

Notes on Hans Kelsen's Pure Theory of Law (1st Ed.)

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1 Law and Nature

Law and nature are categorically different. From an intra-systemic, internal, or *legal* point of view, *law is norm, not fact*. The code of the legal system, the formative distinction that creates and perpetuates the identity of the legal system is lawful/unlawful. That distinction is based on norms. "It is to these norms that legal cognition is directed – norms that confer on certain material facts the character of legal (or illegal) acts, and that are themselves created by way of such legal acts." (§5). Legal science adopts the internal point of view; legal sociology adopts the external point of view. "The object of such cognition [of legal sociology], then, is not actually the law itself, but certain parallel phenomena in nature." (§7).

2 Law and Morality

Law "qua norm is an ideal reality, not a natural reality." (§8). As such, law is on one side of the is/ought divide; nature is on the other. However, as law needs to be distinguished from nature, so it needs to be distinguished from other ideal realities, in particular from morality. (§8). Morality is transcendent in the Kantian sense, law is subject to cognition. Connecting morality and law is the hallmark of ideologies, revolutionary or conservative. "The PTL is directed against them, The PTL aims to depict the law as it is, without legitimizing it as just or disqualifying it as unjust; the PTL enquires into actual and possible law, not into 'right' law. In this sense, it is a radically realistic legal theory." (§9). The PTL is the *cognitive science* of the law.

3 The Concept of Law and the Doctrine of the Reconstructed Legal Norm (Rechtssatz)

The legal system conceptualizes a norm as a hypothetical judgment: If A, then B. The norm connects certain legal conditions (A) with a legal consequence (B) by way of imputation

(*Zurechnung*). Imputation is to the law what the category of causality is to our observation of nature; it renders law intelligible, it allows us to say “that someone is punished ‘because’ of a delict.” (§11(b)). The normative connection between A and B (*Tatbestand und Rechtsfolge*) “is the ‘ought’ in which the PTL represents the positive law.” (§11(b)). Not every hypothetical normative judgment is a legal norm; legal norms are defined by the *particular consequence* that is attached to their conditions, that is, “the coercive act of the state.” (§12).

The concept of the unlawful act gives up its extra-systemic position . . . and takes an intra-systemic position.” (§13). In other words, there are no *mala in se*. An act is unlawful if and only if a legal norm attaches to it coercive action by the state as its consequence. (§13). The unlawful act does not *break* the law; the law as norm cannot be broken. Rather, the act is unlawful because it fulfills the condition of a norm that describes such behavior as unlawful. (§13). As a social technique, described from an external point of view, the “purpose of the legal system is to induce human beings . . . to behave in the desired way, using the threat of coercion. (§14(a)). Any behavior (legal condition) can be linked with a coercive act (legal consequence). The law is not an end in itself, but rather a specific means. “The law is a coercive apparatus having in and of itself no political or ethical value, a coercive apparatus whose value depends, rather, on ends that transcend the law qua means.” (§14(c)).

Therefore, the PTL “is the theory of legal positivism.” (§17). But the PTL is *not naturalistic*. It does not attempt to explain internal legal events through external observations of behavior. “To replace [legal science] with legal sociology is impossible, for legal sociology focuses on an entirely different problem.” (§16). Legal sociology focuses on behavior caused by legal norms (“what is/isn’t?”); legal science focuses on the meaning of and the relationship among norms (“what is lawful/unlawful?”), thereby maintaining the constitutive difference of each social system. The PTL is therefore a normative theory, however, *normative* only in the technical sense of the hypothetical legal imperative – if legal condition (theft) then legal consequence (punishment) – which can be translated into the secondary norm that one ought not to steal. (§17).

4 Overcoming the Dualism of Legal Theory

The PTL opposes the traditional dualism – traditional in European legal theory – between subjective right (based on status, ownership, etc.) and objective law (based on other norms). Rights and obligations only exist because of and within the limits of the law. A’s being legally obligated to do X means that doing non-X is the legal condition of a coercive act against A. “Legal obligation, then, is recognized as the sole essential function of the objective law.” (§24(a)). Every complete legal norm creates an obligation. (Often, a complete legal norm will be comprised of a set of incomplete fragments, for example, definitions.) Some norms confer subjective rights upon individuals. B has a subjective right against A

if and only if the coercive act against A, following a breach of A's obligation, depends on B bringing a claim. (§24(b)). "With this insight into the essence of what is called law in the subjective sense, the PTL eliminates the dualism of objective law and subjective right. The subjective right is not different from objective law; it is itself objective law. For there is a subjective right (qua legal right) only in so far as the objective law is at the disposal of a concrete subject." (§24(b)).¹

5 The Legal System and its Hierarchical Structure

"That a norm belongs to a certain system follows simply from the fact that the validity of the norm can be traced back to the basic norm constituting the system." (§27). In a moral system, norms are valid if their content is compatible with the content of the basic norm, that is, if the norm is correctly deduced from the basic norm. In a legal system, "any content whatever can be law." (§28). A norm is valid if it was created according to a (higher) norm; validity is a question of procedure, not of content. Consequently, "[p]articulate norms of the legal system cannot be logically deduced from this basic norm." (§28). The basic norm is a necessary presupposition if the law is to be understood qua norm. Given the validity of the basic norm, the legal system resting on it is also valid. (§29). Thus, the basic norm has a transcendental function; starting from the observation that law, in fact, exists as a normative practice (that is, lawyers act as if judges and parties are norm-driven), the necessary conditions for that existence must also exist. The basic norm is such a necessary condition. (Put differently, a second order observer would have to conclude that first order observers, participating in the legal system, necessarily presuppose the existence of a basic norm. Otherwise, their behavior would not make sense.)

The content and the validity of the basic norm depends on "the material fact creating that system to which actual behavior (of the human beings addressed by the system) corresponds to a certain degree." (§30(a)). As indicated above, the basic norm is a necessary condition of understanding a practice as a system of norms; as such, the content of the basic norm depends on *matters of fact*. If the actual behavior shows that subjects obey the rules of a monarch, then the basic norm says: "What the monarch enacts is law" or "Follow the rules enacted by the monarch!" If the actual behavior is one of following the rules enacted by parliament, then the basic norm says: "Rules enacted in parliament are law." The content

¹Kelsen's concept of the person – which is burdened with a somewhat counter-intuitive terminology – originates from the notion that only certain aspects of human behavior are regulated by norms. A human being is subject to obligations and a bearer of rights. To the extent that a human being's behavior is regulated by legal norms, the human being is represented within the legal system as a "physical person," a shorthand for the bundle of obligations and rights addressing a particular human being's behavior. Thus, the law does not impose obligations on persons, but rather on human beings; it is human behavior that is regulated by norms, "and human behavior can only be behavior of human beings." (§25(a)). Similarly, "legal persons" (such as corporations) are useful but non-essential concepts; the underlying reality is always one or more human beings whose conduct is regulated by norms. (§25(b)).

of the basic norm depends on facts; yet the basic norm remains a necessary condition for understanding law as a normative system. “Just as one cannot, in defining validity, leave reality out of consideration, so one cannot identify validity with reality.” (§30(b)). Law cannot be identified with power, rather “[t]he law is, in terms of the theory developed here, a certain system (or organization) of power, that is, an organization where power (facticity) is constantly confronted with the normativity of the law (the validity of which requires the very facticity that it affirms in part and challenges in part). (§30(b)). Note that facticity is only a precondition for the validity of the basic norm. “The question of the validity of any particular norm is answered within the system by recourse to the first constitution [in this context, the basic norm], which establishes the validity of all norms. If this constitution [the basic norm] is valid, the norms issued in accordance with it must be regarded as valid.” (§30(d)).

Paragraph 31 contains the famous exposition of the hierarchical structure of the legal system (*Stufenbau der Rechtsordnung*). “Law governs its own creation, that is, the legal system is autonomous in the sense that only legal communication defines what constitutes future legal communication. (§31(a)).

[A] norm is valid because and in so far as it was created in a certain way, that is, in a way determined by another norm; and this latter norm, then, represents the basis of the validity of the former norm. The relation between the norm determining the creation of another norm, and the norm created in accordance with this determination, can be visualized by picturing a higher- and lower-level ordering of norms. The norm determining the creation is the higher-level norm, the norm created in accordance with this determination is the lower-level norm. (§31(a)).

Within a state, the constitution is the topmost layer of norms (§31(a)); adjudication is the lowest, “it is law creation in the literal sense of the word.” (§31(c)).

Insight into the hierarchical structure of the legal system shows that the contrast between making or creating the law and carrying out or applying the law does not by any means have the absolute character accorded to it by traditional legal theory, where the contrast plays such a significant role. Most legal acts are acts of both law creation and law application. With each of these legal acts, a higher-level norm is applied and a lower-level norm is created. [...] While the presupposition of the basic norm has the character of pure law creation, and the coercive act has the character of pure application, everything between these limiting cases is both law creation and law application. (§31(f)).

Within the hierarchy of norms, Kelsen provides an account of unconstitutional law and other instances where the lower-level norm violates the higher-level norm, either in the process of its creation or in terms of its content. “Normative cognition tolerates no

contradiction between two norms of the same system.” (§31(h)). A legal act is either valid or void. If it is void, it is a nullity “and a nullity is really not a norm but merely the appearance of one. If the legal act is valid, then there are two alternatives. If the lower-level norm corresponds to the higher-level norm in all respects, “it is complete, adequate, and on the mark. Thus, no contradiction exists. If the lower-level norm does not correspond to the higher-level norm, the lower-level norm is subject to invalidation (*vernichtbar*), however, unless and until it has been invalidated, it remains valid. “That a norm ‘contrary to norm’ can be overturned . . . therein lies not ‘norm contrariety’ (‘unconstitutionality’, ‘illegality’), but what is better characterized as norm ‘deficiency’ or ‘legal erratum’.) (§31(h)). Thus, “[t]he unity of the hierarchical structure of the legal system is not endangered by logical contradiction.” (§31(h)).

6 Interpretation

Law is to a significant degree indeterminate; the higher-level norm can only provide outside boundaries for valid lower-level norms. “Interpreting a statute, then, leads not necessarily to a single decision, but possibly to a number of decisions, all of them of equal standing [...], even if only a single one of them becomes, in the act of the judicial decision, positive law.” (§36). Interpretation is an act of will, that is, an act of lawmaking, not one of cognition. (§39).

7 The Methods of Creating Law

“The doctrine of the hierarchical structure of the legal system comprehends the law in motion, in the constantly regenerating process of its self-creation. It is a dynamic theory of law – in contradistinction to a static theory, which seeks to comprehend the law (its validity, its sphere of validity, and so on) apart from the process of its creation, and simply as a system already created.” (§43).

8 Law and State

Traditional legal theory posits a dualism of law and state. “The state must be imagined as a person, different from the law, so that the law can justify the state, which creates and subjects itself to the law. [...] From a naked fact of power, the state becomes the Rechtsstaat, which justifies itself by making law.” (§47). The PTL dispenses with this dualism. The state is a legal system. (§48(a)). Specifically, the state is a problem of legal imputation. “Every act of the state is first of all simply an act of a human being, and the problem of imputation is expressed in the question of why a certain human act is imputed not to the acting human being himself but to a subject imagined, so to speak behind the human being. The only possible criterion for this imputation proves to be the legal

norm. (§48(b)).” Given the identity of law and state, “every state must be a Rechtsstaat – if one understands by ‘Rechtsstaat’ a state that ‘has’ a legal system.” (§48(e)). “From the standpoint of a logically consistent legal positivism, the law, exactly like the state, cannot be comprehended as anything other than a coercive system of human behavior – which is to say nothing about that system’s values of morality or justice. The state, then, is to be understood in legal terms, no more and no less so than the law itself; the law qua ideal subject-matter is a system, and therefore an object of normative-legal cognition, while the law qua act – both motivated and motivating, both psychological and physical – is power, legal power, and a such object of inquiry for social psychology or sociology.” (§48(e)).

9 The State and International Law

Traditional theory posits a dualism of international law and national law, whereby international law requires recognition by the national law for its validity. The PTL opposes this view. “Norms of the state legal system that are created by ‘violating’ international law remain valid, even from the standpoint of international law, because international law makes no provision for a procedure whereby norms of the state legal system that are ‘contrary to international law’ can be invalidated. [...] The content of the state legal system is determined by international law in exactly the same way as the content of future statutes is determined by a constitution lacking provision for constitutional review, that is, content is determined in terms of alternatives. [...] From this vantage-point, then, nothing stands in the way of assuming the unity of international law and state law.” (§50(f)). International law is on a higher plane than the laws of nation states. Otherwise, treaties between states had no binding force. The material fact of entering into a treaty has normative consequences only if a higher norm, one of international law, so stipulates. (§50(h)). The PTL is thus directed against the “principal instrument of imperialistic ideology directed against international law,” which is the dogma of sovereignty. “With this in mind, it may be said that the PTL, because it secures the cognitive unity of all law by relativizing the concept of the state, creates a presupposition not without significance for the organizational unity of a centralized system of world law.” (§50(i)).

Literature

1. Horst Dreier, “Hans Kelsen und Niklas Luhmann: Positivität des Rechts aus rechtswissenschaftlicher und systemtheoretischer Perspektive”, in: *Rechtstheorie* 14, 1983, 419-458.
2. Michael Pawlik, “Die Lehre von der Grundnorm als eine Theorie der Beobachtung zweiter Ordnung”, in: *Rechtstheorie* 25, 1994, 451-471.

3. Michael Pawlik, "Die Reine Rechtslehre und die Rechtstheorie H. L. A. Harts. Ein kritischer Vergleich", Berlin 1993.