

Kelsen's Pure Theory of Law from the Perspective of Globalization

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Abstract

This essay attempts to critically look at Kelsen's pure theory of law and pyramid model of legal order (der Stufenbau der Rechtsordnung) from the perspective of globalization. The stream of globalization has changed the face of legal order: legal plurality, inter-legality spread out, retreat of legal formalism, advent of 'soft law' and legal particularism, and accordingly it has become increasingly difficult to put limitations on how far each domain of regulation covers. It is my belief that this in fact reflects how the lines between domains in the pyramid are becoming hazy.

In this essay I will briefly look at the particular features of Kelsen's legal theory; afterwards, the limitations of the pyramid model, the retreat of the state law centrism following globalization. Under this light, I will attempt to demonstrate that legal autonomy and purism as asserted by Kelsen cannot be maintained easily. We can but say that law is only partially enveloped by the pyramid model.

I. Introduction

Throughout his life, Kelsen has advocated the view that knowledge of law is possible without moral knowledge. Amongst the scholars of law, Kelsen is the only legal scholar who has been chosen – in welcoming the new millennium – as one of the highly influential figures during the last one thousand years. It is easy to see Kelsen's singular status in law, his works having been translated into almost 28 languages.¹⁾

Kelsen was not only a scholar of law but from 1921 to 1930 he practiced as a judge at the Austrian Federal Court of Constitution of which its establishment he actively participated in.²⁾ Many people mistakenly believe the pure theory

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1) For more information, see Werner Krawietz, *Hans Kelsen – Ein Normativer Mastermind des Rechts und der Rechtstheorie für das 21. Jahrhundert?*, 38 RECHTSTHEORIE 34 (2007).

2) *Id.* at 35 f.

of law to be somewhat the result of many years toiling in an ivory tower, in fact that theory reflects much of his long experience during his time as a practitioner.³⁾ Being Jewish he lived most of his life as a wayward traveler, nevertheless he said that law – even Nazi law! – could not be called not law just because of its contents and throughout his life he stuck to his opinion that knowledge of law should be separate from moral knowledge.⁴⁾

Kelsen aimed to understand not the content but the structure of law. This structure can be explained by four features. These are: positivity of law, legality, dualism of is and ought and lastly the pyramid model (der Stufenbau der Rechtsordnung). This essay attempts to critically look at Kelsen's pure theory of law and pyramid model of legal order from the perspective of globalization.

In short we can but say that law is only partially enveloped by the pyramid model.⁵⁾ The stream of globalization has changed the face of legal order: legal plurality, inter-legality spread out, retreat of legal formalism, advent of 'soft law' and legal particularism, and accordingly it has become increasingly difficult to put limitations on how far each domain of regulation covers. It is my belief that this in fact reflects how the lines between domains in the pyramid are becoming hazy.

In this essay I will briefly look at the particular features of Kelsen's legal theory; afterwards, the limitations of the pyramid model, the retreat of the state law centrism following globalization. Under this light, I will attempt to demonstrate that legal autonomy and purism as asserted by Kelsen cannot be maintained easily.

II. The Problem of the Pure Theory of Law and the Basic Norm

Kelsen described the 'pure' theory like following. "Als Theorie will sie

3) *Id.* at 35.

4) Hans Kelsen, *Rechts und Moral*, in 1 DIE WIENER RECHTSTHEORETISCHE SCHULE 797ff (Hans R. Klecatsky et al. eds., 1968).

5) Mario G. Losano, *Turbulenzen im Rechtssystem der Modernen Gesellschaft – Pyramide, Stufenbau und Netzwerkcharakter der Rechtsordnung als ordnungsstiftende Modelle*, 38 RECHTSTHEORIE 30 (2007).

ausschließlich und allein ihren Gegenstand erkennen. Sie versucht die Frage zu beantworten, was und wie das Recht ist, nicht aber die Frage, wie es sein oder gemacht werden soll. Sie ist Rechtswissenschaft, nicht aber Rechtspolitik. Wenn sie sich als eine 'reine' Lehre vom Recht bezeichnet, so darum, weil sie nur eine auf das Recht gerichtete Erkenntnis sicherstellen und weil sie aus dieser Erkenntnis alles ausscheiden möchte, was nicht zu dem exakt als Recht bestimmten Gegenstande gehört. Das heißt: sie will die Rechtswissenschaft von allen ihr fremden Elementen befreien. Das ist ihr methodisches Grundprinzip."⁶⁾

To free the science of law from alien elements Kelsen aimed to thoroughly pull apart and understand not the content but the structure of law. This structure can be understood by four distinct features: positivity, legality, dualism of is and ought and the hierarchical structure of the legal order (the pyramid model). That is, firstly, law is and means the positive law itself. With no regard to whether that law is right or wrong, Kelsen takes into account only the question of ought in terms of law. This is because law only exists in terms of its legality, that is whether it ought to be or not. Therefore when it comes to the content of law and every other fact linked to this, or even the realm of values, these cannot set foot into the realm of law. The world of law in terms of what ought to be, is, not law according to whether its contents are correct or not – Kelsen would refute, asking who could vouch for such a thing?⁷⁾ But law according to the fact that it comes into effect as it *ought* to, according to its structure, overriding other regards.

Therefore the order of law according to Kelsen is not an order dictated by reason but by hierarchy. This hierarchical structure is essential in purifying law by separating it from other non-law regions (pure theory), and at the same time forming an integrated system of fundamental concepts in law (general jurisprudence). Kelsen is strong and consistent in his request of

6) HANS KELSEN, REINE RECHTSLEHRE 1 (zweite Auflage, Unveränderter Nachdruck, Verlag Franz Deuticke Wien 1976) (1960).

7) *Id.* at 349-350: "Allein von einem auf das positive Recht gerichteten Standpunkt aus gibt es kein Kriterium, auf Grund dessen die eine der im Rahmen des anzuwendenden Rechts gegebenen Möglichkeiten der anderen vorgezogen werden könnte Es ist trotz aller Bemühungen der traditionellen Jurisprudenz bisher nicht gelungen, den Konflikt zwischen Wille und Ausdruck in einer objektiv gültigen Weise zugunsten einen oder des anderen zu entscheiden."

putting all law into one system, that is, from one unified viewpoint, interpreting it as complete and whole in itself.⁸⁾

In the stage by stage structure commonly referred to as the pyramid model, what stage do you suppose is at the top? Since Kelsen's legal theory is theory of positive law, it seems natural that constitutional law, the foremost of all positive laws, is placed on top. The logic behind his pyramid model is based on the idea that what should be legally is followed through by transporting the validity of the ought(norm). If so, then, what transport the validity of the constitutional law? The general will of the people? The natural law or natural rights? According to Kelsen, this kind of answer is impossible. This is because these things are impure matters unable to set its foot inside the legal world. The concept introduced to solve this problem is the basic norm(Grundnorm).⁹⁾ So this is in fact Kelsen's logical equivalent of the constitution, transcendental-logical presupposition,¹⁰⁾ so that it may be possible to put into effect what ought to be, that is, a norm which cannot be retracted to a higher state of 'ought.'

In Kelsen's legal world, norms do not hold meaning due to its contents but because it is what it is, a norm, and therefore this 'Grundnorm' cannot make any meaningful demand.¹¹⁾ Even so, if we were to dictate a demand, it would be "do as the constitutional law demands." That is, if we were to assume positive law as being effective, people would foremost set down the premise that the constitutional law, historically the very first law, on which all other positive legal order has been built upon, this very constitutional law should be abided word to word.

III. The Significance and Limitations of the Pyramid Model

The pyramid model explains well the characteristics of law explained by Kelsen. The influence of Kelsen's pure theory and hierarchical order of law is so great that the pyramid model is now almost the shining symbol of law

8) *Id.* at 209.

9) *Id.* at 204 f.

10) *Id.* at 204 ff.

11) *Id.* at 196.

itself. I myself remember the strong impression I got as a student when my professors drew a diagram of a pyramid with ordinances, orders, statutes on the bottom of the pyramid and the constitutional law on top. Then again, I feel that the pyramid model goes beyond the theoretical and into reality, holding significance in practice. It allows us to understand law more easily, readily, and has the 'psychological effect' of creating a feeling that the legal world is orderly and encompassing.

The pyramid model, in the sense that it should include only law that fits in with the bottom level of the pyramid to the top, fits in well with the characteristic that the system of law should be consistent and systematically correct. It also conveys an impression of completeness, as everything that should be inside of it is included. Also since that everything is arranged so that the top level of the pyramid is the pinnacle, each element comprising each level can be deduced to the highest order. Above all, the pyramid model is most effective in outlining the hierarchical structure of legal order.

The study of law has long been stuck in the rut of deductive syllogism. This fact has primarily been responsible in making law look a lot like science, according to the German legal philosopher, Arthur Kaufmann.¹²⁾

Systematic thinking leads in reality mainly to habituality. By emphasizing the system, it can exaggerate the stability and integrated nature of actual practice, which in reality is rough and rocky. Also it can sneak in aspects of reality which have no place in this system. On this point, I would like to introduce an old Chinese fable about the foot and 'tak (度).' Here the Chinese character 'tak' refers to a picture of a foot such as one you would get from placing your foot on a piece of paper and drawing the outline of it. In the State of Zheng (BC 806~375, China) there was a man named "Chachiri (且置履)" who drew the outline of his foot, a 'tak,' and then forgot to take it to the market with him. On arriving at the market he realized this and went back to his house to get it — but by the time he returned to the market with his 'tak,' the markets had closed and he could not buy his shoes. When people asked him why he did not just try on the shoes, he answered that he could trust an imprint of his foot but could not trust his own foot.¹³⁾

12) ARTHUR KAUFMANN, RECHTSPHILOSOPHIE 54 (2. Auflage, C.H. Beck, 1997).

13) Folktale from Han Fei Tzu.

Kelsen's theory on the hierarchical levels of law is a result of legislative positivism. Fundamentally, it springs from the idea of a legislative state and it is a positivism model appropriate for the state law structure. However, today we have departed from state-centrism and with the strong wind of international law blowing, the state law is placed under pressures and exposed to new environments where overlapping with supra-state laws such as EU law (EU law itself also conflicts with international law) is inevitable. The pyramid model cannot but face limitations in explaining such new predicaments.

In short the law is only partly explained by the pyramid model.¹⁴⁾ When we consider overlapping or pluralizing of legal order and the difficulties involved in setting boundaries of governance, the boundaries in the pyramid model also become ambiguous.

IV. The Crisis of the Governing Capacity of Law

During the last two centuries the law order was run according to state law centrism. Thoughts on law in the Western world assume the politics and society of a modern national state. The rational form of governance which went hand in hand with western modernization was 'rule of law' as pointed out by Max Weber as being the last stage of modernization. Such rule of law was conceptually general.

History discovered that this unlimitedness of the concept of the rule of law appeared to be bound by the national state. As a modern, political scheme this universal or general concept proffered the fundamental blocks on which sovereignty and autonomy of the national state could be built on. In this sense it was a legal concept which accompanied the process of becoming a state. And accordingly the jurisprudence continued to be a general jurisprudence.

The rule of 'law' grew into becoming the 'rule' of law because geographical circumstances compelled it so; and hence since modern times, the lawful state under the rule of law is the result of this development. The reason why political, economical rule could mold a form of rule which took root, grew and

14) Losano, *supra* note 5, at 30.

expanded — while regional exceptions and beliefs, tradition and customs and social status was ignored — was because a legal system existed. The expansion of the rule of law reveals itself in the formation of many social theories. For example in social engineering by Comte wherein he suggested the pinnacle of social thought lay in a positivism-utopia; and by Emil Durkheim when he suggested the development of legal institutions as evidence of a system based on regional values and beliefs, having undergone division of labor and accordingly having achieved functional integration or bonds. Ferdinand Tönnies explained the same phenomenon as the development from a tradition and custom based 'Gemeinschaft' to a rationality based 'Gesellschaft,' and in his own words Sir Henry Maine expressed this as: "from status to contract."

To the extent that we understand internationalization to be a strategy for strengthening the state and expanding territory, the universal or general concept of state law is a concept which goes hand in hand with the birth of today's international legal order. Therefore international law springs from the assumption of state-centrism. Theorists who associated the rule of law with global order and world peace are scarce in number, to name one Kant may be the only obvious answer.

To summarize it would be correct to say that the 'rule of law' principle is missing in international law.¹⁵⁾ This is because the principle of division of power or distribution of authority in the rule of law was considered to be applicable only to nationals and state institutions. And accordingly the principle of nonintervention became a key principle of international law.

During the last twenty years or so one of the features following the tide of globalization is that state-law centrism is retreating. In the legal relationship outside the boundaries of the state, the state no longer emerges as the singular actor. Of course even though globalization continues to occur, that process will not be completely free from the actions of the state. However many scholars, following the progress of globalization agree that the state's monopolistic role as the distributor of social values is starting to depart from that of actors other than the state.¹⁶⁾ This can be interpreted to some extent that

15) Danilo Zolo, *The Rule of Law: A Critical Reappraisal*, in *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* 40 (Pietro Costa & Danilo Zolo eds., 2007).

16) *Id.* at 45, 48.

the state's role as the regulator, direct public welfare producer or guarantor of social equity is changing to one of a co-ordinator.

With the state existing in the 'interstates system' under the phenomenon of the decrease in effectiveness of the state law system, weakening of the state law's ability to regulate, the secondary nature of the state's regulatory function, the regulatory power of 'informal laws' that are not state law; an asymmetry between state law and non-state law is arising.¹⁷⁾

V. The Advent of Legal Particularism

Regulations that are not made by the state are showing notable growth. Due to the growth of regulations at the local, supranational and global level the phenomena such as legal plurality, monopoly of state law, and social regulations transcending the state level is appearing.

At the regional level, among African states, for example, the state's regulation is changing into a role of a subsidiary or a comprehensive sum of all non-state laws due to the pressures of the hegemonic forces in the world economy.¹⁸⁾ Also there are only a few lawyers in the field of business and finance who are able to deal with multinational corporations, and the law in the lives of ordinary citizens is showing signs of returning to regional laws that depend on the traditional authority.¹⁹⁾ In Brazil, in the outskirts of the city where some thousands of ostracized lower classes operate under an informal form of 'underground law' for the internal maintenance of order and commercial trading among them, and this 'underground law' the government tacitly tolerates.²⁰⁾

There is also the self-regulation, trading practice, and the supranational law made by firms behind these emerging as new sources for international law. One example is the UCL, which works in supranational commercial trading fields. This in fact is the emergence of legal particularism.

17) BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 96 (2d ed., Butterworths 2002).

18) About the case of Mozambique, see *id.* at 93.

19) *Id.* at 193.

20) *Id.* at 155.

Especially in the case of developing countries, multinational corporations are pushing through agreements made among them concerning tree felling, medical supplies, etc through global self-regulation. There is the tendency of relying more heavily on pools of trust like arbitration or human relationships rather than relying on regulations to resolve conflicts over world economy issues.²¹⁾ In legal activity which crosses over national boundaries guiding principles or general transaction provisions, international law firms, the World Chamber of Commerce, International Bonds Collection Organization, human networks based on trust, these things have a more important role than the international law order.²²⁾ These can hardly be called global laws, more likely they are the domineering phenomenon of globalized regional law.

The main feature of the globalized world where on one hand regionalization (EU) and globalization (WTO, UN), and on the other hand, the localization simultaneously occur is that the actor and the objective of acts can not be uniform. In this aspect the world legal culture can be understood as a facet of the 'complications of postmodernism.'²³⁾ The law, instead of having one uniform foundation, is a multifold structure of regional, transnational, and supranational.

As a result, in the multilayered relationship where the actors and objectives of the acts become complex, no one unit structure or linkage structure can be homogeneous in the traditional sense. This situation demonstrates that social conflicts can no longer be solved satisfactorily

21) For empirical research results that indispensable predictability and trust in cross-border trading is obtained by building on personal trust, mutual interdependence, long history of trading, arbitration procedures rather than through legal obligations, see Wai-Keung Chung and Gary G. Hamilton, *Social Logic as Business Logic: Guanxi, Trustworthiness, and the Embeddedness of Chinese Business Practices*, in *RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS* 325-346 (Richard P. Appelbaum, William L. F. Felstiner & Volkmar Gessner eds., 2001).

22) On the tendency to resolve problems through non-law methods in order to avoid high costs of making a claim on credit because of differences in legal culture, difficulties due to custom, lack of experience, complexity of the situation in international trading despite the efforts of state law to achieve coherence and uniformity, see Yves Dezalay, *The Big Bang and the Law: The Internalization and Restructuration of the Legal Field*, 7 *THEORY, CULTURE & SOC'Y* 279-293 (1990).

23) Santos, *Law: A Map of Misleading. Toward a Postmodern Conception of Law*, 14 *J.L. & SOC'Y* 279-302 (1987).

through authorities of the past.

VI. Enfeeblement of Legal Formalism

When we look at the process of establishing and executing norms related to international · supranational economical transactions the retreat of legality seems to be apparent. The hope of all multinational corporations is the minimizing of national regulation and control. Instead of sacrificing the regulations of the individual state by putting up the vitalization of the economy and finance, multinational corporations are opting to develop an arbitrary behavioral norm. They have a tendency to distrust the courts of individual states. They believe that those courts prioritize state interests over the global standard. So, they seek to find ways of resolving conflicts through other means than through the formal justice system. Forms of contracts are also changing into weaker forms such as standard provisions or gentlemen's agreement.

In the midst of this trend, changes of norms are being based more and more on firm or market customs rather than on case law or scholarly doctrines. As an example UCL, where 175 banks are a part of and is one of the main examples of 'lex mercatoria,' is a supranational pact which exerts influence over international financial transactions and binding to most countries. These regulations can be seen as being quite successful in excluding the interference of the state thanks to the immediacy of transactions, the cost factor involved in transnational transactions, transparency, etc. Although these regulations do not satisfy the 'normative expectations' in comparison to state law, it does meet up to the standards of 'cognitive expectations' which induce actions and motives to maintain order in the field of transactions.²⁴⁾

24) Behavioral patterns which stop at cognitive expectations(kognitive Erwartungen) begin to transform into normative demand with the progress of globalization. That is, cognitive expectations develop into normative expectations(normative Erwartungen). In the midst of this global law orders such as the aforementioned 'soft law' appear. This can be seen as a global standard wherein enforceable powers are not guaranteed and therefore it is at a stage between cognitive expectations and normative expectations such as gentlemen's agreements or soft law which have weak normative powers. For more, see Klaus F. Röhl, *Die Rolle des Rechts im Prozeß der Globalisierung*, 17 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 23 (Heft 1, 1996); HOLGER KREMSER, 'SOFT

The increase in the amount of 'soft laws'²⁵⁾ which sits between 'cognitive expectations' and 'normative expectations' can be explained in the sense of retreat of legal formalism. This trend is forcing the retreat of generality, openness, neutrality, legal certainty and stability, continuity etc which are the main aspects of rule of law.²⁶⁾

VII. The Crumbling of Law as an Autonomous Discipline

Throughout history, the request for autonomy and legal formalism as asserted by Kelsen has been theoretically challenged.²⁷⁾ The biggest threat to the autonomy of law comes, of course, from morality. From the perspective of law, to accept moral under legal logic means accepting particular moral values and subjectivity which follows through, and at this point it becomes difficult to establish standards to evaluate the values in the content and thereby can harm generality, certainty and legal stability. Another important problem is that such morals might entail partiality in legal interpretation. In law the request for formality is closely tied up with autonomy of law. The fact that law is in want of formality means that it does not want to be enveloped or subordinated by a interest structure by something outside of law.²⁸⁾ It can be said that legal formalism is prepared for the dangers of moral subjectivity and accordingly partiality from legal interpretation. In other words formalism aims to make law seem to have a simple and straightforward structure in order to make interpretation of law self-evident or unnecessary in legal practice.²⁹⁾

However when we look to history, that which is evident in the name of

LAW' DER UNESCO UND GRUNDGESETZ. DARGESTELLT AM BEISPIEL DER MEDIENDEKLARATION (1996).

25) WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* 117 n. 132 (2009).

26) William E. Scheuerman, *Franz Neumann: Legal Theorist of Globalization?*, 88/1 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 79-89 (2002).

27) Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761-780 (1987).

28) Stanley Fish, *The Law Wishes to Have a Formal Existence*, in CLOSURE OR CRITIQUE. NEW DIRECTIONS IN LEGAL THEORY 157 f (Alan Norrie ed., 1993).

29) Kelsen, *supra* note 6, at 30.

formality has become increasingly diminished in the field of law.³⁰⁾ For example in ancient and medieval law, formality has been much more pronounced than today. At one point formality was law itself. External formality which emphasizes procedures, symbolism, and ceremony has been expressed in the shape of wigs, robes and architecture of the court and some of it still remains intact today.

The modality of expression cannot help but reflect the way of life of that era. In our reality today law is made because of the realistic needs of today. Therefore judges of today must take into account transaction customs and public sentiment, and it has become increasingly difficult to disregard or nullify certain regulations just because it does not fit legal formality. In actuality the spirit of the times has changed, we have chosen the road to find material truth. The paradigm of law has been converted too, from formal law to material law. Along with globalization of law there is acceleration of materialization of law, and conversion into 'soft law.' This means that, contrary to Kelsen's opinion, the assumption that legal truth is a self-evident communication system which cannot be linked to a certain experience or a situation has finally crumbled.³¹⁾

If so does law have its own window through which it looks into the world? If we were to stoutly disagree with this question it will seem that we are announcing that law in its discourse, methodology and knowledge, it does not have any inherent characteristics.³²⁾ However I feel that this is an overstatement. Just because we admit to the ebb of the autonomy of law this cannot also negate the status of legal science as a division of scholarly study.

30) Wilhelm Ebel, *Recht und Form*, VOM STILWANDEL IM DEUTSCHEN RECHT 14 ff (J.C.B. Mohr: Tübingen 1975).

31) Kelsen, *supra* note 6, at 205 ff.

32) For example, ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 51 (2006): "Law's social conditions of practice determine the forms of knowledge appropriate to it. It lacks any of the usual intellectual marks of disciplinary: controlling master theories, distinctive methods of intellectual debate, established paradigms of research practice, familial epistemological and ontological positions or controversies...."

VIII. Communication rather than System

Now return to Kelsen's system: Can the new legal environment be rearranged into a pyramid structure? If so then what will be placed on top of the new pyramid? Additionally a new discussion must be opened on what will be placed on the bottom of the pyramid. Among legal sociologists there are those who are paying close attention to this phenomenon and assert that there must be a shift of paradigm from the pyramid model to the 'networking' model. While traditional legal positivists like Kelsen understood the law as a structure and came up with the pyramid model, these legal sociologists have approached law from the perspective of legal functionalism and have suggested the network model.³³⁾ However in truth legal system in some ways has contained attributes pertaining to networks. In Korea we oftentimes use the rhetoric legal network (法網). It seems right to say that the internal attributes of the network have been strengthened by the influence of IT, globalization, etc.

In conclusion we must find a way that takes both the pyramid and the network fully into account. On this point Kelsen's theory on the hierarchical order of law has its limits in being able to contribute to the legal discourse in the transition era of today.

It is important to view the system as act or system of communications rather than to focus on the rigid system itself. The production of the legal text is important, however, more important is applying the text to reality and blowing life into it by giving it meaning. This job, contrary to Kelsen's opinion, cannot be conducted by law alone, and without supplementary discourse.

The verses like those of W. H. Auden in the poem 'Law, Like Love' can now really be uttered only when we recite poetry.

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,

33) Losano, *supra* note 5, at 30.

Law is but let me explain it once more,
Law is The Law.

KEY WORDS: pure theory of law, basic norm, globalization, pyramid model, legal plurality, interlegality

Manuscript received: Oct. 26, 2009; review completed: Dec. 1, 2009; accepted: Dec. 10, 2009.