibits leaving a person in danger while another prohibits remaining in a certain territory. A collision arises when it is impossible to help a person in danger without passing through the forbidden territory.

3. *Criticism of J. Raz and J.W. Harris.* Unlike Celano, Raz, in analyzing Kelsen's theory of conflicts, focuses on practical problems associated with its application rather than theoretical issues. From the British jurist's perspective, the notion that an actor can both behave and not to behave in a certain way simultaneously is "a wholly unacceptable solution to the problem of practical conflicts" (Raz, 1976:503). Raz argues that this approach renders practical reasoning impossible and severely limits practical discourse (Raz, 1976: 503). Similarly, J. W. Harris, another representative of the Oxford school of philosophy of law, notes the impossibility of genuine normative conflicts due to the existence of conflict resolution mechanisms in all modern legal systems (Raz, 1976:503).

It is important to distinguish between the practical question of resolving conflicts and the theoretical question regarding the nature of conflicts. Kelsen clearly differentiates these two problems, asserting that the pure theory of law exclusively seeks "to know and to describe its object", and "attempts to answer the question what and how the law is, not how it ought to be" (Kelsen, 2015a:10). The question of whether conflicts exist – whether real or imagined – cannot be resolved purely empirically; it depends on the accepted definition of normative conflicts and the philosophical-legal conception of their nature. While one may not rule out *a priori* the theoretical possibility of normative conflicts (and Harris does not appear to do so), it is challenging to deny the practical existence of legal conflicts.

Derogatory norms and conflict resolution

In his later works, Kelsen emphasizes the distinction between two approaches to resolving conflicts: at the level of the legal system as a whole and for specific cases. When a conflict is resolved in a specific case (i.e., the application of one of the norms), the normative conflict as a whole remains unresolved (Kelsen, 2024c:211; Kelsen,

1991:214, 220–222)⁸. At the level of general norms, a conflict can only be resolved by abolishing (derogating)⁹ one of the conflicting norms.

Kelsen argues that modern jurisprudence often obscures the understanding of normative conflicts and derogation due to misinterpretations of the principle *lex posterior derogat priori* (the subsequent law repeals the previous one), which originates from Roman jurisprudence¹⁰. This principle has garnered significant attention from researchers studying this problem. A literal interpretation suggests that derogation occurs through one of the conflicting norms. However, in reality, the subsequent norm does not inherently abolish the previous one; instead, it comes into conflict with it by regulating the same human behavior differently. Derogation necessitates a third norm – a norm of positive law – specifically aimed at abolishing one of the conflicting norms (Kelsen, 2024c:214–215; Kelsen, 2024b:254–255; Kelsen, 1991:125).

Although Kelsen does not explicitly emphasize it, his reasoning implies that two distinct kinds of derogatory norms are possible. The first type consists of rules that repeal specific provisions, such as an article within a law. The second type includes general rules of repeal (Kelsen, 2024b: 255), with conflict-of-laws-rules serving as a primary example – these rules abolish conflicting rules based on a specific general criterion. The principle of *lex posterior derogat priori* exemplifies such a conflict rule. However, this principle is not universally applicable¹¹; other conflict rules can render a later law invalid (Kelsen, 2024b:255; Kelsen, 1991:126–127). The principle itself is typically not explicitly stated in laws but is generally assumed. Kelsen believes that modern law-making and enforcement exhibit three methods for resolving conflicts, each considered self-evident or evaluated as interpretative methods:

1. In the event of a conflict between legal norms and the constitution, the legal norm loses its force.
2. An earlier norm loses force when it conflicts with a later norm.

⁸ It is important to remember that this assumes that none of the conflicting norms has lost its efficacy (and therefore its validity), that is, the practice of their application is contradictory.

⁹ The term “derogation” originates from Latin, with Roman legal terminology distinguishing between full (abrogatio) and partial (derogatio) repeal of the law, likely dating back to a fragment from Cicero's dialogue “On the Commonwealth” (3, 22) (Cicero, 2016:94). Kelsen suggests that there is no fundamental difference between the full and partial repeal of a norm, since a norm, unlike a physical object existing in space, cannot persist when partially altered. A “partial” abolition or “change” of a norm, effectively constitutes the abolition of the old norm and the establishment of a new one that partially coincides with the previous one in terms of content (Kelsen, 2024b:247–250; Kelsen, 1991:111–114).

¹⁰ It is worth clarifying that the modern understanding of the principle of *lex posterior derogat priori* (as well as its Latin formulation) does not belong to Roman jurisprudence proper – where the idea of the priority of later law was understood not as a general principle but as a technique of judicial reasoning – but rather to later continental European romanistics (Petrov, 2020:39–48).

¹¹ From a logical standpoint, the opposite principle is quite possible (and is even present in religious normative systems), which assumes the validity of the new law only to the extent that it does not contradict the earlier laws. This principle is exemplified by the well-known legal maxim *prior in tempore, potior in jure*, which gives priority to the earlier contract in resolving conflicts of obligations arising from two contracts (Kelsen, 2009:258–259).

3. If the method for resolving the conflict is not legally specified, the decision regarding which conflicting norm to apply is left to the discretion of the law enforcer, or the norms may negate each other (Kelsen, 2024b:256; Kelsen, 1991:126–127).

Law-applying practice is guided by these collision rules, thereby positivizing them by incorporating them into the legal system. However, if such principles are not established through legislation or judicial practice, the normative conflict will remain unresolved, and “legal science can no more resolve it than it can establish new norms” (Kelsen, 2024b:256; Kelsen, 1991:126–127).

Calculus of errors and alternative authorization

In contrast to other conflicts, the conflict of norms of different levels is analyzed using the theory of the hierarchical structure of the legal order by H. Kelsen (Kelsen, 2015a:278–342; Kelsen, 2005:123–162; Kelsen, 2015b:176–186) and A. Merkl (Merkl, 1927; Jelić, 1998). This theory, also known as the “pyramid of norms” reflects the dynamics of the legal system and the relationships between its different levels¹².

Hierarchical conflicts

The theory of the hierarchical structure of legal order is based on the existence of hierarchical relations between norms, whereby some norms determine others. There are two types of such determination; static and dynamic. Dynamic determination occurs when one norm establishes the order for creating another norm, granting appropriate lawmaking powers to a specific body and possibly outlining a particular procedure for lawmaking. Through this dynamic relationship, the higher norm serves as the basis for the validity of the lower one. Static determination involves defining the content of a future norm. In this sense, the static principle can be correlated with substantive law, while the dynamic principle aligns with procedural law. The hierarchy of norms is constructed from the most abstract basic norm that authorizes the constitutional legislator to the most concrete individual prescriptions (Kelsen, 2005:123–124; Kelsen, 2015a:278; Kelsen, 2015b:174). The number of levels in the “pyramid of norms” varies depending on the specific legal system; however, three main levels can be distinguished in relation to modern law.

The first (highest) level of the normative system is represented by the constitution¹³, which is created according to the order defined by the basic norm. The constitution

¹² It is important to note that the theory of the hierarchical structure of legal order has significantly influenced the development of legal positivism and has been adopted by nearly all its leading representatives after Kelsen. Notably, this theory has been incorporated into the concepts of A. Ross (Ross, 2019:93–99), institutional positivists (Weinberger, 1988:228–231), E. Bulygin (Bulygin, 2011) and, with some reservations, J. Raz (Raz, 1997:121–167). A notable exception is H.L.A. Hart, who did not clearly express his stance on this theory; however, his position appears to aligns closely with that of Raz.

¹³ The focus here is on the constitution in the material sense, which, according to Kelsen, consists of a set of rules governing the creation of general norms, particularly laws (Kelsen, 2015a:278–281; Kelsen, 2005:124–125).

determines the competence and formation process of the supreme bodies of state power, as well as the creation and content of general rules (particularly, regarding lawmaking procedures). The content of future general rules can be defined both negatively – such as through enumeration of civil liberties that cannot be restricted – and positively (Kelsen, 2005: 125–126), such as by indicating existing forms of property.

The second level of legal order consists of general norms adopted based on the constitution – these includes laws, subordinate normative legal acts (decrees), judicial precedents and customs (Kelsen, 2005:130–131; Kelsen, 2015a:281–287; Kelsen, 2015b:175–177). The norms at this second level determine the content of the norms at the third level (individual prescriptions) and establish the competence of those who create them, primarily public authorities (Kelsen, 2005:130; Kelsen, 2015a:287–305, 310–329; Kelsen, 2015b:177–180).

From the perspective of the pure theory of law, four types of hierarchical conflicts are possible:

1. Conflict between the constitution and law.
2. Conflict between the constitution and decree.
3. Conflict between law and decree adopted based on law.
4. Conflict between the constitution, law or decree on one hand and individual norms on the other.

Describing conflicts involving decrees presents challenges because, from the viewpoint of the theory of the hierarchical structure of the legal order, two different types of decrees can exist¹⁴. The first type consists of decrees based directly on the constitution. These may be equivalent to laws when there are two distinct legislative procedures – such as a law adopted by parliament and another adopted by the head of state – or they may regulate a specific area of public relations within the authority's competence. Conflicts involving such decrees that do not comply with the constitution fall under the second type of hierarchical conflict. However, a conflict between such a decree and a law is not hierarchical; it concerns norms at the same level. Nonetheless, it is possible for a conflict resolution norm to favor the law, as indicated in part three of Article 90 of the Constitution of the Russian Federation. The second type of decrees includes normative legal acts based on law that specify its content. Conflicts between these decrees and laws are hierarchical and similar to conflicts between constitutions and laws (Kelsen, 2005:130–131, 158; Kelsen, 2015a:286–287, 338; Kelsen, 2015b:184).

Taking into account the nuances related to the second and third types of conflicts, as well as the classical understanding of a norm as a general rule, we will focus on the first type of conflict, bearing in mind that it is not the only one.

¹⁴ It should be noted that a similar question regarding the dual nature of decrees issued by the head of state was widely discussed in the state-legal literature of the 19th to early 20th century. In his renowned monograph *Decree and Law* N.M. Korkunov defended the distinction between laws and decrees of the supreme administration not only under constitutional conditions but also within the framework of autocratic monarchy (Korkunov, 1894:227–357).

Doctrine of alternative authorization

The legal system, by allowing for hierarchical conflicts, creates mechanisms for their prevention and resolution. In the first instance, it is possible to establish the responsibility of officials for adopting unconstitutional or unlawful normative legal acts; in the second instance, a body of constitutional control can be established (Kelsen, 2015b:175).

However, the existence of these mechanisms indicates that the legal system itself permits hierarchical conflicts and, under certain circumstances, even their persistence. The mechanism for resolving these conflicts and integrating them into the legal system is referred to as the “calculus of errors” (Fehlerkalkül) (Kletzer, 2005:47–48).

At the heart of the doctrine of alternative authorization is the desire to explain the existence (legal validity) of unconstitutional laws, as well as illegal decrees and judicial decisions.

If the constitution allows for challenging an unconstitutional law, it presupposes that such a law exists within this legal system and remains valid until recognized as unconstitutional. Moreover, this possibility implies that if the constitutional review body makes an error, if a relevant law does not undergo review, or if there is no constitutional review body at all, this defect will persist, allowing the unconstitutional law to remain in force (Kelsen, 2015b:183).

Recognizing the validity of unconstitutional laws suggests that there must be some basis for this within the legal system, specifically a constitutionally prescribed alternative mode of lawmaking. The same reasoning applies to unlawful rulemaking by the executive branch (Kelsen, 2015a:338; Kelsen, 2005:158).

Kelsen argues that absolute nullity of a legal act cannot exist within the legal system. He contends that the doctrinal distinction between nullity (inherent invalidity) and voidability (the possibility for a court to declare a defective act invalid) is illusory; in reality, there are only two procedurally distinct types of voidability (Kelsen, 2005:159). Declaring a norm null and void through a court decision is not merely a declaratory act but constitutes retroactive derogation (Kelsen, 2015a:340–341). While Kelsen does not deny instances of knowingly null “legal acts” – such as the decree issued by the protagonist in Nikolai Gogol’s story *Notes of a Madman*, who fancied himself a “Spanish king” – he believes that such situations lie outside the law and cannot be legally defined (Kelsen, 2015a: 341). Any legal act about which there may be doubts regarding its validity becomes part of the legal system when subjected to judicial review under the “calculus of errors”. Kelsen compares this remarkable property of law – transferring wrong into right (albeit contestable) – to the gift (and curse) of the legendary King Midas, who turned everything he touched into gold (Kelsen, 2015a:341–342; Kelsen, 2005:161).

Critique of the doctrine of alternative authorization

The doctrine of alternative authorization has faced repeated criticism from various authors (Bulygin, 2013:353–357; Bulygin, 1995; Harris, 1986:2014–220; Jackson, 1985;

Köpcke, 2019:32, 121; Rubinstein, 2007:5–7; Weyland, 1986)¹⁵. The objections to this doctrine can be categorized into two main groups.

1. Criticism from administrativists. The first group of objections has been articulated by representatives of the classical theory of administrative justice, including Austrian scholars R. Novak, G. Winkler, and Israeli jurist A. Rubinstein.

According to Novak and Winkler, the theory of alternative authorization contains a logical circularity; it does not justify the validity of normative legal acts adopted with violations but instead assumes it from the outset. The validity of the challenged norm is only hypothetical when it is contested. For instance, only a legally significant (albeit defective) legal norm can be included in the hypothesis of the norm that determines the procedure for challenging illegal normative legal acts (Kletzer, 2005:57). Critics conclude that to maintain the possibility of valid but contestable norms, it is necessary to revive the traditional theory that links the possibility of recognizing absolute nullity to significant violations in its adoption (Kletzer, 2005:57–58).

We concur with C. Kletzer’s assessment regarding these considerations. He notes that (1) the theory distinguishing between essential and nonessential violations in the adoption of a normative legal act is not universally applicable across all legal systems and essentially refers to criteria established by positive law (Kletzer, 2005:58), and (2) there is no logical circularity in justifying the validity of the challenged norm since the norm regulating “essential and nonessential violations” is not applicable to all legal systems. The norm governing the “calculus of errors” merely presupposes the validity of the challenged norm in that it positivizes it by incorporating it into the legal system without requiring its existence (Kletzer, 2005:58).

Rubinstein argues that the distinction between nullity and contestability of normative legal acts can be justified by referring to different procedures for contestation – direct attack and collateral attack. In a direct attack, the validity of a norm can be challenged through a specific procedure, while in a collateral attack, it can be contested within any dispute considered by any jurisdictional body where the issue arises (Rubinstein, 2007: 5–6). However, Kletzer remarks that this objection misses its mark, since the “calculus of errors” theory does not deny the existence of different contestation procedures (which fall under positive law); rather, it asserts that recognizing a normative legal act as invalid presupposes its legal validity (Kletzer, 2005:58–59).

2. Criticism from philosophers of law. Philosophers of law have criticized the theory of alternative authorization for its alleged “irrationality”, interpreting it as granting authorities the simultaneous power to make both legal and illegal decisions, essentially allowing any decision at will (Bulygin, 1995:17; Köpcke, 2019:121; Harris, 1986:220). For instance, M. Köpcke argues that this theory “effectively dissolves the possibility of legal reasoning” (Köpcke, 2019:121). Many critics focus on the relationship between the second and third levels of the “pyramid of norms”, considering the doctrine within the context of justifying judicial decisions. B.S. Jackson, for example, concludes from Kelsen’s denial of the possibility of deducing judicial decisions that he also denies semantic relations between general

¹⁵ For an analysis of German and Austrian critical literature, see (Kletzer, 2005).

norms and judicial decisions as a whole (Jackson, 1985:87–93)¹⁶. This interpretation distorts Kelsen's thought, as he acknowledged such relations but denied them the status of logical connections (Kelsen, 2005:258–265; Kletzer, 2005:60). The most consistent critique of the “irrationality” of alternative authorization comes from I. Weyland, who argues that assuming alternative authorization introduces significant uncertainty into the legal system. He contends that recognizing a choice between lawful and unlawful options at each stage of the legal order leads to a high degree of uncertainty and blurs “the distinction between norm and no-norm, between validity and invalidity” (Weyland, 1986:255).

It is worth noting that the critical reasoning of these philosophers is based on a fundamental error – equating “standard” and “alternative” authorization. This conflation implies an idea of free choice between rightful or wrongful alternatives without recognizing any difference in the “weight” of those alternatives (Weyland, 1986:254–255)¹⁷. Critics overlook that, according to Kelsen, the validity of a norm involves not only its authorized establishment (i.e., inclusion in the normative system) but also a certain degree of efficacy, which means actual implementation. Thus, the existence of a valid static norm (which determines the content of a lower norm) implies its regular actual realization; deviations from such norms in the legal system can exist only as exceptions conditioned by the purposes of “calculus of errors”. Moreover, the norms requiring relevant authorities to invalidate decisions made in an “alternative” manner also possess validity and efficacy, further indicating the exceptional nature of such deviations. It is this exceptional application of alternative authorization that distinguishes the normative system in which it is applied from one based on arbitrary actions by authoritative bodies¹⁸.

Another problem with the criticism of the theory of “calculus of errors” is the lack of an alternative explanation for the phenomenon of validity of legal acts adopted contrary to the norms of a higher level. The only attempt to address this was made by E. Bulygin, who distinguished between the concepts of systemic validity (belonging to a normative system) and applicability (mandatory for application within this normative system). For example, according to Bulygin, the norm of an unconstitutional law is invalid but applicable (Bulygin, 2013:352–356). On one hand, this concept allows us to dispense with the notion of authorization for issuing defective legal acts, assuming that this distinction is not purely terminological. On the other hand, it faces a significant issue: as a result of defective rule-making, a parallel normative system may emerge over time that is not (based on the distinction of validity and applicability) part of the original normative system and is not clearly related to it (Timoshina, Vasil'eva, Kondurov & Kraevsky, 2023:549–550).

¹⁶ For similar reasoning see: (Bulygin, 1995:16–24; Weinberger, 1995:263).

¹⁷ For example, Weiland suggests that the distinction here can only be psychological, that is, meta-legal (Weyland, 1986:264).

¹⁸ It is worth noting a similar discussion of the distinction between a game with an authorized counter, whose decisions are binding, and a game “at the counter's discretion” by H.L.A. Hart (Hart, 2007:143–147).

Conclusion

The analysis of Kelsen's theory of normative conflicts reveals that the jurist fluctuated between two fundamentally different approaches to assessing this phenomenon: holism, which denies the reality of legal conflicts due to the systemic properties of law, and realism, which acknowledges the existence of normative conflicts. Kelsen's holistic theory is characterized by a specific neo-Kantian justification; he posits that the detection of conflicts indicates a defect in legal cognition, which should be resolved using *a priori* principles for normative conflicts resolution. In contrast, Kelsen's later realist position, which rejects neo-Kantian methodology, asserts that the logical law of non-contradiction does not apply to norms. He compares normative conflict to the effects of differently directed physical forces on the same body, suggesting that such conflicts can only be resolved through derogation – the abolition of one conflicting norms by another. Kelsen treats conflicts between norms of different levels within the normative system as imaginary in both his holistic and realistic theories. From this perspective, the existence of a mechanism to challenge defective normative legal acts implies the possibility of their validity, thus negating the notion of absolute nullity. Criticism of this concept by specialists in administrative justice and legal philosophers often stems from misunderstanding of Kelsen's position, particularly the misattribution of the thesis regarding the equivalence of choosing between adopting a materially correct versus a defective legal act. In reality, due to the existence and efficacy of substantive norms that must be applied, along with norms requiring authorized bodies to conduct norm control, Kelsen contends that "alternative lawmaking" is only possible as an exception.

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