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# THE PURE THEORY OF LAW

REGINALD PARKER\*

*Philosophy teaches us to feel uncertain about the things that seem to us self-evident.*

Aldous Huxley

There is hardly a theory of law about which there exists so much confusion in the minds of so many scholars as about Hans Kelsen's theory, which is commonly known under the name "Pure Theory of Law." If, for instance, a scholar of the stature and standing of Professor Northrop maintains that Kelsen locates the basic norm of the Austrian Constitution of 1920 "in the earliest Constitution of 1867,"<sup>1</sup> then it seems that there is still room, indeed an intellectual demand, for a brief and simple exposition of Kelsen's theory. We shall attempt it in the following article<sup>2</sup> not without avoiding the temptation to oversimplify crucial problems.

The Pure Theory of Law is called "pure" because it is a theory of law and not, like sociology, of causally related social facts; because it is a theory of law and not of ethics; and because it is a theory of law regardless of the political conditions that led to the creation of this or that democratic, communist, fascist, tribal or other law. It is a theory of legal positivism, that is, a theory of man-made rather than transcendental law.

A legal positivist may recognize other normative orders such as the religious or moral orders, or etiquette; but to him these norms are not "law," *i.e.*, a part of the legal order, unless they have been incorporated into law by reference.<sup>3</sup> Moreover, every validly created legal norm is law to the positivist, even though he may deplore the state of the law and seek to change it. (The name "legal positivism," incidentally, appears to be preferable to "analytical jurisprudence"

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1. NORTHROP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE* 67 (1959). Kelsen has of course never said that Austria's basic norm was grounded anywhere save in the successful revolution of 1918.

2. The present article is at the same time a book review of Kelsen's most recent fruition of his Pure Theory of Law. See KELSEN, *REINE RECHTSLEHRE—MIT EINEM ANHANG: DAS PROBLEM DER GERECHTIGKEIT* (2d ed. 1960) [hereinafter cited as KELSEN, *REINE RECHTSLEHRE*]. The book is made invaluable also by the appendix, prepared by Dr. Rudolf Aladar Métall, of Kelsen's writings—483 in number!—to the end of 1959. Fortunately for the learned world, Kelsen has not remained silent since then.

3. *E.g.*, if the law declares immoral contracts to be invalid, if it threatens aliens guilty of a crime involving moral turpitude with deportation, by reference to the common welfare of the community, etc.

and "analytical positivism," which are often used, especially in connection with John Austin's work. The legal thinking of the positivist is no more "analytical"—either in the sense of critical thinking or pertaining to analysis as opposed to synthesis—than that of, say, an adherent of the historical school.)

It is beyond the scope of this brief exposition to outline the history of legal thinking. Suffice it here to remind ourselves that until the eighteenth century most, if not all, legal philosophy was steeped in the theory of natural law. We may add the observation that many of the great protagonists of one or another natural law idea, such as Plato, Aristotle (to some extent), Cicero, St. Thomas Aquinas, Richard Hooker, Locke, and Rousseau, were not lawyers but rather general philosophers or essayists and publicists of one kind or another. However, most lawyers of the past who did indulge in legal philosophy accepted the natural law doctrine just as much as their brethren of the purer philosophy. Grotius, Christian Wolff, Samuel Pufendorf, and, of course, Sir Edward Coke,<sup>4</sup> may be mentioned as examples. The position, however, of some eminent classical lawyers, such as Ulpian or Bracton, can be regarded as dubious despite occasional references to "natural law."<sup>5</sup> The eighteenth century saw the culmination of the natural law idea, with its ideals of "self-evident" rights, the equality of man and the social contract theory; but it also saw the rise of skepticism. Montesquieu, the originator of both Western sociology and comparative jurisprudence, propounded the thesis that law as well as basic conceptions of justice are necessarily influenced not only by religion and custom but also by climate and soil. His contemporary, David Hume, "destroyed the theoretical basis of natural law"<sup>6</sup> by denying the existence of axiomatic truths and of ascertainable rational principles in the sphere of human behavior that would be of universal validity. His ideas, however, failed to replace the natural law philosophy with a working system of legal theory. This was first attempted by Friedrich Karl von Savigny, the founder of the historical school of jurisprudence. His most important disciple in the world of English law was Sir Henry Maine.

Savigny, one of the greatest legal scholars of all times, pointed out that, even as language and customs are different in every nation, so do the legal systems of the nations necessarily vary from one another;

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4. In *Dr. Bonham's Case*, 8 Co. 113b, 114a, 77 Eng. Rep. 646, 647 (1610), Coke proposed that unreasonable acts of Parliament be void. It cannot be said, however, that he ever transformed this dictum into a rule of law.

5. Ulpian maintained that natural law is that which "nature teaches all animals," DIG. 1.1.4., which, if true, would deprive it of its normative character and constitute it as a mere physical or causal law. BRACTON, *DE LEGIBUS*, bk. I, c. 3, § 1; bk. I, c. 4, § 1, states that law is promulgated by prudent men in council and that without law a person cannot be just.

6. FRIEDMANN, *LEGAL THEORY* 50 (3d ed. 1953).

and that this is indeed desirable, for what is "good" or "correct" law for one nation is not necessarily so for another.<sup>7</sup> Yet Savigny's historical school, which has had a most profound influence on man's approach to history, forcefully demonstrating that laws are not of universal validity, retained some natural law element nevertheless. Savigny insisted that law must be "found" rather than made—"it is first developed by custom and the people's faith, next by legal science, therefore everywhere by internal, silently operating forces rather than the arbitrary will of a legislator."<sup>8</sup> There is some wisdom in this thesis, in that it states the nature and origin of good and desirable law, or at any rate of such law as a German law professor of the romantic school would find (by listening to the "people's spirit") to be good and desirable; but it fails to explain the nature of law as such, good, bad, or indifferent. To do this was left to modern positivism.

John Austin pointed out that law cannot be defined by the inclusion of any ideal of justice. Rather, it must be determined by reference to its source, *i.e.*, the sovereign: "Every positive law, or every law simply and strictly so-called, is set by a sovereign person, or a body of sovereign persons . . ." And the sovereign is defined as a "determinate humane superior, not in a habit of obedience to a like superior," who receives "habitual obedience from the bulk of a given society."<sup>9</sup> Thus the command of the sovereign, under threat of sanction, is law according to Austin. But the question presents itself: Who determines who the sovereign is? Austin's approach to this obvious problem is blurred by vague references to the constitution of the state. In other words, it is a certain set of laws that determines who is to make the law! This recognition somewhat emasculates Austin's proud sovereign. Moreover, Austin's theory fails to explain the position of the courts, wherefore Gray, another pre-Kelsen positivist, could assert that "in truth" all law is judge-made law, inasmuch as it is the courts that give legislative enactments their authentic interpretation.<sup>10</sup>

Kelsen has resolved these and other doubts. Like Austin, he proposed that whether law is "just" (and therefore, in the view of some, "natural") or "unjust" depends on criteria not capable of scientific cognition.<sup>11</sup> Law is enacted for a certain purpose, which the law-

7. SAVIGNY, *VOM BERUF UNSRER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT* (2d ed. 1828).

8. SAVIGNY, *op. cit. supra* note 7, at \*14. (Translation is mine.)

9. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 193-94 (5th ed., Campbell, with notes of John Stuart Mill, 1885; re-edited by H. L. A. Hart, 1954). (The citations are to the British "Library of Ideas" edition.)

10. GRAY, *NATURE AND SOURCES OF THE LAW* 84, 96, 98, 121, 125 (2d ed. 1921). *But see* KELSEN, *REINE RECHTSLEHRE* 260.

11. "Judgments of justice cannot be tested objectively. Therefore, a science of law has no room for them." KELSEN, *GENERAL THEORY OF LAW AND STATE* 49 (1945); KELSEN, *REINE RECHTSLEHRE* 197.

maker, in performing his political task no doubt regards as a good one, but no objective value judgment can be rendered in regard to this purpose or in regard to the law as the social technique to accomplish this purpose. Rather, law, like the norms of any normative order, is either valid or not regardless whether we like its contents.

Thus the validity of a legal norm depends on its source; it is not Austin's "sovereign" to whom we must look, however, but rather to the legal norm. If, for instance, a city police chief promulgates a new traffic rule, this rule is valid only if the legal order, such as a regulation of the state highway commissioner, authorizes it; and the commissioner's regulation must likewise be grounded in law, e.g., a statute authorizing him to issue regulations. The lawmaking power of the legislature derives from the state's constitution, which in turn may be based on an older constitution. The original state constitution was again authorized by higher law, in our case the federal constitution, which authorizes the states to make law in those fields not reserved to the federal government. This might be a fair outline of the American picture, but it is at once obvious that this system of legal hierarchy is confined neither to this country nor to any particular country or form of government. It is simply a description of the norm-creating process, whether it takes place in America, England, Nazi Germany, or ancient Rome. To say, therefore, that "under our system even government must operate within the law,"<sup>12</sup> as one often hears, is too narrow. Not only our government but any government *can* act only within the law. Even Hitler's "will" was law unto the Germans only because the then German constitution provided that he had the supreme lawgiving power.<sup>13</sup> What the quoted statement means is that, under a system such as ours, the government may act only within the confines of pre-established, ascertainable law. That is the constitutional situation in what the Germans call a *Rechtsstaat*, which unfortunately is not the state of affairs in a great many countries. Yet nobody can truly doubt that the legal systems of those and many other autocracies, old and new, constitute "law," too.

Having determined, then, that any law must be based on the constitution—written or unwritten, tyrannical or democratic—the question irresistibly arises: On what authority is the constitution based? Of course, many a constitution was enacted pursuant to the authority of a previous constitution; and so may our Constitution be based on the Articles of Confederation.<sup>14</sup> But who or what authorized the

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12. Justice Douglas in *Yanish v. Barber*, 73 Sup. Ct. 1105, 1108 (1953).

13. See the discussion of this kind of law in *In the Matter of the Estate of Leefers*, 127 Cal. App. 2d 550, 274 P.2d 239 (1954).

14. Article thirteen of the Articles of Confederation, however, authorized changes of the Articles only upon unanimous assent of the states. The

latter? Its force can be said to be grounded in a revolutionary act, as manifested in the Declaration of Independence. Similarly, British law can be traced a long way back; but the laws and decrees of William the Conqueror were not authorized by those who prior to him ruled England. We must concede that it was his act of subjection of England that created what the Pure Theory calls the *basic norm*: "A norm the validity of which cannot be derived from a superior norm we call a 'basic' norm."<sup>15</sup> Its assumption stems from the empirical recognition that successful revolutions, conquests, or even military occupations are norm-creating events. The men who partook in the French or American revolutions were law-violating rebels—until they succeeded: *ex iniuria ius oritur*. Thus the basic norm furnishes the reason for the validity of a positive legal order. The presupposition of this norm, which is not a positive norm, is the condition under which a coercive order, established by acts of man and by and large effective, may be interpreted as a system of objectively valid norms.<sup>16</sup>

It may be said, however, that successful conquests and revolutions are norm creating events because international law so authorizes. International law may then be restated as providing as follows: "Whenever a group of men overthrows the government and disrupts its legal continuity by establishing a new legal order which is by and large obeyed, this new legal order is recognized and becomes the law of the land."<sup>17</sup> A new state or system of government has been formed. It depends on one's political philosophy to choose the force from which the legal system derives. If it is international law, however—and this is Kelsen's political choice<sup>18</sup>—then the search for the basic norm has been merely deferred, for if the law of nations is a legal order, it, too, must have a basic norm. International law must be grounded in customary law whose basic norm might be formulated as follows: "The states ought to behave as they have customarily behaved."<sup>19</sup> Nothing can demonstrate more forcefully the weak character of international law than its basic norm. As a matter of fact, one may seriously doubt whether the above-quoted restatement,

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Constitution was declared to be in force after ratification by only nine states. It might be concluded, therefore, that the Constitution became law, like its predecessor, by revolutionary act rather than by authority of existing law.

15. KELSEN, GENERAL THEORY OF LAW AND STATE 111 (1945).

16. KELSEN, REINE RECHTSLEHRE 196-209, 364; Kelsen, *What Is the Pure Theory of Law?*, 34 TUL. L. REV. 269, 276 (1960); Kelsen, *On the Basic Norm*, 47 CALIF. L. REV. 107 (1959).

17. See KELSEN, REINE RECHTSLEHRE 212-221; KELSEN, GENERAL THEORY OF LAW AND STATE 118-122 (1945).

18. KELSEN, REINE RECHTSLEHRE 343-345.

19. KELSEN, GENERAL THEORY OF LAW AND STATE 369 (1945); KELSEN, REINE RECHTSLEHRE 222.

and therefore international law as such, has any normative character.

The basic norm of religion is the basic command, subject to further search for a reason of its validity, that we ought to obey the commands of God.<sup>20</sup> It would be going too far, however, to say that indeed a system of natural law could be deduced from the basic norm hypothesis with the same logical force as a positivist, natural-law denying system.<sup>21</sup> As Kelsen emphasizes, there exists merely an external similarity between the theory of the basic norm and the natural law doctrine, in that both purport to derive the validity of the legal order from an assumption of a norm which is outside of the positive law. The natural law doctrine, however, inquires about the contents of the legal system and it attempts to answer the question whether a positive legal system is valid categorically, that is, depending on whether or not it is in accordance with the natural principles of justice. In other words, positive law is valid under that doctrine because it has a certain content—because it is just. The Pure Theory of Law, on the other hand, inquires merely as to the formal validity of a legal system regardless of its contents; and it answers this question not categorically but merely hypothetically, viz.: "If the positive law is to be regarded as valid, one must presuppose a ('basic') norm under which men ought to behave in such a fashion as the historically first constitution (under which the positive legal system has been created) prescribes it."<sup>22</sup>

From an observation of the legal hierarchy an answer can be given to the age-old question whether judges "make" or "apply" the law: a judge, *like any other law applier*, such as a legislator under the constitution or an administrative agency under a statute, both applies and makes law. He applies the higher norm, for instance a statute declaring negligent homicide to be a tort or criminal offense, by making a command—and hence a new concrete norm—that the defendant shall pay the plaintiff a certain sum of money, or by directing the sheriff to confine the accused in a jail. The law which the judge thus applies by making new law on a lower level may be the constitution or a simple statute.

In the Anglo-American legal system, the applicable higher norm may also be "precedential" law, that is, it may be based on the opinions of judges in previous similar cases. The existence of this judge-made law constitutes no exception to our rule that judges make law by applying law. A judge who lays down a new rule of law, does so because—and only insofar as—the legal system of his jurisdiction

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20. Kelsen, *On the Basic Norm*, 47 CALIF. L. REV. 107, 108 (1959).

21. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL ED. 457, 461 (1954).

22. KELSEN, *REINE RECHTSLEHRE* 442-443.

so authorized him. A judge who must decide a lawsuit based on a cause of action not grounded in existing statutory or precedential law—let us say, on a claim of absolute liability for the handling of explosives in a state where there has never been a decision on this point—may dismiss the action for failure to state a claim upon which relief can be granted, because the legal order contains no norm in the plaintiff's favor. In so doing, he may briefly rule that the "doctrine of absolute liability has never been adopted in this state." On the other hand, he may exercise his authority to create a new rule of law and decide in the plaintiff's favor. In this case, too, the judge applies law—the rule of law that authorizes judges to create a new rule of law if the existing law is found to be unsatisfactory or unreasonable according to the judge's opinion.

It is at once clear that the individual who thus applies law will very often have a choice between various interpretations of the law he has to apply, because the lawmaker—either deliberately or unintentionally—has left the discretion to choose between various answers to the law applier; as when the former directs the latter to assess a penitentiary sentence between five and ten years for a given crime, where he leaves it to an administrative agency to take "appropriate measures" to carry out the statute, where a constitution authorizes lawmaking to regulate "commerce," or where a statute prescribes "cruelty" as a divorce ground. In all these cases the law may be applied correctly in a variety of ways. It depends on the policy choice of the law applier whether he wants to give the higher law a broad or narrow meaning.<sup>23</sup>

The Pure Theory, as all too briefly sketched in this article, has been criticized on a variety of grounds, most of which concern themselves with this or that phase of our theory. It is not necessary to discuss them here. Two attacks, however, appear to go to the heart of positivism and deserve a moment's attention. The first propounds that the Pure Theory of Law is too much what it says: an abstract, purely logical theory "devoid of real life." But this argument is no more valid than it would be against mathematics, which deals with abstract numbers and bodies instead of concrete things, such as apples or bombs. Moreover, it is not accurate to say that the "analytical lawyer is a positivist. He is not concerned with ideals; he takes the law as a given matter created by the State, whose authority he does not question."<sup>24</sup> His system of legal theory is, indeed, not concerned with ideals. Although he does not question the authority of

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23. Thus I DAVIS, *ADMINISTRATIVE LAW* 23 (1958), correctly holds that policy determination and adjudication cannot be kept apart. *But see* Jaffe, *Book Review*, 73 *HARV. L. REV.* 1638, 1639 (1960).

24. See FRIEDMANN, *LEGAL THEORY* 163 (3d ed. 1953).

the state, he may, however, question the desirability and wisdom of its laws, which he, the positivist, like any other human being, may seek to alter by legal means or even by revolution. Hans Kelsen himself has been a most outstanding example of a jurist concerned with ideals of peace and justice. Nor of course would any reasonable positivist deny that a lawyer's education, in law school or elsewhere, should concern itself with "ideals," in other words, with politics and ethics. While the positive legal theorist points out that the basic norm hypostasizes the assumption that the law should be obeyed, the jurisprudence teacher may well turn into social psychologist and discuss the problem why the law is actually obeyed; and to this he may add the even more vexatious question why supreme court judges, and other law applying organs whose duty to enforce the law is not subject to legal sanction (wherefore it cannot be regarded as a legal duty),<sup>25</sup> actually as a rule do enforce the law. Whatever answer, if any, the positivist may have to these and similar problems, he should not present political or ethical postulates in the guise of law.

The second contention is similar but it goes more directly to the moral side of positivism. In divorcing law from ethics, religion and morality, the argument runs, the Pure Theory is actually fostering amorality by treating on an equal level the legal system of, say, the United States or Switzerland with that of dictator Franco or the Soviet Union.<sup>26</sup> But it is true that Spanish fascist law is law, as was that of Hitler. It is up to man to change the law with a forthright attitude by recognizing it as law that can be altered—not by lulling oneself into believing that it is non-law!

Furthermore, the positivist is essentially a relativist and therefore humble. He does not have the knowledge, which the protagonist of natural law ideas professes to have, that this or that system of law and government is inherently better than any other.<sup>27</sup> Rather, he tolerantly believes that there does not exist, or is at any rate not within human cognition, a system of law that conforms to the absolute good. And as long as men will be different from one another, in preference over the "happy antheap" (as Dostoyevski sarcastically termed the totalitarian society of the possible future),<sup>28</sup> there will

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25. KELSEN, *REINE RECHTSLEHRE* 272-273.

26. KELSEN, *REINE RECHTSLEHRE* IV-V. And see Ebenstein, Book Review, 5 *NATURAL L. F.* 154, 156-158 (1960).

27. KELSEN, *REINE RECHTSLEHRE* 357-444, analyses virtually ever Western theory of justness as well as many current maxims of justice, such as "to each his own," the golden rule, and the categorical imperative.

28. Of course, if we reach the goal of the *Brave New World*, not much law would be necessary at all. Men will simply be *caused*—by chemical injections, drugs, hypnopedia, etc.—to do their tasks rather than told what they *ought* to do.

be no law in any given state that pleases everybody. The second-best solution must therefore suffice: law that pleases the majority. That is the political postulate of democracy.<sup>29</sup>

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29. Kelsen, *WHAT IS JUSTICE* 22-24 (1957).

