The Legal Positivism of Hans Kelsen

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THE LEGAL POSITIVISM
OF HANS Kelsen

by

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LIFE

Michael Henry Ducey, S. J. was born in Chicago, Illinois, on January 17, 1933.

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At present he is an appointee to the Jesuit Mission of Patna, India, and Nepal.
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CHAPTER I

INTRODUCTION

The first two decades of the twentieth century were very active ones in German for philosophers of law. The beginning of the first World War saw the completion of the long process of consolidation of the Germanies, and its end resulted in the birth of the precarious republic of Austria, with its severe economic problems and many constitutional reforms.

It was at this time that Professor Hans Kelsen of Vienna University began to write the books on legal philosophy which developed into a systematic legal positivism, now called "The Pure Theory of Law", or "normative jurisprudence".

Hans Kelsen was born in Prague, Czechoslovakia in 1881. He received his LL.D. degree from Vienna University in 1906, and held a professorship there from 1911 to 1929. After this long tenure in Vienna he moved to Cologne for three years, leaving there for the Geneva Institute of International Studies in 1933. He stayed at Geneva for three years this first time, but left there to take a professorship at the Prague German University from 1936 to 1938, when the Anschluss prompted his return to Geneva. This time he remained there for two years, his departure now being for the United States. He came here in 1940 at the invitation of Harvard Univer-
sity. He lectured at Harvard for one year, and then accepted a professorship of Political Science at the University of California, Berkeley, where he has remained since. He was an active professor there from 1942 to 1952, at which time he was made Professor Emeritus at the age of seventy-one.

During his stay at Vienna University, he had a major hand in the writing of one of the Austrian constitutions. He became a naturalized citizen of the United States in 1945.

Professor Kelsen has received five honoris causa LL.D. degrees: from Harvard, the University of Utrecht, the University of Chicago, the University of California, and the National University of Mexico. He resides at present in Berkeley, California.

In 1934 Dean Roscoe Pound of Yale characterized Kelsen as "unquestionably the leading jurist of the time," and further assigned him a place in the history of the philosophy of law equal to that of Kant in the history of philosophy. Whether or not this is precisely true, it does reflect the high regard in which Professor

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1Erich Voegelin, "Kelsen's Pure Theory of Law," Political Science Quarterly, XLII (1927) 271-275. Professor Voegelin's comment on this contribution to the Austrian constitution is that it is "the most important event in the modern history of constitutions from the point of view of legal technique," and adds that "with its background of the pure theory of law, it is a remarkable contribution to the development of democracy." (p. 275)

2Who's Who in America (Chicago, 1958), XXX, 1493.

Kelsen is held by many notable jurists in this country and Europe, and also in South America and Japan. Even those who oppose his Pure Theory of Law testify to his importance by their number and the seriousness of their critical efforts.

The number of books and articles written about his theory is quite impressive. The bibliography to his 1945 work in English, General Theory of Law and State,\(^4\) lists 118 books and articles in every major western language and Japanese. This listing is far from complete. It limits itself to "the more important contributions to the discussion of the problems concerned."\(^5\)

Any philosophy of law, it would seem, may be analyzed from the point of view of a lawyer or from that of a philosopher, and each analysis will treat of a generally different, even if overlapping, set of problems. Therefore, the aim and scope of this the-

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\(^4\)This book is the definitive exposition of Kelsen's theory in English. It is something of an historical quirk in the development of the Pure Theory of Law, because Kelsen had already completed his theory in 1934 with his Reine Rechtslehre. The General Theory (published at Harvard) is, as Kelsen says, "intended to reformulate rather than merely to republish thoughts and ideas previously expressed in German and French." (p. xiii) This reformulation was made desirable by Kelsen's extended stay in the United States, a visit caused in the first place by World War Two.

The doctrine which General Theory is reorganizing was expressed in a large number of books and articles. Of these the four main books are: Hauptprobleme der Staatsrechtslehre (1911), Allgemeine Staatslehre (1925), Théorie Generale du Droit International Public (1928), and the Reine Rechtslehre. Much of the criticism of Kelsen's theory was written before 1946. General Theory of Law and State will be referred to hereafter as GT.

\(^5\)GT, 458.
sis is to examine the Pure Theory of Law from the point of view of a philosopher, and more particularly from the point of view of a Thomist.

The Thomist point of view is important to this paper, because it establishes a basic difference between it and another study of Kelsen's Pure Theory of Law already made. The other work is William Ebenstein's excellent book entitled, The Pure Theory of Law, published at the Wisconsin University Press in 1945.6 Like the present paper, it is also a general summary of Kelsen's doctrine, but besides being more detailed, it is also organized around an entirely different philosophical point of view. This establishes a very different basis for criticism, and even in the exposition produces a difference in selectivity and emphasis.

From the point of view of the present writer, then, Kelsen's Pure Theory of Law admits of a division into four parts. The first includes its most theoretical aspects, or what may be called its philosophical foundation. The second is its doctrine on the two fundamental concepts of jurisprudence: the nature of law and of justice. The third is its doctrine on the basic legal institutions, that is, the person, state, and international law. The fourth includes the practical applications of Kelsen's theory which seem of

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6This book was first published at Prague in 1938 under the title, Die Rechtsphilosophie Schule der Reinen Rechtslehre. Its original manuscript was translated into English by Charles H. Wilson, but the 1945 version represents the author's own extensive revision of the original translation, both in form and substance.
greater moment to the present writer.

This four-fold division dictates the procedure of the thesis. It will be to start with the preliminary considerations at the end of this chapter, then to take up each of the four parts of Kelsen’s theory, and to end with a consideration of the main lines of criticism of it.

The preliminary considerations to be made before the examination of Kelsen’s actual doctrine concern the historical background of the Pure Theory of Law. This background is an historico-intellectual texture composed of three main elements. These elements are: Kelsen’s association with the Vienna Circle and Moritz Schlick, the political history of Germany from the eighteen-sixties to the Great War, and Kelsen’s training in Kantian philosophy.

The first of these elements—Kelsen’s personal association with the Vienna Circle—is a matter of fact, but it only began in 1923, and Kelson’s theory does not bear any marked sign of the influence of analytical positivism. Just what elements in his theory are due to the influence of the Vienna Circle, and what he held already because of his Kantian background, is hard to say. It is sufficient here to note that he was for a time personally associated with the members of the Vienna Circle.

The second element is the historical phenomenon of the German drive towards unity which began in the eighteen-sixties and contin-

ued up to the Great War, and the influence this had on German legal thinking of the time. Professor Erich Voegelin describes the phenomenon in the following manner:

The unification of Germany and the emergence of a federal constitutional and administrative law stimulated speculation on the problems of legal theory, and the sight of a magnificent legal structure rising out of the former unsatisfactory state of disunion drew attention particularly to the problems of concrete positive law as against abstract natural law. One might say that the rise of the empire, the spectacle of a new body of law being created, proved fatal to the survival of eighteenth-century speculations on natural law. 8

Professor Voegelin adds further that this movement to separate legal theory in the strict sense out of a mass of problems traditionally assembled under the vague title of Staatslehre was started in Germany by Karl Gerber, Laband, and George Jellinek. Although Kelsen roundly criticizes them, especially Jellinek, for their natural law tendencies, he still wishes to stress the point that he is carrying on the tradition of these men, and claims that he is doing in a more perfect way what they were able to achieve only in part. 9

The third, and perhaps most important, element of this historico-intellectual background is Kelsen's training in Kantian philosophy. Kelsen most certainly is a neo-Kantian in his legal philosophy, but the peculiar meaning of that term when applied to him is matter for the following chapter. Suffice it to say here that

9Ibid.
he is deeply indebted to Kant for the structure of his Pure Theory.

One more preliminary consideration remains, and that is the reception accorded Kelsen's theory in German and Austria.

The reactions were varied, but even though there was opposition, Kelsen was recognized as a thinker of such stature that a group formed around him which came in time to be called generally "The Vienna School." Its members were such men as Adolf Merkl, Rudolf A. Metall, the phenomenologists Fritz Schreier and Felix Kaufmann (who was also an original member of the Vienna Circle), and Alfred Verdross, who later fell away from adherence to the Pure Theory. In this country, Charles H. Wilson, Josef L. Kunz, and Henry Janzen have written quite favorably of Kelsen's theory.

From the start, however, there was also opposition. It consisted mainly of two schools: those who held the psychological interpretation of legal validity as put forward by Bierling, Jellinek, and Stammler, and those of the sociological school of Eugen Ehrlich, Sombo, and Max Weber. There are frequent polemics in Kelsen's writings against both of these schools.


11 Ebenstein, 111-112.
CHAPTER II

THE PHILOSOPHICAL FOUNDATION

Kelsen's Pure Theory of Law has been referred to as "neo-Kantian" legal philosophy, and as regards its epistemological foundation, this is certainly true. Kelsen holds the pristine Kantian doctrine which states that "cognition itself creates its objects, out of materials provided by the senses and in accordance with its immanent laws."¹ His adherence to Kant also includes the distinction between the transcendent and the transcendental realms, and its consequent rejection of metaphysics. This distinction is the logical basis on which he constructs the framework of his pure legal theory, as we shall see later.

But Kelsen's Kantianism is by no means that of the Metaphysische Anfangsgründe der Rechtslehre, and the categorical imperative. It does not go beyond the Critique of Pure Reason. Kelsen refers to the categorical imperative as a meaningless tautology,² and objects to giving the will any status in the formation of law

¹Hans Kelsen, "Natural Law Doctrine and Legal Positivism," translated by Wolfgang Herbert Kraus. In General Theory of Law and State, 434. This monograph is printed as the appendix to General Theory, pp. 389-448. It will be referred to hereafter as GT.

²GT, 10.
other than that of a mere instrument in the process of determination. If he grants Kant's distinction between pure and practical reason, the concession only results in his placing of jurisprudence entirely within the realm of pure, not practical, reason.

This Kantian epistemology, however, is not the driving force in Kelsen's theory of law. It is rather the milieu or context in which he is working, and out of which he is drawing the general logico-philosophical structure to support his main concern, which is for the purity of legal theory. This desire for a pure legal theory is described by J. Walter Jones in these words:

Kelsen has set out to show that an independent science of law is not only possible but indispensable. ... Far from being too abstract, the science of law, in the view of Kelsen, has never yet been abstract enough. ... Only by restricting his field and resolutely refusing to wander along any road which may bring him in contact with the extra-legal world, can he [the legal theorist] hope to avoid the pitfalls which, in Kelsen's view, await those who think they can use legal technique to solve problems of politics or sociology. Law must therefore be defined so as to cut it off from everything which may enmesh legal science with an alien study. ....... The physical, psychological, and sociological aspects of law belong to the science of Nature and not of Law.3

This desire for purity is the real moving force of Kelsen's theory, and so, although it is based on a Kantian epistemology, it has rightly earned a distinctive and non-Kantian title, the Pure Theory of Law.

The purity Kelsen is striving for is three-fold, based on the three-fold distinction so congenial to Kant's critical philosophy,

between sensibility, the realm of pure forms, and the realm of pure ideas. In accord with these three divisions, Kelsen says, there are three realms of human cognitive activity: 1) the realm of metaphysics and all other ideology, including the ideology of law, natural law theory, and philosophy of justice; 2) the realm of the normative sciences, one of which is jurisprudence (others are ethics, politics, grammar, and aesthetics); 3) and the realm of the empirical, natural sciences, which include empirical jurisprudence. This considers law as a psychological or sociological phenomenon.

Therefore Kelsen wishes to establish a pure legal science which is free from adulterating influences coming from three "directions": from metaphysics, natural law theory and philosophy of justice above, from psychology and sociology below, and from the influence coming "horizontally" from other normative sciences which are less pure, especially ethics and politics.

The purity that Kelsen desires may be looked upon as a purity of subject matter, but more properly he wishes it to be a purity of method:

It is by confining jurisprudence to a structural analysis of positive law that legal science is separated from philosophy of justice and sociology of law, and that the purity of its method is attained.4

This citation seems to indicate that the purity of method intended depends on the common sense fact that no other field of knowledge analyzes the structure of positive law. But Kelsen's

4GT, xv.
purity goes much deeper. For if cognition creates its objects, as Kelsen holds, then the purity or independence of any object depends radically on the purity or independence of the cognitional process that attains it. Likewise the purity of a science will depend on the uniqueness of the cognitional method by which it attains its object. And Kelsen says, "to cognize something juristically or legally can only mean to know it to be law." That is, there is a way of knowing peculiar to the normative science of jurisprudence.

He arrives at this position this way: for him, as for Kant, the world is a non-unified set of elements which presents itself to human sensibility. These elements might be called "facts". (And here is the charter of positivism against all metaphysics.) Man unifies the world of facts in "objects" by knowing them. Moreover, according to Kelsen, there are two different methods of thinking by which he does this. One is the principle of causality, and the connecting of the elements in the world by this method produces Nature. The other is a normative principle, and it produces Society. This latter method of thinking consists in connection by social norms, principally by the norm, or principle, of retribution.

The principle of retribution consists in a "free" sequence of events as opposed to a determined causal one. For example, light-

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6Hans Kelsen, Society and Nature (Chicago, 1943), viii.
ning striking, not as the result of the action of blind forces of nature, but as a sanction administered by a god in retribution for some displeasing act.

Among the phenomena, or facts, in the world, we find the behavior of men, and so of course we may consider the behavior of men according to the principle of causality or the principle of retribution. In the first case, this behavior will be a part of Nature, and matter for the empirical sciences; in the second case, it will be a part of Society, and material for normative sciences.

Kelsen says:

Since norms determine human behavior, the science of law, in describing the law as a set of norms is also describing human behavior; but it does not describe it as it takes place as cause and effect in natural reality. It describes behavior as it is determined, i.e., prescribed or permitted, by legal norms. 7

Therefore, the remote object of the science of jurisprudence is, according to Kelsen, human behavior; and its proximate object is the set of norms which comprises positive law. The philosophical status of the norm is described by Kelsen as follows:

To say that a norm is created by a fact is a figure of speech. The norm is the specific meaning of the fact, and this meaning, not perceptible by our senses, is the result of an interpretation. 8

That is, according to an immanent law of human cognition, some elements of human behavior are interpreted as norms. These

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8 Ibid., 649.
elements are called legislative acts. In this sense, knowing a law is creating a law. It is when men interpret a human act as law that that act assumes a normative character and truly becomes law. It is the task of jurisprudence to talk about the contents of these norms.

We shall now discuss more in particular each of the three freedoms Kelsen desires for legal theory.

The first is freedom from the ideology of law: metaphysics, natural law theory, and philosophy of justice. This is a standard positivistic position which Kelsen enunciates in the following way:

Cognition can grasp only a positive order evidenced by objectively determinable acts. This order is the positive law. Only this can be an object of science; only this is the object of a pure theory of law, which is a science, not metaphysics of the law. ... It seeks the real and possible, not the correct law. It is in this sense a radically realistic and empirical theory.9

This concern for facts implies a spirit of positivism somewhat similar to that of the Vienna Circle. But although Kelsen does reject metaphysics as unverifiable ideology, his position is based on the distinction between transcendental forms and transcendent ideas rather than on any bare concern for analysis and verification. He was never seriously concerned about a logical analysis of legal propositions, but rather with establishing the character of law as a system of norms. Although he holds that

9 GT, 13.
"like any other empirical science, normative jurisprudence describes its particular object," he immediately adds, "but its object is norms and not patterns of actual behavior."\(^{10}\) This concern for norms is similar to Schlick's position on value judgments and the basis of ethics,\(^{11}\) but Kelsen's lack of interest in logical analysis tends to make the establishment of his exact relationship to the Vienna Circle still problematical.

But Kelsen's positivism is indeed a theory which "turns away from a transcendent sphere beyond experience, not viable to reason and the senses, as from a useless construction."\(^{12}\) As such it is a kind of empirical monism which has a high esteem for science. For Kelsen avers that

The metaphysical-religious dualism of heaven and earth, of God and world, is overcome when man, especially through the advance of empirical science, finds the courage to discard the realm of the transcendent, which is beyond his experience, because it is an unknowable, uncontrollable, and therefore scientifically useless hypothesis.\(^{13}\)

\(^{10}\) Ebenstein, 110.

\(^{11}\) See Victor Kraft, The Vienna Circle (New York, 1953), 183-184. He sums up Schlick's doctrine on ethics in the following words: "The possible scientific achievements of ethics are limited to the description and systematization of moral norms, but no norms are posited in scientific ethics. Ethics can validate derivative norms in terms of fundamental norms, but it cannot justify the most fundamental norms, it can only describe their acceptance as a fact. There are no criteria for absolute values, all values are relative to a subject. On the other hand, ethics can explain norms on the basis of general extra-legal conditions; it can deduce moral attitudes from the natural laws of behavior in general."

\(^{12}\) Ebenstein, 110.

\(^{13}\) Ebenstein, 433.
Sometimes in this context Kelsen talks of the realm of metaphysics and "transcendental justice" as if that realm were real enough but just beyond the scope of present considerations. For instance he says that "the problem of justice, by its very nature lies beyond the borderlines of a normative jurisprudence, confined to a theory of positive law..."14 But what he really means is that there is no realm beyond the one considered by normative jurisprudence, except the one of emotion and ideology. Therefore he holds that "justice is an irrational ideal."15 He also holds that natural law is meaningless when compared to positive law, but we shall consider his full position on that subject in the next chapter.

Now we turn our attention to Kelsen's position on the relation of legal theory to natural science. We have already seen his general epistemological foundation, which is based on a Kantian model, but introduces new doctrines. In this position the direct object of legal theory is norms, while its indirect object is the human behavior determined by these norms. These norms, as the specific meaning of certain human acts, are obviously logical rather than real entities, and it seems that they are something like Kant's pure forms of experience. But Kelsen sometimes speaks of the object of legal theory as if it were a physical being in nature, as for instance, when he says:

14GT, 174.
15GT, 13.
Legal reality, the specific existence of the law, manifests itself in a phenomenon which is mostly designated as the positiveness of law. The specific subject of legal science is positive or real law in contradistinction to an ideal law, the goal of politics.\(^{15}\)

But even here the phenomenon in which legal reality manifests itself is of the normative order. That is, it is a logical phenomenon, the result of considering the elements of human behavior as connected and unified by a retributive principle, just as a natural phenomenon is the result of considering a set of elements in the world according to the connection of causality.

This distinction between norm and Nature is also expressed as the distinction between "Is" and "Ought". Ebenstein says of Kelsen:

He makes of the Is and the Ought a formal-logical, insoluble antagonism, which has for consequence an inevitable division of the sciences. According as the object of research is the Is of actual events—that is, reality—or an ethical, legal, esthetic, or other Ought—that is, ideality—so our knowledge divides itself into two fundamentally distinct groups, the world into two realms which no path unites. The sciences in turn are divided into causal sciences and normative sciences.\(^{17}\)

This distinction between the kinds of sciences also concerns the kind of statements a science uses to describe its object. As Kelsen holds:

The statements by which a normative jurisprudence describes law are different from the statements by which a sociology of law describes its object. The former are ought-statements, the latter are is-statements of the same type as laws of na-

\(^{15}\)GT, xiv.

\(^{17}\)Ebenstein, 6.
Even statements about the specific existence and content of norms should be ought-statements according to Kelsen. "A statement to the effect that something ought to occur is a statement about the existence and the contents of a norm, not a statement about natural reality, i.e., actual events in nature."\(^\text{19}\)

Therefore Kelsen sets up two separate realms: that of \textit{Sein} (translated as "Is") and that of \textit{Sollen} (translated by Kelsen as "Ought", but by Voegelin as "essence")\(^\text{20}\), and corresponding to these two realms the two kinds of statements which describe them: is-statements and ought-statements respectively.

Since positive law is an historical fact as well as a set of pure norms, it will be possible to make is-statements about law. But, as was just stated above, the science which does this is the sociology of law, a science radically distinct from true and pure jurisprudence. For jurisprudence in the strict sense concerns itself only with the law as it stands, a set of norms with a specific content and existence in the normative order. But the question as to where the content of the positive legal order has originated, as to what factors have caused this content, is beyond this cognition [that is, connection according to the principle of retribution], which is limited to the

\(^{18}\)\textit{GT}, 163-164.

\(^{19}\)\textit{GT}, 37.

given system of positive legal norms in its "ought" quality.\(^\text{21}\)

It is especially against this sociology of law and against the psychology of law that the normativity of the Pure Theory is postulated. For Kelsen sees that such views of jurisprudence result in making personal consent, or the will of a group the essence of law, and above all he wishes to avoid such errors. His view is that the way such human factors influence the law is by the existence of a presupposed basic norm which specifies that such and such an act is law creating. The \textit{de facto} existence of such a norm is discovered by an empirical examination of an existing order of positive law.

Here we see Kelsen's combination of radical positivism, which attains its object always by an analysis of empirical facts, with a theory of normativity, which is at least a formalism and possibly a kind of idealism. Henry Janzen indicates this combination when he says of Kelsen's theory that

"oughtness" is a relative \textit{a priori} category which enables one to grasp the empirical legal material. But it is not the distinctive characteristic of law, it is only the most general concept (Oberbegriff). Kelsen, who continues in the positivist tradition, sees the distinctive quality of law in its being a coercive order, with an external sanction (i. e., a sanction which does not spring from the subject's inner consciousness.)\(^\text{22}\)

This means that a law, which is something in the formal order of norms, has as its distinctive quality something in the concrete

\(^{21}\)GT*, 438.

order of things.

The third freedom of the Pure Theory of Law is from the other normative sciences, especially ethics (morals) and politics. The reason legal theory must be free from these is that they are based on a kind of value judgment which is repugnant to the method of true science.

For Kelsen there are two kinds of value judgments. First, there are those judgments which concern the aptness of a means for attaining an end already specified. These pertain to a strict normative science such as legal theory. Secondly there is the kind of value judgment which is "a statement by which something is declared to be an end, an ultimate end which is not in itself a means to a further end," and concerning this type he immediately adds, "such a judgment is always determined by emotional factors."²³

Both ethics and politics depend on this second kind of value judgment. For ethics is a theory of right and wrong in some absolute sense. It is a theory of the just and the unjust. And politics, while it does not always say that its values are absolutely just, does set up the goals it strives for in an arbitrary and subjective manner.

With regard to ethics, we have already seen Kelsen's viewpoint that justice is an irrational ideal. If justice is interpreted as the satisfaction of basic human needs, Kelsen asks:

But which human needs are worthy of being satisfied and espe-

²³ GT, 7.
cially what is their proper order of rank? These questions cannot be answered by means of rational cognition. The decision of these questions is a judgment of value, determined by emotional factors, and is, therefore, subjective in character, valid only for the judging subject and therefore relative only.\(^{24}\)

And with regard to politics, the final position of the Pure Theory of Law is this:

The purity of its knowledge in the sense of political indifference is its characteristic aim. This merely means that it accepts the given legal order without evaluating it as such, and endeavors to be most unbiased in the presentation and interpretation of the legal material. In particular it refuses to stand for any political interests under the pretext of interpreting the positive law or of providing its necessary correction through a norm of natural law, by pretending that such a norm is positive law, while in reality it conflicts with it.\(^{25}\)

In summary of this chapter we might say that Hans Kelsen's general philosophical foundation is composed of two elements: First, a context of Kantian epistemology from which he draws certain elements for the overall structure of his theory. This context includes the three-fold distinction between sensibility, the realm of pure forms, and the realm of pure ideas, and also the doctrine of objectivity as due to a way of knowing immanent to cognition. From this latter doctrine Kelsen draws his position on the principle of retribution as the way of knowing which produces the normative order, and the principle of causality as that which produces the order of Nature.

\(^{24}\)GT, 6.

\(^{25}\)GT*, 438.
Secondly, Kelsen has a desire for the purity of legal theory and law which expresses itself in a three-fold manner: 1) He desires purity from metaphysics and the ideology of law; this is to make jurisprudence a strict science. 2) He wants the purity of normative jurisprudence from sciences of nature such as the sociology or psychology of law. 3) He aims at the purity of scientific legal theory from other normative theories which are based on emotional value judgments, as, for instance, ethics and politics.
CHAPTER III

THE NATURE OF LAW AND JUSTICE

In the preceding chapter we considered the general philosophical background and the overall aims of Professor Kelsen's Pure Theory of Law. Now we shall see how that background and those aims are applied to the two most basic categories of legal theory, law and justice. We have already seen something of his doctrine on these points, but now we shall discuss them more fully.

Since this is a practical science, we shall begin with ends, that is, Kelsen's doctrine on the nature of justice. We have seen that the Pure Theory of Law is both a positivism and also a formalism, a theory of the normativity of law. According to these two aspects of the theory, there are two definitions of justice which it proposes. The first of these, the one connected with normativity, is really a definition of what justice is not. It is a position taken to refute a misconception of justice. This definition is that "justice is an irrational ideal."¹ The second one is a manifestation of positivism. In it Kelsen says quite simply, "Justice is social happiness. It is happiness guaranteed by a social

¹GT, 13.
order."

The misconception of justice against which the first definition is aimed is based on the judgment that there is something which is an end in itself. As was seen above, "such a judgment is always determined by emotional factors."  

For Kelsen there are no postulates of practical reason by which one can establish a set of absolute values, as there were for Kant. To him reason is what science does, and only that. That is to say, the activity of reason is identical with the activity of the empirical scientist, and does not go beyond it. The only value judgment viable to science, and therefore the only one viable to reason, is the one which pronounces on the suitability of a means for an end previously determined. Science does not achieve, nor does man experience an ultimate end; therefore such an end is in the realm of the transcendent and is scientifically useless. Kelsen says that

The essential characteristic of positivism ... may be found in the difficult renunciation of an absolute, material justification, in this self-denying and self imposed restriction to a merely hypothetical, formal foundation ...  

Therefore, when Kelsen says that the problem of justice is beyond the borders of normative jurisprudence, he also means that it

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3 GT, 7.
4 GT*, 396.
is beyond the borders of reason, and so in a certain sense is non-existent. The question of absolute justice is limited to the sociology of law, which would treat of it as a social phenomenon in connection with law as a social or historical fact. 

But Kelsen does hold that there is an entity, which is relative and not absolute, which does answer to the notion of justice. He says:

What does it really mean to say that a social order is a just one? It means that this order regulates the behavior of men in a way satisfactory to all men, that is to say, so that all men find their happiness in it. The longing for justice is man's eternal longing for happiness. It is a happiness that man cannot find as an isolated individual and hence seeks in society. Justice is social happiness.

By "happiness" here he does not mean subjective happiness, as Bentham meant in his dictum "the greatest good for the greatest number." Kelsen explicitly rejects such a concept and defines happiness this way:

The happiness that a social order is able to assure cannot be happiness in a subjective-individual sense; it must be happiness in an objective-collective sense; that is to say, by happiness we must understand the satisfaction of certain needs, recognized by the social authority, the lawgiver, as needs worthy of being satisfied, such as the need to be fed, clothed, housed, and the like.

But just as there are many ideas of what individual happiness is, so there are many varieties of social happiness. For instance,

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5GT, 174.
6GT, 6.
7"What Is Justice?", 3.
there is the freedom of a democratic republic as over against the complete security of a full socialism. Each of these social conditions gives social happiness, so each of them is an end worth striving for, and therefore a criterion for the justice of a legal order. For the law is just if it brings about some species of social happiness. However, none of these forms of happiness have any absolute value. Kelsen specifically eschews any absolute justice for a social (legal) order. "The absolute in general, and absolute values in particular, are beyond human reason, for which only a conditional, and in this sense relative, solution of the problem of justice ... is possible."8

The result of this doctrine is that ends cannot be quarreled with on rational grounds, but the aptness of a legal system as a means for attaining the end decided upon can be so discussed. The justice that reason can pronounce upon is the relative justice of the aptness of a means for an end previously decided upon." Therefor all just law is only relatively just. It is problematical whether there is any law that is unjust, for every law achieves some end.

Now we shall consider Kelsen's definitions of law. According to the same two aspects of the Pure Theory of Law, its normative and positivistic aspects, two definitions of law are given. In the positivistic vein and in conjunction with the definition of justice

8Ibid., 10.
as social happiness, there is the definition of law as

a specific social technique of a coercive order ....... the social technique which consists in bringing about the desired conduct of men through the threat of a measure of coercion which is to be applied in case of contrary conduct.9

In the normative order and in contrast to the irrational ideal of absolute justice, law is simply a system of norms.

In the first definition there are three elements: first, that law belongs to a certain order, which will be found to be normative and positive; secondly, that law is essentially coercive; and thirdly, that it is a means to an end.

Kelsen sets up the normativity of positive law by his definition of society. His concept of society in general is that is is "ordered living together, or more accurately put, society is the ordering of the living together of individuals."10 That is, the essence of society, that which makes it what it is, is the empirically observable fact of its being regulated conduct.

The function of every social order is to bring about a certain mutual behavior of individuals—to induce them to certain positive or negative behavior, to certain action or abstention from action. To the individual the order appears as a complex of rules that determine how the individual ought to behave in relation to other individuals. Such rules are called norms.11

9GT, 19.
11Ibid.
Given this concept of society, it is easy to see why law is essentially coercive for Kelsen. However, this essential coerciveness does not identify law with force. For Kelsen defines coercion as follows:

The element of "coercion" which is essential to law thus consists, not in the so-called "psychic compulsion," but in the fact that specific acts of coercion, as sanctions, are provided for in specific cases by the rules which form the legal order. The element of coercion is relevant only as part of the contents of the legal norm, only as an act stipulated by this norm, not as a process in the mind of the individual subject to the norm.12

A coercive order is consequently, "a social order that seeks to bring about the desired behavior of individuals by the enactment of such measures of coercion [i.e., deprivation of possessions such as life, health, freedom, property]. . . ."13 The enactment of these measures of coercion is the enforcement of the law, and should be called a specific social technique distinct from the law. Enforcement is a physical technique while law is a rational one; but both of them are means to the same end: ordered, regulated human behavior.

Thus we see that even the "social" aspect of law, which we might have thought would be connected with facts and Nature, is of the normative order. Both society and coercion are normative entities for Kelsen. Society is nothing else but the ordering of human conduct, which is done through norms; and coercion is nothing

12GT, 29-30.

13"The Law as a Specific Social Technique," 235.
but the provision in the law of a specific sanction for a specific contrary action. Yet this is also positivism for Kelsen, because as we have seen, "the science of law, in describing the law as a set of norms is also describing human behavior."14

The second definition of law, as a system of norms, is more important than the first even though it is shorter. In this definition, Kelsen is using both of its substantive words—that is, "system" and "norm"—in a refined technical meaning. This system of norms which is the law is closely similar to a system of symbolic logic, in which there is dependence within the system on fundamental postulates, and complete independence of the system as a whole from all other systems. This results in a high degree of inner consistency which, with respect to law, Kelsen calls "the meaningfulness of the law."

Such a position prompts Ebenstein to observe:

In the light of such assumptions as these, it is not surprising that the Pure Theory of Law has gone further and ... has sought to make the science of law, first, into a theory of legal forms and, finally, like the pure mathematics of the physical sciences, into an "exact" science, a "geometry of the totality of legal phenomena."15

This system of norms is brought into being by man's interpretation of certain human acts as norms. There was a time, Kelsen says, when primitive man interpreted all events as norms. For in-

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14Kelsen, "Science and Politics," 651. (See above, p. 12.)

15Ebenstein, 15. The phrases in quotation marks are taken from Kelsen's Hauptprobleme der Staatsrechtslehre, 93.
stance, he did not associate rain with atmospheric conditions, but considered it a reward or punishment of the gods, or perhaps considered it a god itself. It is the thesis of his book, Society and Nature, that man gradually changed his point of view from a completely normative one to one which thought of some things in terms of causality. Thus he created Nature.

Now in modern times he only interprets certain acts as norms. But Kelsen adds:

To interpret the meaning of a fact as a norm is possible only under the condition that we presuppose another norm conferring upon this fact the quality of a norm creating fact; but this other norm, in the last analysis, cannot be a positive norm.¹⁶

That is, it must be a presupposed norm, a hypothesis. This "fundamental juristic hypothesis" as Kelsen calls it, is the basic norm. This basic norm is like Kant's transcendental principles of cognition. Just as they are the conditions of all experience, it "is simply presupposed as the condition of positive legal norms."¹⁷

The basic norm has three functions with respect to positive law: to create law in the first place, to give law meaningfulness, and to make it a self-sufficient system.

Ebenstein says:

A presupposed basic norm sets up a legitimate rule-making authority, which is the condicio sine qua non of the law as a normative system, but not its cause. The processes con-

¹⁷G.T.*, 436.
tribute to content of the norm but not its validity. This goes back to the basic norm. 18

Kelsen also affirms this, and adds the second function:

Its [the basic norm's] function is therefore, in the first place, to establish a supreme law-making authority; it is above all a function of delegation. In this, however, it does not exhaust itself. ... It also contains the guarantee that whatever has thus been created can be understood as meaningful. It states that one should act in obedience to the commands of the supreme authority and of the authorities delegated by it, and that these commands must be interpreted as a meaningful whole. 19

The basic norm makes positive law independent and self-sufficient by the fact that it is purely a postulate, 20 and also by the fact that it alone confers validity on laws. Kelsen says:

A command is binding, not because the individual commanding has an actual superiority in power, but because he is "authorized" to issue commands of a binding nature. And he is "authorized" or "empowered" only if a normative order, which is presupposed to be binding, confers on him this capacity, the competence to issue binding commands. 21

This idea of the basic norm as the only validating agency in law is a review of Kelsen's doctrine of the distinction between the normative sciences and the natural sciences, especially between pure jurisprudence and the sociology and psychology of law. For

18 Ebenstein, 114-115.
19 GT*, 405-406.
20 Kant insisted on the proved necessity of the categories, but Kelsen, although he makes the basic norm similar to them, is not insistent on its proved necessity. He readily speaks of it as a postulate, as an "indispensable assumption." This is because he is a positivist, and therefore doubts the possibility of having absolutes of any kind.
21 GT, 31-32.
Kelsen, the external acts which these sciences treat of—which are called "legislative" acts—have no juristic meaning unless there is a norm already in the system of law specifying that such and such a process should have this legal meaning. The fact that some act or process in the realm of Nature is the occasion of a norm being created does not disturb the homogeneity or independence of the system of norms, because the essential juristic relationship of conferring validity is kept within the system itself.

We should also make note of the fact which Ebenstein mentions above, that the connection between norms is one by which the more basic norms are the condition of the derived norms, not their cause. This is true because casality is the fundamental way of thinking which constitutes Nature and distinguishes it from Society. Thus the higher norm, for example, "The judge ought to sentence murders in accord with the law," is the condition of the validity of the derived norm, "This murderer ought to spend twenty years at hard labor." The system of norms also invokes the principle of retribution in the case of the judge, by specifying a sanction in case of neglect or disobedience of the law.

The idea that the binding force of a law does not emanate from any commanding human being or other natural event is expressed according to Kelsen by the famous legal dictum, non sub homine sed sub lege.

This homogeneity and independence from Nature also have implications with respect to the definition of the validity and ef-
feciacy of law. For Kelsen, validity merely means "the specific existence of norms." That is, validity signifies that there is an ought-statement, a definite prescription about human action, existing in a system of ought-statements that is empirically recognized as existing. The very fact that a norm states, "A ought to do B" is its validity, if the system as a whole is recognized empirically as law.

This recognition, in turn, is the efficacy of law. As Kelsen says, efficacy means that "men actually behave as, according to the legal norms, they ought to behave, that the norms are actually applied and obeyed." The way one discovers the basic norm is also worthy of note, because it is a purely a posteriori method. The procedure is to examine an already existing system of positive law and formulate an ought-statement which will give it homogeneity and unity. This "ought" is then taken as the basic presupposition which also confers validity on the norms in question. The statement may for instance refer to the first constitution of a nation, saying that one ought to obey it. Or it may say that one ought to abide by the decision of a group of men constituting the military command of a successful revolutionary party.

Then, once the basic norm has been established, it along with the common principles of interpretation, such as lex posterior de-

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22 GT, 30.
23 GT, 39.
regat priori, will give the system of norms meaningfulness. The principles of interpretation may be used because they are merely applications of the law of contradiction to positive law. Such principles are for Kelsen presuppositions of legal cognition because they are the presuppositions of all cognition.

At this point a summary of Kelsen's doctrine on the nature of law is in order.

We saw at the start that law is a specific social technique for attaining social happiness. As such it is a coercive order which regulates the conduct of men in such a way that some kind of social happiness is achieved. We saw that this order is a normative order, which means a system of ought-statements whose unity, validity, and independence come from a juristic hypothesis, the basic norm.

However, there are clarifying aspects of positive law as a system of norms which we have not touched on. We have avoided them till now because they are closely connected with Kelsen's position on the relationship of positive law to natural law. His position on this important subject may be fairly stated in the form of a syllogism. He would say:

If they are two distinct systems, then either positive law is superfluous, or natural law is meaningless;
But they are two distinct systems, and positive law is not superfluous;
Therefore natural law is meaningless.

24 Kelsen's doctrine on natural law is embodied mainly in the monograph, "Natural Law Doctrine and Legal Positivism."
His proof for the major comes from the nature of a system, of which we have seen something already, and from the obvious fact that positive law is not superfluous. As in mathematics, it is the nature of a really distinct system to exclude all other systems from its area of relevance. Kelsen says:

A system of norms can only be valid if the validity of all other systems of norms with the same sphere of validity has been excluded. The unity of a system of norms signifies its uniqueness. This is simply a consequence of the principle of unity, a principle basic for all cognition, including the cognition of norms whose negative criterion is found in the impossibility of logical contradiction.25

He notes further that any attempt to establish a relationship between the two systems of norms in terms of simultaneously valid orders ultimately leads to their merging in terms of sub- and supraordination, that is, to the recognition of positive as natural law or of natural as positive law.26

According to this description of a system, the major is of course quite true. That is, if natural and positive law are truly distinct systems, then it is true that one or other of them must be lost either by merger or annihilation.

Kelsen proves his minor premise with four main arguments: (1) natural law is a static system, developed by deduction, while positive law is a dynamic system, developed by determination; (2) natural law is non-coercive in method, while positive law is essentially coercive; (3) natural law is general and abstract, while posi-

\[25\text{gt}^*, 410.\]
\[26\text{gt}^*, 411.\]
tive law is concrete and particular; (4) natural law is not susceptible of empirical scientific organization, while positive law is.

With regard to the first argument, he describes the static and dynamic systems this way: a static system is one in which norms follow from the basic norm without requiring a special act of norm-making, an act of the human will. They are all contained in the basic norm from the outset and are derivable from it by a mere intellectual operation.27

But a dynamic system has this characteristic:

Its basic norm merely empowers a specific human will to create norms, ... The authority which has received its power from the basic norm can, in turn, delegate its jurisdiction either for the whole or a part of its sphere, ... The unity of a dynamic system is the unity of a system of delegation.28

He also makes the factor of the human will an explicit identifying mark of positive law as opposed to natural law.29

This is where the "positivity" of a legal system comes in, as compared with the law of nature; it is made by human will—a ground of validity thoroughly alien to natural law because, as a "natural" order, it is not created by man and by its own nature cannot be created by a human act.30

He enunciates his second argument, the opposition between coercion and non-coercion, in the following manner:

Are they really two distinct systems of norms? It might appear doubtful ....... The methods, however, employed by the two in regulating human conduct are essentially different. One

27GT*, 400.

28Ibid.

29In spite of this statement, Kelsen is far from making human will the essence of law. Here it seems to be only an instrument for determination of the law.

30GT*, 392.
order proceeds by prescribing the socially desired conduct as content of an "ought", the other by providing a coercive act which ought to be applied to the person whose action constitutes the direct opposite of what is desired.31

He further indicates his position by the following statement, which might seem to be psychologically too optimistic:

Since the idea of natural law is one of a "natural" order, it follows that its rules, directly as they flow from nature, God, or reason, are as immediately evident as the rules of logic, and thus require no force for their realization. This is the second point by which natural law is distinguished from positive law. Positive law is essentially an order of coercion.

The "first point" obliquely referred to here is positive law's dependence on a human will.

For his third argument, Kelsen cites the generality of natural law principles such as "good is to be done and evil avoided," and concludes:

... the order of natural law, provided it exists, must necessarily be rendered positive in its application to the concrete conditions of social life, since the general abstract, norms of natural law can only become concrete, individual norms by means of human acts. It must be recognized that here we encounter the limitation of the natural law idea.33

This statement is in fact the one which best expresses the essence of Kelsen's position with regard to the relationship between natural and positive law.

His fourth argument is summed up in the following manner:

31GT*, 398-399.
32GT*, 392.
33GT*, 397-398.
However, none of the numerous natural law theories has so far succeeded in defining the content of this just order in a way even approaching the exactness and objectivity with which natural science can determine the content of the laws of nature, or legal science the content of a positive legal order. That which has so far been put forth as natural law, or, what amounts to the same thing, as justice, consists for the most part of empty formulas, like suum cuique, "to each his own," or meaningless tautologies like the categorical imperative.34

Having thus proved the major and minor of this syllogism to his satisfaction, the conclusion follows that natural law is meaningless, or non-existent as far as any legal science is concerned. In this sense does the normative homogeneity of law preserve itself free from ideology.

This is Kelsen's position on the relation between natural law and positive law. Although we have reserved a later chapter for a general critique of the Pure Theory of Law, it seems in place here to make a brief criticism of this particular point.

Concerning the major premise, it was said that its truth must be conceded on the condition that natural and positive law are systems in Kelsen's meaning of the term. But that is precisely the question, are they? It is a de facto question whose answer depends on the merits of the metaphysical-epistemological foundations concerned. Without discussing the issue of foundations here, it can at least be said that the foundation Kelsen relies on is far from self-evident.

Then let us look at the four arguments given in support of the minor. They consist in four sets of opposed characteristics which

34 GT. 9-10.
set the two systems apart.

The first is "dynamic vs. static", or in other words, development by determination of a human will vs. development by deduction. It may be true that Kelsen's objections against a purely static system of natural law are well founded. But it is not at all sure that all theories of natural law make it such a purely deductive system. According to Pufendorf it may well be so, but St. Thomas' view includes much more room for induction and the influence of human acts in the elaboration of natural law. To him the natural law is resident in concrete man, and not in an a priori deducible system of Platonic forms. In fine, it may be true that positive law must be distinct from a purely static (deductive) system of law, but it is doubtful whether natural law is always proposed as such a system.

The second opposition is that of coercion vs. non-coercion. The answer here might simply be a denial that natural law is without coercive sanction. Perhaps natural law is without coercion in Kelsen's sense, that is, "the fact that specific acts of coercion as sanctions are provided for in specific cases by the rules which form the legal order." But the limitation of coercion to such a definition seems gratuitous in the present context. It is still quite possible for coercion to have a wider and fuller meaning. Theistic natural law provides an adequate sanction, although it is

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35 GT, 29.
not expressed in explicit norms, and partly because of its very na-
ture as an unwritten law.

The third opposition, between generality and particularity, is in itself no argument at all, for within the system of positive law as described by Kelsen himself, the more general statutes of constitutions are made particular by judicial decisions and so forth. It is also a misrepresentation of the natural law to limit its prescriptions to such wide generalities as "good is to be done and evil avoided." Kelsen's whole line of argument here seems to be better applicable to the theories of Grotius and Pufendorf rather than to that of St. Thomas. But his rejection of natural law is without limitation to this or that form of its expression.

The fourth opposition is between scientific formulation and elusiveness with respect to science. The answer here seems to be that not even positive law is very susceptible of scientific formulation, unless one makes it as formal as Kelsen does. But in that case one runs into other difficulties, as we shall see in a later chapter. Moreover there is a question as to how much premium one should place on the extension of scientific formulation to all fields of rational endeavor.

By way of a summary of this critique: Ebenstein says of this monograph of Kelsen's:

... the way in which he breaks up natural law by a critical analysis, which from the standpoint of natural law is imma-
nental, and finally reduces it to positive law, is one of his most original performances in the field of legal philoso-
But it seems that the only thing Kelsen has done here is to reduce a certain concept of natural law which he possesses to positive law. It is not at all certain that what he considers as natural law is what natural law necessarily is.
CHAPTER IV

PERSON, STATE, AND INTERNATIONAL LAW

The consideration of Kelsen's doctrine on person, the state, and international law occasions the observation that there are three points at which we would suspect that a pure theory of law would have difficulty in maintaining the separateness of law from all natural reality. These points are: the psychological or otherwise real human act of creation of a law (legislation); secondly, the basic norm; and thirdly, the application of the law to real men.

We have already seen how Kelsen handles the first two points. He says that the whole juristic meaning of any legislative act comes from the norm which says that such an act ought to have such an effect. And he makes the basic norm a pure assumption, the juristic hypothesis which is the presupposition of his legal science.

Now in Kelsen's conception of the person, we will see how he applies the law to real men without appearing to disturb its purity or involve it in any contact with natural reality. His doctrine on the nature of person then becomes the basis for his position on the nature of the state, and the homogeneous legal structure is finished by his concept of international law.

When Kelsen defines "person", he does so as a legal theorist
and not as a psychologist. His primary intention is to define the generally accepted legal precision used by jurists and judges everywhere, which is called "the legal person".

We have a clue to what his position will be in the fact that he begins his treatise on the legal concept of person by avowing that in general there is no such thing as a substance underlying accidents. This is a consistently empiricist position held by Hume and others, which has no more importance in Kelsen's theory of law than that it prefaces and parallels his doctrine on the legal person.

For he says that neither is there any such thing as a person underlying legal rights and duties, that is, a person separate from the personification of them. The legal person is only the personified unity of the complex of legal norms which comprise rights and duties.

He makes a distinction between the natural reality which should be called "a human being" or a "man", and the point of unity in a system of norms which should be called a person, or more fully, a juristic person. He makes a two-fold distinction with respect to this juristic person. There is juristic person in the wide sense, or what is called the "physical" or "natural" person. Secondly, there is juristic person in the strict sense, which is

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1GT, 93.
2Ibid.
the legal corporation.

It would be a mistake to think that Kelsen identifies physical or natural person with "man" or "a human being". This would be an impossible mixing of the disparate realms of norm and reality (ought vs. is) for him. For "man is a concept of biology and physiology, in short, of the natural sciences. Person is a concept of jurisprudence, of the analysis of legal norms."\(^3\)

The concept of physical (natural) person means nothing but the personification of a complex of legal norms. Man, an individually determined man, is only the element, which constitutes the unity in the plurality of these norms.\(^4\)

Therefore, or in other words, what constitutes a person in general is the group of rights and duties which coalesce within the law around a certain point. This point of coalescence may be in one instance the behavior of an individual man, or in another instance the behavior of several individuals (that is, a corporation). In the latter case, these several individuals fall under a single point of imputation only because they are made into a single unity by a partial legal order. The corporation is, to define it properly, a normative order constituted by its statute (i.e., its by-

\(^3\)GT, 94. If taken in an exclusive sense, this statement would contradict what was said above about Kelsen's not making any incursions into psychology. Whether he really thinks that person is exclusively a term of jurisprudence is hard to say. He might well allow its proper use by psychiatrists, his main point being that he is not talking about what they are talking about.

\(^4\)GT, 95.
laws). It is not a real being. But Kelsen says further, "The substratum of the personification is thus in principle the same in both cases." That is, it is a complex of rights and duties.

But it would still seem that if the law imputes rights and duties to real men, it is connected directly and essentially with natural reality. Kelsen attempts to avoid this impasse by his definition of a delict and his formulation of the principle of imputability.

There are three elements in the area of this problem of the relationship between the biological entity called "man" and the system of pure norms that is "law". These elements are: man, his acts, and the norms. Obviously there is a connection between man and his acts; they are both in the natural order and he is their cause. The question is, is there a connection between man's acts and legal norms? If there is, the acts of man may perhaps be used as a middle term to connect man and norms.

Now note Professor Kelsen's definition of a delict. It is "the behavior of the individual against whom the sanction as a consequence is directed..." or, reduced to its substantive elements: behavior against which a sanction is directed.

This definition is perfectly ambiguous. It may be read as

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5CT, 98.
6CT, 99.
7CT, 55.
"behavior against which a sanction is directed (in fact)," which is a pure "is" statement, an empirical observation having nothing to do with law formally speaking. Or it may be read as "behavior against which a sanction is directed (by the law)," or in other words, "behavior against which a sanction ought to be directed," which is a purely normative statement, having nothing to do with natural reality. There are two ambiguities here. is can mean literally what it says, or can be a loose substitute for ought. Behavior can mean the natural reality in the world of causes, what a man actually does, or it can mean the abstraction of behavior which is found in the content of pure norms.

It is true that in the norm, a sanction is prescribed for the act. And in reality, the act intrinsically belongs to a person. But the middle term here used in going from pure norm to real man is the ambiguous interpretation of act. If there is nothing real in the normative order, and nothing normative in the realm of nature, then Kelsen's definition of delict is ambiguous. It is this very ambiguity which permits him to seem to make the connection between law and nature here, while still keeping law pure of nature.

The same situation exists with reference to the following definition of imputability. It is defined as "not the relation between an individual and an action of his, but the relation between the legal sanction and the action, and thus indirectly the acting individual himself." Here again there are two ambiguous terms:
act (as already described), and legal sanction. Does he mean the sanction prescribed in the law, or the actual event of executing sanction which occurs in the real natural world? He seems to want to mean both. But if he does, he compromises his principles.

There is another solution to this difficulty which Kelsen gives in another context. But before referring to it, let us note another statement of this ambiguity concerning delict and imputability. It is later than the previous ones, and shows better the role that it plays in Kelsen's theory. He says:

As far as imputation is concerned, when a morally meritorious act is performed or a religious sin or a legal crime is committed, the question is not: Who has performed or committed these acts? This is a question of fact. The ... question of imputation is: Who is responsible for these acts? And that means: Who ought to be rewarded? Who ought to do penance? Who ought to be punished? It is the reward, the penance, or the punishment which is to be imputed as a definite consequence to a definite condition, to its specific condition. And the condition is the act constituting the merit, the sin, or the crime. The imputation of the reward to the merit [etc.] ... implies the imputation to the person, that is, to the subject of the act constituting the merit, the sin, or the crime, this subject being an inseparable part of the act as an act of human behavior.9

Another solution to this problem of the application of pure norms to real human beings is the "tension theory" which Ebenstein ascribes to Kelsen when treating of the basic norm. Kelsen does not use it here, but it would be in the spirit of his position to do so. Ebenstein says:

The regulative principle for the choice of the basic norm,
therefore, is that a definite relation shall obtain between the content of the obligation (Ought) to be enforced by the basic norm and the content of the corresponding reality (Is). This relation cannot be exactly established, but we can determine an upper and a lower limit.¹⁰

In the context of delict and imputation, this "tension theory" could become a theory of simple coincidence of content. That is, in the case of a delict, one could usually determine accurately whether the content of the obligation corresponds to the content of the reality.

These observations concerning delict and imputability permit us to understand better Kelsen's definition of person and his doctrine on the relation of rights and duties to real men.

In the latter case the same ambiguity is present. It may be good for him to define a legal person as a complex of rights and duties. The concept of a juristic person is a convenient abstraction used by all jurists for the sake of clarity and efficiency in law. But obviously "I" am not merely a set of rights and duties, and therefore it seems that I am not a person. It is merely a circular argument to say as Kelsen does that "I have a legal right to do something, or to forbear from doing something, only because and insofar as another has the legal duty not to hinder me from doing or not doing it."¹¹ Moreover, to say that "the statement that a human being has rights and duties means that legal norms regulate

¹⁰Ebenstein, 116-117.

¹¹GT, 76.
the behavior of the human being in a specific way, "12 is burdened by the same difficulties of connecting the pure, regulating norm, and the natural, real behavior.13

However, Kelsen's definition of a person still remains "a complex of rights and duties," and "the legal right is, in short, the law,"14 for him. And he insists on making the connection between pure norm and real man by the ambiguous use of man's acts.

As a corollary to this treatment of Kelsen's theory of person, we shall consider his idea of freedom of the will. Ebenstein's analysis is accurate. He ascribes the following statement to the Pure Theory of Law:

A person is free only because, and in so far as, he is a center of attribution. The will which can be free, therefore, is not the psychological, causally determined will, but an Ought, a normative entity whose fundamental nature involves the idea of freedom, interpreted as the possibility of discrepancy, or tension, between norm and reality—for a norm which prescribed what already existed would be no norm at all.15

This position is fully consistent with the rest of his theory of person. It is due to his deterministic concept of causality, and to his limitation of the ways of thinking of man to two: causality and retribution.

12GT, 95.
13 It will be noted here that there is criticism mixed in with the exposition. It seemed necessary in order to make the exposition clear.
14GT, 81.
15Ebenstein, 67.
One more definition of person is in order, because it leads us into Kelsen's theory of State. Professor I. Husik remarks:

Just as the concept of number must be defined in such a way that it will include integers, fractions, surds and imaginary numbers, so person must be defined in such a way that it will embrace natural person, juristic person, the State, provided all these have something in common. Now on examination Kelsen finds that the only thing they have in common is that certain acts of individual human beings ... and certain events also which stand in a certain relation to human beings are in the law imputed to them. In other words a person is the end-point of legal imputation.16

Professor Kelsen's theory of the State, then, is but an extension of his theory of the person. He defines the state succinctly in the following manner:

The State is the community created by a national (as opposed to international) legal order. The state as a juristic person is a personification of this community or the national legal order constituting this community.17

This personification, however, is not something distinct from the mere unity of the national legal order. The State is a person and therefore is the law, specifically, the national legal order. Man's tendency towards animistic thinking sometimes makes him set up a dualism of law and state in which the state is something "behind" the law, but Kelsen disapproves of such an error.

In referring to the state as a "community created by a national legal order," he is using the term community as he technically defines it:


17 GT, 181.
The community ... consists in nothing but the normative order regulating the mutual behavior of the individuals. The term "community" designates only the fact that the mutual behavior of certain individuals is regulated by a normative order. The statement that individuals are members of a community is only a metaphorical expression, a figurative description of specific relations between the individuals, relations constituted by a normative order.\textsuperscript{16}

He describes society in the same vein (see also above, p. 26), as that whose function is

to bring about a certain reciprocal behavior of human beings: to make them refrain from certain acts which, for some reason, are deemed detrimental to society, and to make them perform others which, for some reason, are considered useful to society.\textsuperscript{19}

All of these definitions fit in perfectly with Professor Kelsen's definition of law as a coercive order, and his definition of person as a complex of legal norms which is the end-point of imputation.

The state is also a kind of corporation. But the difference between a corporation and the state is that corporations are included in the specific content of the national legal order. Both are juristic persons, but the state is superior to the corporation, because of its own intrinsic nature. That is, because the national legal order contains norms which regulate the activity of corporations and not vice versa.

Professor Kelsen also considers the possibility of the state being something in the real order. He considers and rejects five

\textsuperscript{16}GT, 182.

\textsuperscript{19}GT, 15.
types of real (as opposed to normative) unity which could make it so.20 First, perhaps the state means social interaction. But this cannot be the case because social interaction is relatively the same across national boundaries as within them. Secondly, perhaps it is a common will or interest. No, for this is only a political fiction. Thirdly, the state is not a natural organism, because this is an absurd extension of biology. Fourthly, the state may be constituted by the fact of domination (some command and some obey), but this really depends on the unity of the legal order. Lastly, the state may be political power, but even if it were, political power is nothing but the validity and efficacy of the legal order.

Kelsen also faces the problem of the connection between the purely normative entity called State, and real men. He states the problem thus:

It cannot be seriously denied that actions and forbearances can only be actions and forbearances of a human being. When one speaks of the actions and forbearances of a juristic person, it must be actions and forbearances of human beings which are involved.21

When the state acts, it is really men who act. This is possible, Kelsen says, because the legal order includes norms which create organs. "Whoever fulfills a function determined by the legal order is an organ,"22 and the state always acts through its organs.

20GT, 183-1881
21GT, 97.
22GT, 192.
But suppose persons as organs commit delicts? Is the state then guilty of a delict? Certainly not. The state can only commit a delict (be imputable for an action) with respect to international law, not with respect to itself. When persons as organs commit delicts, they are then not the state, but run counter to the state, which is the law.

Kelsen visualizes this theory as preventing public offices from becoming political footballs, because law-makers are subject to the independent law.23

He defines the territory of the state as the spatial sphere of validity of a normative (positive) order, and even is so practical-minded as to express the opinion that this sphere is a three-dimensional section of space in the shape of an inverted cone rising from declared boundaries.24 With respect to the temporal existence of a state, he holds that the birth and death of states are dependent on the principle of efficacy. A state exists as long as the national legal order which constitutes it is efficacious.25 A third sphere of validity is the personal sphere, that which refers to the "people" of a state. He also introduces the concept of the material sphere of validity of the state, that is, what actions of man or social subject-matter the law actually covers. He says that

23 GT, 197.
24 GT, 217.
25 GT, 218.
this sphere is not limited by nature, either man’s or the state’s, but can be limited legally.26

But since there are forces outside particular national legal orders which influence their territory, temporal existence, and other spheres of validity, these concepts serve as an introduction to Professor Kelsen's treatment of international law.

He declares at the very beginning of his treatise on the State that the problem connected with it is two-fold. There is the question of its nature, and the problem of the limitation of its existence, that is, the problem of the relation between states. This is the problem of international law. He says:

Positive law appears empirically in the form of national legal orders connected with each other by an international legal order. There is no absolute law; there are only various systems of legal norms—English, French, American, Mexican law, and so on—whose spheres of validity are limited in characteristic ways; and in addition to these, a complex of norms that we speak of as international law.27

It is the task of the jurist, he says, to indicate the specific nature of those systems and to indicate just how they are delimited and how interrelated.

His position on these questions results in the following doctrine on international law.

International law, he says, is a system of valid legal norms created by custom (which produces general international law) and

26 GT, 242.
27 GT, 181.
by treaties (which produce particular international law). It has the character of primitive law, in that it is very decentralized, and empowers its subjects to act as organs of the law. This means that its subjects (states) must exercise a high degree of self-help in righting wrongs done to them. Its essential function is to delimit the territorial, temporal, personal, and material spheres of national legal orders. It does this through recognizing treaties (in this way delimiting territorial and personal spheres), and the principle of effectiveness (which delimits the temporal sphere). This principle says that a national legal order is valid, and therefore is to be recognized as such, when and as long as it is effective. By this means international law regulates the birth and death of states. This essential function is based on two basic norms (juristic hypotheses) which may be enunciated as: pacta sunt servanda --the basic norm of particular international law--and "the states ought to behave as they have customarily behaved," 28 which is the basic norm of general international law.

International law, moreover, forms one single system of norms with the network of national legal orders through a relationship of delegation. This means that the norms of international law are incomplete norms which empower the subjects of international law to perform certain actions as organs of the law. The states, as juristic persons, are the subjects of international law much the same way as corporations as juristic persons are the subjects of

28 GT, 369.
national law. For this reason, international law applies to human beings indirectly (for the most part) through states.

In this summary of Kelsen's doctrine on international law, three points are worthy of note. These are: the validity of international law, its unity, and its primacy over national law.

To Kelsen the validity of international law is quite debatable. According to his definition of law as a specific social technique of a coercive order, the question is formulated this way: "Is international law a hypothetic judgment prescribing a certain sanction for a certain delict?" He makes the test case the question of war. If war is neither delict nor sanction, as some say, then international law does not have the force of true law. But if war is legally forbidden in principle—the bellum justum theory—and permitted only as a reaction against an illegal act, then international law is real law.

This is a question purely of the legality of war, not its morality. Kelsen favors the bellum justum theory, on the grounds that historically men and governments have always shown that they considered war illegal, permitted only against a wrong suffered. But on the other hand there are several arguments against this theory, the weightiest of which is that "according to international law war cannot be interpreted either as a sanction or a delict. Who is to decide the disputed issue as to whether one State has actually violated a right of another State?"
The weight of this argument leads Kelsen to hold that scientifically either position can be held, but that if one holds that war is neither delict nor sanction, he must be consistent and deny the force of law to international law. He points out that the opponents of the bellum justum theory still want to consider international law to be a true law.

It is this argument also which leads to Kelsen's comparison of international law with primitive law. For to say that there is such a thing as a just war, without ever being able to find one in the concrete order, would be an intolerable position for Kelsen, unless one could attribute this situation to a deficiency of the law which future evolution might overcome. He says that his preference for the bellum justum theory, which he calls a political preference, is only justified by the possibility of this evolution. But since we do not know whether the possibility will ever actually be realized, the other theory is scientifically admissible too.

As for the unity of national and international law, Kelsen says that it "is an epistemological postulate. A jurist who accepts both as sets of valid norms must try to comprehend them as parts of one harmonious system." 30 This is in perfect accord with Kelsen's views on the nature of a system, which we have transcribed above (pp. 33-34).

But within one system there may be a question of the primacy

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30 OT, 373.
of one part or another. Kelsen definitely prefers the primacy of international law. One commentator praises him for "having relegated a piece of make-believe—namely, the sovereign will of the personified state—to its proper place among other relics," and says further that "Kelsen takes the state off the pinnacle of the legal pyramid—a position to which it had been elevated by the doctrine of sovereignty—and consigns it to an intermediate place in the legal hierarchy." But even with this preference, and even though Kelsen says that the hypothesis of the supremacy of national law is a parallel with a subjectivist philosophy whose only consequence can be solipsism, he also insists that if there is a primacy of international law, it is only in the epistemological (logical) order. It is merely a way of looking at law, which as a system of norms, must be looked at as one harmonious whole. This epistemological primacy says nothing about positive primacy. This point of view is no basis at all for declaring a certain law in a national legal order invalid. A positive law is invalid if and only if there is another positive law which explicitly provides for its abrogation.

This is also why the hypothesis of the supremacy of national law is scientifically on a par with that of the supremacy of inter-

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32 Ibid.

33 ibid., 386.
national law. Neither of them has the power to affect the existing order of positive law. For the foundation of this whole legal theory is the analysis of positive law as it presents itself to us empirically. A point of view which is fabricated to comprehend law as a unity cannot affect the brute entitativesness of positive law.

But if one must look at law as a unity, Kelsen prefers to do so by considering international law as supreme. He holds too, it must be admitted, that international law regulates national law even in the positive order. However, he does not insist on this point.

In summary: Kelsen considers the whole existing system of positive law as a single harmonious, homogeneous whole, a dynamic system of pure norms. Essential to this view is the definition of the juristic person in general as a complex of legal norms, and the definition of the state as the personification of a national legal order. Thus, the person is a normative entity within the state, and the state is a normative entity within international law. There is a problem, however, about the relation of this whole system of norms to concrete man, through the concept of person.
CHAPTER V

SOME PRACTICAL APPLICATIONS

Since Professor Kelsen has done much writing on practical legal problems, it would be good to consider how he handles some of them. We shall look for the relationship between his handling of these problems and his basic legal theory.

He is very interested in international law, and so has had much to say about the United Nations. Taking one instance only, he criticizes the preamble to the Charter of the U. N. He points out that it is illogical in places and repetitious in general. This sloppiness might have been criticized by a jurist holding any legal theory.

But he also criticizes the preamble for appealing both to justice and international law. He then points out that if they are identical, then one of the appeals is superfluous, and adds the following characteristic statement:

If, which is more probable, they are not identical, and consequently may be in opposition to each other, the question arises whether the one or the other shall be maintained in case of a conflict. Since the Charter gives no answer to this question and no definition of the concept of justice, the organ of the United Nations which has to apply the provi-

sion of the Charter has the choice between justice, or what
this organ considers to be justice in the case at hand, and
positive international law. In essence this means that the
Charter does not strengthen but rather weakens respect for the
obligations of international law.2

Here there is a definite echo of Professor Kelsen's formalism,
his desire to have every situation taken care of by a positive
norm. It also reflects his opinion that justice and the corre-
responding system of natural law are ideologies which readily come in-
to conflict with positive law.

Secondly, Kelsen discusses the possibility of a peace treaty
with Germany after World War Two.3 Here we find a strange rever-
sal of doctrine, what appears to the present writer as an inconsis-
tency of theory with application of theory.

For Kelsen says that since the army and actual governing body
of Germany have been destroyed, German as a state has ceased to
exist. He says that, therefore, a peace treaty is impossible be-
cause one of the parties who is supposed to take part in it is non-
existent. What should be done is to form a new state by a four-
power agreement; but in this case, no peace treaty would be neces-
sary, because the old state has ceased to exist, and there is no
continuity with the new one.

What is puzzling here is Kelsen's citing of the destruction

2Ibid., 156-157.

3Hans Kelsen, "Is a Peace Treaty with Germany Legally Possible
and Politically Desirable?" The American Political Science Review,
XLI (December, 1947), 1188-1193.
of an army and a governing body—elements of natural reality—as the factors which end the existence of a state. For he says that the state is of the normative order. It would also seem that, if the new Germany uses the same body of law as the old, there would not only be a continuity between the two states, but that they would be the same state.

The third practical application is Kelsen's opinion about preambles for constitutions in general. He says that a preamble has an ideological rather than a juristic character. If it were dropped, the real import of the constitution would ordinarily not be changed in the least. The preamble serves to give the constitution a greater dignity and thus a heightened efficacy.4

This viewpoint is only the logical application of a theory for Kelsen.

Along with his opinion on preambles, there is his view on bills of rights. Of the contents of such a "bill" he says, "Such a right is thus no more 'natural' than any other right countenanced by the positive legal order."5 That is, a bill of rights is a set of rights conferred on a people by the arbitrary and ideologically founded decision of the makers of the constitution.

Fourthly, there is Kelsen's opinion of the relation between power and law. We have cited above (pp. 19-20) the political indifference of the Pure Theory of Law, by which it recognizes any

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4 GT, 261.
5 GT, 267.
existing legal order and seeks a basic norm for it. Kelsen's position on the application of this indifference is to say, "Thus, the basic norm, in a certain sense, means the transformation of power into law." 6

These observations should be sufficient to give the reader a general indication of the pattern which the application of the Pure Theory of Law tends to follow.
CHAPTER VI
TOWARDS AN EVALUATION

It is the purpose of this final chapter to set forth the main lines of a reasonable, honest, and thorough criticism of Hans Kelsen's Pure Theory of Law. These qualities would seem to be presupposed in an academic or professional philosophical endeavor, but they are, in fact, not always found. In particular, they are not always found with reference to Professor Kelsen's theory.

Some criticisms, though fundamentally true, seem to consist in the turn of a phrase, for example:

... and he answers that by safeguarding the consistency of the legal system he has thereby safeguarded its meaning. But since for Kelsen meaning is consistency, he has simply involved himself in an empty tautology. He has merely preserved order for the sake of order.¹

This criticism seems to be too quick to be of much value in discovering the basic problems in a fully elaborated theory of law.

Other critiques, though more extended, are concerned more with details of Kelsen's theory than with the larger philosophical

issues, and so are not well adapted to the purposes of this paper. 2

But there are also critiques which do get at the heart of the matter and express their points clearly and objectively. It is upon these that we will base most of the contents of this chapter.

These critiques may be gathered under five heads. First, the mention of the valuable points in Kelsen's Pure Theory and praise of his contribution to the science of law. Secondly, there is the problem of the method of the Pure Theory. Thirdly, the problem of grounding such a formal theory and the validity of the basic norm. Fourthly, the question of the connection of law with real man. Fifthly, the significance of the consequence of the Pure Theory, which is a power philosophy.

In praise of Kelsen, the consensus is that his theory "throws considerable light upon the real nature of jurisprudence." 3 In one sense it does this by showing that "in grounding his whole construction upon a hypothetical premise, the jurist may well claim that he is doing nothing but what is done in all other empirical sciences." 4 In another respect his contribution is that his theory has shown the lawyer that it is only by reducing the law to its simplest elements that it becomes possible to proceed with the work of applying, developing, and, if the word may be

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4 Ibid.
used, making the law, with full awareness at every step of the non-legal factors which are influencing him.5

And he sheds light in a third respect, the present writer might add, because he focuses on law as a means to an end, an observation which has great clarifying power as long as it is connected with a true method of discovering ends. Fourthly, it has been observed that his construction of positive law based on a basic norm (Grundnorm) has an amazing formal affinity to some tenets of natural-law theory.6 A fifth contribution which Kelsen has made is the clarity of his position in divorcing law from various consent- and will-theories, and those which make the state an organism involving the total human being. He makes of positive law a net-work of relations which govern only some human acts. Society is composed of these relations, but man is something which extends beyond them.

Such achievements of clarity are largely due to the high degree of formality of Kelsen's theory. It is to be expected that a theory which tends to make jurisprudence a branch of logic would achieve some of the precision and clarity of logic. But this purification and formalization of legal theory has adverse consequences when it is carried too far, and it seems that Kelsen has so


over extended himself.

The first difficulty with the formalism of Kelsen's theory concerns the method by which the law is created, the immanent law of cognition by which man interprets some elements in the world as norms. For if this normative way of thinking is immanent to cognition as such, it should be applicable to everything in the world that man knows. Kant saw this clearly, and that is why he held that categories such as substance, causality and relation are laws of cognition for all experience. Everything that is unified into an object is unified by the categories.

But norms on the contrary are only found as the meaning of a limited group of facts. A knowable fact such as the attraction of a weight by the mass of the earth simply is not susceptible of interpretation as a norm, that is, as a "free" relation of delict and sanction according to the principle of retribution. If primitive man did interpret it that way, that is no sign that he did it by an immanent law of cognition. He may simply have made a mistake. The fact that he could stop thinking of it as a norm proves that the way of thinking was not fundamental to him.

Along this line, Kelsen has the strange position of holding that causality, the other way of thinking immanent to cognition, "is not a form of thought with which human consciousness is endowed by natural necessity." For, he says that there were peri-

7Hans Kelsen, Society and Nature (Chicago, 1943), viii.
ods in history when man did not think causally. And he means not at all. He seems to find no difficulty in having the fundamental nature of man's intellectual activity changing from age to age. His position in these basic questions of epistemology is far from satisfying.

The second difficulty concerns the grounding of the basic norm. After Professor d'Entreves praises Kelsen for grounding jurisprudence on a hypothetical premise, he utters the caution that scientific constructions are always based on working hypotheses. That is, a scientific hypothesis, though unverified, tends with all its nature to be verified in the world of fact. If it is not, it dies and is discarded by the scientist. As d'Entreves says:

In other words there is, and must be, a point at which the basic norm—the hypothesis—is converted into a fact—a thesis—unless its validity be derived from some other or further hypothesis, a norm which will no longer be positive but can only be a proposition of "natural law" a pronouncement on justice.

This second objection against the Pure Theory of Law contains three issues: the first, which we have just introduced, concerns the validity of the basic norm; the second concerns the need for absolute values in respect to law; the third flows from the second, and concerns the points of view connected with relativism and ethical absolutism.

Concerning the validity of the basic norm, Kelsen agrees that

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8 d'Entreves, 107.
9 Ibid.
the ultimate test of its validity is beyond law itself, as he sees it.\textsuperscript{10} D'Entreves interposes that this is nothing but a natural law proposition,\textsuperscript{11} and such seems to be the case.

But Kelsen is perfectly content to leave the ultimate validity of the basic norm an open question. This attitude considerably disturbs such critics as Professor Hall and Martin J. Hillenbrand. Their comments are less thoroughly reasoned than Professor d'Entreves', but perhaps are just as valid.

Mr. Hillenbrand's complaint that "he seems to lead us up to the door and then reluctantly tell us he has forgotten the key,"\textsuperscript{12} is a journalistic expression of a solid objection. For Kelsen either says that there is no answer to the question of ultimate validity or else that the answer is in man's emotional make-up. If he gives the former answer, he falls under the suspicion that anyone falls under who refuses to answer intelligible questions. If he insists on the emotionality of any solution, he is expressing a definite theory of ethics which, in turn, needs to be justified.

But Kelsen sticks firmly to a relativism that excludes all absolute values from the realm of reason and law. Perhaps the indignant outcry raised by Hall, Hillenbrand, and Rommen is the best answer to this particular facet of Kelsen's theory. Their assertion

\textsuperscript{10}GT, 116.
\textsuperscript{11}d'Entreves, 108.
\textsuperscript{12}Martin J. Hillenbrand, \textit{Power and Morals} (New York, 1949), 51.
is simply that the Pure Theory of Law as a whole "has merely underlined the impossibility of establishing a truly creative jurisprudence in a vacuum." Kelsen would say that this assertion is justified only to the extent that it is a true expression of the disappointment these critics feel at not having their emotional predispositions satisfied. To him this is just a question of different points of view, different Weltanschauungs. Such things are purely subjective matters of emotion.

Therefore, one must not merely find an objective justification for such an outcry against relativism, but an objective justification for the point of view which causes it.

But the point of view of Rommen, Hillenbrand, and Hall (though expressed in varying degrees of excellence) is merely that there is an objective justification for some definite point of view. This implies that there is a set of absolute values, that law is rooted in reality. Thus, we find ourselves seeking an objective justification of objectivity.

The issue can be stated in many ways. Professor Rommen chooses an ad hominem argument, a variation of the appeal to "the experience of intelligent men everywhere," He says:

We must give up the idea that the world is chaos to be ordered by man following subjective arbitrary standards or that it is an irrational, unintelligible order mechanically produced by the struggle for existence or the survival of the fittest. We must restore the sequence—objective being, intellect, moral law, will. Otherwise we cannot come to a genuine natural law.

13 Ibid., 52.
as the basis for political philosophy that is more than a collection of trite indifferent facts that are by themselves only the raw material for science, but not a real science, even if classified according to some arbitrary standards. ¹⁴

This is a good statement of the case in general, and will satisfy many men. But there is a better way. Edgar Bodenheimer, quoting his colleague Lon Fuller, cites this take-it-or-leave-it appeal to evidence which strikes the present writer as being very much to the point. Bodenheimer says:

He convincingly links natural law with the problem of "purpose" in law and shows that against the background of a teleological jurisprudence the fundamental Kantian distinction between the "is" and the "ought" loses much of its conceptual sharpness and doctrinal absoluteness. A purpose, Fuller points out, is "at once a fact and a standard for judging facts." ¹⁵

But if this is true, then we have found a norm that is also a natural fact, and have the grounds for building a coherent and rational theory of law based on objective evidence and imbedded in actual reality. If facts are also norms, then there is no longer any need for presupposing a basic norm as a juristic hypothesis. Rather, there is a need for discovering the basic norm as it actually exists in a concrete order. If any one fact can be a norm, then the existence of a factual basic norm is implied.

The third difficulty found with the Pure Theory of Law concerns its connection with real man. We have already noted part of

¹⁴Rommen, The State in Catholic Thought, 181.

that difficulty above while treating of Kelsen's doctrine of person.

But Professor Kurt Wilk also has an interesting objection.16 He observes that since Kelsen isolates law from the legally constituted society, he cannot rest the unity of the legal system on any relevance it might have for one and the same social group. Thus, the unity can only come from the abstract relations of its norms to one another, based on their common logical dependence on the same fundamental norm. Then he asks on what basis we distinguish the law of one nation from that of another, since both have the same general logical structure and the same ultimate basic norm. He says that "... there are no logical limits to such a system or any cogent criterion to distinguish separate bodies of law on a purely logical basis..."17 He also points out that there are, in fact, many illogicalities and inconsistencies in law. Judges may interpret irrationally, but their mistakes often stay on the books, and what is more important, their decisions are effective. And, lastly, he says that Kelsen ignores the real historical development of law. It was not always so coherent as it is now. Coherence is only a feature of a particular stage of law. But law was always law even before it reached that stage.


17Ibid., 174.
This objection, while fixing on a true difficulty with Kelsen's theory—its abstractness—does not seem to go deep enough. For even though Kelsen does seem to leave himself open to this type of objection when he is emphasizing the purity of law and comparing a system of norms to mathematical systems, still his overall theory is a positivism as well as a formalism. Moreover, his doctrine of the law as a means to an end permits him to discover the unity and distinctness of legal systems by reference to their ends, which are outside the law. Contradictions he would handle by saying that there can be deficiencies in a legal order, but that does not prove that law does not need consistency. As for the development of law, he explicitly admits it. Increase in coherence would thus be an increase in the excellence or perfection of the law.

Professor Wilk's criticism is internal with respect to Kelsen's system. There is also an external criticism concerning this relation of law to man, expressed by Professor Rommen. He says that

a system of norms presupposes a real authority issuing the norms, and persons who do in reality acknowledge and obey them; only by this real obedience, freely given or forcibly imposed, does the community exist. Thus "norm" presupposes in abstracto authority issuing orders and expecting conformity from free rational beings; "norm" presupposes someone addressed, and acceptance or consent and effective obedience to those orders by the individual persons. We may therefore say that community is not beside or above the individual persons but in them all together.18

Although this is a generally true statement, it also somewhat

18Rommen, The State in Catholic Thought, 34.
misses the mark as a direct rebuttal of Kelsen's dichotomy. For, all those presuppositions could be true and the norm could still be totally isolated from reality. From this point of view, the criticism seems to be, as was stated incoherently above (pp. 43-47), that Kelsen recognizes the need for a connection between the law and human beings in its application to them. But his principles make the connection logically impossible, and leave him only with a pseudo-connection based on the fundamental error of a four-term syllogism. The fact that he recognizes the need for at least this connection puts him in the uncomfortable position of being an opponent of his own postulate of purity.

There is one more argument against Kelsen's disavowal of any scientific need for grounding the basic norm. It is expressed with a certain amount of trenchancy and bitterness by Carl J. Friedrich, but the argument is still mature and well-considered in itself. Friedrich says:

Apart from the vicious circles and tautologies which are contained in these propositions ... it is important to understand clearly that this readiness, indifferent to all values, to designate every power to command as an "order of norms" (Sollensordnung), that is to say, as something valuable, may be meaningful for a time which is peaceful and unified in its value judgments, but it is senseless in a time which is torn by conflicts over values. Such a doctrine offers stones instead of bread.19

And later on he concludes by saying that legal positivism of all kinds represents a turning away from the philosophy of law en-

19Carl J. Friedrich, The Philosophy of Law in Historical Perspective (Chicago, 1958), 175.
tirely. He ends with this remark

I may be permitted therefore to put at the end of this chapter a sentence of Kelsen in which he describes what may be expected of him who has freed himself of all metaphysical thought. He finds behind the positive law not the absolute truth of a metaphysics nor the absolute justice of a law of nature. "He who lifts the veil and does not close his eyes faces the Gorgon head of power." This is exactly what we have experienced.

This is not a mere quarrel with conclusions apart from the validity of premises. Rather it is a scientist's complaint against a theory that does not solve the scientific problem. Kelsen's theory of law ultimately becomes a theory of lawlessness. In some cases it does not work, for instance in times which are torn by a conflict over values. These times are notably frequent in human history. Such a failure to provide law for situations which require law is comparable to the failure of a physical law, for instance, the law of gravity, to work under certain conditions. Suppose the law of gravity worked for all free-falling bodies except iron ones.

If power is the ultimate determinant of the validity of law, then law is no determinant. The world is then a field of banditry. This is an ironic conclusion to draw from a theory of law. It is like expressing a theory of the law of gravity in an equation composed entirely of unknowns. Scientists would ridicule such a law. And so Friedrich is bitter in his attitude towards the Pure Theory of Law.

20Ibid., 177.
Whether it is necessary to be so trenchant in our criticism of Kelsen's theory as a whole is at least an open question, for he has made real contributions to jurisprudence. But Friedrich seems to be justified on this point.

In summary: the main lines of a reasonable, honest, and thorough evaluation of Hans Kelsen's Pure Theory of Law would seem to include the following five points:

First, an appreciation of the contribution Kelsen has made to jurisprudence by clarifying the area of legal theory, 1) by trying to isolate jurisprudence on the basis of a hypothetical premise, thus giving it the independence of the empirical sciences; 2) by making the lawyer aware of the non-legal factors which are influencing him, especially the sociological ones; 3) by pointing out the position of law as a rational means to an end; and 4) by showing the limitation of positive law, and therefore society and the state, to a material sphere of validity which includes only some of man's actions and not the total human being.

Secondly, we must note the insufficiency of Kelsen's epistemological position which considers normativity as the product of a way of thinking immanent to cognition. This objection is made both on the grounds of the inexplicability of the restriction of norms to the interpretation of only certain facts, and on the grounds that Kelsen holds that such immanent laws are not unchangeable.

Thirdly, many have found difficulty with the lack of grounding for the validity of the basic norm. This problem also includes
Kelsen's rejection of all absolute values, and the possibility of having an objective and rational point of view which will lead to such values.

Fourthly, there is the problem of the connection of law with real man.

Fifthly, we must make those observations which are necessary concerning a theory of law which is admittedly reduced to a philosophy of power.
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Mr. Michael H. Ducey, S. J.
West Baden College
West Baden Springs, Indiana

Dear Father Ducey:

In reply to your letter of March 6th I wish to inform you that Ebenstein's work gives - on the whole - a fair picture of the pure theory of law such as it was at the time Ebenstein wrote his book (1938). But in the meantime the theory has been developed. I call your attention to my book What Is Justice?, University of California Press, 1957, and I am sending you under separate cover reprints of some articles which may be of interest to you.

If you have doubts with respect to one or other point of my theory I should be glad to answer your questions.

Very sincerely yours,

(signed) Hans Kelsen
Professor of Political Science

HK:dd
The thesis submitted by Michael H. Ducey, S.J.,

has been read and approved by three members of the Department of Philosophy.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Arts.

June 16, 1959

Date

Signature of Adviser

(pur De. Dnalgan 37.)