HANS KELSEN
ESSAYS IN LEGAL AND MORAL PHILOSOPHY

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HANS KELSEN
(1881–1973)

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ESSAYS IN LEGAL AND
MORAL PHILOSOPHY

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PREFACE

In his choice of texts, the Editor has been faced with the difficult task of selecting, from among the author's more than 600 publications, those of the greatest philosophical interest. It is chiefly the topics of value-relativism and the logic of norms that have been kept in view. The selection has also been guided by the endeavour to reprint, so far as possible, texts which have not hitherto appeared in English. At times, however, this aim has had to be discarded, in order to include works of key importance and also the latest expressions of Kelsen's view.

In addition to the two topics already mentioned, the Editor has considered Kelsen's discussions of the causal principle to be so far worthy of philosophical attention, that some writings on causality and accountability have been included in this collection of philosophical studies.

OTA WEINBERGER

Hans Kelsen died on April 19th, 1973. Only his work now lives, for the inspiration of future generations of jurists and philosophers.

Graz, 25th April, 1973

OTA WEINBERGER

TRANSLATOR'S NOTE

I am obliged to the Editor for his careful scrutiny of the translation, which has led to a number of corrections and improvements in the text. I am also indebted to Mrs. Eusebia Shifflett and Mrs. Judy Catto for their accuracy and diligence in typing the manuscript.

INTRODUCTION: HANS Kelsen AS PHILOSOPHER

The jurist of our century, as Hans Kelsen has been called, has now celebrated his ninetieth birthday – he was born in Prague on 11th October 1881. Despite all the vicissitudes of a richly productive and contentious life, he is one of the few men in the intellectual history of mankind to whom it has been granted to take an active part for six decades – and always in the forefront – in the scientific fray. He has not yet laid down his pen, and is working with a great thinker's sure touch for the actuality of the problems, on questions concerning the logic of norms and the relation between law and logic. In this foreword to a selection of his philosophic writings, I am therefore by no means intent on making a final assessment of the achievement of this great man; I shall merely endeavour to bring home to the English-speaking reader the philosophical relevance of his ideas. An exhaustive account and evaluation of his work in the philosophy of law and his contribution to the clarification of juristic method is needless, for as a master teacher of legal methodology he is so well-known that there is scarcely a single philosopher of law who has not had to come to grips with his views.

In the Foreword to *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze*, an epoch-making work, in which Kelsen first took the road towards the founding of the Pure Theory of Law, we find a passage which gives clear expression alike to his scientific position and his ethos as a thinker:

The blending of mutually exclusive approaches necessarily leads to *fiction*, the claim to actuality in conscious defiance of the real state of affairs. And nothing is so typical of the state of contemporary legal science than that its theory is riddled with fictions. The struggle against fiction, that contemptible white lie of science, is one of the aims of my book.¹

In addition to the moral attitude of unconditional integrity, characteristic of the thinker striving for knowledge and clarity, three fundamental features at least of Kelsen's outlook find expression in this declaration of his programme:

- (1) The conviction that the mode of approach determines the knowl-

edge and structure of the scientific system, and that for the intellectual unity and correctness of science it is therefore necessary to isolate the different approaches from one another, and to build up each science as a methodologically unitary system;

(2) The endeavour, by exact analysis of concepts, to sift out the essentials in formal generality, and to set them forth explicitly;

(3) The connection with reality, one aspect of which it is the business of every science to present objectively, as an answer to a particular way of asking questions.

The philosophical foundations on which the Pure Theory of Law is constructed are conceptions of general philosophic interest. In accordance with the aims of this survey, I should like to discuss the philosophical character and significance of Kelsen's main ideas and beliefs, together with their overall consequences, while omitting consideration of the implications of the Pure Theory of Law for questions of juristic detail.

In speaking of the philosophical and scientific views of a thinker whose work embraces so large a span of time, there will inevitably arise questions also about the development of his doctrine, and the changes of opinion that have occurred over the years. In Kelsen's work we find, from this standpoint, a most uncommon stability in his basic views. According to Métall's valuable bibliography, dating from 1969, Kelsen's *oeuvre* comprises 604 items, in which he expounds his position, discusses a series of interesting related problems, and at times also engages in polemics against other views and in rejoinders to critics.² Kelsen's work strikes me as so much of a piece, that I would even venture to claim that already in the *Hauptprobleme* all his essential attitudes are present at least in embryo; the firm outlines of his thought, no less than the elaboration of its details, appear to me as a rational unfolding of the basic position, and an answer to the academic developments of the period, fashioned by a lucid and unremittingly active mind.

I should now like to set forth under a few headings what seem to me the key conceptions underlying the fabric of Kelsen's thought.

1. KELSEN'S CONCEPTION OF LEGAL SCIENCE: THE STRUGGLE AGAINST SYNCRETISM OF METHODS

Kelsen, like Max Weber, champions the notion of a value-free science,

a science which seizes and sets forth what is actual, without evaluating what it finds. This also applies even when the object of knowledge consists of facts which are themselves by no means value-neutral, which contain – as law does – an ‘ought’ and valuations which man certainly does not approach with any lack of concern or evaluative interest. It is precisely here that it is important to view the law as it actually exists, and to distinguish the purely cognitive tasks of science from any evaluation of the law. In juristic methodology this leads to a sharp separation of considerations *de lege lata* from those *de lege ferenda* – of which only the first are in Kelsen’s opinion juristic – even where questions of interpretation or discretion are concerned.

In addition to its value-free character, Kelsen’s general conception of science and his delimitation of legal science are responsible for the idea that every science must constitute a methodologically unitary whole, and hence – in his neo-Kantian phraseology – that the subject-matter of science is first determined by its method, its mode of observing and apprehending. This must be taken to mean that science does not depict entities as they may happen to be in and for themselves, but rather that the objects of the scientific system are constituted by the perspective, which is itself defined by the statement of the problem and the mode of approach. Science is an ordered whole, a system of cognitions answering to the setting of a problem.

The two ideas thus introduced, the value-free character of science, and its systematic unity, constituted by method, are the source of Kelsen’s postulate of the purity of legal theory: Legal theory must be a general theory of positive law, employing the specifically juristic method of apprehension, while excluding all admixture of considerations drawn from psychology, sociology, politics or ethics. The Pure Theory of Law ignores, though it does not deny, the law’s connection with the facts of psychology, sociology, morals and politics, but it insists emphatically on purity in the avoidance of any syncretism of methods, “which obscures the essential character of legal science and erases the boundaries set for it by the nature of its subject-matter”.³

The issue of syncretism, with all the intellectual background and consequences of the postulate of purity, are naturally matters of general philosophical interest, inasmuch as the question is decisive in determining the essential nature of legal science.

According to modern views – although even today it is mostly not stated in Kelsen's idiom – science is regarded as a system which depicts one aspect of a sphere defined by the questions put. From this point of view, Kelsen's conception of science and his clear-cut delimitation of legal science appear justified; and all the more so in that the juristic method as a way of looking at law, as a normative determination of accountability, which can be represented by the general schema of a normative linking of conditions and consequences of right- or wrong-doing, guarantees a unitary view of the subject. Nevertheless, it is precisely one of the main points on which Kelsen's theory has been exposed to critical attack. For it has often been doubted whether it is possible to effect a strict isolation of the purely normative conception of positive law, without reference to sociological considerations; and also whether it is not in fact precisely the jurist's task to study the immensely complex fabric of the law from every side, in all the wealth of its relations to psychology, sociology and the theory of value. As to this it must be said that, having started from an initially somewhat dismissive attitude to the sociology of law, Kelsen began increasingly to recognise and become interested in it. Himself the author of so important and essentially sociological a work as *Society and Nature*, he insisted nonetheless upon confining juristic and legal science to nothing other than the normological apprehension of the meaning of positive law.

It might be thought a purely terminological or external question, whether to adopt Kelsen's view of legal science as merely the study of positive law, and to assign all other questions concerning the law to other sciences, notably legal sociology and political science. But then there is the problem, that without sociological arguments the positive nature of the norm-system could scarcely be vindicated, and that all the elements which carry weight here – namely those of legal operativeness – are sociological facts. Moreover, in my view, there are complex questions calling for a consideration and confrontation of the observation of the legal phenomenon from many angles, and such as must interest the jurist, since they are needed to explain this very complex phenomenon of law. Can the jurist disregard the question of whether and how law is made real, or whether it remains 'on paper'? He will certainly have to take into consideration, and rightly so, the genetic relations of law, its specific institution in regard to social conditions, and the social effects

of setting up norms. Although, therefore, I do not care to accept Kelsen's anti-sociological pure jurisprudence as a pointer to the exclusion of such important considerations from legal science, I think that his battle against syncretism of methods is justified, and has elevated legal science to a new level. Syncretism of methods is to be fundamentally avoided, i.e., the description and explanation to be given by science must be framed in pure fashion – according to the problem in hand; it would be an error, for example, to answer such a legal question as whether this or that legal duty exists under a particular system of law, by considerations drawn from sociology or value-theory, rather than by an enquiry into norms. This perfectly justified postulate of Kelsen's does not, in my view, exclude even complex enquiries such as that concerning the genetic relation between social facts and the shaping of the content of the law – so long as we pay proper attention in our investigations to the different elements of the problem.

I believe, therefore, that the methodological separation of the normo-logical consideration of law – which represents the aim of the Pure Theory of Law – from other legal enquiries, especially from the socio-logical and evaluative angle, is well-founded. But it seems to me inexpedient to exclude from legal theory, as metajuristic, all questions not of a purely normological kind. Legal theory cannot renounce such enquiries, if it wishes to arrive at a full understanding of law as an actual phenomenon, and is concerned to offer scientific guidance to the lawyer in his work.

Kelsen's demand for a purely cognitive science of law is connected with the exclusion from jurisprudence of any considerations *de lege ferenda*, and of the theory of the reasons for law. Much as I concur with Kelsen in postulating a separation of the *de lege lata* and *de lege ferenda* viewpoints, it seems to me nonetheless possible and necessary to make a scientific study also of the grounds for law, the reasons *de lege ferenda*. Here too it is the task of science to analyse the 'how' of such argumentation; though it may not be called upon to take a stand on the subject, it can discuss the pros and cons of the normative regulations which are under enquiry. Indeed, I regard this as a task for jurisprudence.

Kelsen's endeavour to create a general theory of law, its essential concepts, and the structural connections within the legal system, is in every way valuable and justified. Here he stands in the line of those

authors who – like Bentham, Austin, Hohfeld, Hart and many others – have put forward a so-called analytical theory of law. I believe it is here that Kelsen's greatest merits must be acknowledged. When he seeks to depict the universal characteristics of law, this must be understood in terms of structural generality, and not of inductively-based empirical generalisation. In opposition to these analytical enquiries into structure, and especially in criticism of the Pure Theory of Law, we often encounter the quite unwarranted objection that Kelsen leaves the content of law out of account and wishes to see legal theory and legal science concerned only with the form of law. Such objections testify to a fundamental misunderstanding of all structural analysis and an incomprehension of the relation between form and content. Positive law is content; and legal cognition, for Kelsen, is a knowledge of the content of positive orders. The structural theory merely provides instruments for a clear depiction of content. To criticise Kelsen because he allegedly turns away from the study of legal content, is a sign of utter failure to comprehend the basic ideas of his theory.

As a matter of intellectual history it should not be overlooked that the direction of attention to the structural relations in law was an important incentive to the development of the logic of norms, and that the Pure Theory of Law has disclosed essential principles of the logic of norm-systems.

2. THE CONTRASTING OF 'IS' AND 'OUGHT'

The clear separation of judgement and norm, of 'is' and 'ought', undoubtedly derives from the philosophy of Kant. But while for Kant it is above all the problem of causality and freewill ("Causality through freedom") which occupies the centre of discussion in this problem, for Kelsen it is causality and accounting (or imputation) which are contrasted as characteristic modes of conjunction in the fields of the 'is' and the 'ought'.⁴ This contrasting of realms of experience – nature and human behaviour – with their correspondingly different ways of conjoining and explaining, is typical of Kelsen's basic philosophical attitude.

Nature, according to one of the many definitions of it, is a determinate order of things, or a system of elements, related to one another as cause and effect, i.e., according to a principle we refer to as causality. The natural laws by which science describes this subject-matter, e.g., that metals expand when heated, are applications of this principle. The relation between heat and expansion is that of cause and effect.⁵

If, nonetheless, we analyse our statements about human behaviour, it appears that we connect acts of human behaviour with one another, and with other facts, not only according to the principle of causality (i.e., as cause and effect), but also according to another principle quite distinct from that of causality⁶

Only if society is understood as a normative order of mutual human behaviour, can it be conceived of as an object different from the causal order of nature; only then can social science be opposed to natural science [...]. The ordering principle, different from causality, that we apply when describing a normative order of mutual human behaviour, may be called *imputation* [or accounting].⁷

"The principle of causality says that if *A* is, then *B* is (or will be). The accounting-principle says that if *A* is, *B* is to be".⁸ Causality is independent of human intervention, whereas accounting is set up through norms posited by men; it is set forth in moral or legal laws. Causal chains are endless and overlapping. Accounting has a terminal point.

... man alone is held to account, because and insofar as moral and legal orders command only human behaviour; and they do so because it is assumed that only in man does the idea of their norms occasion acts of will, which in turn cause the behaviour commanded.⁹

The normative mode of apprehension, rooted in the concept of accounting, leads to Kelsen's answer to the problem of freewill.

Man is not held to account because he is free; he is free because he is held to account. Accounting and freedom are indeed essentially connected with each other. But this 'freedom' cannot exclude causality; and nor, in fact, does it do so in the least. If the claim that, as moral or legal personality, man is free, is to have any possible meaning, then this moral or legal freedom must be compatible with the determinacy of his behaviour under the causal law. Man is free because and insofar as reward, atonement or punishment are accounted as consequences to a particular piece of human behaviour as condition: not because this behaviour is causally undetermined, but although it is causally determined, and indeed, because it is so. Man is free because this behaviour of his is a terminal point in the accounting-series.¹⁰

For Kelsen the distinction of 'is' and 'ought', the cognitive and the normative, has epistemological and logical significance. Following Simmel, he associates the conceptual distinction of 'is' and 'ought' with the question of how being and obligation are grounded. "The question of why anything ought to be can invariably lead back only to an ought, just as the question why anything is, invariably finds an answer only in the being of something else."¹¹ In Kelsen's view (which I believe to cover the facts) the distinction of 'is' and 'ought' is to be understood as a conceptual differentiating of thought-contents, as a semantic distinction between different types of sentences which cannot be translated into one another. The logical relevance of the distinction lies in the fact which

finds brief expression in the slogan: You cannot derive an 'ought' from an 'is', or an 'is' from an 'ought'.

The difference between *is* and *ought* cannot be further explained. It is immediately apparent to us. Nobody can deny that the statement: 'Something is' – i.e., a statement describing a matter of fact – is essentially different from the statement that 'something ought to be' – i.e., a statement describing a norm; or that, from the fact that something is, it cannot follow that anything ought to be, or *vice versa*.¹²

It was Henri Poincaré who alerted logicians to the fact that, in what we nowadays call the logic of descriptive language, there are no rules whereby commands (norms, ought-sentences) can be derived from statements (cognitions); he thereby gave a significant impetus to the building-up of a logic of norms.¹³ Kelsen's postulate, that no 'ought' can be derived from an 'is' (and *vice versa*), is imbued with the same spirit as the thesis of Poincaré. Yet there is a not unimportant difference. The norm-logicians inspired by Poincaré say that among the arguments justifying an ought-sentence at least one normative sentence must always appear, which means, in effect, that an 'ought' cannot be founded on an 'is' alone. In those inferences which have normative and indicative premises,¹⁴ they see both premises equally as arguments for the conclusion. 'Ought', therefore, is never founded on 'is' alone, but is often derived from 'ought' and 'is' together. Kelsen emphasises that 'ought' depends on 'ought'. He is naturally aware that there are inferences with normative and assertive premises, but interprets the ties of validity in legal dynamics in such a way as to see the ground of validity only in the higher norm, not in the facts as well (*cf.* for example, *Reine Rechtslehre*, 2nd edn., p. 196; *Pure Theory of Law*, pp. 193f.). The legal dynamic thereby appears self-enclosed, but its connection with the facts is pushed into the background.

Obligation is a product of the human will, not something that exists outside the sphere of human willing and society. The will of the state is expressed in legal enactments, being nothing else but a system of norms; at all events, it is something distinct from the will of the persons who create law.

The conceptual relation of norm and law to the will is in my opinion an essential feature of Kelsen's theory. Not only is it connected with the postulates of the unity and exclusiveness of the norm-system, and the principle of legal positivism; Kelsen's firm conviction that law must be

expressed in the form of a norm-sentence prescribing a sanction is also to be understood on this basis (cf. pp. XVIII–XXIV).

The postulates of the unity and exclusiveness of the norm-system have found their way into the logic of norms. The unity of the norm-system finds expression there in the demand that the system should be free from logical contradiction; the exclusiveness of the norm-system states that every normative consideration or judgement must proceed strictly from one system. In jurisprudence these postulates lead to the monistic constructions of international law; and they are also the justifiable foundation of Kelsen's arguments against the possibility of a natural law having validity over and above that of positive law.

As types of 'ought' Kelsen distinguishes commanding, permitting and authorising.

'Ought' usually expresses the idea of being commanded, not that of being authorised or permitted. The legal 'ought', i.e., the copula connecting condition with consequence in the statement of law, embraces all three meanings: that of being commanded, that of being authorised and that of being (positively) permitted the consequence; the 'ought', that is, which is set forth in the statement of law, designates all three normative functions. This 'ought' merely expresses the specific sense in which the two sets of facts are connected together by – which means in – a legal norm.¹⁵

Later he also introduces derogation, as a specific form of 'ought'.¹⁶ The norm-logicians should take note of these observations and test the relation between Kelsen's distinctions and the customary deontic modalities.

3. THE VALIDITY OF THE NORM

Kelsen sees validity as the specific mode in which norms exist. We are then confronted with the question of how the validity of a norm is grounded. Kelsen's answer is connected with his distinction of static and dynamic norm-systems, and also with his theories concerning the hierarchical structure of law and the basic norm of the legal system. In static systems the norm's validity is based on relations of content; in dynamic ones it rests on the creation of norms through particular instances, which are determined by other norms and depend in the last resort upon an authorisation by the basic norm. There can be no doubt that the theory of validity in dynamic systems has been worked out with much greater thoroughness by Kelsen than in the case of static systems, whose discussion leaves something to be desired in the way of precision.¹⁷

The theory of legal dynamics and the hierarchical structure of law – Kelsen's fellow-traveller Adolf Merkl has done particularly important work here¹⁸ – represents an integral constituent of the Pure Theory of Law. The whole of legal life, legislation, legal transactions, the judicial or administrative decision, official action and execution, are similarly explained and defined as the creation and fulfilment of norms. Every legal norm of this many-tiered system, held together logically by ties of delegation, receives its justification by reference back to already existing (well-founded) norms of the system; the final norm which underlies the creation of law – Kelsen's basic norm – gives authorisation for setting up the constitution and hence, through the chain of delegatory relations, for the framing of the entire legal system.

One may dispute about the nature of the basic norm, debating its semantic character – as a norm or an assertion – and also about whether it involves merely an expedient doctrinal assumption or a postulate in need of sociological justification; but at all events, this theory is an imposing conception, making it possible to present a unified, logically ordered picture of law, to furnish a consistent scientific explanation of what happens in law, and to create a unitary concept of legal validity, in a way that has not been done with similar clarity by any other theory with which I am acquainted.

Kelsen's theory of legal validity is distinguished by a sharp opposition to all justifications based on content; the validity of a legal norm is founded solely on the fact of a legitimate norm-creating act, and not on teleological considerations. The expediency or in expediency of a norm is irrelevant to its validity in the hierarchical system of law. It is not disputed that the legal norm has purposes in view, but the juristic viewpoint is contrasted with the teleological one¹⁹, accounting is non-teleological in character²⁰, and the teleological assessment of a norm plays no part in determining the validity or invalidity of legal norms.

4. Kelsen's CONCEPTION OF LEGAL NORM AND LEGAL DUTY; PHILOSOPHICAL PROBLEMS OF THE SANCTION THEORY OF THE LEGAL NORM

Kelsen's conception of the legal norm is a theory which, although it has often been criticised, has exerted a very great influence on legal science,

and possesses features of interest to philosophy and the logic of norms.

Law is not only a dynamic system of norms, but also a coercive order. It is inseparably bound up with the normatively regulated activity of a state apparatus of coercion. The coercive character of law – wherein it chiefly differs from morality and custom²¹ – and the endeavour to make a sharp conceptual and even structural separation between legal and other types of norms, leads Kelsen to the sanction theory of the legal norm. On two points, indeed, Kelsen's theory of the legal norm has changed in the course of developing the Pure Theory of Law; namely, in his attitude to the imperative theory, and on the question of the judgmental character of the legal norm, which has now been clarified by the distinction between legal norm and statement of law. But the basic structure of the sanction theory remains unaltered. A piece of behaviour is legally commanded, when and only when, and only because, a legal norm posits the opposite course of conduct as the condition of an ordained sanction. The legal order commands a course of conduct

by prescribing a sanction as obligatory in case of the opposite behaviour.... The obligatoriness of the sanction incorporates the forbiddenness of the behaviour which is its specific condition, and the commandedness of its opposite. It should be noted here that by the 'commandedness' or 'forbiddenness' of a particular course of conduct we mean, not the obligatoriness of this behaviour or its opposite, but the obligatoriness of the consequence of this behaviour, namely the sanction. The behaviour commanded is not that which is made obligatory; it is the sanction which is made obligatory. The commandedness of a course of conduct signifies that the opposite of this behaviour is the condition for the obligatoriness of the sanction.²²

Kelsen frequently describes the execution of the sanction as a legal duty (here he uses the term in such a way that only the state or its organs could have legal duties); but mostly he understands by legal duty the commanded behaviour of those who have duties, which arise out of, and are based on the fact, that a sanction is imposed on the opposite course of conduct. Legal duty in this sense is a consequence of legal duty in the first sense. This perhaps rather odd construction, in which the norm determining the behaviour of those having duties (citizens) is relegated to a secondary position, goes back to Kelsen's conception of the will and his view of the relation between will and norm. In his *Hauptprobleme* we read:

In order that we may speak of a willing in the true sense, and not merely of a wishing, the idea of a future occurrence or situation calculated to satisfy a need or urge must be coupled in consciousness with *some activity of his own* on the part of the willer.²³

The state, as the supporter of the legal will, can therefore will only its own behaviour; what it wills, finds expression in the legal norm. Legal norms express the self-obligation of the state (cf. *op. cit.*, pp. 190f.).

The sanction which the rule of law must contain, precisely for its purpose of instigating the legal subjects (other than the state itself) to a particular course of conduct, and which customarily consists in punishment or restraint, represents an activity of the state (*ibid.*, p. 205).

The conditioned will of the state to punish or restrain, as the legal order may disclose it – in other words, the rule of law – is the ground of cognition for the legal duty of the subject (*ibid.*, p. 207).

In the *Hauptprobleme*, this view of willing, and the thesis that the legal norm determines the state's own behaviour, were associated with a campaign against the imperative theory of the legal norm.

The will directed merely to the behaviour of another finds expression in a command. On the prevailing theory, the rule of law appears to order or prohibit; and this view of objective law is commonly described as the imperative theory.²⁴

The imperative form attributed by the prevailing theory to legal norms is taken over from the norms of morality, which pursue a similar purpose (namely a particular course of conduct on the part of individuals), and are generally and rightly acknowledged to be *imperatives*. But to maintain of legal rules what is valid for the norms of morality can only be done by overlooking the fundamental difference which exists between the two kinds of norms on this very point.²⁵

The imperative is a willing directed to the behaviour of another, but the will of the state must always be directed towards its own behaviour.

The starting-point of the imperative theory, which assumes the content of the state's will, expressed in the rule of law, to be correct behaviour on the part of the subject, is the element of purpose. The goal pursued by means of the state legal order, namely a condition of orderliness of law-abiding action and abstention on the part of the legal subjects, becomes the standard for formulating those norms whose essential content constitutes the legal order.²⁶

... an imperative formulation of the legal rule, in which there appears as content of the state's will, not its own behaviour, but the corresponding action and abstention of other legal subjects, is impossible.²⁷

The citizen cannot be motivated by the will of another, but only by his own interest. (pp. 202f.).

The more appropriate, therefore, the imperative form may be for the norms of an autonomous morality, the more inadequate it appears for the heteronomous rule of law.²⁸

The sanction which the rule of law must contain, precisely in view of its purpose of instigating those subject to it (apart from the state itself) to a certain course of conduct, and which customarily consists in punishment and restraint, represents an activity of the state. It is this behaviour of its own that the state 'wills' in the rule of law aimed at bringing about

the corresponding behaviour on the part of its subjects^a, and not this behaviour of those subjects, which is alien to the state and is to be inferred only indirectly from the rule of law, as an aim of the latter. This behaviour is presented as the negative of that state of affairs to which punishment or execution is attached in the rule of law.²⁹

Against the imperative theory Kelsen argues:

The psychological characteristic of the imperative – unlike the judgement – is that it is the *immediate* expression of a *will* directed to the behaviour of another, whereas the judgement represents a function of the *intellect*.³⁰

It is not only the rule of law in the narrower sense, decreeing the state's will to punish or distraint under certain conditions, that is a *hypothetical* judgement; this is also true of law in the wider sense, since the will of any state can only appear in the legal order as a conditioned will.³¹

Every legal norm is thus a judgement, and the only peculiarity of this judgement is that the synthesis of concepts in it is valid simply *because the legislator wills it*.³²

In the *Hauptprobleme* Kelsen still ascribes truth to this judgement expressing the will of the state (cf. *ibid.*, p. 260).

Kelsen – in the view of some of his interpreters – has perhaps somewhat modified his attitude to the imperative theory. He accepts, indeed, the thesis of Dubislav, that there can be “no imperative without an *imperator*”, and also relates it to law.³³ In the *Reine Rechtslehre*, 2nd edn., he explains obligation as the meaning of certain human acts of will, intentionally directed to the behaviour of others, but the legal norm is still primarily concerned merely with the behaviour of the state, i.e., its sanctional structure is retained, and the teleological view of the norm rejected as metajuristic. The *imperator*, the willer of the legal norm, is spoken of only as the agent who lays down positive norms. For the clarification of his position concerning the judgemental character of the norm, see Section 5.

It seems needful for us, on the one hand, to emphasise the motivating role in the generation of the sanction theory played by the idea that willing, and therefore the norm, is directed to the willer's own behaviour; and on the other, to subject the thesis itself to critical examination. There is warrant for characterising the peculiar nature of the ‘ought’ (the norm) by depicting it as a product of human willing. But I think that willing should then be regarded, not merely as a psychological activity directed to one's own behaviour, but in more general terms, as a decision governed by the setting of goals, and a goal-directed activity determining behaviour. If we designate morality, custom and law as volitional ‘ought’-

systems, the willing here cannot signify the psychological activity directed to the actions and bodily movements of the person willing. The content of the will that posits norms – if we choose to employ these terms – cannot possibly, in that case, be the willer's own behaviour. The state, as the conceptual willer of law, is utterly incapable of so acting as to realise the content of its willing, in the way that the individual man is able to do this by bodily movement. The willing of the state cannot therefore be directed to its own material movement. If we view the state as the agent or conceptual willer of law, this agency always commands action on the part of others, who either act in terms of their own objectives, and by their own will and choice, or operate in the name of the state, as its organs. The acts of an organ are certainly imputed to the state, but there is no question here of any such realisation of willing as occurs in the execution of Jones' intention to get up from his seat, when Jones gets up in accordance with his will. We must therefore abandon the idea that the content of obligation, and particularly legal obligation – the legal norm – can be only the state's own behaviour and not that of its subjects. If we speak of the will of a collective, such as society, or of the state's will as the basis of law, we cannot then insist that the object of this willing can only be its own behaviour.

Even with the individual, it is wrong to suppose that there is only wishing and not willing, when one's own action is not implied in the realising of one's will. Where the subject himself acts as he wills, it is certainly implied that it is a matter of willing and not just of a wavering or fanciful wishing, but there can also be definitive willing where the realisation of it does not consist in action of one's own; at all events, the object of willing – that which is willed – does not have to be identical with what the willing subject does, i.e., the content of willing is not always the willer's own behaviour.

When a father orders his son to do *A*, he wills that the son should behave in manner *A*. The content of his willing is the son's behaving in manner *A*. Coercive measures in case of disobedience – or the will to reward if the son obeys – certainly do not have to be willed along with this. To command is itself an action, not a mere fanciful wishing, since the imperative is an instrument for determining behaviour, even in the absence of punishment or reward – for man is accustomed to his role in society and is generally willing to play it.

The psychological and sociological question of fact, as to how man is motivated, must be examined with care. A person can obviously be motivated, not merely by punishment and execution, but also by the offer of inducements and by reward. We also have to reckon with the possibility that the content of the norm coincides with the will of the subject himself, and with his willingness to adopt a role, to accept normative coordination and guidance, even where certain wishes tell against this. If I want to play football, I shall submit to the rule that the ball may not be stopped with the hand, even when no referee is present to blow the whistle on this infraction, and even when observance of the rule in a concrete situation is to my disadvantage. Sociologically and psychologically it is simply not true that man only fulfils his role when he is given an interest in law-abiding behaviour by the threat of sanctions to follow; for he is above all interested in taking part in the life of society – in playing the game, as we might say.

The theoretical motivation of the sanction theory of legal norms appears, therefore, to be dubious. In my opinion other arguments also tell against this theory:

(a) It lays excessive stress on the element of coercion, underestimating the organising role of law and pushing this role out of sight.

(b) Even within the framework of a coercive system, it seems to me that so-called *leges imperfectae* are by no means meaningless. They appear chiefly as norms imposing duties on the paramount organs, or as defining duties with vague consequences for wrong-doing, where the possible disadvantages are not legally specified.³⁴

(c) From the form of the sanction-norm “If *A*, then *B* (the sanction) is to be”, i.e., a hypothetical ‘ought’-sentence, the forbiddenness of *A* can be logically inferred when and only when it is known that *B* is posited as a *sanction*. This is the case when and only when the behaviour posited as condition of the obligatoriness of the sanction is assumed to be forbidden. In other words, the concept of a sanction contains an implicit reference to a behavioural norm, whose violation is the condition of the sanction. The behavioural norm must therefore be presupposed in any case, and it will not do to regard law, in Kelsen’s fashion, as a mere system of sanction-norms.³⁵

(d) As Kelsen himself has recognised, the legal system as a whole cannot in any case be viewed as a set of sanctioned norms, since the basic

norm, which terminates the chain of justification of the legal system, can only authorise – it cannot coerce by means of sanctions.

(e) Kelsen has shown with strict logical consistency that although “*A* is to be” and “*A* is not to be” exclude one another, the same conduct could be simultaneously enjoined and forbidden in a normative order consisting solely of norms in the form of sanction-norms, without any logical contradiction arising; for the sanction-norms corresponding to injunction and prohibition, “If not *A*, a sanction is to follow” and “If *A*, a sanction is to follow”, do not contradict one another.³⁶ Thus if law is expressed solely in the form of sanction-norms, the enjoining and prohibition of the same conduct does not appear as a logical contradiction or logical defect of the system. Kelsen is content with this; but we see it as a serious argument against the sanction theory of the legal norm.

5. LEGAL NORM AND STATEMENT OF LAW

In the *Hauptprobleme* Kelsen characterises the statement of law, representing the general structure of law, as the judgement that under certain conditions a consequence of wrong-doing is to be realised. Even in the First Edition of the *Reine Rechtslehre* we find a similar formulation: the legal norm is defined here as a hypothetical judgement expressing the specific linkage of a conditioning circumstance with a conditioned consequence.³⁷ In the Second “completely revised and enlarged” Edition of the *Reine Rechtslehre*, legal norms and statements of law are sharply distinguished and the semantic and ontological difference strongly emphasised. Legal norms are created by acts of human behaviour; they constitute the normative relation between conditioning and conditioned circumstances. But

statements of law are hypothetical judgements asserting that, according to some – national or international – legal order of which we have legal cognisance, certain conditions defined by this legal order being given, certain consequences defined by this order are to follow. Legal *norms* are not judgements, i.e., statements about an object given to cognition.³⁸

Since a legal order in the sense just specified is a coercive order, it can be described in sentences stating that under defined conditions (defined, that is, by the legal order) defined acts of coercion (also defined by that order) are to be performed. All the material given in the legal norms of a legal order fits into this schema of the statement of law formulated by legal science – which statement is to be distinguished from the legal norm posited by the legal authority.³⁹

Here, therefore, a general schema of legal description is being enunciated, in which law can be correctly and completely described.

In contrasting legal norm and statement of law, Kelsen is formulating an important philosophical and logical problem. In what way is this distinction logically relevant? How are we to conceive the justificatory relation between legal norm and statement of law, or more generally, between the verbally formulated norm and the statement affirming the normative relation? What should the logic of norms be fastening upon – the norms (the sentences expressing them) or the declarative statements about norms, or about the relations constituted by norms? Kelsen's statements of the problem are uncommonly stimulating, even if, in my opinion, they provide no final solution.

6. Kelsen's LEGAL POSITIVISM AND VALUE-RELATIVISM – THE IDEOLOGICAL AND DEMOCRATIC CONSEQUENCES

Kelsen may be considered the most important champion of legal positivism. The latter is, as it were, a self-evident consequence of the value-free, purely cognitive science which he has in view. The assumption of a natural law, standing behind positive law and functioning as the ground and/or standard of the latter, is an absurdity. There is no absolute obligation, no 'ought' independent of human positing; it would be in contradiction with the separation of 'is' and 'ought' if there were an immanent 'ought' existing in independence of the will. A duality of positive law and natural law, in which the latter was the ground or standard of the former, also contradicts the principle of the exclusive character of every sovereign order of norms. Quite apart from the historical fact of the variety that has existed among legal obligations, there is no possibility of cognising or justifying natural law as a set of obligations having *a priori* correctness, since 'ought' is not derivable from 'is' alone, and is determined only through willing and positing.

Kelsen's value-relativism naturally implies no denial of values or making light of value-attitudes: it is simply a matter of regarding them as decisions, as something that cannot be demonstrated in purely cognitive fashion.

Kelsen's pure positivism and his relativist theory of value are not unrealistic and neutral in their pragmatic consequences; they lead, rather,

to a critique of ideology, to an understanding of value-pluralism, to the postulate of tolerance, to a pluralistic democracy based on the free play of ideas in the self-correcting dialectic of clashing opinions within the field of legal development. They do this, however, without the fiction that in the process we shall simply apprehend "correct" law that has somehow been previously given.

Kelsen's attitude and his work – precisely because of his resolute struggle for pure knowledge, criticism and clarification – seem to me imbued, therefore, with a high moral tone, in keeping with the modern spirit, which is sustained equally by the idea of democratic freedoms and by creative responsibility and the will to betterment.

On the occasion of his 90th birthday, we must not only congratulate Hans Kelsen on a well-spent life, but also thank him for his contribution to the science and wisdom of our age.

It should be mentioned that a full-length biography of our author, by R. A. Métall, appeared in 1969 under the title *Hans Kelsen, Leben und Werk*. It is supplemented by an extensive bibliography of Kelsen, and by a catalogue of writings on his work and on the Pure Theory of Law.⁴⁰

NOTES

¹ Kelsen, H., *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze*, Tübingen 1911, p. VIII.

² Métall, R. A., *Hans Kelsen, Leben und Werk*, Vienna 1969.

³ Kelsen, H., *Reine Rechtslehre*, 2nd edn., Vienna 1960, p. 1. Cf. *Pure Theory of Law*, Transl. by Max Knight, Berkeley, Los Angeles, London, 1970, p. 1. [Although page references are given to this translation, it is neither adequate nor complete and has not been relied on in rendering quotations from the original – Transl.].

⁴ Kelsen, H., *Hauptprobleme*, p. 8. Cf. also the essay 'Causality and Accounting' in this volume, pp. 154–164.

⁵ Kelsen, H., *Reine Rechtslehre*, 2nd edn., p. 78. Cf. p. 154 below, and *Pure Theory of Law* (PTL), p. 75.

⁶ Kelsen, H., *op. cit.*, p. 79. Cf. p. 154 below, and PTL, p. 76.

⁷ *Ibid.*, p. 79. PTL, p. 76.

⁸ *Ibid.*, p. 93. Cf. p. 161 below, and PTL, pp. 89–90.

⁹ *Ibid.*, p. 100. PTL, pp. 96–97.

¹⁰ *Ibid.*, p. 102. Cf. pp. 163 below, and PTL, p. 98.

¹¹ Kelsen, H., *Hauptprobleme*, p. 8. Cf. also Simmel, G., *Einleitung in die Moralkwissenschaft*, Berlin 1892.

¹² Kelsen, H., *Reine Rechtslehre*, 2nd edn., p. 5. Cf. PTL, pp. 5–6.

¹³ Poincaré, H., *Dernières pensées*, Paris 1913; on this subject, cf. Weinberger, O., 'Die Sollsatzproblematik in der modernen Logik', *Rozprawy ČSAV*, 1958, p. 8.

¹⁴ For example, in inferences of the following form:

If *A*, then *B* is to be

A

B is to be

both premises are equally arguments, but only together do they justify the inferred norm.

¹⁵ Kelsen, H., *Reine Rechtslehre*, 2nd edn., p. 81. *PTL*, p. 77.

¹⁶ Cf. the essay on 'Derogation' below, pp. 261–275.

¹⁷ See Kelsen, H., *Reine Rechtslehre*, 2nd edn., pp. 198f. *PTL*, pp. 195f.

¹⁸ See Merkl, A., 'Prolegomena einer Theorie des rechtlichen Stufenbaues', in *Gesellschaft, Staat und Recht* (Kelsen Festschrift), Vienna 1931, pp. 252–294.

¹⁹ Kelsen, H., *Hauptprobleme*, pp. 69ff.

²⁰ *Ibid.*, pp. 75ff.

²¹ In a sense, indeed, custom is certainly not without sanctions, but breaches of custom are mostly not defined in advance, or exposed to sanctions to be carried out by an organised official machinery.

²² Kelsen, H., *Reine Rechtslehre*, 2nd edn. p. 26. [*PTL*, p. 25, omits a part of this passage – Transl.].

²³ Kelsen, H., *Hauptprobleme*, p. 110.

²⁴ *Ibid.*, p. 190.

²⁵ *Ibid.*, p. 203.

²⁶ *Ibid.*, p. 201.

²⁷ *Ibid.*, p. 202.

²⁸ *Ibid.*, p. 204.

²⁹ *Ibid.*, p. 205. (a) "The word 'subjects' is used here simply as a very practical collective term for all legal subjects other than the state" (Kelsen's note).

³⁰ Kelsen, H., *Hauptprobleme*, p. 210.

³¹ *Ibid.*, p. 254.

³² *Ibid.*, p. 256.

³³ Kelsen, H., 'Recht und Logik', *Forum* XII/143 (1965), p. 496: No norm without an act of will, of which this norm is the meaning"; in the footnote to this, Dubislav's "No imperative without an *imperator*" is referred to. Cf. p. 237f. of this volume.

³⁴ Even if no sanction is expressly laid down in law, there are often actual consequences of wrong-doing. Thus a legal time-limit, for example, by which an official has to settle some matter, is not therefore meaningless because no sanction is expressly envisaged in advance. It has a motivating effect, and the official can have a real interest in complying even with a "sanctionless" legal norm. The reputation of being continually in arrears might impair, for example, his chances of promotion.

³⁵ Law is a coercive system, but it does not follow from this, in my view, that it can contain only norms expressly furnished with sanctions. This by no means implies, however, that the behavioural norms whose observance is to be enforced become superfluous.

³⁶ Kelsen, H., *Reine Rechtslehre*, 2nd edn., p. 27. *PTL*, p. 25.

³⁷ Kelsen, H., *Reine Rechtslehre*, 1st edn., Leipzig-Vienna 1934, p. 22.

³⁸ Kelsen, H., *Reine Rechtslehre*, 2nd edn., p. 73. *PTL*, p. 71. [The term "Rechtssatz" is commonly rendered by Kelsen translators as "rule of law". Although there is some warrant for this in his earlier writings, it is clearly inappropriate once the distinction has been made – as it is here – between norms (of which rules are a species) and statements *about* norms, made, e.g., by jurists. For the sake of uniformity, "Rechtssatz" has here been translated virtually throughout (except in quotations from the early *Hauptprobleme*) as "statement of law".

But it should be borne in mind that in the earlier essays, at least, no clear contrast between a statement, proposition or judgement and a norm, law or rule was apparently envisaged by the author himself. I am indebted to my colleague Professor A. D. Woozley for clarification on this troublesome point – Transl.]

³⁹ *Ibid.*, p. 59. *PTL*, p. 58.

⁴⁰ See note 2 above.