

Kelson's pure theory of law essay sample

Law



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This paper deals with the basic causes of numerous – often extremely negatively intoned – critical estimations said on the account of Kelson'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. Aim and objectives of the research paper:

The aim of theory of law is to reduce chaos and multiplicity to unity. Legal theory is a science and not volition. It is knowledge of what the law ought to be. Law is a normative and not a natural science. As a theory of norms legal theory is not concerned with the effectiveness of the legal norms. A theory of law is formal, a theory of the way of ordering, changing concepts in a specific way. The relation of legal theory to a particular system of positive law is that of possible to actual law. Research question:

1. The Concept of Law and the Doctrine of the Reconstructed Legal Norm
2. Two statements of which one affirms the validity of a norm prescribing that men ought to behave in a certain way, and the other the validity of a norm prescribing that men ought not to behave in this way.
3. To find the just norms of human behavior in the nature of man, particularly in his reason.
4. Overcoming the Dualism of Legal Theory
5. The Legal System and its Hierarchical Structure

Introduction

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'th 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, qualified as misunderstandings and, accordingly, rejected. Kelsen's troubles with the law scientists, according to the claim of Radomir D. Lukic, comes from the fact that he was a " philosopher-law scientist, but they were only law scientists. He wanted to raise them to the level of philosophy, but they were not able for that." In the same context, Lukic 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. No matter how much, basically correct and in addition witty, the quoted explanation provided by Lukic certainly demands some supplements and explanations, that is, appropriate preciseness.

Namely, Lukic 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 times⁴ 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 <https://assignbuster.com/kelsons-pure-theory-of-law-essay-sample/>

points established even in his first systematic work published in 1911 under the title "Hauptprobleme der Staatsrechtslehre", Tiibingen, Verlag von ICE. Mohr 1911, based upon which essential determinations of this law doctrine were then continuously worked out, shaped and modified over several decades. 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."

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"? 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 formal 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 formal 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

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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 synchronism 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 <https://assignbuster.com/kelsons-pure-theory-of-law-essay-sample/>

the book "Principal Problems of the Theory of State Law" which was published in 1923. V. Kubers 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 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. IO 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. Kubers, 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 Kubers 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 nominalistic grounds of law of William of Occam (1290-1349)¹¹ However, "Allgemeine Theorie der Normen", the last work of

Kelsen, goes on V. Kubes, 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 Hagerstrom, Lundstedt, Olivecrona and Alf Ross.

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 Kubes, 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 non is a condition of its validity, which, according to Weinberger, is the attitude opposing the normativistic way of viewing."

The Pure Theory of Law is, as its name indicates, a theory of law. The way in which a theory is elaborated is determined by its object. In order to apprehend the peculiarity of a theory of law, we must know the nature of its object; we must, first of all, answer the question as to what is law. Although <https://assignbuster.com/kelsons-pure-theory-of-law-essay-sample/>

the theory of law-or, as it is usually called, jurisprudence—is one of the oldest sciences, there is no generally accepted definition of the concept of law.

There are two different views concerning this object. According to the one, law is a fact, a definite behavior of men, which takes place in time and space and can be perceived by our senses. Facts are the object of the natural sciences: physics, chemistry, biology, psychology, sociology. Hence, according to this view of the law, jurisprudence does not essentially differ from these natural sciences. Just as these sciences, jurisprudence describes its object in statements to the effect that something is or is not, that is to say: in is-statements. According to the other view, law is not a fact, but a norm. A norm is a rule whose meaning is that something ought to be or to be done, even if actually it is not, or is not done.

A norm has the character of a command or prescription and is usually expressed linguistically in an imperative, A norm may have not only the character of a command but also the character of an authorization; by a norm a person may confer upon another person the power or capacity of issuing commands. The constitution of a state authorizes a certain individual or a body of individuals to issue statutes-general norms-and statutes authorize courts and administrative organs to issue individual . A norm may have the character of permission, that is to say, by a norm a person may be allowed to do something which without that permission is forbidden.

According to the Pure Theory of Law, law is norm, or, more exactly, a set of norms, a nonnative order.

Since a normative order is the object of jurisprudence, and the meaning of norms is that something ought to be done, that men ought to behave in a

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certain way, jurisprudence can describe its object not as natural sciences describe their object-in is-statements-but only in ought-statements. According to Kelsen, a theory of law should be uniform. It should be applicable to all times and in all places. Kelsen advocated general jurisprudence. He arrived at generalizations which hold good over a wide area. Kelson writes that a theory of law must be free from ethics, politics, sociology, history etc. in other words it must be pure. if a theory is general it has to be shorn of all variable factors.. kelsen did not deny the value of ethics, politics, sociology, history etc but his view was that a law must keep clear of those considerations.

The doctrine which defines law as a fact is based on the erroneous identification of the norm with the act whose meaning the norm is, and of the validity of the norm with its effectiveness. By avoiding this erroneous identification, the Pure Theory of Law separates jurisprudence, describing norms in ought-statements, from natural science describing facts in is-statements. This is the first reason that it is called a " pure" theory of law. The second reason is that it separates jurisprudence from ethics. The science of ethics describes norms, as does jurisprudence, but the norms described by ethics are not legal norms, but rather moral norms. The difference between legal and moral norms consists in that the former prescribe a certain behavior by attaching to the contrary behavior a coercive act as a sanction. A sanction is a forcible deprivation of life, freedom, property, or other values, as a reaction against a behavior considered by the legal authority as harmful to society.

Law forbids murder, theft and the like by prescribing that if someone commits murder or theft, he ought to be punished by capital punishment or imprisonment. Law commands payment of one's debts by prescribing that if a person does not pay his debts, civil execution ought to be directed against his property. By attaching a sanction to a certain behavior, law qualifies this behavior as a delict, as illegal, and makes the contrary behavior the content of a legal obligation. In this sense, law is a coercive order. Moral norms too, forbid or command a certain behavior, and some of them prescribe the same behavior as law, but without attaching to the contrary behavior a coercive act as a sanction. A moral order is a normative, but not a coercive order. The fact that a legal norm becomes effective must be added to the fact that it is created by an act; otherwise it can no longer be considered as valid. But just as the act by which the norm is created is not identical with the norm which is the non norm. A norm is a proposition in hypothetical form.

The science of law consists of the examination of the nature and organization of normative proposition. It includes all norms created in the process of applying some general norm to a specific action. Law and nature are categorically different. From an intra-systemic, internal, or legal point of view, law is norm, not fact. The code of the legal system, the formative distinction that creates and perpetuates the identity of the legal system is lawful/unlawful. That distinction is based on norms. " It is to these norms that legal cognition is directed - norms that confer on certain material facts the character of legal (or illegal) acts, and that are themselves created by way of such legal acts." Legal science adopts the internal point of view; legal sociology adopts the external point of view. " The object of such cognition [of

legal sociology], then, is not actually the law itself, but certain parallel phenomena in nature." Law " qua norm is an ideal reality, not a natural reality." As such, law is on one side of the is/ought divide; nature is on the other.

However, as law needs to be distinguished from nature, so it needs to be distinguished from other ideal realities, in particular from morality. Morality is transcendent in the Kantian sense, law is subject to cognition. Connecting morality and law is the hallmark of ideologies, revolutionary or conservative. " The PTL is directed against them, The PTL aims to depict the law as it is, without legitimizing it as just or disqualifying it as unjust; the PTL enquires into actual and possible law, not into ' right' law. In this sense, it is a radically realistic legal theory." The PTL is the cognitive science of the law. A statement about the law must not imply any judgment about the moral value of the law, about its justice or injustice; which, of course, does not exclude the postulate that the law should be just. However, since there are not one justice, but many different and even meaning of this act →the effectiveness of these many justices is meant. Exactly as the Pure Theory of Law separates law from nature and thus jurisprudence from natural science, it separates law from morals, and thus jurisprudence from ethics. In these two respects it is a " pure" theory of law.

The Pure Theory of Law is a theory of positive law. Positive law is a coercive order whose norms are created by acts of human beings-by legislative, judicial or administrative agencies, or by custom constituted by acts of human beings. Legislative, judicial, and administrative agencies are human beings in their capacity as organs of the state. The Pure Theory of Law shows

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that an act performed by a human being is interpreted as act of state only if this act is determined in a specific way by the legal order; that to attribute the performance of this law-creating act to the state means to refer the act to the legal order by which the act is determined; that the state as an acting person creating the law is nothing else but the personification of the legal order which regulates its own creation; and a state as a social order Of political organization is this coercive we call law; that a state imagined as a real being different from the law is the hypothesis of this relatively centralized legal order, or of its personification. Thus the Pure Theory of Law dissolves the misleading dualism of state and law prevailing in the traditional legal and political theory. The same objection applies to that version of the natural-law doctrine which pretends to find the just norms of human behavior in the nature of man, particularly in his reason.

Reason is the faculty of cognition. By our reason we are able to know, to understand or comprehend something which is given as an object of cognition, independently of this mental operation. To set a norm, to prescribe something, is a function of will, and human will is a psychic phenomenon totally different from human reason. Human reason can know norms after they have been created by acts of human will, but It cannot create norms. Only in God may reason and will be considered to coincide; only of God can people believe that knowing what ought to be is identical with willing that it ought to be. It is the old myth of the tree of knowledge knowing good and evil is the same as commanding the good and forbidding the evil. Only if the reason of man, as a being created by God in His own image, is part of the divine reason, can it be considered to be at the same

time a norm-creating will, a so-called "practical reason." This self-contradictory notion, which is the basis of a law of reason, is of theological origin. In opposition to a theological or natural law doctrine the Pure Theory of Law, as a positivistic theory, does not see the reason for the validity of positive law in a divine or natural order, different from and above the positive law.

It rejects the view that a positive law is valid only if its content corresponds to a divine or natural order, i. e., valid only if the positive law is just. It considers every positive law-every coercive order which is established by acts of human beings and is by and large effective-as valid without regard to its justice or injustice. The question of the reason for the validity of positive law- the question why the norms of any coercive order ought to be obeyed and applied-is, according to the Pure Theory of Law, to be understood as the following question: What is the logical condition under which the subjective meaning of the law-creating acts-that men ought to behave in a certain way-can be interpreted as their objective meaning? In answering this question we must be aware that it is logically impossible to infer from the statement that something is or is done, the statement that something ought to be or to be done, just as it is logically impossible to infer from the statement that something ought to be or to be done, the statement that something is or is done. This logical principle applies also to the fact of an act of will whose subjective meaning is that something ought to be done.

From the fact that an individual commands that another individual ought to behave in a certain way, it does not follow that the other individual ought to behave in this way. It does not follow from the subjective meaning of the act

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of command that the meaning of the act is an objectively valid norm, disobedience to which would constitute something wrong. If a gangster commands that another person pay him a certain sum of money, we do not assume that this individual ought to obey the command and that, if he does not obey, he commits something wrong. A norm cannot be deduced from a fact; it can be deduced only from a norm. Hence the reason for the validity of a judicial decision or an administrative command is not the fact that a judge has actually rendered the decision, or when judge to render decisions and the administrative organ to issue commands. The reason for the validity of statutes is the constitution, authorizing an individual or a body of individuals to issue statutes.

If it is historically a first constitution, and if the reason for the validity of this constitution cannot-from the point of view of a positivistic theory of law-be considered to be a superior order created by a divine, superhuman will, authorizing a certain individual or a body of individuals to establish the constitution, the reason for the validity of the constitution and hence of the statutes, judicial decisions, and administrative commands established on the basis of the constitution can only be a norm we presuppose, if we are to interpret the acts whose subjective meaning the constitution, the statutes, the judicial decisions, the administrative commands are, as objectively valid norms. A norm is presupposed according to which men ought to behave in conformity with the constitution, hence in conformity with the general norms issued on the basis of the constitution by legislation or custom and, finally, in conformity with the individual norms issued on the basis of statutes

or customary law by judicial and administrative acts; that is to say, in conformity with the legal order in its hierarchical structure.

This norm, which is not a positive norm-not a norm created by an act of human or superhuman will, but only presupposed in juristic thinking-is the reason for the validity of a positive legal order. It is called the basic norm. Its presupposition is the condition under which every coercive order established by acts of human beings and by and large effective, may be interpreted as a system of objectively valid norms. This presupposition is possible but not necessary. If the basic norm is not presupposed, a coercive order established by acts of human beings and by and large effective cannot be interpreted as a system of valid norms, but only as an aggregate of commands; and the relations constituted by such an order cannot be interpreted as legal relations, that is, as obligations, rights, competences and the like, but only as power relations. Thus the Pure Theory of Law, by ascertaining the basic norm as the logical condition under which a coercive order may be interpreted as valid positive law, furnishes only a conditional, not a categorical, foundation of the validity of positive law. Since the basic norm refers to a definite coercive order established by definite acts of human beings and by and large effective at a definite time referring to such a coercive order can be presupposed

Conclusion:

According to the Pure Theory of Law the basic norm may be presupposed with reference to every coercive order established by acts of human beings and by and large effective, whatever its content may be, that is to say,

without regard to its justice or injustice. This theory does not aim at a moral or political justification of positive law. As a science of positive law, it refuses on principle to evaluate its object as just or unjust; it is unable to furnish a firm, an absolute, standard for evaluation. Those who expect such standard from jurisprudence may consider a positivistic theory of law in general and the Pure Theory of Law in particular as unsatisfactory. But their expectation can be fulfilled only by theological speculation: by metaphysics, not by science of law. Since pure theory of law does not represent a closed system of formal 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"

In that context, first and last, according to our opinion, supported should be the attitude of Vladinnr Kubes who insists on providing clearness with respect to the fundamental-tal 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." In addition to this, so to say, basic task necessarily assigned to the renowned representatives of the pure theory of law, as the most

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

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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.”

Bibilography

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