The Catholic Lawyer

Volume 26
Number 2 *Volume 26, Spring 1981, Number 2*

Article 4

September 2017

Kelsen's Pure Theory of Law

Henry Cohen

KELSEN'S PURE THEORY OF LAW

HENRY COHEN*

Hans Kelsen (1881-1973) was a leading German-American legal positivist. His major works on legal positivism were the *General Theory of Law and State* and the *Pure Theory of Law*.[1] This article will summarize Kelsen's pure theory of law, comment on his view of customary court-made law, and briefly critique his concept of the basic norm.

THE PURE THEORY OF LAW

Positivism

Kelsen was a legal positivist. The "positivity" of law, in his words,

> lies in the fact that it is created and annulled by acts of human beings, thus being independent of morality and similar norm systems. This constitutes the difference between positive law and natural law, which, like morality, is deduced from a presumably self-evident basic norm which is considered to be the expression of the "will of nature" or of "pure reason."[2]

Kelsen labelled his theory of positive law "the pure theory of law." He explained the nature of its purity:

> [I]t seeks to preclude from the cognition of positive law all elements foreign thereto. The limits of this subject and its cognition must be clearly fixed in two directions: the specific science of law, the discipline usually called jurisprudence, must be distinguished from the philosophy of justice, on the one

* Legislative Attorney for the American Law Division of the Congressional Research Service of the Library of Congress. B.A., Queens College, 1970; J.D., St. John's University School of Law, 1975. The views expressed herein do not necessarily represent those of the Congressional Research Service or the Library of Congress.

[1] The first edition of PURE THEORY OF LAW [hereinafter cited as PURE THEORY] was published in 1934, and the second in 1960 (trans. 1967). GENERAL THEORY OF LAW AND STATE [hereinafter cited as GENERAL THEORY], published in 1945, was intended as a reformulation of the first edition of PURE THEORY, as well as other works. GENERAL THEORY at xiii. The second edition of PURE THEORY was a revision and enlargement of the first. Kelsen, *Professor Stone and the Pure Theory of Law*, 17 STAN. L. REV. 1128, 1130 (1965).

[2] GENERAL THEORY, *supra* note 1, at 114.

hand, and from sociology, or cognition of social reality, on the other.[3]

The pure theory of law should be distinguished from the philosophy of justice. While the pure theory of law is a science,[4] justice is an "irrational ideal"[5] and "a judgment of value, determined by emotional factors and therefore subjective in character."[6]

The pure theory of law must also be distinguished from sociological jurisprudence. The pure theory of law studies norms—"propositions that state how men should behave"[7]—whereas sociological jurisprudence studies what "is"—how people actually behave. Thus, Kelsen agreed with neither the natural law theorists, who viewed law and morality as sharing the same basis,[8] nor the legal realists, who believed that law consists solely of "the actual decisions of courts that litigants must live with."[9]

Law as a Coercive Order

Kelsen viewed law as a coercive order of human behavior. Laws "command a certain human behavior by attaching a coercive act to the opposite behavior."[10] He disagreed, however, with the belief of John Austin, who posited laws to be "a species of commands,"[11] since a command "is essentially a willing and its expression," and because it is doubtful whether some laws embody the true will of anyone.[12] Many legislators enact laws without understanding them, let alone willing them. Kelsen preferred to describe laws as norms or rules "stating that an individual ought to behave in a certain way, but not asserting that such behavior is the actual will of anyone."[13]

Kelsen also disagreed with Austin's position that laws are enforced by a specific authority.[14] Understanding this to mean that the threat of

---

[3] Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 44 (1941), *reprinted in* H. KELSEN, WHAT IS JUSTICE? (1957).

[4] The pure theory of law is a normative science, rather than a natural science, in that it studies the significance of facts, not simply facts. *See* Snyder, *Hans Kelsen's Pure Theory of Law*, 12 HOW. L.J. 110, 115-16 (1966).

[5] Kelsen, *supra* note 3, at 48.

[6] *Id.* at 45.

[7] *Id.* at 52.

[8] Kelsen observed that the doctrine of natural law "either justifies positive law by proclaiming its agreement with the natural, reasonable, or divine order, an agreement asserted but not proved, or it puts in question the validity of positive law by claiming that it is in contradiction of one of the presupposed absolutes." *Id.* at 48.

[9] Taylor, *Law and Morality*, 43 N.Y.U.L. REV. 611, 634 (1968).

[10] PURE THEORY, *supra* note 1, at 33.

[11] J. AUSTIN, LECTURES ON JURISPRUDENCE 88 (5th ed. 1885).

[12] Kelsen, *supra* note 3, at 55.

[13] *Id.* at 56.

[14] *See* J. AUSTIN, *supra* note 11, at 89.

sanctions commands obedience, Kelsen noted that fear of sanctions is often not the primary motive for obedience to law.[15] In any event, Kelsen considered the reason why law is obeyed to be "a problem of sociological, not analytical or normative jurisprudence. The latter can only affirm that the law sets up coercive measures as sanctions that are to be directed under definite conditions against definite individuals."[16]

Kelsen thus eliminated what he perceived as the often fictional psychological content from the definition of law. Law consists not of the will of one person or group enforced upon others through fear of sanctions, but merely norms which provide that persons ought to act in specified ways. If they do not, others should employ sanctions against them. Furthermore, Kelsen observed, the norms providing that persons ought to act in specified ways are unnecessary.[17] For example, the norm "you shall not murder" is superfluous if there is another norm providing "he who murders ought to be punished." Moreover, without the norm "he who murders ought to be punished," the norm "you shall not murder" would not be law.

The Basis of Law

How is a coercive order which is a "law" distinguished from an illegal threat? To Kelsen, the difference was that "[t]he meaning of a threat is that an evil *will be* inflicted under certain conditions; the meaning of a legal order is that certain evils *ought to be* inflicted under certain conditions . . . ."[18] The sanction in the case of the threat is invalid; in the case of the law, it is valid—but why? Kelsen explained that a legal norm is valid if it has been created in accordance with another, higher norm:

> If one asks the reason for the validity of a judicial decision, the answer runs: the decision containing the individual norm, by which, for example, *A* is obligated to pay *B* $1000, is valid because the decision came into being by the application of general norms of statutory or customary law that empower the court to decide a concrete case in a certain manner. The general norms so applied are valid because they were created in accordance with the

---

[15] Kelsen, *supra* note 3, at 57.

[16] *Id.* at 57-58.

[17] *See* Kelsen, *supra* note 3, at 57-59. H.L.A. Hart has pointed out some shortcomings of viewing laws as merely directions to officials to employ sanctions under specified conditions. As an example Hart states:

> A punishment for crime, such as a fine, is not the same as a tax on a course of conduct, though both involve directions to officials to inflict the same money loss. What differentiates these ideas is that the first involves, as the second does not, an offense of breach of duty in the form of a violation of a rule set up to guide the conduct of ordinary citizens.

H.L.A. HART, THE CONCEPT OF LAW 39 (1961).

[18] PURE THEORY, *supra* note 1, at 44.

> constitution. What is the reason for the validity of the constitution? The norm from which the constitution derives its validity is the basic norm of the legal order. This basic norm is responsible for the unity of the legal order.[19]

What, then, is this basic norm? It is a norm that is *presupposed.* Its content, in any legal system, is essentially that the prescriptions of the constitution must be obeyed.[20] The basic norm "is not . . . valid because it is created in a certain way by a legal act, but it is valid because it is presupposed to be valid; and it is presupposed to be valid because without this presupposition no human act could be interpreted as a legal, especially as a norm-creating, act."[21] The alternative to attributing the validity of the constitution, and hence the legal system, to be a presupposed basic norm is to attribute it to God or nature.[22] Kelsen regarded this as irrational.

Kelsen's formulation of the basic norm reveals that when he said that a law ought to be obeyed, or that a law was valid, his statement was somewhat relative.[23] A law ought to be obeyed from the standpoint of the legal system, not necessarily from the standpoint of a moral or religious system. To say that a law is valid is merely to say that it is a law. Legal positivism, Kelsen wrote, does not purport "to produce a material and absolute justification of the legal order."[24]

Validity and Efficacy

To Kelsen, a norm was valid if it *ought to be* obeyed, and it ought to be obeyed if it was created as prescribed by a valid higher norm, which ultimately was created as prescribed by the presupposed basic norm. A norm was efficacious, however, if in practice it generally *was* obeyed: "Validity and efficacy are two completely distinct qualities; and yet there is a certain connection between the two."[25] One connection is that while a single legal norm may be valid but not efficacious, a norm which remains inefficacious becomes deprived of any validity by "desuetudo." "Desuetudo" is the negative legal effect of custom. "A norm may be annulled by custom, viz., by a custom contrary to the norm, as well as it may be created by custom."[26] Kelsen believed that any legal norm, in-

---

[19] Kelsen, *supra* note 3, at 63.
[20] PURE THEORY, *supra* note 1, at 201.
[21] GENERAL THEORY, *supra* note 1, at 116.
[22] PURE THEORY, *supra* note 1, at 200.
[23] *See* GENERAL THEORY, *supra* note 1, at 394.
[24] *Id.* at 396.
[25] Kelsen, *supra* note 3, at 50.
[26] GENERAL THEORY, *supra* note 1, at 119. It is suggested that it would be more consistent with Kelsen's view of law as a coercive order to state that a norm is not deprived of its

cluding a statutory norm, may lose its validity by desuetudo.[27] This vulnerability would even exist in statutory norm which provides that statutes may not lose their validity by desuetudo.

A second correlation between validity and efficacy is that, although a single norm may be valid but not efficacious, if the legal order itself loses its efficacy, none of its norms remains valid, since its basic norm would no longer be presupposed. This happens when there is a revolution, which "occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself."[28] Usually, after a revolution, most of the legal order's general norms remain in place. They are no longer valid, however, for the same reason. A new basic norm is presupposed which validates the norms it adopts from the old order.

CUSTOMARY LAW AND COURT-MADE LAW

Customary Law

Kelsen distinguished "between statutory law and customary law as the two fundamental types of law."[29] He defined statutory law broadly, to include law created "by legislative, judicial, or administrative acts or by legal transactions, especially by contracts and (international) treaties."[30] Statutory law, then, was a law "created by an act that deliberately aims at creating law . . . ."[31] In contrast, customary law was defined as law that originated in customary conduct. Individuals do not intentionally seek to create customary law, but necessarily consider their behavior to be conforming to a binding norm.[32] The acting individuals who create a customary law must be an overwhelming majority of those obligated or entitled by it.[33] Once a custom becomes law, all individuals are bound by it, just as they are by the statutory law which they did not create directly.[34] The authority for courts to apply customary law, Kelsen argued,

---

validity by desuetudo; it is deprived of its validity when a court for the first time refuses, on the ground of desuetudo, to apply a sanction to a violation of the norm. At least one scholar noted Kelsen's apparent inconsistency: "As the norm [to be valid] need not be efficacious it follows that the sanction need only be a formal one. . . . The important point to note is that if the sanction need only be formal then it cannot be an essential element in law." A.L. GOODHART, ENGLISH LAW AND THE MORAL LAW 16-17 (1953).

[27] *See* GENERAL THEORY, *supra* note 1, at 119.

[28] *Id.* at 117.

[29] *Id.* at 114-15.

[30] *Id.* at 115.

[31] *Id.* at 114.

[32] *Id.*

[33] PURE THEORY, *supra* note 1, at 229.

[34] GENERAL THEORY, *supra* note 1, at 128.

may be either expressed in the constitution or derived from the basic norm.[35]

John Austin, unlike Kelsen, believed that customs could not become positive law until they were judicially adopted:

> The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.[36]

Austin's analysis of customary law, it is submitted, is consistent with Kelsen's view of law as a coercive order. Kelsen's concept of customary law is foreign to any theory of positive law. To Kelsen, a norm must include a sanction to be a legal norm.[37] The sanction, furthermore, must possess social organization.[38] Even a legislatively established norm "must be regarded as legally irrelevant" if it lacks a sanction.[39]

In a legal sense, a sanction attaches to a particular norm only when a legislature enacts a sanction for violating the norm, or a court holds a defendant liable for violating it. Until a legislature or court so acts, the norm may be socially binding, but it is not legally binding. Thus, it is immaterial whether a norm originated in a custom or originated in the minds of the legislature or court. Without a sanction a norm is not positive law; with a sanction it is.

Kelsen, however, specifically disagreed with the position of Austin: "Austin overlooks the fact that the rule created by custom may be a rule providing sanctions—and must be such a rule in order to be a rule of law —so that 'custom' is 'clothed with the legal sanction' before it is 'adopted by the courts.' "[40] Kelsen appears to argue that to be a customary law, a custom must have a customary sanction. If this is true, does a court ever need to apply customary law? Customary law would seem to stand by itself outside the judicial system.[41] No one need sue to have it enforced,

---

[35] PURE THEORY, *supra* note 1, at 226. Kelsen stated that if the authority to apply customary norms is not expressed in the constitution, it may be derived from customary "unwritten norms of constitution." GENERAL THEORY, *supra* note 1, at 126. He recognized, however, that if "a norm that regulates the creation of general [customary] norms, can be created by custom, then it must already be presupposed that custom is a law-creating fact. This presupposition can only be the basic norm. . . ." PURE THEORY, *supra* note 1, at 226.

[36] J. AUSTIN, *supra* note 11, at 101-02.

[37] *See* text accompanying notes 10-17 *supra*.

[38] PURE THEORY, *supra* note 1, at 33.

[39] *Id.* at 52.

[40] GENERAL THEORY, *supra* note 1, at 127.

[41] One might respond that an injured party might seek to have a court impose a sanction,

and aspiring lawyers need not study it in law school. In addition, why should Kelsen insist that customary law be derived from the same basic norm as non-customary law? Why not presuppose two basic norms? One norm would state that people ought to behave as the constitution prescribes; the other that people ought to behave in conformity with socially binding norms.[42]

Court-Made Law

Kelsen postulated that customary law exists prior to its application by a court, and recognized that some need remains for courts to apply customary law. He also acknowledged the distinction between the application of a general legal norm created by custom, and one created by legislation:

> [T]he ascertainment of the validity of a norm of customary law to be applied—that is, the ascertainment that a law-creating custom is present—plays a much more prominent and clear role in the judge's conscience than the ascertainment of the validity of a norm created by legislation and published in the official gazette. This explains why the view is sometimes held that customary law is court-made law. If the courts have to apply usually customary law, as in the sphere of the Anglo-American common law, and if they, besides, have the authority to create precedents, a theory can easily develop in such an area that all law is court-made law; that no law exists before the judge's decision; that a norm becomes a legal norm only because it is applied by the court.[43]

It is submitted that the role of courts in ascertaining the validity of a norm of customary law is not only more prominent than their role in ascertaining the validity of legislation, but is also qualitatively different. In the case of statutes and judicial precedents, a court need merely open its law books. In the case of customary law, however, a court must first determine whether a relevant social norm exists and, then, whether it is considered binding by an overwhelming majority of those obligated or entitled by it.[44] The additional discretion inherent in ascertaining the validity of customary-law norms further weakens Kelsen's contention that courts ascertain, rather than create, customary law. It is true that courts

---

other than the customary sanction, upon a violator of a customary law. But in such a case, the existence of the customary sanction would be secondary; it would be the imposition of the judicial sanction that would bring the norm within the legal order.

[42] *See* Raz, *Kelsen's Theory of the Basic Norm*, 19 AM. J. JURIS. 94, 99 (1974).

[43] PURE THEORY, *supra* note 1, at 254-55 (citing J. GRAY, THE NATURE AND SOURCE OF THE LAW (2d ed. 1927)).

[44] In all instances, including legislation, judicial precedents, and customary law, after ascertaining a law's validity, judicial interpretation may be necessary to determine whether its application is appropriate in the case to be decided.

may create customary law only within strict guidelines, since they must draw only from socially binding norms. It is courts, however, that must determine which norms are considered socially binding, and it is courts which impose sanctions for violations of such norms. It appears preferable, therefore, to view courts as creating rather than merely applying customary law. It does not follow, as Kelsen feared, and legal realists argued,[45] that courts create law when they apply legislation and judicial precedents, since there are persuasive grounds for viewing customary law differently from legislation and judicial precedents.

Although Kelsen believed that Anglo-American common law is primarily customary law,[46] this is not necessarily true, at least in modern times. Judges usually do not create precedent by applying social norms that are considered binding.[47] Precedents are created when they interpret ambiguous statutory or constitutional provisions, or fill in gaps[48] in the law, in the manner they find most consistent with moral principles and public policy as reflected in the existing legal order.[49] These principles and policies need not be, and usually are not, social customs. Courts are authorized to apply such principles and policies:

> [A legislator] realizes the possibility that the general norms he enacts may in some cases lead to unjust or inequitable results, because the legislator cannot foresee all the concrete cases which possibly may occur. He therefore authorizes the law-applying organ not to apply the general norms created by the legislator but to create a new norm in case the application of the general norms created by the legislator would have an unsatisfactory result.[50]

Traditional jurisprudence, in Kelsen's view, does not acknowledge that courts have such discretion. Rather, it postulates that judges may substitute their judgment for a legislature's only when gaps exist in the law—that is, when the legal order lacks a general norm applicable to a particular case. Kelsen noted, however, that a legal order which contains an applicable legal norm may at times also yield an unsatisfactory result. As an example, he suggested a legal order that "contains a legal norm applicable to murder with robbery in the same way as to the case in which a son kills his incurably ill father upon the latter's request."[51] Furthermore, Kelsen aruged, it was impossible for there to be gaps in a legal order because, at the very least, a legal order regulates all behavior by not

[45] *See* text accompanying note 9 *supra*.
[46] PURE THEORY, *supra* note 1, at 254.
[47] Binding social norms may be applied occasionally, as when contracts between merchants are construed.
[48] *See* text accompanying notes 50-52 *infra*.
[49] *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY ch. 4 (1977).
[50] GENERAL THEORY, *supra* note 1, at 148.
[51] PURE THEORY, *supra* note 1, at 246-47.

prohibiting it. Kelsen, nevertheless, viewed the theory of gaps as a valuable fiction: If a judge accepts the assumption that the law has gaps, he will "only rarely make use of his authorization to take the place of the legislation."[52]

Thus, Kelsen accepted a theory that he recognized as fictional and only partly effective in order to prevent the application of positive law when it would yield unjust results. This seems unnecessary. A preferable approach would be to acknowledge the full scope of judicial authority and to recognize that judges must be trusted to divorce personal values from their work and to create exceptions to existing law only when such exceptions are consistent with the moral principles and public policies inherent in the legal order.

Although Kelsen acknowledged that courts may have authority to create exceptions to positive law, as in the case of customary law, he denied thay they create law:

> The court always applies preexisting law, but the law it applies may not be substantive, but adjective law. The court may apply only those general norms which determine its own existence and procedure, the general norms which confer upon certain individuals the legal capacity to act as a court of a certain State.[53]

This point, however, accomplishes little. It states that courts do not exceed their authority when they apply principles not found in substantive law, but it does not face the implications of the fact that courts do apply principles not found in substantive law. A positivist theory of law that admits that non-positive law may determine legal rights and duties—even pursuant to positive procedural law—does little to bolster the positivist dichotomy between law and morals.[54]

A CRITIQUE OF THE BASIC NORM

What distinguishes a legal order from the demands of a group of gunmen? Is there a difference? The source of authority to make law has been called "the central question of political philosophy."[55] Kelsen answered that the authority to make law derives from a presupposed basic norm. It has been suggested that "[b]y blandly suggesting that this basic norm must be 'presupposed to be binding' Kelsen avoids the most important problem in legal philosophy."[56]

In examining this charge, a comparison of Austin's and Kelsen's con-

---

[52] *Id.* at 249.
[53] GENERAL THEORY, *supra* note 1, at 152.
[54] *See* R. DWORKIN, *supra* note 49, ch. 2.
[55] I. BENDITT, LAW AS RULE AND PRINCIPLE 129 (1978).
[56] A.L. GOODHART, *supra* note 26, at 18 (1953).

cepts of the state is helpful. Austin used the term "state" synonymously with "sovereign."[57] A sovereign was a group or an individual to whom "[t]he *bulk* of the given society are in a *habit* of obedience" and who itself "is *not* in a habit of obedience to a determinate human superior."[58] The sovereign was thus outside the legal system, and could have no authority within that system to make laws. He was the gunman writ large. Even in Austin's framework, however, the sovereign was not always above the law; he derived his powers from the law and was subject to it. If the authority to create law is found in the law, "[t]he theory of sovereignty seems . . . to involve a begging of the question which positivism sets out to answer."[59]

By presupposing the basic norm to provide unity to the legal order, Kelsen eliminated from his theory of law the concepts of sovereignty and state as existing apart from the law:

> Law and state are usually held to be two distinct entities. But if it be recognized that the state is by its very nature an ordering of human behavior, that the essential characteristic of this order, coercion, is at the same time the essential element of the law, this traditional dualism can no longer be maintained. By subsuming the concept of the state under the concept of a coercive order which can only be the legal order, by giving up a concept of the state distinct in principle from the concept of law, the pure theory of law realizes a tendency inherent in the doctrine of Austin.[60]

The concept of the basic norm avoids the question of what differentiates law from other coercive orders. Its essential failing is that it identifies the legal order in circular manner. The identity of a legal order is derived from its basic norm, yet "the content of a basic norm is determined by the facts through which an order is created and applied, to which the behavior of the individuals regulated by this order, by and large, conforms."[61] Is this tantamount to a statement the legal order is whatever it is generally taken to be? If so, what purpose is served by presupposing a basic norm? H.L.A. Hart suggested:

> If a constitution specifying the various sources of law is a living reality in the sense that the courts and officials of the system actually identify the law in accordance with the criteria it provides, then the constitution is accepted and actually exists. It seems a needless reduplication to suggest that there is

[57] J. AUSTIN, *supra* note 11, at 101.
[58] *Id.* at 220.
[59] L. FULLER, THE LAW IN QUEST OF ITSELF 69 (1940). One might suggest that Austin answers the question of where individuals get their authority to make law "by denying, in effect, that there is any such thing as the authority to make law," since Austin placed the sovereign outside the law. I. BENDITT, *supra* note 55.
[60] Kelsen, *supra* note 3, at 64-65.
[61] GENERAL THEORY, *supra* note 1, at 120; *see* Raz, *supra* note 42.

a further rule to the effect that the constitution (or those who 'laid it down') are to be obeyed.[62]

CONCLUSION

This article has set forth a summary of Kelsen's pure theory of law, a critique of his analysis of customary and court-made law, and a discussion of the basic norm—the doctrine of his legal philosophy which "succeeded most in attracting attention and capturing the imagination."[63] It is hoped that this article will encourage further interest in Kelsen's work, including its broader philosophical underpinnings and its application to international law, which represents a significant development in jurisprudence.

---

[62] H.L.A. HART, *supra* note 17, at 246 (1961).
[63] Raz, *supra* note 42, at 94.