Papeles el tiempo de los derechos

"A Consideration of Hans Kelsen's Pure Theory of Law"

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A Consideration of Hans Kelsen's Pure Theory of Law[1]

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Hans Kelsen's pure theory of Law is one of the central elements of contemporary legal theory. As Mario Losano[2] has pointed out, all 20th century legal theories are eventually judged in terms of their proximity to or distance from the pure theory set out by Kelsen in the opening decades of the century, and later developed until the final years of his life. For this reason an examination of Kelsen's doctrine in a workshop dedicated to the main contemporary conceptions of legal theory is more than appropriate.

When studying Kelsen's theory it is essential to bear in mind its complex and interdependent nature. Its complexity is due, among other reasons, to its dual nature, fruit of its attempt to be both a theory of law and a theory of the science of law, and, indeed, of a theory of normative science as well[3]. Furthermore, the notably interdependent character of his work means that the comprehension of many concepts will depend on taking into account the context in which they occur in relation to the whole[4].

These characteristics of Kelsen's work mean that it will not be possible in this paper to deal with all aspects of the pure theory of law, nor even to examine in depth its essential features. I will instead limit myself to looking at the assumptions that give shape to Kelsen's approach to law as understanding them is essential to understanding his overall conceptual scheme. I will also examine Kelsen's conception of law as a

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[2] LOSANO, M., "Hans Kelsen: una biografía cultural mínima", Derechos y libertades, núm. 14, Época II, 2006, pp. 113-128, p. 113.

[3] TROPER, M., «Contribución a la crítica de la concepción kelseniana de la ciencia jurídica» in TROPER, M., Por una teoría jurídica del Estado, cit., pp. 25-35, p. 25. The pure theory of law « prior to being a general theory of law is an epistemological theory of all possible general theories of law», LENOBLE, J. y OST, F., Droit, mythe et raison. Essay sur la derivé mythologique de la rationalité juridique,Publications des Facultes Universitaires Saint-Louis, Bruxelles, 1980, p. 468

[4] GARCÍA AMADO, J. A., Hans Kelsen y la norma fundamental, Marcial Pons, Madrid, 1996, p. 9.

system, that element of his work that has most influenced post-Kelsian legal theory.

I. Some assumptions: methodological purity and the legal positivism of the pure theory

All of Kelsen's work is shaped by his choice of a neo-Kantian epistemology as an instrument to construct a positivist legal theory[5]. The choice of a neo-Kantian epistemology obliges the assumption of the principle of methodological purity. This principle attempts to "exclude" from the consideration of law "all elements that are foreign to it"[6] and seeks the construction of an exclusively normative theory, purified of all influences from the real world and the worlds of politics and morality, hence the pure doctrine of law[7].

The "first purification of the pure theory"[8] leads to the central postulate of the dualism between what is (*Sein*) and what should be (*Sollen*). This is an essential distinction for the elaboration of a scientific theory of normative character as it allows it to establish its autonomy from the natural sciences. The main consequence arising from this neo-Kantian dualism is the affirmation that the validity of legal norms can never be founded on an empirical event, only on another norm[9]. There is, thus, a conflict between Kelsen's doctrine and realist conceptions of law.

In order for knowledge in the normative sphere to acquire the status of a real science, to which Kelsen's theory aspires, purification is required to establish its neutral, objective and non-ideological character[10]. In Kelsen's view the object of study of legal science should be limited to positive law and should exclude all moral considerations.

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[5] LOSANO, M., Sistema e struttura nel diritto, vol.II, Giuffrè, Torino, 2002, p.79.

[6] KELSEN, H., Teoría pura del derecho, trad. de R. Vernengo, Porruá, Buenos Aires, 7.ª ed., 199, p.202

[7] LOSANO, M., Sistema e struttura nel diritto, vol.II, p. 43.

[8] CASAMIGLIA, A., Kelsen y la crisis de la ciencia jurídica, Ariel, Barcelona, 1977, p. 91

[9] "The question of the validity of the norm … cannot be dealt with through the verification of an empirical event, because the source of validity for that norm cannot be such an event…" KELSEN, H., Teoría pura del derecho, cit., p. 201.So, for Kelsen, "there is no such thing as an intrinsically legal act. The quality of an act of law is determined by the relation of that act to a norm … the legal norm or the normative system is an interpretative scheme which allows events to be characterized as legal. The legality of an act springs from the normative system and without a normative system there cannot be either legal or legal activity", CASAMIGLIA, A., Kelsen y la crisis de la ciencia jurídica, cit., p. 64. See also, GARCÍA AMADO, J.A., Hans Kelsen y la norma fundamental, cit., p. 13

[10] CASAMIGILIA, A., Kelsen y la crisis de la ciencia jurídica, cit., 92.

Arising from the voluntarism[11] and relativism[12] of the Austrian thinker, norms are seen as a product of will and not of mere reason and moral judgments are seen as subjective and no scientific knowledge about them can be obtained. This second purification involves a radical rejection of *lex naturalis* conceptions of law.

Moving from these reference points Kelsen's theory is characterized by its use of a number of typically positivist theses. In this section I will look at those most closely related to the principle of methodological purity and which serve to clarify its meaning.

1. The thesis of the conceptual separation between law and morality

In relation to this thesis it is worth emphasizing that while Kelsen's theory is often presented as drawing a firm line between the two normative orders, in my view the thesis of conceptual separation proposed by Kelsen affirms the independence of law from correct morals and not from any morality. He himself says "The requirement to distinguish between law and morals, between law and justice, means that the validity of a positive legal system is independent of the only completely valid moral order, of the moral of morals, of morality *par excellence*[13]. And he admits without hesitation that "All positive legal systems may conform with the many norms of justice… without this conformity being considered fundamental to its validity. A positivist, that is to say realist, doctrine … does not deny that the formation of a legal order can be, and often is, by the representation of one of the many possible norms of justice"[14]. Though in Kelsen's theory, as has already been mentioned, relativism is a central argument when it comes to rejecting the existence of a conceptual relationship between law and what is morally correct, this relationship is also "repudiated for other reasons", among these are

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[11] Kelsen's definition of norms as the meaning of an act of will is well known. See for example, KELSEN, H., Teoría pura del Derecho, cit., p. 23.

[12] For an example of Kelsen's relativism see KELSEN, H., «¿Qué es justicia?» in KELSEN, H., ¿Qué es justicia? trad. y edición a cargo de A. Casamiglia, Ariel, Barcelona, 2.ª ed., 1992, p. 39. Thus, for Kelsen, reason cannot have absolute or evident values and it lacks the capacity to produce an objective grounding in questions related to values.

[13] KELSEN, H., Teoría pura del derecho, cit., p. 79.

[14] KELSEN, H., «Justicia y derecho natural», Crítica al Derecho Natural, trad. de Elías Díaz, Taurus, Madrid, 1966, pp. 29-163.pp. 101 y 102. Also KELSEN, H., «La doctrina del Derecho Natural y el positivismo jurídico» in trad. de E. Bulygin en KELSEN, H., Contribuciones a la teoría pura del Derecho, cit., pp. 119-137pp. 131 y 132.

that "In its application in the real world, by way of a dominant legal science in a particular legal community", it may lead to "an uncritical legitimation of the coercive state order that constitutes that community"[15]. Seen like this, Kelsen's theory - in spite of its sometimes misunderstood "purity" - is fully compatible with the view that law always expresses a point of view about justice and can be considered, like Hart's theory, as expressing a relationship between law and morality which holds that there exists a contingent or chance relationship between both normative orders. What is pure is not law, which appears conditioned by moral dimensions, but rather knowledge of law.

2. The thesis of the exclusivity of positive law

Kelsen defines the pure theory of law as "a monist theory of law, according to it there is nothing else but positive law", as opposed to the dualist character of the *lex naturalis* doctrine which affirms the "existence of a natural law as well as a positive law"[16]. In Kelsen's view, law is "always positive and its positiveness consists of the fact that it is created and nullified by the acts of human beings which makes it independent of morality and other similar normative systems"[17].

The foregoing assumes that legal norms have their origins in empirically verifiable events, in acts of human will, that is to say, that they are positive norms. As will be seen later in more detail, the fundamental norm - the only norm which cannot be related to real events in the sense suggested above because it is assumed rather than established - is also related to empirical reality in that its formulation is conditioned by the general effectiveness of the legal system. So, in spite of the necessity to separate the two spheres, imposed by the principle of methodological purity, Kelsen considers the presence of a certain correlation between legal norms and reality to be a basic requirement for the obtaining of the objectivity and neutrality understood to be basic necessities of scientific knowledge. This thesis coincides with Hart's thesis on the social sources of law.

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[15] KELSEN, H., Teoría pura del derecho, cit., pp. 81 y 82.

[16] See KELSEN, H., «Justicia y derecho natural», cit., p. 163. Again Kelsen makes clear that "the fundamental norm is not a different law from positive law, it is solely its source of its validity, the logical-transcendental condition of its validity."

[17] KELSEN, H., Teoría General del Derecho y del Estado, trad. de E. García Maynez, UNAM, México, 1995, p. 13

3. The conception of law as a system

To fully understand Kelsen's concept of the legal system it has to be understood that the systematic articulation of norms in the pure doctrine is not only done for theoretical or methodological reasons but also for epistemological ones.

This locates Kelsen's theory inside a stricter understanding of positivism than the two previous ones, which have the idea of system among their defining features. Though I cannot deal with the question in detail here, I think that it is possible to state that the systemic vision constitutes one of the identifying marks of legal positivism understood as a theoretical approach to legal questions that allows it to differentiate itself from realist theory. Turning to the distinction between systematic and decisionist conceptions of law, it is possible to identify positivism with the former and realism with the latter[18]. It can, thus, be seen that Kelsen's position involves a critique of realist theories of law.

The assumption of a systematic conception of legal issues holds that the objective validity of a legal norm requires not only that it have been put in place by factual behavior the subjective sense of which is a norm but also demands that this factual behavior be identifiable as a "creator" of legal norms on the basis of that which has been established a superior law[19]. This is the criteria used by Kelsen to distinguish a legal norm from a highwayman's order[20].

I will now turn to an examination of Kelsen's systematic conception of law.

II. The idea of the legal system in the pure theory of law.

Bobbio states that it is with Kelsen that the theory of law for the first time turns to "the study of legislation as a whole, as it takes not the individual norm but legislation, understood as a system of norms as a fundamental concept"[21]. Although in his first great

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[18] WRÒBLEWSKI, J., "Dilemmas of the Normativistic Concept of Legal System", Rechstheorie, Beiheft 5, 1984, pp. 319-333, p. 321, BOBBIO, N., El positivismo jurídico, trad. de Rafael de Asís y A. Greppi, Debate, Madrid, 1993, pp. 152 y ss. y GUASTINI, R., Dalle fonti alle norme, Giappichelli, Torino, 1990, pp. 278-284.

[19] BARBERIS, M., "La norma senza qualitá. Appunti su 'validità' in Hans Kelsen", Materiali per una storia della cultura giuridica, núm. 11, 1981, pp. 405-438.p. 428

[20] KELSEN, H., Teoría pura del derecho, cit., p. 60.

[21] BOBBIO, N., "Estructura y función en la Teoría del Derecho de Kelsen" in BOBBIO, N., Contribución a la Teoría del Derecho, trad. de A. Ruiz Miguel, Debate, Madrid, 1990, pp. 235-254, p. 245.Bobbio's position is exaggerated, for two reasons. Firstly, because Kelsen's theory is indebted to the work of other authors, especially A. Merkl and also because natural law and primitive positivism involve a certain idea

work Kelsen occupies himself exclusively with the study of law from a static perspective that "has as its object law as a system of norms with validity, law in a state of equilibrium" - which led him to develop a theory of the legal norm -, in his later works he went to add a dynamic perspective to his approach which looks at "the legal process in which laws are made and applied, law in movement"[22], on the basis of which he developed a theory of legislation which resolves the issue of the validity of legal norms.

Kelsen's model of the legal system presents itself as a formal scheme which tries to take account of its internal structure as well as the functioning of the legal orders in force. In his view, positive law consist of a set of norms, a plurality of decisions made by different authorities, all amenable to being considered as one, as a system.

So, when it comes to examining the question of the unity of legislation it is useful to differentiate between two perspectives, two points of view. The first is internal and has its boundary in the constitutional norm and deals with the problem of the validity of norms by considering them individually; while the second is external, goes beyond the bounds of the constitution and deals with the question of the validity of legislation as a whole[23]. Thus, in Kelsen's system there are two basic reference points: 1) the gradual, hierarchic or pyramidal construction which operates from the internal viewpoint and 2) the fundamental norm which operates from the external point of view.

The solution to the problem of legislative unity offered by Kelsen's theory from the internal perspective not only has travelled beyond the ambit of representatives of the pure theory but has even exceeded the bounds of the theory of law. In Kelsen's opinion the legal order "is not… a series of coordinated norms which are to be found lying side by side on the same level, as it were, but rather a true hierarchy of different levels"[24].

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of system. Furthermore, in spite of the importance Kelsen gives to the idea of system he has recourse to the idea that the sanction is the defining feature of legal norms and not their forming part of legislation.

[22] KELSEN, H., Teoría pura del derecho, cit., p. 84

[23] The distinction between the internal and external viewpoint is here used in a somewhat different sense from that used by HART, H.L.A. El Concepto de Derecho, trad. de Genaro Carrió, Abedelo-Perrot, Buenos Aires, 1998, p. 110 and similar to that used by ASÍS ROIG, R., Jueces y normas. La decisión judicial desde el Ordenamiento, Marcial Pons, Madrid, 1995, pp. 23 y 24. According to the latter "The internal viewpoint is here understood as that adopted from inside legislation, that perspective which does not go beyond the limits of law. The external viewpoint, on the other hand, looks at law 'from the outside' and uses material and focuses that do not necessarily come from the legal ambit".

[24] KELSEN, H., Teoría General del Derecho y del Estado, cit., p. 146.

The law can, therefore, be represented by the image of a pyramid[25]. In line with this image the legislative order can be seen as internally configured as "a terraced structure with norms reciprocally subordinated and superordinated"[26]. In accordance with this scheme the plurality of norms existing at lower levels decreases as the hierarchic order is ascended until a final norm is arrived which, limiting the considerations possible from the internal viewpoint, is the constitutional norm. Within this gradualist construction, the validity of a norm rests on a superior norm and a norm is valid if it conforms to the norms of a higher level in the structure. The legal system is, therefore, in Kelsen's view a scheme for the identification and justification of norms in which validation requires appealing to a higher norm[27].

In the explanation of the unity of the external viewpoint, that is, in the justification of legislation as a whole, Kelsen, as a consequence of the principle of methodological purity - which, of course, prevents the validity of a norm from being grounded in any external factual or ideological element - introduces the expedient of the fundamental norm. This norm is presented as the element which constitutes the "unity" and "validity" of all the other norms in the system[28]. I will now turn to an examination of this element.

With respect to its function, the fundamental norm serves to put an end to the chain of validation of inferior laws by superior ones. As Kelsen points out, the question as to the validity of a norm leads eventually to the constitution as the superior norm in the legal order. The validity of the constitution can be referred back to a previous one but in all cases a constitutional norm will be arrived at which has either arisen in a

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[25] See, for example KELSEN, H., Teoría pura del derecho, cit., p. 215 The doctrine of gradual construction of the legal order (Stufenbau) is adopted by Kelsen, as he himself recognizes in the "Prólogo a los Problemas capitales de la teoría jurídica del Estado" from MERKL, A., «Prolegomeni alla costruzione a gradi» en MERKL, A., Il duplice volto del diritto. Il sistema kelseniano e altri saggi, trad. de C. Geraci, Giuffrè, Milano, 1987, pp. 3-65

[26] KELSEN, H., Teoría pura del derecho, cit., p. 215.

[27] GOLDING, M.P., "Kelsen and the concept of 'Legal System'" in SUMMERS, R.S., More Essays in Legal Philosophy, Basil Blackwell, Oxford, 1971, pp. 69-100, p. 76. This idea of the meaning of validity as conformity with superior norms is later assumed by HART, H.L.A., El Concepto de Derecho, Abedelo-Perrot, Buenos Aires, 1998, p. 133. Hart also assumes the systematic vision of law and the concept of validity used by VON WRIGHT, G.H., Norma y Acción, Una investigación lógica, trad. de P. García Ferrero, Tecnos, Madrid, 1ºed., 1ª reimp., 1979 on the basis of the idea of higher order norms and chains of subordination, markedly Kelsenian notions. The same can be said about the systematic reconstruction proposed by RAZ, J., El concepto de sistema jurídico, Una introducción a la teoría del sistema jurídico, trad.de R. Tamayo y Salmorán, México, 1986, based on the idea of chains of validity.

[28] KELSEN, H., Teoría pura del derecho, cit., p. 202.

revolutionary context or is the first constitution of the state in question[29]. For Kelsen, the validity of this constitutional norm rests on the fundamental norm.

This is a norm "the existence of which must be assumed as it cannot be enacted by an authority the competence of which would have to be based on a norm of even greater superiority"[30]. It is a necessary assumption given the epistemological coordinates in which Kelsen's theory frames "all positivist interpretations of legal themes"[31]. Kelsen states that his formulation of the pure theory only makes explicit "what all jurists, unconsciously in the majority of cases, take for granted when they consider positive law as a set of valid norms and not just as a set of events and when at the same time they reject any natural law from which the order of positive law might receive its validity"[32].

The fundamental norm is, as has already been indicated, conditioned by its effectiveness. As Kelsen says, "The basic norm of a legal system is not the arbitrary product of the imagination of a jurist. Its content is determined by events"[33] in so far as it can only be assumed in the context of a legal order which is effective in overall terms, that is to say, that is generally applied and obeyed. Kelsen is also careful to clarify that while effectiveness is a necessary condition for the validity of a legal system it is not in itself the basis on which the validity of the fundamental norm is founded. Validity is not produced by effectiveness but cannot exist without it[34].

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[29] In Kelsen's own words in idem pp. 202, "If the source of the validity of the constitution of the state is asked about, that on which the validity of all its norms rests … the constitution of an older state will perhaps be arrived at. That is to say that the validity of the actual state constitution would have originated from a previous state constitution, by way of constitutional reform consistent with the constitution, that is, consistent with a positive norm established by a legal authority. This process could be continued until the first constitution of the state is arrived at, the validity of which could not derive from a positive norm established by a legal authority. We would, thus, arrive at the constitution of a state set up by revolutionary means, by a rupture with the pre-existent constitutional order, and the validity of which would have been implanted in a dominion which previously would not have been, in general, the dominion of any constitutional state nor any state legal order based on it."

[30] Idem, p. 202.

[31] KELSEN, H., Teoría General del Derecho y del Estado, cit., p. 137

[32] Ibid.

[33] KELSEN, H., Teoría General del Derecho y del Estado, cit., p. 141.

[34] The impact of effectiveness on the fundamental norm can be clearly seen in the response offered by Kelsen to situations of revolutionary change in the legal order which result in change to the basic norm when the laws established by the new constitution "are applied and obey, in general terms", KELSEN, H.,Teoría pura del derecho, cit., pp. 217-219. The relationship between the fundamental norm and effectiveness can also be seen in the solution offered by Kelsen to the classic problem of distinguishing between law and the orders of a gang of thieves. Faced with isolated act of a highwayman Kelsen has

The fundamental norm has not produced the degree of consensus produced by the rest of Kelsen's theory. The most important objection to it is that it is superfluous and serves only to disguise the reality of power. The fundamental norm can indeed be done without if one abandons the neo-Kantian assumptions on which Kelsen's theory is based. I share the opinion of those critics who believe that it would be more correct to talk of a "basic founding event", that is, the power that supports the effectiveness of the legislation, identified at this level of analysis[35]. Kelsen himself believes that the fundamental norm may only be assumed to exist if there is an effective power behind it, capable of enforcing the law. The pure theory resolves the issue of the validity of the legal system in terms of its effectiveness. As a result, the fundamental norm becomes a fictitious solution which transforms the power of law,[36] which "disguises" in normative terms, what is in reality no more than the "factual situation"[37] .

At this point I would like to make some important observations. Firstly, the abandonment of the theory of the fundamental norm does not mean abandoning the idea that the "the gradualist theory and Kelsenian concept of validity" continue to be "a plausible scheme for explaining the functioning of legal systems"[38]. Secondly, though it is often pointed out that towards the end of his life Kelsen recognized his error and admitted the fictitious nature of the fundamental norm the fact is that he had always been fully conscious of the fundamental role of power in determining the validity of law. In a text dating from 1917 he wrote, "The problem of natural law is the eternal problem of what lies behind positive law. And I am afraid that those who look for an

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recourse to the idea of a normative system. However, when what is involved is the "systematic activity of an organized gang" the element that allows its activities to be distinguished from that of the legal order is that "no basic norm is assumed". Now the key question becomes "Why not assume one?" and the answer appeals to the question of effectiveness. "It is not assumed because, or rather when an order does not have a lasting effect… that is when the coercive order, considered as a legal system, is more effective than the coercive system constructed by the gang of thieves." Idem, pp. 60 and 61

[35] See, for example, PECES-BARBA MARTÍNEZ, G., Introducción a la filosofía del Derecho , Debate, Madrid, 4.ª reimp., 1993.p. 42.

[36] BOBBIO, N., "Kelsen e il problema del potere" inn B OBBIO, N., Diritto e potere. Saggi su Kelsen, cit., pp. 102-122, Edizioni Scientifiche Italiane, Napoli, 1992, p. 120. Expressly mentioned by KELSEN, H., in his 1928 text "Die philosophiscen Grundlagen u nd res Rechtspositivismus" included as an appendix to the English and Italian translations of the General Theory of the Law and the State. Here I use the English translation "Natural Law Doctrine and Legal Positivism" in KELSEN, H., General Theory of Law and State, translated by A. Wedberg, Harvard University Press, Cambridge, 1949, pp. 389-446 , "In a certain sense the fundamental norm means the transformation of power into law".

[37] LOSANO, M., Sistema e struttura nel diritto, cit., p. 76.

[38] PRIETO SANCHÍS, L., Ideología e interpretación jurídica, Tecnos, Madrid, 1997, p. 131.

answer will find neither the absolute truth of metaphysics nor the absolute justice of natural law. *Whoever lifts the veil and does not close their eyes will be dazzled by the Gorgon of power*"[39] . Thirdly, I believe it to be possible to interpret the fundamental norm as an option to judge law not in terms of naked power or relations of force but rather as a set of objectively valid norms. This would be an option for playing the game of law.

Moving forward in my analysis; Kelsen's systemic vision of the Law is completed by a definition of the legal system as being dynamic, in contrast to the static character of moral systems[40]. From a reading of the texts in which Kelsen makes reference to this distinction, it would seem that he makes use of two criteria to differentiate dynamic from static systems. These are, 1) the different structure, or the nature of the fundamental norm and 2) the different relation of norms inside the system, that is, the different configuration of inter-normative relations.

The structural or "natural" difference between the fundamental norms in dynamic and static systems arises from the fact that in static systems the fundamental norm is configured as a precept that integrates certain general moral contents, that is to say, in a static system the fundamental norm appears to have a material nature. In dynamic systems, on the other hand, the fundamental norm is merely formal in nature and limits itself to awarding competence to the maximum norm-creating organ without imposing conditions on it regarding the norms to be created by it.

The formal characterization of the fundamental norm of the legal order, understood as dynamic normative system, is the other side of the coin of its connection with its effectiveness and expresses the positive character of the pure theory in so far as it involves the translation of the specific terms of Kelsen's discourse to the thesis of the conceptual separation between the law and morality[41]. The exclusively formal character

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[39] KELSEN, H., Gleichlteit vor dem Gesetz, "Veroffentlichung der Deutschen Staatsrechtslehrer" , Heft 3, Walther de Gruyter, Berlin-Leipzig 1927, p. 55. In Greek mythology the Gorgon is a kind of marine monster with a petrifying glare and who his often represented as having snakes instead of locks of hair.

[40] Regarding this dichotomy see KELSEN, H., Teoría pura del derecho, cit., p. 20, KELSEN, H., Teoría General del Derecho y el Estado, cit., p. 129 and the previously cited 1928 text. In my view this dichotomy does not try to take account, as is usually held, of the difference between law and morals from the viewpoint of their systematic configuration, rather it deals with two clashing conceptions of law: positivism and natural law.

[41] Kelsen states that "Validity cannot be denied to any positive legal order because of the content of its norms. This is an essential aspect of legal postivism and precisely through its doctrine of the founding norm the pure theory shows itself to be a positive legal order." KELSEN, H ., Teoría pura del derecho, cit., p. 228.

of the fundamental norm prevents it from in any way “conditioning the content of the constitution, that is, the norms established by the founding act of the constitution and the content of those norms later created on the basis of that constitution”[42] . The fundamental norm’s lack of content implies that the socially effective power, that which actually obtains obedience, has the competence to produce superior norms with absolute discretion. That which prevents the denial of validity to an effective legal order, regardless of its contents, allows the validity of legal orders based on different moral options to be affirmed and allows that which is produced by a revolution that manages to impose itself to be considered valid law.

Turning to inter-normative relations, in static systems norms are deduced form each other, a norm is considered valid if its content may be deduced from the content of a superior norm and finally in the content of the fundamental norm. In dynamic systems, by contrast, norms are produced by means of each other, a norm is considered to be valid if it has been produced in the manner determined by a superior norm and finally by that determined by the fundamental norm. In law, seen as a dynamic normative order, the hierarchic relation of dependence between norms is a production regulation relation. Superior norms regulate the production of inferior ones.

The idea that the law regulates its own production occupies a central part of Kelsen’s structural analysis. He considers it to be “an especially significant peculiarity of law” with “extraordinary theoretical relevance”[43] . The radical importance of this note on the theoretical plane arises from the fact that, as has already been mentioned, the systematic re-construction of law is based exactly on this regulation of production[44].

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[42] KELSEN, H., «El concepto de orden jurídico», trad. de M. I. Azareto in KELSEN, H., Contribuciones a la teoría pura del derecho, cit., pp. 91-117, p. 98.

[43] KELSEN, H., Teoría pura del derecho, cit., p. 84.

[44] Kelsen expressly defines law as a “system of individual and general norms, interrelated between each other on the basis that law regulates its own production.” In any case and in spite of the importance he gives it for the understanding of law, Kelsen understands that he lacks the virtuality necessary to distinguish the legal system from other normative orders. Here he is obliged to resort to the element of coercion contained in his theory, of legal norms considered individually. Based on this premise, the norms which regulate legal production, essential for legislation to be considered dynamic, are presented from a static perspective as being fragments of norms, or non-independent norms which, like secondary behavioral norms, need to connect with primary norms which establish sanctions in order to be considered proper legal norms. KELSEN, H., Teoría pura del derecho, cit., p. 67 y KELSEN, H., Teoría General del Derecho y del Estado, cit., p. 170. In any case, the idea of system, its dynamic character and its note of coercion can coexist as characteristic features of the legal phenomenon as long as the conceptual incidence of the coercion feature is moved from isolated norms to legislation considered globally. And the type of coercion that characterizes law is coercion institutionalized, organized and

According to the most widespread version of Kelsen's theory this production-regulation relation, which connects legal norms in a dynamic system, is no more than formal in nature. It is thus held that in Kelsen's view superior norms limit themselves to establishing the competent organ for the production of inferior norms and the procedures for their creation, or at least that these formal aspects of the relations of production are the only characteristics that have to be considered when deciding on the question of validity. The criteria for validity are thus essentially formal. It is, thus, commonly held that the evolution of contemporary constitutional legislations that incorporate a range of material norms that are said to condition in an essential way the valid exercise of normative power leads to the necessity to abandon or at least to revise Kelsen's conception of the judicial system.

Nevertheless, a more thorough reading of Kelsen's systematic vision of law allows us to see that the superior norms do not only formally determine but also materially determine the creation of inferior norms[45] and that both kinds of determination are important in determining legal validity. In Kelsen's system the validity of legal norms depends on their having been created by the competent organ, following the appropriate procedure and not being in conflict with the contents of superior norms. Seen another way, the action of normative power is both formally and materially conditioned.

Kelsen repeatedly insisted that the determination of an inferior norm by a superior one "is never complete", there always being a "larger or smaller space for the free play of discretion"[46] . In order to understand this a brief examination of Kelsen's conception of interpretation will be required.

Kelsen conceives interpretation as "a spiritual procedure which accompanies the

regulated by legal norms, which is a consequence of its articulation as a normative system of the dynamic type.

[45] In Kelsen's view in KELSEN, H., Teoría pura del derecho, cit., p. 45, at any level of the judicial pyramid "the production of an inferior norm by a superior one may occur in two directions. The superior norm may determine the organ that produces the norm as well as the procedure by which it is produced and its content." In any case Kelsen shows himself to be not in favor of the material determination of general norms from the constitutional norm. In this sense Kelsen's theory "contaminates" itself, expressing a preference for a constitution without contents, or with sufficiently precise contents related to his moral relativism and maintained in the defense of democracy as a political model. See KELSEN, H., La garantía jurisdiccional de la Constitución, en KELSEN, H., Escritos sobre democracia y socialismo, trad. de J. Ruiz Manero, Debate, Madrid, 1988, pp. 109-155, p. 143.

[46] KELSEN, H., Teoría pura del derecho, cit., p. 350.

process of the application of law in its movement from a higher level to a lower one[47]. In his view, this procedure does not lead to the discovery of the only correct interpretation of the norm on the basis of which its only possible application can be effected. Kelsen sees legal interpretation as "knowledge of the sense of the object interpreted" which produces as a result a "framework which sets out the law to be interpreted and, therefore, the various possibilities produced within the framework"[48] . So, when the interpretation is carried out with a view to application, the competent authority has to choose one of the meanings of the legal disposition in order to be able to make a decision which is not the only correct one possible but one of a range of correct ones possible.

Basing himself on these parameters, Kelsen claims that in the authentic interpretation - that is, one carried out by a legal organ in the process of application of law - "the cognitive interpretation of the applicable law connects itself with an act of will in which the law application organ effects a choice among the possibilities which the cognitive interpretation offers"[49] . The important thing about the framework is that its existence supposes that there will be interpretations that remain outside it. It is thus possible to speak of possible and impossible, valid and invalid interpretations. In Kelsen's own words, "All acts of interpretation conform to law" - that is, are valid - "if they remain inside that framework and fill it with some possible sense"[50] .

In his view, the question of "what would be the 'correct' possibility within the framework of applicable law" is not a question directed at knowledge of positive law nor is it a theoretical judicial problem; rather it is a political one"[51]. The choice among the interpretations possible with the framework is, in Kelsen's view, influenced once more by moral relativism, a purely subjective act of volition. He thus refuses to involve himself in the question of the justification of decisions or legal argumentation and refuses the possibility of[52] rationally analyzing the choice of the interpreter. Again, this

[47] Idem, p. 349.

[48] Idem, p. 351.

[49] Idem, p. 354.

[50] Idem, p. 351.

[51] Idem, p. 353.

[52] In any case this analysis would exceed the ambit of legal positivism.

is generally understood as a defect in Kelsen's theory, especially in the context of constitutional law.

To close this exposition of Kelsen's systematic conception of law I will now look at the problem of irregular norms. In Kelsen's own words, "Given that the legal order represents a terraced construction of subordinated and superordinated norms and that a norm only belongs to a specific legal order when its production arises from a determining superior norm, there arises the problem of a conflict between a superior and inferior norm. Hence the question; what counts as law when a norm does not correspond with the norm which determines its production?"[53] Kelsen, on considering the possibility that norm creating authorities might not follow rules for disciplining its normative activities, thought it of crucial importance the establishment of mechanisms to guarantee the correctness of acts of legal production and deal with violations of the legislative hierarchy in order to maintain the functionality and consistency of law as a normative system. In the context of a dynamic normative order these mechanisms consist in the "conferring" of a power, that is, authorizing an organ to examine the correctness of the actions of another organ and where necessary to annul incorrect decisions"[54].

Yet another organ could be established to examine, in its turn, the decisions of the first organ of control. However, as Kelsen warns, discussions relating to the correctness of decisions "cannot continue indefinitely", and "must have a time limit" imposed by the existence of the final competent organ "to reach a decision on the dispute, an authority whose decision cannot be revoked or modified"[55]. Given all this, Kelsen himself acknowledges that "there can be no absolute guarantee that an inferior norm will correspond to a superior one. The possibility that the former will not correspond to the latter, which should determine its creation and content… can never be excluded"[56].

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[53] KELSEN, H., Teoría pura del derecho, cit., pp. 273 and 274.

[54] CELANO, B., "Justicia procedimental pura y teoría del Derecho", Doxa, núm. 24, 2001, pp. 407-427 p. 415. In Kelsen's view in KELSEN, H., Teoría pura del derecho, cit., p. 274, "the question referring to whether a norm produced by a legal organ is in accordance with the superior norm" cannot be "separated from the question of who is authorized by the legal organ to resolve the previous question." And this connection means that the harmonizing of inferior norms to superior ones, "can only be dealt with by the organ determined by the legal order according to the procedures determined by that order."

[55] KELSEN, H., Teoría General del Derecho y del Estado, cit., p. 184.

[56] Ibid.

Kelsen's theory proposes dealing with the existence and possible consolidation of incorrect decisions by the formulation of the doctrine of the tacit alternative clause, or the two assumed authorizations. With the thesis of alternativity Kelsen tries to take account of the definitive validity possessed by organs after which no appeal is possible and the provisional validity of other legal authorities, including when they violate the determinations of superior norms[57].By virtue of this doctrine it is understood that the general norm has foreseen two alternative general authorizing norms: one which expressly states that it authorizes the creation of norms of a certain content by the way of a specific procedure, and another, tacit, which authorizes the creation of norms with their content and the procedure for creating them decided by the power itself. By this expedient, the tacit alternative clause eradicates the possibility that the power will infringe on the prescriptions of the superior norms because the decisions which clash with the express alternative are by definition in conformity with the tacit alternative the determination of which depends exclusively on the will of the power itself.

Many criticisms have been made of the alternative clause doctrine on the grounds of the damage it does to the systematic vision of law. Perhaps the strongest objection is that which signals that the doctrine of alternativity affects not only the determination of content but also that of procedure[58] and even the determination of the competent organ, which has led one commentator to say that "It is evidently absurd that positive law can authorize anyone to produce norms of any content and following any

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[57] In Kelsen's words "What does it mean that that the legal order allows no further appeal of the decision of the highest court? It means that in spite of the existence of a general norm which the court ought to apply and which predetermines the content of the decision the court ought to produce, an individual norm produced by the highest court and which does not correspond with the general norm may acquire validity. The fact that the legal system may confer validity on such a sentence means that not only is the general norm valid that predetermines the content of the sentence but also a general norm which means that the court may itself determine the content the individual norm should produce. These two norms constitute a union so that the highest court is authorized either to produce an individual legal norm of predetermined content or an individual norm the content of which is not predetermined but rather has to be determined by the court itself." See KELSEN, H., Teoría pura del derecho, cit., p. 275. It is important to mention that Kelsen also applies this doctrine to constitutional orders and distinguishes between two assumptions: one in which there exists an organ charged with ensuring the constitutionality of laws and one in which there is no such authority, in which case the legislator "is in a position analogous to that of the highest court." Idem, pp. 279 and 280. Starting from the highest level, this alternative authorization extends itself down the judicial system and explains the validity of materially irregular norms which are susceptible to being annulled. In Kelsen's view, the provisional validity of these norms "reposes in the legal order", that is, "a preexistent general norm, previous to its production, which when it determines the content of a legal norm does so in the alternative sense set out here." KE LSEN, H., Teoría pura del derecho, cit., p. 276.

[58] Kelsen clarifies in Kelsen KELSEN, H., Idem, pp. 274 and 275 that "in the interests of brevity", he will only examine the question of material correspondence between inferior and superior norms.

procedure"[59] .

This is something that radically conflicts with the idea of system. By virtue of the alternativity doctrine any effective power becomes a legal power and any positive mandate becomes a legal norm as long as it is effective.

Kelsen expressly admits, when he deals with the treatment of incorrect decisions, the existence of a new limitation on the principle of legitimacy - which demands that norms be created by formal rules and of content contemplated in the legal order itself - by the principle of effectiveness[60]. This limitation in effect supposes that the principle of effectiveness predominates over that of legitimacy. Furthermore the tacit alternate clause doctrine implies that the principle of effectiveness determines the principle of legitimacy in so far as effective norms are considered valid by virtue of their legitimacy, that is by virtue of their conformity with superior norms[61]. With the tacit alternative clause doctrine Kelsen tries to harmonize legally valid norms - in terms of his theory - with effective norms which are applied and obeyed in a given society.

The tacit alternative clause doctrine, along with the theory of the fundamental norm, constitutes an expedient to which recourse is had to "translate into normative terms the factual determinations operating in the legal system, determinations which Kelsen is well aware that he cannot include in his theory without feeling that he is destroying his essential theoretical construction; the radical separation and autonomy of *Sein* and *Sollen"*[62]. Kelsen's response to the problem of irregular norms is, thus, manifestly unsatisfactory. In any case, Kelsen's errors and their causes allow us to extract lessons which may help to resolve a difficult dilemma produced by any systemic conception of law.

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[59] NINO, C.S., "El concepto de validez y el problema del conflicto entre normas de diferente jerarquía en la teoría pura del derecho" in Derecho, Filosofía y Lenguaje. Homenaje a Ambrosio L. Gioja, cit., pp. 131-146, p. 139 y RUIZ MANERO, J., Jurisdicción y normas, Centro de Estudios Constitucionales, Madrid, 1990, p. 67.

[60] KELSEN, H., Teoria Generale delle Norme, a cura de M. Losano, trad. de M. Torre, Einaudi, Milano, 1985, p. 405.

[61] PINTO, J., "El voluntarismo de Hans Kelsen y su concepción del orden jurídico como un sistema normativo dinámico",Filosofía y Derecho. Estudios en honor del profesor José Corts Grau,Universidad de Valencia-Facultad de Derecho, 1977, pp. 175-208 (recogido también en DELGADO PINTO, J., Estudios de Filosofía del Derecho, Centro de Estudios Políticos y Constitucionales, Madrid, 2006, pp. 115-149), p. 195.

[62] GARCÍA AMADO, J.A., "Hablando de Kelsen con Delgado Pinto" in El positivismo jurídico a examen. Estudios en Homenaje a José Delgado Pinto,Ediciones Universidad de Salamanca, Salamanca, 2006, pp. 1199-1209, p. 1209.