

## AN OBSERVATION ON THE THEORY OF LAW OF HANS KELSEN

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**Abstract.** *The author of this paper deals with the basic causes of numerous – often extremely negatively intoned – critical estimations said on the account of Kelsen's pure theory of law and exposes essential properties of certain phases of its development; point to the contribution of Merkl and Verdross to the making of pure theory of law and to the main determinants of Kelsen's attempts to formalize jurisprudence (the science of law) for the purpose of creating conditions for exact and objective study of positive law; analyzes the meaning and scope of Kelsen's normativisms and provides his views of further making of the pure theory of law.*

**Key words:** *pure theory of law, positive law, theory of degrees, classical pure theory of law, new pure theory of law, structural (immanent) approach to law, Kelsen's normativisms, logics of norms, further making of the pure theory of law.*

### 1. INTRODUCTORY CONSIDERATIONS

From its origin in 1911 to date, the pure theory of law of Hans Kelsen (1881-1873), doubtlessly a leading law scientist of the 20<sup>th</sup> century, is almost a lasting challenge to the renowned workers in the domain of jurisprudence (the science of law), but also the subject of ongoing critical settling of accounts and heated disputes. In the greatest number of cases, however, numerous critical objections said on the account of Kelsen's views could be, in keeping with a suitable remark of Alfred Verdross<sup>2</sup>, qualified as misunderstandings and, accordingly, in our opinion, doubtlessly rejected.

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<sup>1</sup> Cf. Rudolf A. Metall: "Hans Kelsen, Leben und Werk, Verlag F. Deuticke, Wien 1969. In the introductory note of his book Metall states that Kelsen is "the writer of the 20<sup>th</sup> century". Similar estimation is provided by Rosco Pound, who at one time emphasized that Kelsen is "probably the greatest living worldwide law scientist and one from the distinguished circle of classical authors of the law science" (see Здравко Гребо: "Маркс и Келсен", "Свјетлост", Сарајево, 1979, p. 6).

<sup>2</sup> Cf. Robert Walter: Kelsens Lehre im Spiegel rechtsphilosophischer Diskussion in Österreich ("Österreichische

Kelsen's troubles with the law scientists, according to the claim of Radomir D. Lukić, comes from the fact that he was a "philosopher-law scientist, but they were only law scientists. He wanted to rise them to the level of philosophy, but they were not able for that." In the same context, Lukić also remarks that, in fact, it seems that nobody (including himself while he was young) understood Kelsen enough, did not dive to the depth of his thought to be able to successfully and groundedly criticize him.<sup>3</sup>

No matter how much, basically correct and in addition witty, the quoted explanation provided by Lukić certainly demands some supplements and explanations, that is, appropriate preciseness. Namely, Lukić does not provide an answer to the question what the greatness and significance of Kelsen's work consists of and how it is possible that it is that much denied, very often from quite different, mutually opposing points of view, and that his author is at the same time considered the greatest law theoretician of recent times.<sup>4</sup> In that sense, it seems that, first of all, it should be stressed that Kelsen's teaching is of primarily methodological character and that it makes a set of programming starting points established even in his first systematic work published in 1911 under the title "Hauptprobleme der Staatsrechtslehre", Tübingen, Verlag von J.C.B. Mohr 1911, based upon which essential determinations of this law doctrine were then continuously worked out, shaped and modified over several decades.<sup>5</sup>

The aforementioned circumstance unambiguously points to the conclusion that Kelsen's theory of law is not any completed and rounded off teaching, but – as Robert Walter, present head of the Institute "Has Kelsen" in Vienna, correctly ascertains – a doctrine permanently under development, open to the ongoing add-on invited to participate in which are all persons interested in.<sup>6</sup>

When one approaches consideration and estimation of Kelsen's scientific creative work, it is necessary, first of all, general methodological attitudes to be precisely identified and separated from the material statements; the difference between them, as it is usually said, is often very "slippery"<sup>7</sup> what mainly is not taken care of enough, so that the programming determinations are identified with the completed results and thus mixed that what is instructive with that final and vice versa, as well as that which represents its subject, that is, with the positive law.

On the other hand, Kelsen's scientific activities span a period of more than 60 years, so that it is quite natural that between the initial and final formulations of his key views there are sometimes significant, even essential differences that reasonably give a pretext for two mutually opposing concepts – classical and a new pure theory of law to be spoken

*Zeitschrift für öffentliches Recht*" Band XVII, Heft 2-3, Springer-Verlag, Wien-New York, 1968, p. 351).

<sup>3</sup> Cf. др Радомир Лукић: "Келзенов нормативизам", *Анали Правног факултета у Београду*, No. 1-4/1983, p. 496.

<sup>4</sup> Cf. др Снежана Савић: "Појам права као нормативног поретка", Бањалука, Универзитет у Бањалуци - Правни факултет 1995, p. 87. She justifiably propounds a questions why the critics of Kelsen's teaching always start from certain shortcomings instead of good sides which would, doubtlessly, be more adequate if Kelsen is spoken of as the greatest law scientist of the 20<sup>th</sup> century.

<sup>5</sup> Cf. "Hauptprobleme", Vorrede III (1911) where Kelsen explicitly underlines that his work is primarily of methodological character.

<sup>6</sup> Cf. Роберт Вагнер: "Теорија права Ханса Келзена", Досије, Београд, 1999, p. 41.

<sup>7</sup> Cf. др Мирослав Печујлић: "Методологија друштвених наука", друго, измењено и допуњено издање, p. 139, "Савремена администрација", Београд, 1982.

about. According to Vladimir Kubeš<sup>8</sup>, scientific activities of H. Kelsen have passed a development way of several decades which include four distinctly marked stages (phases), the characteristics of which will only be outlined here.

**Phase One** is related to the appearance of the already mentioned Kelsen's first systematic work "Principal Problems of the Theory of State Law" which served as a basis for the making of the normativistic doctrine of the Vienna law school, that is, encouraged gathering of a circle of principled like-minded persons, out of which, otherwise, each separately tried to learn from the other, not giving up the idea of following his own way.<sup>9</sup>

The main characteristic of this stage, particularly at its beginnings, is a fight against the traditional trends of the theory of law, that is, against its non-critical syncretism of methods, for the purpose of enabling distinct and precise defining the structural or immanent approach to the positive law in the law phenomenon in general.

**Phase Two** begins with the second edition of the book "Principal Problems of the Theory of State Law" which was published in 1923. V. Kubeš allows that this phase began probably a couple of years earlier when the original, exclusively static teaching, primarily under the direct influence of Merkl, transformed into the dynamic legal understanding. This stage sees relativization of former absolute opposites between the world of reality or being (Sein) and the world of what ought to be (Sollen).

**Development Phase Three** usually is ascribed to the necessity of adjusting the pure theory of law to the American circumstances, on which Kelsen provides closer explanation in the introduction to his work "General Theory of Law and State", in which he anew formulated thoughts and ideas reported in earlier works published in German and French.<sup>10</sup> Certain articles from this period, and particularly the aforementioned work, which was for the first time published in 1945, can only with some hesitation be classified in the pure theory of law, understood in its classical or authentic form.

**Phase Four** and the last one in the development of Kelsen's doctrine, begins, according to V. Kubeš, around 1963, to be singled out in this period should be two exceptionally significant works such as "Zum Begriff der Norm" and "Recht und Logik" which, according to Verdross, prove not only the flexibility of Kelsen's spirit ("Elastizität seines Geistes"), but also his courage to subject his earlier attitudes to self-criticism. Unfortunately, as Kubeš claims, Kelsen comes in this phase, under the influence of Walter Dubislaw, to a tragic conclusion ("zu dem tragischen Schluss") "that the norm prefers emperor", that is, "that there is no imperative without the emperor" ("kein Imperativ ohne Imperator"), so that A. Verdross is right claiming that Kelsen has thus come back to the

<sup>8</sup> Cf. V. Kubeš: "Das neueste Werk Hans Kelsen über die allgemeine Theorie der Normen und die Zukunft der Reinen Rechtslehre" (Österreichische Zeitschrift für öffentliches Recht und Völkerrecht, Vol. 31, No. 3-4, 1980, Springer-Verlag Wien-New York, pp. 195-199).

<sup>9</sup> Cf. Ханс Келзен: "Чиста теорија права", Правни факултет у Београду - Центар за публикације, Београд, 1998, p. 7. Belonging to the mentioned circle, headed by Kelsen, in addition to others were Adolf Merkl, Alfred Verdross, František Weyr, Jozef Kunz, Leonidas Pitamic as well as Fritz Sander who, however, became later one of Kelsen's embittered opponent.

<sup>10</sup> The book "General Theory of Law and State", Harvard University Press 1945) is, in fact, a compilation from three Kelsen's works, such as: "General Theory of Law and State" ("Allgemeine Staatslehre", 1925) "Théorie générale du droit international public", 1928 and "Reine Rechtslehre", 1934

nominalistic grounds of law of William of Occam (1290-1349).<sup>11</sup> However, "Allgemeine Theorie der Normen", the last work of Kelsen, goes on V. Kubeš, is, "in fact, only the highest point ("Gipfelpunkt") and a summary of this tragical development which brings him quite to the School of Uppsala of A. Hägerström, Lundstedt, Olivecrona and Alf Ross!"<sup>12</sup>

Ota Weinberger, the author of the well-known law logic "Rechtlogik" (Springer-Verlag, Wien-New York, 1970), who notes that the basic theses contained in "Allgemeine Theorie der Normen" are an expression of a new concept that in essential features differs from earlier Kelsen's views, agrees in principle with the exposed view of Kubeš, so that today classical and new pure theory of law ("klassische und neue Reine Rechtslehre") can be talked about.

In the new pure theory of law, validity of the norm is much more closely linked with real facts than it was the case in the classical form of this theory, in two directions:

1) the existence of the norm is linked with the being of the act of will the sense of which is the norm; a single norm cannot in a logic way be directly derived from the appropriate general norm without previously making the corresponding single act;

2) the norm is valid only when it is effective. Namely, in the new concept of the pure theory of law, not only that the validity of the legal order (legal system) is linked with the certain degree of efficacy, but the validity of the single norm is dependent on the corresponding efficacy as well, that is, efficiency of the single norm is a condition of its validity, which, according to Weinberger, is the attitude opposing the normativistic way of viewing.<sup>13</sup>

## 2. CONTRIBUTIONS OF MERKL AND VERDROSS TO THE MAKING OF THE PURE THEORY OF LAW

Among the main representatives of the Vienna School of Law, as a name for a group of famous law theoreticians whose spiritual centre was the capital of Austria over the period shortly before the World War I and around ten years after its completion, in the narrow and proper sense of the word, in addition to Kelsen, Adolf Julius Merkl (1890-1970) and Alfred Verdross-Drossberg (1890-1980)<sup>14</sup> should, first of all, be included. To

<sup>11</sup> In the history of philosophy William of Occam is considered to be among the representatives of nominalism (lat. nomen = name) who pointed out that a notion is nothing else but a common name for single things. Universalies, according to them, cannot be recognized to objectively exist, since single things exist in reality. Universalies for Occam, in fact, represent that what is similar in single things.

<sup>12</sup> Closer data and information on the Uppsala School (in Serbian) can be found in the book of др Стеван Врачар, "Структуралност филозофије права", Издавачка књижарница Зорана Стојановића, Сремски Карловци – Нови Сад, 1995, pp. 164-261.

<sup>13</sup> Cf. Ota Weinberger: "Normentheorie als Grundlage der Jurisprudenz und Ethnik, Duncker und Humblot, Berlin, 1981, pp. 171-172.

<sup>14</sup> In honour of Kelsen, Merkl and Verdross, as the leading representatives, that is classical authors, of the Vienna School of Law, Hans Klecatzky, René Marcic and Herbert Schambeck prepared a proceedings of papers under the title "Die Wiener Rechtstheoretische Schule" in 1968, containing selected papers of the above three classical authors, in two books, published by "Europa Verlag", Wien-Frankfurt-Zürich und "Univerzitätsverlag Anton Pustet", Salzburg-München.

the two pupils of his, Hans Kelsen has, in recognition of their contribution to the making of the pure theory of law, devoted the second edition of his work "Principal Problems of the Theory of State Law" (1923), stating in the introduction to that edition that to Merkl belongs the merit of formulating the theory of degrees ((Stufentheorie), and to Verdross of "essentially developing" the teaching on the basic norm as the constitution in law and logical sense and laying down the problem of relations of state and international law.<sup>15</sup>

According to Kelsen, Merkl has already in his first works on law and theory studies, prior to his thirties, introduced himself "as a real genius of law science thinking" ("als ein wahres Genie rechtswissenschaftlichen Denkens"). In connection with this, Kelsen remarks that Merkl's theory of degrees is one of the most important contribution to the exact knowledge and objective description of positive law and that it is only with it that an insight into the internal structure of the legal order has been obtained. "As I have already emphasized in the introduction to the second edition of my book "Principal Problems of the Theory of State Law (1923)" – writes Kelsen, "Merkl's theory of degree has become an essential integral part of the pure theory of law which I advocate: thus, Merkl must be considered one of its cofounders."<sup>16</sup>

Robert Walter, Merkl's pupil, points to the fact that the theory of degrees is often simplified in application, although an exceptionally complex teaching is in question. Here, it goes without saying, we can neither venture analyzing it or discussing the consequences arising from it,<sup>17</sup> but, anyway, it seems that one should point out that this theory unambiguously suggests the necessity of expanding the subject of the law science to studying single norms, that is, to investigating relevant judicial, administrative, business and other legal practices, as forms of concretizations of statutes and substatutes regulations. Reducing the subject of continental jurisprudence primarily and predominantly, and very often and exclusively to working out legal material provided in the form of general legal rules, in the long run, means dealing with normative semifinished products. In that sense, Kelsen justifiably remarks that it is a mistake to think that making of the law completes with the legislature or that, moreover, it is contained only in it.<sup>18</sup>

The general law norm as an abstract and impersonal command obliges everybody and practically refers to no one.<sup>19</sup> That is why the law science would have to come to the general rules, like in the Anglo-Saxon system, by the generalization of single typical cases as well, since no legal term, that is, notion has fully safe meaning, while it and its

<sup>15</sup> Cf. "Hauptprobleme" (1923), Vorrede zur zweiten Auflage, pp. XV-XVI and XXII-XXIII.

<sup>16</sup> Cf. Hans Kelsen: "Adolf Merkl zu seinem siebzigsten Geburtstag am 23. März 1960". (Österreichische Zeitschrift für öffentliches Recht" Band X Heft 3-4, Springer-Verlag, Wien, 1960, p 313). For closer information on the theory of degrees an excellent article by Roger Bonnard, published in "Revue du droit public et de la science politique en France et à l'étranger", tome 45, Paris 1928 (pp. 668-696) under the title "La théorie de la formation du droit par degrés dans l'oeuvre d' Adolf Merkl" should be, first of all because of easy-going exposure, referred to.

<sup>17</sup> Cf. A. Merkl: "Prolegomena einer Theorie des rechtlichen Stufenbaues", "Gesellschaft, Staat und Recht", Wien, Verlag von Julius Springer, 1931, pp. 285-294.

<sup>18</sup> Cf. Ханс Келзен: "О суштини и вредности демократије", Центар за унапређење правних студија, Београд, 1999, pp. 28-29.

<sup>19</sup> Cf. Проф. др Драган Милков: "Управно право II", Универзитет у Новом Саду, Правни факултет, Центар за издавачу делатност, Нови Сад, 1997, p. 26.

limitations have been proved in practice, which is just a case of precedent.<sup>20</sup>

Like an exceptionally loyal pupil and associate and consistent follower of Kelsen, Merkl has, under the influence of his teacher, in our opinion, done two very important investigations for the needs of making the pure theory of law.

Thus, he had first approached the fundamental study of the problem of legal force for the purpose of overcoming casuistry, which to the moment had been dominating in the study of this law institute, and reported the results obtained in the corresponding monograph published in 1923.

The actual purpose of this monograph, written upon Kelsen's incitement<sup>21</sup>, was to provide stabilization of the subject of jurisprudence, which was at one time proclaimed a worthless science by Kirchmann, a German law philosopher, explaining that "three words corrected by the lawmaker" are enough to make numerous libraries worthless.<sup>22</sup> Since pure theory of law, as correctly remarked by Bonnard<sup>23</sup>, requests unchangeableness of the norm, consequently, steadiness of the subjects of its studies, Merkl has concentrated his research efforts to prove that legal force is a common feature of all legal acts, both judicial and legislative and administrative, where, in spite of certain digressions, he has doubtlessly made considerable success. Therefore, his investigations are also nowadays considered a great contribution to the law science in this domain<sup>24</sup>, and a contribution of paramount importance for defining the concept of legal certainty, that is, legal security.

Standardization of legal concepts has, however, been carried out by Merkl in the province of administrative law, that is, in the most voluminous, most versatile and the most dynamic branch of the legal system or legal order, to put it more precisely, in the field that has always been considered as relatively free from law, moreover, not fettered by law and finally, subjected to the principle of opportunity, but not strict legality.

In his work "General Administrative Law" (1927) Merkl has, in fact, in line with the principles of pure theory of law, and on the grounds of theoretical abstractions from the reality of positive law, built a model of the so-called doctrinary abstract administrative law or science on administration as a legal function, that is, a doctrine which has reached the level of its own legal consideration. A system of generally valid concepts and institutes in the structural sense is in question, within which administration as a state function in its totalness appears exclusively in the form of law and through this, for it unavoidable medium, also immerses into the law science.

In fact, such a set of essential and typical normative creations has no other purpose but to serve understanding the of essence, and the estimation and criticism of each administrative and law order separately as well and to be a theoretical model and inspiration for harmonizing the stated branch of the legal system at regional or general international level.

Finally, it is worth emphasizing that also contained in Merkl's works is a germ of

<sup>20</sup> Н. Винер: "Кибернетика и друштво", Нолит, Београд, 1964, p. 136.

<sup>21</sup> Cf. A. Merkl: "Die Lehre von der Rechtskraft", Franz Deuticke, Leipzig und Wien, 1923. In the introductory note (page VII) he gave recognition to Kelsen for the deciding incentive for this text to be written.

<sup>22</sup> Cf. Љубомир Тадић: "Предмет правних наука", Институт друштвених наука, Београд, 1966, p.7 and Артур Кауфман: "Право и разумевање права", Гутенбергова галаксија, Београд, 1998, p.50.

<sup>23</sup> Cf. Roger Bonnard, op. cit, p. 692.

<sup>24</sup> Cf. др Павле Димитријевић: "Правоснажност управних аката", Београд, "Савремена администрација", 1963, pp. 87-88.

Kelsen's view on relations between law and logic, the view that the creator of the pure theory of law began to support in the late period of his creative work. Namely, Merkl was, in all likelihood, the first to have laid down a thesis that by no means immanent to (characteristic of) the legal order is the principle "Lex posterior derogat priori" applied in the case of conflict of norms, but to its contrary principle "Lex posterior non derogat priori"; the attitude "Lex posterior derogat priori", claims he, is valid only based on the express or supposed (tacit) provision of positive law, but not as a law and logic axiom, as it is usually understood.<sup>25</sup> In other words, Merkl wants to stress (fully in agreement with which is Kelsen as well) that the rules of logic are not applied to the conflict between the norms (arising due to differently regulating the same question), but solutions explicitly prescribed or implicitly assumed by positive law.

In contrast to Merkl who has been next to obsessed by the image of Hans Kelsen, even apt to a kind of glorification of his teacher, Verdross has often been critical of certain theses of pure theory of law, always trying to be honest, well-weighed and tolerant and having principles and arguments when advocating and defending his convictions. Milan Bartoš, who worked together with Verdross on the International Law Commission of the United Nations, particularly points to his good understanding of the problems of practice, that is, that not only a great theoretician is in question, but also a lawyer capable of resolving "world's problems" (les problèmes mondiaux).<sup>26</sup> While Kelsen, concerning the question of relations between state and international law, was permanently hesitant between the two equally acceptable hypotheses, out of which one pleaded for the dominance of state law and the other for international law, Verdross had decidedly and unambiguously decided, on the grounds of the attitude on total law as a unique order, for the precedence of international law. Inceptions of such attitude were indicated way back in 1914 in his article *Zur Konstruktion des Völkerrechts*.<sup>27</sup>

Indisputably, Verdross deserves praise for expanding the pure theory of law to working out the problems of international law, within the frameworks of which Kelsen has identified three degrees, the degree of customary international law, developed based upon the norm, according to which states should behave as they have usually behaved, then the degree constituted by the norms created under international agreements and, finally, the degree composed of norms created by the organs established under the international agreements.

Here, Verdross criticizes Kelsen for taking a materially void formula for the starting point, that is, for the basic norm of international law, because for material determination of this norm, according to Verdross, one must start from those law principles recognized by mutual consent by civilized (cultural) peoples, in view of the fact that the norms of international law in effect have been developed only on the grounds of the agreed legal conscience of peoples.<sup>28</sup>

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<sup>25</sup> Cf. A. Merkl: "Allgemeines Verwaltungsrecht", Wien und Berlin, Verlag von Julius Springer, 1927 (reprinted edition 1969), p. 211.

<sup>26</sup> Cf. Milan Bartoš: "L'influence d'Alfred Verdross sur l'élaboration de la Convention sur les missions spéciales", Internationale Festschrift für Alfred Verdross, Wilhelm Fink Verlag München-Salzburg, 1971, p. 48.

<sup>27</sup> Cf. *Zeitschrift für Völkerrecht*, Bd. VIII, 1914, p. 239 ff. See also Verdross' book "Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung" (1923).

<sup>28</sup> Cf. A. Verdross: "Völkerrecht" Wien, Springer-Verlag, 1950, p. 31.

In any case, regardless of certain disagreements that are, after all, quite normal among the in principle like-minded persons, there is no any doubt that Kelsen's creative work cannot be correctly and fully understood without the corresponding views of Verdross, particularly without an in-depth insight into the work of Merkl. Insisting, however, on the philosophical background of Kelsen's doctrine as a key for proper understanding and interpretation of his principal ideas is often unnecessarily and without reason overstressed because, according to R. Walter, there is much sense in to go too far at this point.<sup>29</sup>

### 3. KELSEN'S STRUCTURAL (IMMANENT) APPROACH TO LAW

In his first systematic work "Principal Problems of the Theory of State Law" (1911) Kelsen comes forth as an advocate of strict and consistent formalization of the law science (jurisprudence) so that, in methodological sense, it could be made ready for exact treatment of positive law, that is, law phenomenon at all. Jurisprudence, according to his views, should and must include "form and only the form" ("die Form und nur die Form"), and as such – sure, not at all points – can be compared with geometry.

In keeping with that, he rejects assertion of Jellinek that purely formal construction of law is not possible ("dass eine rein formale Konstruktion des Rechtes eine Unmöglichkeit ist")<sup>30</sup> and warns that the purpose of law must not be confused with the purpose of jurisprudence; jurisprudence makes legal concepts, while law – legal order and regulates the life relations ("Lebensverhältnisse"). It is just geometry – concludes Kelsen – that provides irrefutable proof that contentsless forms can be built and that its results are not worthless.<sup>31</sup>

Support of this and such extreme formalism, for the purpose of precisely delineating and exactly defining the immanent or structural approach to law, can be encountered even in the works of Gottfried Wilhelm Leibniz (1646-1716), great German philosopher and mathematician, who formally was a lawyer, but, in addition, actually a historian, diplomat, politician, pedagogue, linguist and physicist, a many-sidedly educated person, which gave Norbert Wiener a pretext for choosing him for his "saint" and pronounce him the protector of cybernetics.

As a lawyer by profession, Leibniz was permanently obsessed by the ideas on improving law and law sciences, and in keeping with that he made every efforts deductive procedure to be introduced into them, that is, a strictly logical and mathematical spirit to be inserted so as to regulate the system of law norms in a geometric manner. Namely, according to his opinion, similarity between the law sciences and geometry is obvious: "Jurisprudentia enim cum aliis Geometriae similis est"<sup>32</sup>

Generally speaking, Leibniz claims, "the only way to improve our reasonings is to make them thus tangible such as the reasoning of the mathematicians is; it means that at an eye's glance one can find out one's own mistake. And when discussions among people

<sup>29</sup> Cf. Роберт Валтер: "Теорија права Ханса Келсена", Досије, Београд, 1999, p. 17.

<sup>30</sup> Cf. "Hauptprobleme der Staatsrechtslehre", pp. 92-94.

<sup>31</sup> Op. cit., p. 94.

<sup>32</sup> Cf. Радмила Шпијаковић: "Лажбници и опште добро", "Просвета", Београд, 1975, p.183 and on.



arise, they will be able without any formalities to say: let us count, that we would see who is right".<sup>33</sup>

No doubt that the exposed reasonings of Leibniz are, in many aspects, strikingly identical to the corresponding methodological attitudes of the creator of pure theory of law, and particularly to his efforts to introduce exclusively formal elements into the legal concepts. Such and similar reasonings have indeed resulted in creating mathematical and symbolic logic in the 19<sup>th</sup> century, but it was later on that Kelsen became aware of the fact that his programming postulates, he had formulated in his early work "Principal Problems of the Theory of State Law", were too extremely laid down that they could, under further working out, become practically useful. After all, it was in 1931 that Kurt Gödel (1906-1978), Kelsen's compatriot and Austrian mathematician and physicist irrefutably proved that even mathematics could not be reduced to the pure form, that is, be deprived of any contents<sup>34</sup>, not to speak of jurisprudence the exact method in which has not become reality even in present times.

Although Kelsen has considerably lessened, better to say explained his originally exposed methodological attitudes, transforming them gradually into relatively balanced, even quite acceptable material statements, his most ardent rivals, particularly those among the advocates of dogmatic Marxism, did not stop accusing him for extreme formalism. Therefore, A. Merkl, in one of his papers, written on the occasion of Kelsen's 80<sup>th</sup> birthday, deemed it necessary to tell clearly and decidedly to the opponents of the pure theory of law that there are no forms without contents and contents without forms in the legal experience, but that the form and contents are complementary phenomena of each legal act,<sup>35</sup> that is, that the purity of the law science Kelsen strives for cannot and must not be equalized with some contentlessness at all.

Scientific study of law within its own frameworks or the structural analysis (as an immanent approach) is not, therefore, concentrated on negation of normative contents, but to the introduction of maximum strictness into the legal methodology, on discovering specific legitimacies of the legal phenomenon and, that what is probably the most important at the moment being, on creating conditions for establishing interdisciplinary cooperation between jurisprudence and other related and adjacent sciences. In that view, it is also interesting to point to Kelsen's expectations he has exposed in the introduction to the second edition of his work "Principal Problems of the Theory of State Law", emphasizing that the pure theory of law is a joint work of an ever-expanding circle of people, "theoretically like-minded persons".

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<sup>33</sup> Op. cit., p.132.

<sup>34</sup> It is interesting in this context to remind that Engels has defined mathematics as a science on space forms and quantity relations. In other words, symbols in mathematics cannot be used like designations without any meaning in view of the fact that they must be based upon some empirical contents. A corresponding connection with reality is necessary because of the applicability of mathematical theories, that is, symbolic systems, so that Alfred Trasky correctly remarks that the system for which we cannot cite any single interpretation, probably, would be interesting to no one. (Cf. Миленко Николић: "Уводне теме у методику математичког образовања", Младо покољење, Београд, 1967, p. 93 and Алфред Тарски: "Увод у математичку логику и методологију математике", Рад, Београд, 1973, pp. 220 and 222.

<sup>35</sup> Cf. Adolf Merkl: "Zum 80. Geburtstag Hans Kelsens reine Rechtslehre und Moralordnung" ("Österreichische Zeitschrift für öffentliches Recht", Wien, Springer-Verlag, 1961, p. 296).

"Perhaps I may ... hope that their rivals will show understanding of their efforts to philosophically deepen the problems of the theory of state and law and to link those problems to analogue problems of other sciences, for the purpose of freeing our science from its unhealthy isolation and its including, as a worthy member, into the system of sciences."<sup>36</sup>

Intreconnection of certain scientific disciplines and their mutual communication on a multidisciplinary grounds supposes a built-up common language and defined common ideas so that, applying a corresponding technique, certain characteristic phenomena could be included into a unique system or homogenous entirety of interdependent parts.

Insisting on the immanent approach, structuralism as a methodological movement, succeeded in significantly bridging the existing gap between the so-called humanitarian and exact sciences by creating a set of identical terminological and conceptual instruments by the use of which comparable data and information of importance for correct recognition and understanding, that is, explanation of the essence of the observed systems, introduced for different realistic and ideal objects can be obtained. In fact, varieties represent specifics of each system separately, while identities (uniformities) identified by comparison based on the common language and common ideas – characteristics of generic nature.

Starting from these premises, Kelsen has found a base for his immanent approach in the theory of degrees (Stufentheorie), which, according to him, provides the deepest insight into the formal structure of legal order and represents, in fact, the first conscious application of the systematic way of thinking to the world of legal phenomena.<sup>37</sup>

The aforementioned theory, the creator of which is deemed to be A. Merkl, analyzes, that is, investigates the legal order from the law creation and application point of view, i.e., dynamically and although it is the least debatable part of the pure theory of law, it opens, as an exceptionally complex doctrine, many relevant and interesting questions that, unfortunately have not satisfactorily been realized and studied so far. Robert Walter also points to this circumstance, from whose attitude one could conclude that the theory of degrees is not a fully completed teaching, responsible for which probably was Merkl himself who gave up to work it out in the form of a monograph, which was explicitly announced way back in 1931.<sup>38</sup>

Apart from the aforementioned fact, Kelsen has, on every occasion, talked about the theory of degrees only in superlatives, so that, in line with its assumptions, he has decided

<sup>36</sup> Cf. Vorrede zur zweiten Auflage, p. XXIII, op. cit. Норберто Бобио (see "Есеји из теорије права", Логос, Сплит, 1998, p. 110) cites this place as a proof that Kelsen wanted his own project of the scientific jurisprudence to classify into a, to him, modern general movement of social sciences.

<sup>37</sup> Cf. A. Merkl: "Die Lehre von der Rechtskraft" Leipzig und Wien, Franz Deuticke, 1923, p. 223.

<sup>38</sup> Cf. A. Merkl: "Prologomena einer Theorie des rechtlichen Stufenbaues", Gesellschaft, Staat und Recht, Wien, Verlag von Julius Springer 1931, p. 294.

Merkl seems to have sometimes been apt to public promises simply leaving them later to sink into oblivion. As he had given up making the announced monograph on the theory of degrees in 1931, it was in the same manner that he abandoned dealing with the general theory on state, although in an article titled "Idee und Gestalt der politischen Freiheit", published in 1953, in the proceedings of papers "Demokratie und Rechtsstaat" (Polygraphischer Verlag A.G. Zürich, p. 186) he made it public that he had concluded the manuscript dedicated to that theme and thus practically announced its publishing in the near future, which, unfortunately, did not see the light of day. For the very same reason the question may be raised whether such a manuscript exists at all.

for the concept of law as a dynamic system of norms the compulsoriness and specifics of which do not depend upon the contents (which may be whatever), but upon the form, that is, the manner in which they have been created (brought about) and in which they are linked into a unique and harmonized entirety.

Such approach, according to Norbert Bobbio's view, represents a border of the pure theory of law, because compared with the importance Kelsen ascribes to structural problems it leaves extremely scarce space for the law function problems.<sup>39</sup>

At first glance, this objection, reported by Bobbio, seems quite reasonable and acceptable. Nevertheless, here, the well-known rule of cybernetics must not be ignored, according to which each structure is, in fact, an indicator of the future conduct of the corresponding system: the systems, and thus the legal system as well, must be appropriately and worthy made up, composed or built to effectively and in a predicted manner function.

In other words, it means that the structure and function of a system are two facets of one and the same phenomenon, so that, therefore, the functional structure and structural function are talked about, that is, to put it concretely: which and what functions of a system of positive law will be dependant upon its structure, i.e., organization.

However, much more serious objection that may be made on account of Kelsen's structural (immanent) approach to law (and which is, after all, regularly made on account of the structuralism in general), reflects, in our opinion, in the thesis that there is no place for people in the pure theory of law, because people are, as stressed by Zdravko Grebo, common products of law norms, although Kelsen claims contrary, proving that law is a forced order of human relations, relations among people and that, therefore, a man is a central figure on the concept of law that advocates his teaching. Grebo, however, like many other dogmatic interpreters of Marxism, does not approve this argumentation of Kelsen, thinking of Kelsen's man only as a personification of the set of norms and the end point of assignment that man, underlines Grebo, is not even a complete abstract man, a man at all, but a partial man, a phantom of the same kind Marx has described in a "man" of national economy.<sup>40</sup>

Kelsen's thought is, by the look of it, too subtle, anyway, to be singlesided as it is incorrectly interpreted by some critics of the pure theory of law, among which doubtlessly belongs Z. Grebo as well.

The human essence, the essence of the man is according to Kelsen's viewpoint (similar to that of Marx) a set of social relations, but regulated by the efficient law norms, since without those norms a man from the present day status of the social order, civil status, would be brought back to the status of chaos, violence and anarchy or even to the original natural status. Therefore, a man must be subordinated to the social order to remain free according to Goethe's well known saying that "only in a limited space he shows himself a

<sup>39</sup> Норберто Боббио: "Есеји из теорије права", Логос, Сплит, 1988, p. 118. The functional side of law has, in all likelihood, been neglected by Kelsen due to his paramount obsession with Merkl's theory of degrees (which represents a typical structural teaching). Thus, for example, in his well-known work "Allgemeine Staatslehre", Verlag von Julius Springer, Berlin, 1925, p.402. Kelsen; writes: "Merkl's Theorie des Stufenbaues der Rechtsordnung ist für meine Darstellung der Funktionenlehre von entscheidender Bedeutung" ("Merkl's theory of graduated structure of the legal order is of deciding importance for my account of the teaching on functions").

<sup>40</sup> Cf. Здравко Гребо: "Маркс и Келсен", "Свјетлост", Сарајево, 1979, pp. 241-242

master" and that "freedom can only be given to us by the law."

Kelsen's structuralistic world of law, as a set of normative relations is, no case, reduced to the world of normative fictions or artificial constructions alienated from the man and not related to the social reality. On the contrary, that world necessarily understands a certain degree of efficacy for the purpose of regulating conflicts of interests and establishment of peace in the social community, that is, it supposes an optimum measure of agreement between the norm and the social reality, or, as Kaufmann would say, "agreement of ought and being".<sup>41</sup>

#### 4. KELSEN'S NORMATIVISM

That we could understand the specifics of jurisprudence, as a general law science, we have, first of all, says Kelsen, to understand the nature of its subject, that is, to answer the question – what is law? With respect to this, there are, Kelsen goes on, two fundamental, mutually contradictory standpoints. According to the standpoint advocated by the fascists, law is a fact and, therefore, it must be studied by means of causative and explaining and other realistic methods.

The teaching that defines law as a fact is based upon the incorrect identification of the norm with the fact it is created by and validity of the norm with its efficiency. For example, antinormative approach to the social phenomena, remarks Kelsen, is an essential element of the Marxist theory in general and the Marxist theory of law in particular.<sup>42</sup>

Such approach was particularly characteristic for the Soviet law doctrine in its so-called "early period" headed by Stuchka and Pashukanis. However, when, after the capitalistic economy has completely been eliminated and the Soviet state and law have stabilized, there occurred a radical turnover in the Soviet theory of law. Under the leadership of Andrei Vyshinsky, the official theoretician, there resulted a comeback to the normative doctrine and law was again defined as a system of norms. Soviet lawyers, who have prior to that, strongly believing in the correctness of the Marxist science on society, rejected the normative theory as a bourgeois theory, were stigmatized as enemies to the nation. Of course, that happened not because of the scientific, but for political reasons, and based upon the Soviet experience a lesson can be learned that negation of the normative character of law, i.e., an attempt to define law without grounds or reference to norms, leads, according to Kelsen's standpoint (exposed in the polemic with Carlos Cossio)<sup>43</sup>, in fact, to the negation of the concept of law. Therefore, Kelsen leans down to the opposite, normative conception of law; essentially, law is a norm or, to put it more precisely, a system of norms, that is, a normative order. According to the interpretation of the pure theory of law, a norm can be understood in different ways: it is a rule of conduct, depsychologized, that is, an impersonal and anonymous command, a scheme of interpreting, a sense of the will of act, but also a relation between at least two people, out

<sup>41</sup> Cf. Артур Кауфман: "Право и разумевање права", "Гутенбергова галаксија", Београд, 1998, p. 90.

<sup>42</sup> Cf. Hans Kelsen: "The Communist Theory of Law", Frederik A. Praeger, Inc, 1955 (Preface).

<sup>43</sup> Cf. H. Kelsen: "Reine Rechtslehre und Elogische Theorie" (Österreichische Zeitschrift für öffentliches Recht, Band V, Hft 4, Springer-Verlag, Wien, 1953. p. 471).

of which one creates, issues a norm, and the other plays a part of addressee of the norm,<sup>44</sup> or, in keeping with the thesis of Walter Dubislaw, adopted by Kelsen, "there is no imperative without the emperor", that is, a norm without the authority who lays down (issues) the norm, but, also, there is neither a norm without one or more addressees it refers to. Doubtless, the latter standpoint reminds of the communication approach to law and the legal phenomenon at all, where an emphasis should anyway be placed on the fact that prevailing in Kelsen's works is the attitude that the norm is a sense (meaning) of the act of will and that, as such, it has an ideal existence which reflects in its validity. However, a reason for the validity of the total legal order as a hierarchical structure of pyramidal form Kelsen finds in the basic norm that can, but need not be assumed ("Die Grundnorm kann, muss aber nicht vorausgesetzt werden").<sup>45</sup>

However, if we do not assume the basic norm, then the enforcement order based upon the acts of human beings and effective in everything cannot be interpreted as a system of valid norms, but only as a set of factual commands. The relations constituted under such order cannot be interpreted as legal relations, that is, as obligations, law, competence and the like, but only as the relations of power.

Thus, the pure theory of law, establishing the basic norms as a logical condition under which positive law can be interpreted as a valid one, finds only conditional, but not a categorical foundation of validity of the legal order.<sup>46</sup>

The exposed concept of the norm, that is, of law as exclusively normative phenomenon, became the object of permanent criticism in the scientific literature, from very different ideological starting points. Kelsen came under the highest criticism for consciously eliminating all so-called metajuristic factors (economic, political, social, psychological, cultural, etc.) from the analysis of the legal phenomenon inseparably linked to which law is; for not taking care of the socially conditioned norm; for simply approaching the study of law, losing sight of the fact that it is an extremely complex social and spiritual creation; for claiming that norm is not only a regulator, but also the main and the only creator of social relations; for practically supporting the fetishism of the norm; for observing the norm as an entity existing for itself and per se only; for considering normative observance an essential feature of the social (and spiritual) sciences and for reducing his teaching on the norm to a kind of *l'art pour l'art* and scientism.

This list of negative qualifications of the Kelsen's doctrine could be, according to us, summed up in the most suitable way by a thesis exposed by Fritz Sander, one of the most gifted Kelsen's pupils at the beginning of the 20s of the 20<sup>th</sup> century and then his ardent opponent, having said that the teaching on the normativity of law is a dogma and evil

<sup>44</sup> Cf. H. Kelsen: "Allgemeine Theorie der Normen", Wien, 1979, Manzsche Verlag – und Univesitätbuchhandlung, p. 23.

<sup>45</sup> Cf. "Allgemeine Theorie der Normen", p. 206.

<sup>46</sup> In his posthumously published work "Allgemeine Theorie der Normen", Kelsen has reduced the basic norm to a fiction in the sense of Vaihinger's philosophy "as if" (op. cit., pp. 206-207). Accordingly, the basic norm is, in fact, a fictive norm, a mediative tool ("ein Denkbehelf") or as Hans Vaihinger (1852-1933) would say, an idea which represents a scientifically permissible fiction (*Erdichtung*) for practical purposes. Робер Валтер (see "Три прилога у чистој теорији права", Досије, Београд, 1999, translated by Данило Д. Баста, p. 35) deems that the contents of the basic norm should read as follows: "Behave as you are commanded by the Constitution and positive commands that may be reduce to it."

(Grundübel) of the overall law science.<sup>47</sup>

All those critical objections (mainly the products of misunderstanding, that is, nonunderstanding) on the account of the pure theory of law have in no way swayed Kelsen in his firm conviction that the norm is a central concept, essence and the only authentic component of the law phenomenon, the least particle that phenomenon can be broken to without losing its particularity. In that sense, according to Radomir Lukić, the norm is an atom of law, because breaking it elements are obtained that are not law, but some other phenomenon.

His viewpoint on the deciding role and importance of the norm for determining the being of law and the human society in general, Kelsen has, in all likelihood, grounded upon the teaching of Sigmund Freud, whose private seminary, dedicated to the problems of psychoanalysis, he began to attend way back during World War. I<sup>48</sup>

In his, in many aspects provocative book, "Nagon i norma" ("Instinct and norm"), published in 1995<sup>49</sup> Andrija Gams, starting from the attitudes of Freud, emphasises that the norm is *differentia specifica*, which differentiates human society from that of animals, i.e., that it makes the essence of the human society and that "as a cardinal social determinant, as a fundamental designation and the basic, all-inclusive category in the organization and functioning of the human society, has not been so far... dealt with in sociology", but was mainly studied in law, the law norm being and most consistently "worked out by the Austrian lawyer Hans Kelsen". Gams had, in fact, exposed all these views of his a couple of year earlier, that is, in his paper "Freud on Society" where he came to conclusion that the norm is an essential and deciding element of the origin and survival of the human society, remarking that the arguments for that thesis can be found exactly in the teaching of Freud.<sup>50</sup>

In all likelihood, stirred up by the exposed ideas of Freud, Kelsen has put many efforts in supporting normative consideration and interpretation of social sciences, claiming that for him "the entire sphere of specifically social matter falls into the domain of normative knowledge, value, but not causal nature of reality". In that context, Fritz Sander has for some reason, at one time and among the first, if not the first, commented that the pure theory of law, by its essence, may be only one particular kind of sociology.<sup>51</sup>

Completely negating, at first, the possibility of constituting sociology as a science on state and law, Kelsen has mitigated later on his rigid attitude and, as correctly ascertained by Radomir Lukić, "starting from the intention to free the law science from sociological elements", he "comes to an end by introducing normativistic elements into sociology... and creating normativistic sociology".<sup>52</sup> In the well known work "The General Theory on State and Law" Kelsen admits the possibility of concurrent existence of sociological and

<sup>47</sup> Cf. Robert Dolp: "Die Rechtslehre Fritz Sanders" (Österreichische Zeitschrift für öffentliches Recht", Springer-Verlag, Wien, 1952, Band V, Heft 1-2, p. 214).

<sup>48</sup> Cf. R.A. Metall: "Hans Kelsen, Leben und Werk", Franz Deuticke, Wien, 1969, p. 40.

<sup>49</sup> Cf. Андрија Гамс: "Нагон и норма" ("Филип Вишњић") – "Савремена администрација", Београд, 1995, pp. 13, 21, 101.

<sup>50</sup> Cf. А. Гамс: "Фројд о друштву", Београд, "Научна књига", 1988.

<sup>51</sup> Cf. Robert Dolp, op. cit., p. 193: "Reine Rechtslehre kann ihrem Wesen nach nur eine besondere Art Soziologie sein... "

<sup>52</sup> Cf. Р. Лукић: "О основним идејама Ханса Келсена", "Архив", No. 4/1951, p. 629.

normative law sciences, but emphasises that the latter has precedence, since the sociological law science assumes a normative concept of law, the concept of law as defined by the normative law science.<sup>53</sup>

The normative approach to the social sciences, in accordance with the exposed Kelsen's determinations, has been carefully worked out by Ivan Padjen in several clever and interesting papers dedicated to the methodology of social, that is, law sciences, which deserve some attention to be paid to them here.

According to this author, "normative explanation", the authorship of which he attributes to Kelsen (see "Социологија и модерно право", Ревизија за социологију, бр. 3-4/1987, p. 95, footnote 4), is a fundamental method of investigation of society, and consists of identifying a certain subject referring to the norms (rules, reasons) which constitute that subject. The so-called empirical, more precisely indicative sciences on modern societies understand previous legal interpretation of their subjects. Sociologists, political economists and political scientists all, without exception, believe that they deal with the firm facts of the social life they independently identify and explain. However, when the valid law norms that constitute some social order, secret or ineffective, then sterile are not only the corresponding law but indicative sciences on that order as well; such order is for any social science a thing in itself. Therefrom unambiguously results a conclusion that the so-called empirical sciences on modern societies, in fact, parasitize on law and law sciences (see "Наше теме", Зарпеб, 1988, No. 7-8, pp. 1875-1880).

The aforementioned assertion, exposed by Padjen, may be in the best way illustrated on the example of the so-called grey economy, that is, dual economy. The fact is that the official or legal market-type economy, in fact, really exists only thanks to the effective law norms; without those norms, the purpose of which is to bring order in the market elements, to provide predictability, certainty and calculability of anyone's conduct in the market competition and to regulate conflicts of the existing interests, official or legal economy unavoidably is transformed into the so-called grey economy which evades statistical and tax records. In other words, the so-called underground (grey) economy, in its different manifestations, cannot be covered by the official statistical investigations and be forced to meet its tax obligations, because they are officially unknown parts of the reproduction process. The so-called grey economy is, in fact, the first and at the same time an ongoing symptom that the state does not perform its economic functions to provide conditions for the economy to be balanced.<sup>54</sup>

Doubtless that Kelsen's teaching on the norms and their role in the human society (as it emanates from the exposed) represents an inspiring challenge not only for jurisprudence, but also for other social and spiritual scientific disciplines. But, at the same time, one must be conscious that this teaching is in no case a finished, round off and complete doctrine.

Namely, the main Kelsen's work dedicated to the problems of norms in general and law norms in particular, as we have already ascertained, was published posthumously, which means that Kelsen did not succeed in making the final revision of the mentioned

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<sup>53</sup> Op. cit., pp. 234-238, Правни факултет, Београд, 1998.

<sup>54</sup> Cf. проф. др Вера Пилић-Ракић: "Сива економија", Удружење "Наука и друштво Србије", Београд, 1997, p. 39.

work and thus give its final form. Therefore, certain Kelsen's views in the aforementioned work cause a lot of confusions, misunderstandings and conflicts or make great dilemmas in view of certain themes that, anyway, represent unresolved or at least predominantly, that is, insufficiently solved questions of law science.

Moreover, Ota Weinberger, one of Kelsen's latest critics, claims that the whole book "Allgemeine Theorie der Normen" is based upon the intention to prove irrationality of norms, that is, that there can be no logical relations among norms, so that the rules of formal, bivalence logic cannot be applied to them.<sup>55</sup>

Not going into the well-foundedness of such an estimation, it seems that Weinberger, consciously or inadvertently, overlooks the fact that Kelsen's fundamental attitude on the unjoinableness of law and logic (in spite of the widely spread conviction on their inseparable association) is not completely deprived of grounds.

Namely, it is an irrefutable fact that in the process of creation (and application) of law, establishment of logical relations among the relevant norms and their mutual meaning-based association is always longed for, but also indisputable is the circumstance that regulation of mutually opposing interests, which, according to Kelsen, makes *raison d'être*<sup>56</sup> not rarely requests tolerance of certain inconsistencies, nonprincipled compromises, unsaid and indefinite things in the normative texts; all which, doubtlessly, proves the well known thesis of Marx that ideas have always disgraced themselves when differing from interests, that is, even better well known saying (ascribed to Hobbes and Lenin) that people, because of interest, are ready to refute even geometrical axioms.

In Kelsen's interpretation, conflict among norms is something quite different from logical contradictions; that conflict, conditionally speaking, can be compared with two powers acting upon the same point from different directions.<sup>57</sup>

To put it more precisely, the truth and nontruth are the features of a statement, while validity is not the feature of the norm, but its specific, ideal existence.

In fact, the norm which is not valid, in fact, does not exist; it is not a norm, while contrary to that, the untrue statement is a statement: it exists as a statement, regardless of the fact of not being correct, that is, of being untrue, incorrect and the like.

The exposed Kelsen's view on the identity of validity and the existence of law norms came under the criticism of Radomir D. Lukić, emphasizing the fact that differentiation should be made between the meaning of the verb "to be, to exist", which refers to the existence of something (some substance, thing) and the verb "to be valid" which refers to the action, function of the substance, being, thing, that is, its quality, its attributes in general, i.e., that which comes along with that existence of things, being, substance, but does not designate only that existence, which is preferred to the quality, the feature of that which exists.

<sup>55</sup> Cf. Ota Weinberger: "Normentheorie als Grundlage der Jurisprudenz und Ethik", Duncker und Humbolt, Berlin, 1981, p. 94.

<sup>56</sup> Cf. H. Kelsen: "The Communist Theory of Law", p. 94.

<sup>57</sup> Cf. Die Wiener rechtstheoretische Schule, particular attention being paid to the paper published in English under the title "Derogation" (p. 1439) and paper "Recht und Logik" (pp. 1478-1479). In this context, Kelsen rejects the solution of Jürgen Jørgensen, who starts from the thesis that each command sentence is composed, in fact, of imperative and indicative factor and that it is that circumstance that enables application of logic rules to imperative attitudes, that is, to norms as commands ("Auf Imperative – und das heisst auch auf Normen").



"Validity as a function, quality, attribute, like something which speaks about the norm" – remarks Lukić – "is not still the norm itself, that is, is not identical to its existence."<sup>58</sup>

Thus, according to Lukić, it results that Kelsen does not differentiate existence of the norm from its validity, because the norm, says Lukić, may exist, for example, when passed, but is not still valid, is not still effective. No one can say that it does not exist, according to Kelsen, who simply makes existence equal to validity, considering that ineffective norm is not a norm. Thus, Lukić reminds of Kelsen's well-known attitude that a law norm objectively is valid when human conduct it regulates really corresponds to it, at least to a certain degree. In other words, minimum of applying of a law norm is a condition of its validity. In harmony with that, Lukić concludes that Kelsen, being desirous to have perfect clearness and preciseness becomes, practically, unclear and imprecise, associating different concepts, that is, existence and validity of norm in one concept.<sup>59</sup>

This<sup>60</sup> and other similar noncoherencies present in Kelsen's views, otherwise objectively conditioned by the nature of law norms as the subject of study of the law science, cannot successfully and consequently be eliminated, starting, exclusively from the traditional logic postulates<sup>61</sup> and from, and in line with them, the grounded and almost to the perfection sharpened categories, concepts and attitudes of the pure theory of law, but first and last, by building special law logic, with the rules of reasoning and concluding different from the rules of general, that is, formal bivalent logic.

It is certain, however, that it is possible to achieve only by introducing corresponding

<sup>58</sup> Cf. Др Радомир Лукић: "Нормативност права", *Анали Правног факултета у Београду*, No. 1-3/1991, p. 196

<sup>59</sup> Cf. Рад. Лукић: "Систем филозофије права", *Савремена администрација*, Београд, 1992, pp. 347-351.

<sup>60</sup> The example cited by Lukić in his criticism of Kelsen's view on the identity of validity and existence of the law norm, according to us, needs to be stated precisely in an adequate manner, because it is not well enough convincing to be easily understandable.

As we have already ascertained, Kelsen starts from the attitude that validity of a law norm is its specific, ideal existence and one says that it comes into effect, then it means that it comes into that particular existence of its, that is, it begins to be effective with unlimited term until removed from the legal order in a legal way. In connection with this, Kelsen explicitly emphasizes that validity is an ought, but not being and that because of that a law norm may, speaking in principle, be valid without being applied at the same time (if objective circumstances are met.).

But, since validity of the law norm is dependent upon reality, it results that the minimum of its application is a condition of its validity as a real existence.

Regulating social relations the lawmaker, that is, another creator of the so-called formal sources of law very often (in the final provisions of regulations and general acts) simulatenously uses expressions "coming into force", and "application" which are, in fact, the language synonyms, the former being used for introducing normative acts into the legal order, while the latter usually serves to denote postponing of legal effect of certain provisions of those acts. To put it more closely, the law norms may exist as integral parts of the legal order without being used, that is, not to obligate the addressees for a certain period of time, in fact, they are not effective.

Based on the aforementioned, one could say that coming into force or validity of a norm is a possibility, and its application the reality of law.

<sup>61</sup> Traditional logic operates with two knowledgeable values, that is, two valences of knowledge (truth and error), while, for example, trivalence logic, in addition to these, adopts the third value (possible, probable and other) as well. В. Šešić deems that only ninevalence logic represents a logic of real knowledge ("Основи логике", "Нучна књига", Београд, 1971, p. 402.)

contents into the formal logic, adequate to the legal way of thinking.

Although Kelsen thought that no specific logic of law could be in questions at all<sup>62</sup>, it is an irrefutable fact that the traditional logic of bivalent type was, already from the 19<sup>th</sup> century, exposed to permanent criticism as an inadequate teaching on the conditions of recognition of the material truth. The formal character of the existing logic rules and their independence from the contents make the application of those rules possible "to any recognizable contents of definite type" independently of its individual characteristics. Therefore, the aforementioned rules represent indispensable, but not sufficient conditions to come to correct conclusions in a certain particular science.<sup>63</sup>

Making of material logical forms, that is, constituting special logics for the corresponding scientific domains represents, therefore, an unavoidableness, since today's extreme formalism in the logic has exhausted its possibilities to a great extent, so that in the near future not only that it does not promise advancement, but, in fact, guarantees increasing production of confusion, which has given rise to Lancelot Hogben, the British mathematician, not without sarcasm, to conclude as follows:

"Recently, some logicians have surpassed Bull as much as he did Aristotle. Polyvalent systems of symbolic regulations for reasoning permit to say that statement, neither fully true nor fully false, in the style of lawyers, can be a bit of one, a bit of other".<sup>64</sup>

##### 5. INSTEAD OF THE CONCLUSION

Since pure theory of law does not represent a closed system of final knowledges and truths, but a doctrine open for further material and methodological innovations, as well as fresh, new stimulative ideas, it is necessary to point to the possible directions of its further development in which, if not all interested, as Robert Walter would like it, then, of course, at least all competent representatives of the law science should take part<sup>65</sup>

In that context, first and last, according to our opinion, supported should be the attitude of Vladimir Kubeš who insists on providing clearness with respect to the fundamental theses of the pure theory of law as, predominantly, the scientific school. If such clearness would not be achieved, then, according to him, we would neither be able to orient ourselves in the confusion of the most versatile views nor we may at all speak of one school in the very sense of that word.<sup>66</sup>

In addition to this, so to say, basic task necessarily assigned to the renowned representatives of the pure theory of law, as the most famous, but at the same time most controversial law doctrine of our times, the forthcoming activities on its further development, viewed globally, should be directed to:

<sup>62</sup> Cf. "Allgemeine Theorie der Normen", p. 220.

<sup>63</sup> Cf. Михаило Марковић: "Филозофски основи науке", САНУ, Београд, 1981, p. 348

<sup>64</sup> Cf. Л. Хогбен: "Стварање математике", Београд, p. 312.

<sup>65</sup> The message of Robert Walter, present-day head of the Institute "Hans Kelsen" in Vienna, seems to have been addressed to the widest possible circle of workers in the field of law, since it states the attitude that Kelsen's theory of law is permanently under development "all of whom are invited to work on it" (cf. "Теорија права Ханса Келзена", Досије, Београд, 1999, p. 41.

<sup>66</sup> Cf. "Das neueste Werk Hans Kelsens", p. 199.

1) *upgrading and improvement of the theory of degrees*, having in mind the fact exceptionally complex teaching is in question of importance to the fundamental realization of structural (and functional) regularities of legal order.

This theory could also, in all likelihood, serve as a solid basis for fruitful formalization of jurisprudence and introduction of exact methods into the area of law investigations;

2) *study of the logic of norms in general, that is, law norms particularly*, by the critical and at the same time constructive reinvestigation of conclusions Kelsen has come to in his posthumous work "Allgemeine Theorie der Normen". Considered within the frameworks of that should be, in fact, the possibility of constituting law logic in the sense of independent scientific discipline accommodated to the needs and requirements of creation, recognition and application of law;

3) *study of the language of law* understood as a set of symbols the use of which is regulated under the syntactic, semantic and pragmatic rules. We consider this assignment an extremely significant undertaking, because norms as the meanings of the acts of will cannot be studied separately and independently, that is, in an isolated manner from their material carriers, language signs, which represent a completely neglected theme within the pure theory of law.

Finally, one must have in mind the fact that principal value of the pure theory of law, first of all, is in that it presents the subject of its study, that is, positive law such as it is, without any unfamiliar additions. It is not only that the methodological doctrine of great heuristic possibilities is in question, but system learning as well that within its investigations tends to embrace the universal legal order interwoven in the composition of which are certain ideas of natural law all contained in many international law documents of general or regional character.

Thus, the pure theory of law of Hans Kelsen, regardless of its principled negative relation towards the natural law teaching, starting exactly from the attitude that law must be presented such as it is, is forced, whether it wants to or not, also to deal with the study of the corresponding contents of natural law, which in present times under the name "human rights" make an essential integral part of the existing international law.<sup>67</sup>

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<sup>67</sup> For more details see the work of prof. Слободан Перовић: "Природно право и суд", Београд, 1996 (Правни факултет Универзитета у Београду и Удружење правника Србије, pp. 102-109).

## ZAPIS O PRAVNOJ TEORIJI HANSA KELZENA

**Zoran Jelić**

*Autor se u članku osvrće na osnovne uzroke mnogobrojnih – često kranje negativno intorniranih – kritičkih ocena izrečenih na račun Kelzenove čiste teorije prava i izlaže bitna obeležja pojedinih faza njenog razvoja; ukazuje na doprinos Merkla i Ferdrosa izgradnji čiste teorije prava i na glavne odrednice Kelzenovog pokušaja formalizacije jurisprudencije (pravne nauke) radi stvaranja uslova za egzaktno i objektivno proučavanje pozitivnog prava; analizira smisao i domašaj Kelzenovog normativizma i daje svoje vidjenje dalje izgradnje čiste teorije prava.*

**Ključne reči:** *čista teorija prava, pozitivno pravo, teorija stepena, klasična čista teorija prava, nova čista teorija prava, strukturalni (immanentni) pristup pravu, Kelzenov normativizam, logika normi, dalja izgradnja čiste teorije prava*