



The Unconquerable Domain of Discretion in Kelsen's Pure Theory of Law

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In its emphasis on form and procedure and its focus on the rule of law, positivist legal theory inevitably evinces utter discomfort by a phenomenon that seems indelible from the reality of jurisprudence: judicial and administrative discretion, a partial delegation of legislative rulemaking authority that deviates from the separation of powers. Not only does Kelsen's Pure Theory of Law fail to resolve this contradiction, it makes matters worse: to keep separation of powers inviolate, it declines to stretch the limits of interpretation, noting that historical or teleological construction trespass all too easily into the legislative domain. Despite cogent systemic logic, this conclusion is unhelpful when a statute is silent or flawed. Kelsen even opposed the positivist gap rule in the Swiss Civil Code that authorizes the judge to act in loco legislatoris. As Justice of Austria's Constitutional Court, Kelsen had to pull the rip cord of all supreme courts: to justify social engineering, he invoked formalistic principle in a politically divisive decision, relying on the fact that further review was unavailable. Political reality caught up swiftly: legislators brushed aside whatever separation of powers Kelsen had intended

to protect, along with his life tenure at Austria's High Court. His role in the culture war over Austria's family law showcases the limits doctrinally stringent jurisprudence faces when the rubber of legal theory meets the road.

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INTRODUCTION

Hans Kelsen's "Pure Theory of Law" (1934) is a purely formal philosophy of compulsory legal norms promulgated by power.¹ It is perhaps the strictest abstractly reasoned manifestation of legal positivism. Positivism fundamentally relies on a realization summarized by Hobbes: "*Auctoritas, non veritas facit legem*" (authority, not truth makes law).² Beyond this theorem, jurisprudence has traditionally been about rationalizing, justifying, and legitimizing rules and decisions. Pure Theory³ does that by relying on the scientific reality of law without recourse to metaphysical dimensions and justifications, holding that law and morality are, and need to remain, two entirely distinct and separate value systems.⁴ Intent on eradicating every last remnant of natural law from the legal theory of his time, Kelsen also seeks to purge the influence of politics and ideology from the application of positive law.⁵ In a Neo-

¹ HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY. A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW xix.*et seq.* (Bonnie Litschewski Paulson and Stanley L. Paulson, trans., Oxford University Press, 1992) (1934). See also Hans Kelsen, *The Pure Theory of Law*, 50 *Law Q. Rev.* 477 (1934) and 51 *Law Q. Rev.* 517 (1935).

² THOMAS HOBBS, LEVIATHAN, SIVE DE MATERIA, FORMA ET POTESTATE CIVITATIS ECCLESIASTICAE ET CIVILIS ch. 26, 132 *et seq.* (London: Andrew Crooke, 1651). The complete proposition states: "*In Civitate constituta, Legum Naturae Interpretatio non a Doctoribus et Scriptoribus Moralis Philosophiae dependet, sed ab Auctoritate Civitatis, Doctrinae quidem verae esse possunt; sed Auctoritas, non Veritas facit Legem.*" ("In an established State, the interpretation of the laws of nature does not depend on the doctors and writers of moral philosophy but on the authority of the State, whereas doctrines may well be true, it is authority, not truth that makes law").

³ The Vienna School of Legal Theory formed around Hans Kelsen, Adolf Julius Merkl and Alfred Verdross. Kelsen remained the school's driving force whereas Merkl and Verdross abandoned focus on legal theory under the influence of Nazi repression of independent scholarship. Hans Kelsen, *Naturrechtslehre und Rechtspositivismus*, in DIE WIENER RECHTSTHEORETISCHE SCHULE, SCHRIFTEN VON HANS KELSEN, ADOLF MERKL, ALFRED VERDROSS 667-680 (Hans Klecatsky, René Marcic and Herbert Schambeck eds., Europa Verlag, 1968) (discussing contradictions between the two polar opposites in legal theory, natural law and positivism).

⁴ HANS KELSEN, REINE RECHTSLEHRE. STUDIENAUSGABE DER I. AUFLAGE LEIPZIG 1934 25 (Matthias Jestaedt ed., J.C.B. Mohr Paul Siebeck, 2008).

⁵ *Id.* at 44. Kelsen conceived positivism as a critique of ideology which he thought held sway over natural law theories that he opposed in his quest for a methodically and structurally "pure," value-neutral and therefore ideology-free philosophy of law. See

Kantian sense,⁶ he thinks of justice as a category of morality, an irrational ideal inherently incompatible with scientific reasoning. Concepts of justice aside, any legal norm is valid in Pure Theory independent of its content⁷ so long as it produces legal effect⁸ as a compulsory order (a Kelsenian “coercive norm”)⁹ ultimately deduced from the “basic norm.” Decades later, in the second edition of his Pure Theory of Law (1960), which had become one of the 20th century’s most widely influential theories in legal philosophy, Kelsen admitted the notion of the basic norm to be a fiction after having still treated it as a hypothesis in the first edition (1934).^{10 11} This Article examines the role of discretion as a litmus test for Kelsen’s philosophical framework; it looks at examples of its judicial

STEFAN UECKER, VOM REINHEITSPOSTULAT ZUR GRUNDNORM. LOGIK UND METHODE DER REINEN RECHTSLEHRE HANS KELSENS 77 *et seq.* (WVB Wissenschaftlicher Verlag Berlin, 2006).

⁶ HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW xxxi, fn. 31 (Bonnie Litschewski Paulson, Stanley L. Paulson trans., Oxford University Press, 1997).

For a comprehensive elaboration see Stanley L. Paulson, *The Neo-Kantian Dimension in Kelsen’s Pure Theory of Law*, 12 OXFORD JOURNAL OF LEGAL STUDIES 311-32 (1992). Many critics have attacked Kelsen’s Kantian roots: see Stefan Hammer, *Kelsen’s Grundnormkonzeption als neukantianische Erkenntnistheorie des Rechts?* in UNTERSUCHUNGEN ZUR REINEN RECHTSLEHRE. ERGEBNISSE EINES WIENER RECHTSTHEORETISCHEN SEMINARS 1985/86 210-231 (Stefan Hammer, Stanley L. Paulson and Robert Walter eds., Manz, 1986). Kelsen relies heavily on IMMANUEL KANT, KRITIK DER REINEN VERNUNFT (Riga: Johann Friedrich Hartknoch, 1781; 2nd ed., 1787) (Critique of Pure Reason) in his choice of terminology. “Pure” theories of almost everything reflected a strong Neo-Kantian intellectual trend in most areas of research in the early days of the twentieth century. Cf. Felix Kaufmann, *Kant und die Reine Rechtslehre*, in 33 BEITRÄGE ZUR REINEN RECHTSLEHRE 141-151 (Rudolf Aladár Métall ed., Europa Verlag, 1974).

⁷ Iain Stewart, *Kelsen Tomorrow*, 51 CURRENT LEGAL PROBLEMS (LEGAL THEORY AT THE END OF THE MILLENNIUM) 183 (1998) (discussing the philosophical and practical significance of Pure Theory’s methodical indifference, and therefore openness, to any content). See also *infra* note 127. This seems all the more contrasting given Kelsen’s opposition to Swiss Civil Code Art. 1, see *infra* sec. VII. and notes 120, 138.

⁸ HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 12, 26 where he characterizes the legal norm as a “scheme of interpretation” with intended as well as unintended levels of indeterminacy (*ibid.*, 77, 78). His earlier position is presented in Hans Kelsen, *La méthode et la notion fondamentale de la théorie pure du droit*. 41 REVUE DE MÉTAPHYSIQUE ET DE MORALE 183-204 (1934).

⁹ HANS KELSEN, GENERAL THEORY OF LAW AND STATE 15, 29, 278-29 (Russell & Russell, 1961).

¹⁰ HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 58, *supra* note 1.

¹¹ H.L.A. Hart, *Kelsen Visited*, 10 UCLA L. REV. 709-28, at 728 (1962-63).

application in Kelsen's own High Court practice¹² and at his theoretical critique of delegation of evaluative authority under the "gap rule" of the Swiss Civil Code.

PART I: THE NATURE OF DISCRETION AS A NECESSARY IMPLICATION OF INDETERMINACY

Kelsen treats the near-ubiquitous reality of administrative and judicial discretion in a purely formal, abstract, hierarchical and jurisdictional approach. Early in the development of his theoretical framework he had largely hoped to subsume and do away with discretion altogether¹³ under the philosophical limitations distilled from the normative conclusions he arrived at by delimiting the concept of law itself. Discretion had evolved historically from two separate concepts with equally ancient roots: one based on equitable considerations,¹⁴ the other arose from the doctrine of sovereignty based on power.¹⁵ Kelsen systematically re-interpreted evaluative

¹² Kelsen's Pure Theory of Law was a positivist counterproposal to the legal theory prevailing at his time and remained a mere episode in European theory of discretion. Remarkably, it had almost no influence on the development of German postwar practice concerning discretion. See THOMAS ELSNER, *DAS ERMESSEN IM LICHT DER REINEN RECHTSLEHRE. RECHTSSTRUKTURTHEORETISCHE ÜBERLEGUNGEN ZUR RECHTSBINDUNG UND ZUR LETZTENTSCHEIDUNGSKOMPETENZ DES RECHTSANWENDERS* 28 (Berlin: Duncker & Humblot, 2011) (presenting a comprehensive review of discretion under Pure Theory from a structural perspective in German constitutional and administrative law).

¹³ In order for the judge to fulfill his role as *viva vox legis* (the living voice of the law), he must not inject his will into the process of determining the law. This necessitates the presumption – or, rather, the fiction – that the law itself is complete and comprehensive in order to justify limiting its judicial application to a mere exercise of subsumption. See CHARLES DE SECONDAT BARON DE MONTESQUIEU, *DE L'ESPRIT DES LOIX. NOUVELLE EDITION FAITE SUR LES CORRECTIONS DE L'AUTEUR, TOME I, livre II, ch. 6, 222 and 225* (Geneve: Barrillot & Fils, 1749), who considered judges "*des êtres inanimés*" (inanimate beings) that are just "*la bouche qui prononce les paroles de la loi*" (the mouth that pronounces the words of the law) and whose decisions "*ne soient jamais qu'un texte précis de la loi*" (should never be anything but the precise verbiage of the law) and whose "*puissance... de juger est en quelque façon nulle*" ([his] power to judge is zero, in a manner of speaking).

¹⁴ See, e.g., ARISTOTLE, *Nicomachean Ethics* 1137b, 1796 in 2 *THE COMPLETE WORKS OF ARISTOTLE* (Jonathan Barnes, ed. & W.D. Ross trans., Princeton University Press, 1984) (c. 384 B.C.E.). Aristotle viewed equity as a source of "correction of law where it is defective owing to its universality."

¹⁵ The tradition of absolutist monarchy ("*l'état, c'est moi*") defended the territorial sovereign's right to be "above the law" (*legibus absolutus*) and, implicit therein, his right to

terms found in statutes as zones of discretion, calling them surviving vestiges of politics and morality within the broader scope of ‘hard law’ that prescribes specific conduct rather than convey a spirit or policy or guideline as ‘soft law’ typically seeks to inculcate. Discretionary exceptions to highly specific general rules are, of course, far from being a rare occurrence – indeed they are absolutely needed to tailor special legal solutions ‘more equal than others’ not only on Orwell’s *Animal Farm* – and as such they have endured as remnants of the absolutist sovereign’s discretion as *pater patriae*.¹⁶ The degree to which courts are given comparable discretionary latitude is a political decision and, from the vantage point of legal positivism, an empirical matter. But Pure Theory thinks of the bandwidth in judicial latitude as entirely irrelevant for purposes of determining the universal nature of law¹⁷ because it axiomatically presumes the unity, harmony, completeness, and freedom of contradictions within the legal system. Consequently, Kelsen construes all evaluative language as an indirect grant of discretion to those authorities that are tasked with applying the law.¹⁸ His key to

arbitrary legislation and executive action. ULLA HELD-DAAB, DAS FREIE ERMESSEN. VON DEN VORKONSTITUTIONELLEN WURZELN ZUR POSITIVISTISCHEN AUFLÖSUNG DER ERMESSENSLEHRE 53 *et seq.* and 68 *et seq.* (Duncker & Humblot, 1996). England, on the other hand, witnessed near-disappearance of discretion both in the law courts and in the equity courts, a trend that was reversed only in the twentieth century following the merger of law and equity. Patrick S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, at 1251-59 (1980). In the U.S. federal courts, this happened through the Federal Rules of Civil Procedure in 1938. This line of reasoning, which one might call apologetic in respect of sovereign interests, contradicted the Greek legal theorists starting with SOLON, *Eunomia*, 33, 3839, *cited after* SOLON, FRAGMENTE 31-43 (Helene Miltner ed., Stifterbibliothek, 1955) (c. 594 B.C.E.), but *see also* PLATO, *Nomoi* IV 715c 9 *et seq.* and 715e, f *et seq.* in PLATO IN TWELVE VOLUMES, VOL. 10: LAWS, VOLUME I, BOOKS I-IV (R.G. Bury ed., Loeb Classical Library, 1926) (c. 347 B.C.E.) and ARISTOTLE, *Nicomachean Ethics* 1134a 28- 1134b 21, *supra* note 14. All sought to limit interpretation in their pursuit of a government of laws rather than of men.

¹⁶ Broadly defined exception clauses to detailed rules meant for typical situations have increasingly become the norm rather than the exception in many areas of contemporary law.

¹⁷ *The Inner Logic of the Law in ETHICS IN THE PUBLIC DOMAIN. ESSAYS IN THE MORALITY OF LAW AND POLITICS* 253 (Joseph Raz ed., Oxford University Press, 1994).

¹⁸ “der *Worlaut* des Gesetzes [enthält] zwar *scheinbar* eine vollkommene Determinierung z.B. des bedingenden Tatbestandes, [bedient] sich dabei aber eines Begriffes [...], dessen Inhalt und Umfang gesetzlich nicht festgestellt oder objektiv gar nicht feststellbar sind“

analyzing discretion is indeterminacy.¹⁹ Legal theorists of all stripes including representatives of the free law movement, legal realists, positivists, critical legal scholars, pragmatists and postmodernists readily agree on the observation that appellate courts could frequently arrive at different solutions that would nonetheless be equally acceptable as valid.²⁰ Equally uniformly, scholars from the entire spectrum of legal theories deny that the law determines each and every legal proposition that is necessary to decide a case. As a result, there is general consensus that legal propositions exist which are judged as being neither true nor false by the sources of law as they employ accepted argumentative techniques.²¹

While Kelsen says that evaluative language is inherently indeterminate and therefore necessarily implies discretion, he also acknowledges that indeterminacy alone does not exhaust the class of vague terms.²² By using “imprecise and equivocal” terms such as justice, equality, freedom, or morality, the legislator does not give any clear directive to the judge.²³ The invasion of the law by outside factors that invite evaluative deliberation is not confined to

(“the wording of the statute may appear to contain a perfect determination of, e.g., the contingent circumstance, but uses for that a notion whose content and portent are not determined by law or cannot be determined objectively at all”). HANS KELSEN, *DIE HAUPTPROBLEME DER STAATSRECHTSLEHRE ENTWICKELT AUS DER LEHRE VOM RECHTSSATZE* 506 (J.C.B. Mohr, 1911).

¹⁹ Claudio Luzzati, *Discretion and Indeterminacy*, in HANS KELSEN'S LEGAL THEORY. A DIACHRONIC POINT OF VIEW 123-177, at 125 (Laetizia Gianformaggio Bastida ed., G. Giappichelli, 1990).

²⁰ Lorenz Kaehler, *Indeterminacy in the Law: Types and Problems*, IVR ENCYCLOPEDIA OF JURISPRUDENCE, LEGAL THEORY AND PHILOSOPHY OF LAW 1 (2009) available at http://ivr-enc.info/index.php?title=Indeterminacy_in_the_law:_Types_and_problems

²¹ The idea of such propositions being neither true nor false can be traced back to ARISTOTLE, *ORGANON II, DE INTERPRETATIONE*, *supra* note 14, at ch. 1, 16a.

²² KELSEN, *HAUPTPROBLEME*, *ibid.*, 506 offers a wide collection of examples of the class of vague terms such as “factory”, “integrity”, “railroad”, “public interest”, “claim”, “competence,” “privilege” – all of which represent indeterminacy in the law. *Cf.* the classic study of Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1916) and 26 *YALE L.J.* 710 (1917).

²³ Hans Kelsen, *La garantie juridictionnelle de la Constitution*, 45 *REVUE DU DROIT PUBLICQUE* 197-257, at 241 (1928).

substantive law or legal methodology. It goes far beyond a marginal adjustment and is much more structural in nature.²⁴

The crux of indeterminacy within Pure Theory leads it to claim that properly exercised discretion is deemed implicitly incorporated in the legal norm that is applied. Kelsen goes to great lengths to show that the agreement of some legal rules with a political or moral principle does not make that principle a part of the law.²⁵ Not all consequences that flow from such a principle are necessarily part of the law, other rules contradicting this principle may also become valid concurrently.²⁶ Kelsen says that traditional jurisprudence is unable to see the overall unity of the legal system. One of the central philosophical objectives of Pure Theory is to reveal this unity by consistently applying hierarchical derivations ultimately descended from the fictitious “basic norm” at the top of the normative hierarchy that incorporates proper use of discretion by reference and through positive, explicit delegation of authority. Each application of a legal norm involves a measure of discretion. Legislators have more discretion than judges who, in turn, have more discretion than officials of the executive branch tasked with

²⁴ Patrick S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, *supra* note 15, at 1271.

²⁵ A judge adjudicating a question of fundamental rights may very well consider himself bound by some conventional standard of morality. However, Kelsen argued that, contrary to what the judge believes to be binding upon him, what makes his act authoritative is not some moral principle but the bounded exercise of existing discretion because moral standards simply *cannot* underpin the authority of a judicial decision. Empirically speaking, conventions are often a source of false beliefs or, indeed, false consciousness. Any jurisdiction’s legal system *needs* not to be seen as grounded in some customarily accepted practice of recognition – always provided that there is a straightforward monistic mode of accounting for its validity. Kelsen himself was interested only in uncovering the true conditions of validity and not in interlocking conventions with varying pedigrees. See Alexander Somek, *Kelsen Lives*, 18 EJIL 409-451, at 428 (2007).

²⁶ Too extreme a dichotomy distinguishing between rules and principles may not be justifiable since the pendulum of judicial practice has been shown historically to swing between them. Ian Ayres argues that “in many circumstances the dichotomous choice between rules or standards may be a false one, because lawmakers may prefer to enact a complementary set of rules *and* principles.” Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1, at 18 (1993).

enforcement.²⁷ Exercise of judicial discretion is therefore inherently bounded and by no means ‘free.’

From the outset, Kelsen’s theoretical concept was surprisingly in synch with the common law perspective of Justice Cardozo.²⁸ The same is probably not true of all of Kelsen’s reasoning as it is rooted in civil law traditions that prioritize statutes and even accept the possibility of scholarly opinion prevailing over some judicial precedent. That congruence in perspectives may have been because, as a canonical matter, the American legal system is more guided by substantive considerations of procedural events than British common law, not to mention civil law jurisdictions. After all, much of positivist legal theory bases legitimate judicial authority, as well as legitimate exercise of judicial discretion, on the ways and

²⁷ “All law is about the creation of lower norms and is addressed to officials, so there is no distinction in kind between public and private law. All officials (except those at the lowest level) perform both functions: they create law for the next lower level, and in so doing they apply the law of the next higher level. There is only a difference in degree, and not in kind, then, between the various levels: all applying of norms involves a degree of discretion but legislators have more of it than judges and judges more of it than enforcement officials. When norms are defective (obscure, ambiguous, inconsistent), the consequence of systematic unity is to leave the judge free to decide as he wishes. There is no way internal to the law of resolving these difficulties. The standard rules of interpretation are of no use, and there is no scientific way of weighing interests or finding the ‘just’ solution. While there are cases that are not covered by any specific legal norm, nevertheless there are no gaps in the law, that is, no cases for which the law does not provide a solution, since the law requires the judge to dismiss a case which cannot be brought under any existing norm.” *Kelsen* in THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA, VOL. I, 479 (Christopher B. Gray ed., Garland Pub. Co., 1999).

²⁸ “Complete freedom – unfettered and undirected – there never is. A thousand limitations – the product some of statute, some of precedent, some of vague tradition or of an immemorial technique – encompass and hedge us even when we think of ourselves as ranging freely and at large.” Benjamin Cardozo, *The Growth of the Law* (Yale University Press, 1924) 60-61. Kelsen himself used the term “frame of possibilities.” See HANS KELSEN, PURE THEORY OF LAW. TRANSLATION FROM THE SECOND (ENLARGED AND REVISED) GERMAN EDITION 351 (Max Knight trans., University of California Press, 1967). This has remained the standard until present: AHARON BARAK, JUDICIAL DISCRETION 9 (Yale University Press 1989) (“[D]iscretion assumes a zone of possibilities.”) and was also described as “the power to choose between two or more courses of action each of which is thought of as permissible.” HENRY M. HART AND ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 162 (West Publishing Inc., 1958). DENIS J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 1 (Clarendon Press, 1986; Oxford University Press, 1990) found judicial discretion to rival in significance “the core of settled rules in terms of which legal order is characterized.”

means by which the legal system itself constrains adjudication.²⁹ Following Kelsen, H.L.A. Hart argued that the extent of defensible judicial discretion is directly proportional to the extent of the applicable law's indeterminacy, so long as judges resolve disputes in an "adequate" or "reasonably defensible" rather than in an "arbitrary" or "irrational" manner.³⁰ Few would dispute that.

Kelsen's abstract definition of law and his theoretical notion of positive legal validity were useful models to highlight the interplay between coercion and discretion in modern bureaucratic legal orders.³¹ His procedure-based concept of legitimacy is part of his effort to de-politicize the law and free it from the need for a transparent consensus on substantive values, but it is also an attempt to distinguish between form and substance in law in order to make such de-politicization practical. Kelsen was forced to accept that at times controversial aspects of judicial discretion are justified only through their procedural necessity and not by any substantive idea of political morality – the existence and influence of which he consistently rejected and denied as a matter of dualist principle.³²

PART II: TYPES AND CONSEQUENCES OF INDETERMINACY

Multiple categories of indeterminacy were recognized well before and after Kelsen. Not only do the theories underlying each

²⁹ Alec Stone Sweet, *The Juridical Coup d'État and the Problem of Authority*, 78 YALE FACULTY SCHOLARSHIP SERIES 917 (New Haven 2007) (arguing that Judges are expected to package their decisions in ways that make their rulings appear to be relatively redundant, self-evident, deductive extensions of existing legal materials).

³⁰ HERBERT LIONEL ADOLPHUS HART, *THE CONCEPT OF LAW* 124-41 (Oxford University Press, 1994) (1961) (argues that the extent of defensible judicial discretion in place at any point was inversely proportional to the extent of the applicable law's indeterminacy, always provided that judges resolve disputes in an "adequate," or "reasonably defensible," rather than in an "arbitrary" or "irrational," manner). See also DONALD NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 28 (Clarendon Press, 1978).

³¹ Dhananjai Shivakumar, *The Pure Theory as Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 YALE L. J. 1383-1414 (1996).

³² Carl Lebeck, *Procedural Fairness as Constitutional Justice: An Essay on Hans Kelsen's Theory of Liberal Constitutionalism*, 63 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 559-612, at 559 (2008).

category have different conceptual and epistemological bases but they also result in distinctly different manifestations of indeterminacy.³³

Ila. Normative indeterminacy

Normative indeterminacy exists where the legal norm does not provide a conclusive answer for how a case should be decided. This can have a variety of reasons:³⁴

(a) Formal indeterminacy:

Exists where the law does not adequately determine which legal norm should control a given set of facts. This is the case with conflicts between opposing rules for which no meta-rule exists.³⁵ Gaps in the law cast doubts on the continued validity of an otherwise apparently controlling legal norm, or about the applicability of such a norm.³⁶

(b) Substantive indeterminacy:

Exists if the law does not provide sufficient arguments to determine how a given norm should be applied, be it due to the abstract nature, ambiguity or vagueness (“open texture”) of legal principles, notions or standards, or due to the possibility of

³³ See also Kenneth J. Kress, *Legal Indeterminacy* 77 CAL. L. REV. 283 (1989).

³⁴ Normative indeterminacy was a subject of philosophical discourse since at least PLATO, THE STATESMAN 233 (J.B. Skemp trans., 2nd ed., Bristol Classical Press, 1952) (c. 360 B.C.E.). See also Leonidas Pitamic, *Plato, Aristoteles und die reine Rechtstheorie*, 2 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 683-700 (1921) (reviewing the history of ideas on indeterminacy).

³⁵ For the perspective of deontic logic see Hans Kelsen, *Derogation*, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 339-361 (Ralph A. Newman ed., Bobbs-Merrill, 1962). Cf. also Chaim Perelman, *Les antinomies en droit, Essai de synthèse*, in LES ANTI-NOMIES EN DROIT 393, at 398 (Chaim Perelman ed., Bruylant, 1965).

³⁶ Lorenz Kaehler, *The Indeterminacy of Legal Indeterminacy*, in EPISTEMOLOGY AND ONTOLOGY, IVR-SYMPOSIUM LUND 2003, 102 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 77 *et seq.* (Zenon Bankowski ed., Franz Steiner Verlag, 2005).

justifying a certain rule or precedent in different ways. This form of indeterminacy is most readily apparent in abstract constitutional principles such as equal justice, human dignity, or liberty.³⁷ This indeterminacy also exists if a legal norm refers to concrete concepts such as publication or war.³⁸ A judge applying abstract norms can refer to them on purely formal basis and can assert that these abstract norms do not actually create law independently. Still, the extent to which the law actually determines a particular argument is often questionable. Statutes in force at a certain time in a legal system are typically adopted by different legislators with incongruent or even opposing ethical, political and social beliefs. Thus, a persuasive basis for presuming overall harmony in the underlying purpose, legislative intent, values and balancing of principles, as Pure Theory axiomatically does, in fact, rarely exists. However, unless we presuppose such harmony, it is unclear how a judge may infer substantive arguments from a statute by way of interpretation without deciding between opposing values and social visions. In so doing, the judge would trespass against Pure Theory's fundamental principle – its indifference to metaphysically derived evaluative choices.

Iib. Factual indeterminacy

Factual indeterminacy of legal decisions always exists because it is uncertain how the courts will decide an issue in the

³⁷ Scope and application of rules and principles have been evaluated in terms of freedom or autonomy. See, Patrick S. Atiyah, *From Principles to Pragmatism in the Function of the Judicial Process and the Law*, *supra* note 15, at 1272, and Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J. L. & PUB. POL'Y 101, at 116-117 (1997). Kelsen had recognized that “[t]he moral principle of individual freedom, for example, is expressed in a positive legal system as freedom of contract. But a legal system which can be said to embody the principle of freedom of contract does not allow all agreements concluded between individuals to be valid. A promise of marriage is not binding, according to many positive legal systems, much like contracts concerning immoral behavior.” HANS KELSEN, *GENERAL THEORY OF NORMS* 116 (Michael Hartney trans., Clarendon Press 1991).

³⁸ HANS KELSEN, *REINE RECHTSLEHRE*, *supra* note 4, at 14.

future.³⁹ Hardly any theory has ever seriously contended that solely the law as a body of rules causes a judge to decide a certain issue in a particular way. Even knowing additional factors such as the judge's social, cultural, ethnic, racial, religious and economic background, his current income, or political preferences might not meaningfully predict his decision because of the complexity and difficulty involved in applying complex legal norms to a set of facts. Still, factual and normative indeterminacy are phenomena entirely independent of each other. Some theorists claim, for instance, that the law is to a great extent determined by the attitudes of judges (and is thus factually determinate) whereas the legal factors *sensu proprio* are, in fact, what is often not conclusive.⁴⁰ This would explain the predictability of cases in the trial courts by knowing the judge's attitudes rather than by identifying some necessity flowing from a statute or legal doctrine. Even in the civil law tradition, a decision that is wrong by established precedent or doctrine would most of the time⁴¹ be accepted as legally valid if a court presents it in the dominating legal terminology and distinguishes it with established argumentative techniques. Conversely, some claim that the law is only normatively determinate but factually indeterminate because of uncertainty surrounding the question as to whether judges will reach the correct decision. This perspective explains judicial discretion by the difficulty of applying correct methods and

³⁹ One is reminded of Justice Oliver Wendell Holmes famous dictum, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARVARD L. REV. 459 (1897). Kelsen took the same pragmatic view of the "prediction theory": HANS KELSEN, PURE THEORY OF LAW, TRANSLATION FROM THE SECOND (REVISED AND ENLARGED) GERMAN EDITION, *supra* note 28, at 89.

⁴⁰ Lorenz Kaehler, *Indeterminacy in the Law: Types and Problems*, IVR ENCYCLOPEDIA OF JURISPRUDENCE, LEGAL THEORY AND PHILOSOPHY OF LAW 1 (2009), available at <http://www.encyclopedia.ivr2003.net/>.

⁴¹ Ewoud Hondius, *Precedent and the Law*, 1, 9, 13, 18, 11(3) ELECTRONIC J. OF COMP. L. (December 2007). See also Bruce V. Harris, *Final Appellate Courts Overruling Their Own 'Wrong' Precedents: The Ongoing Search for Principle*, 118 LAW Q. REV. 408, 427 (2002) who develops a number of "considerations relevant to deciding whether to defer to or overrule precedent." *Id.*, at 422 *et seq.*

principles and of finding the most convincing arguments and justifications.⁴²

IIC. Linguistic indeterminacy

Linguistic indeterminacy exists not only as a matter of semantics but, more importantly, is based on the findings of Kurt Gödel who showed that no rule can determine the scope of its own application as a matter of formal logic.⁴³ Ludwig Wittgenstein arrived at a strikingly parallel result many years later. Decades after his *magnum opus*, the *Tractatus Logico-Philosophicus*,⁴⁴ Wittgenstein created the notion of a single universal logical space. His ontology defined the world as the sum of all facts in logical space (*Tractatus*, 1.13). The world is determined by the facts, and by these being *all* the facts (1.11). For the totality of facts determines both what is the case, and also all that is not the case (1.12). Gradually, Wittgenstein's minimalism gave way to a broader vision of accepting a plurality of grammars and syntaxes in cognitive linguistics. Starting from Gödel's conclusion that we cannot describe a language, value or purpose fully within the boundaries of its means. Wittgenstein, after pursuing for years a quixotic, almost ideological, critique of Gödel's incompleteness theorems, arrived at an increasingly less

⁴² S.G. Williams, *Indeterminacy and the Rule of Law*, 24 OXFORD JOURNAL OF LEGAL STUDIES 539-562 (2004).

⁴³ Kurt Gödel, *Über formal unentscheidbare Sätze der "Principia Mathematica" und verwandter Systeme*, 38 MONATSHEFTE FÜR MATHEMATIK UND PHYSIK 173-198 (1931). English version: *On Formally Undecidable Propositions of "Principia Mathematica" and Related Systems*, in FROM FREGE TO GÖDEL: A SOURCE BOOK IN MATHEMATICAL LOGIC, 1879-1931 596-616 (Jean van Heijenoort ed., Harvard University Press, 1971). In this article, Gödel proved his incompleteness theorems: for any computable axiomatic system powerful enough to describe the arithmetic of the natural numbers that (1) if the system is consistent, it cannot be complete; and (2) the consistency of the axioms cannot be proved within the system.

⁴⁴ Ludwig Wittgenstein, *Logisch-Philosophische Abhandlung*, 14 ANNALEN DER NATURPHILOSOPHIE (Wilhelm Ostwald ed.,) 185-262 (1921). *TRACTATUS LOGICO-PHILOSOPHICUS* (Charles Kay Ogden trans., Routledge & Kegan Paul, 1922).

hesitant acceptance of metaphysical elements.⁴⁵ Linguistic terms are not related to things in such a way that there necessarily exists only a single natural way of using them. Consequently, there is no discernible fundamental philosophical difference between the creation and the application of a rule as the latter always and inevitably involves elements and methodology of the former. That, in turn, is a phenomenological characteristic of discretion. Jacques Derrida and other postmodern philosophers emphasized that no text ever has a determinate meaning and that, as a result, there always remains a difference between the legal text as the signifier and its application to the case as the signified.⁴⁶ While Gödel's early work began in the environment of the anti-metaphysical Vienna Circle⁴⁷ of logical positivists and in the tradition of mathematical formalists such as David Hilbert, Bertrand Russell and Alfred North Whitehead,⁴⁸ his later discoveries contradicted logical positivism in many ways.⁴⁹ Around the *fin de siècle* and well beyond it, positivism was at the cutting edge in philosophy of science. Increased ability to gather, process and interpret empirical data derived from sensory experience and the systematic logical and mathematical treatment of such data became an ever more exciting and credible option as the

⁴⁵ Much later he vastly complicated his tenets in the TRACTATUS of how the conceptual structure in question should be characterized. See LUDWIG WITTGENSTEIN, PHILOSOPHISCHE UNTERSUCHUNGEN (1953). PHILOSOPHICAL INVESTIGATIONS (Gertrude Elizabeth Margaret Anscombe trans., Blackwell, 1953).

⁴⁶ JACQUES DERRIDA, SPEECH AND PHENOMENA AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS (David B. Allison trans., Northwestern University Press, 1973).

⁴⁷ The Ernst Mach Association, later known as *Wiener Kreis* (Vienna Circle) of philosophy of science and mathematical logic, included Moritz Schlick, Hans Hahn, Rudolf Carnap, Herbert Feigl, Kurt Gödel, Otto Neurath, Friedrich Waisman and at times Ludwig Wittgenstein. Cf. SAHOTRA SARKAR, THE EMERGENCE OF LOGICAL EMPIRICISM: FROM 1900 TO THE VIENNA CIRCLE (Garland Publishing, 1996).

⁴⁸ See, e.g., his 1929 Vienna dissertation under Hans Hahn *On the completeness of the calculus of logic*, in KURT GÖDEL, COLLECTED WORKS, VOLUME I, PUBLICATIONS 1929-1936 61-101 (Oxford University Press, 1986).

⁴⁹ For this, Kelsen was bitterly opposed by the adversarial camp of logical intuitionists, chiefly Perelman who rejected formal systems altogether because he did not follow Gödel beyond the introduction to his incompleteness theorem and had no use for paradoxa such as Gödel's, the liar's paradox ("this proposition is false"), or "who shaves the barber who shaves every man in town who does not shave himself." Chaim Perelman, *Les paradoxes de la logique*, 45 (178) MIND 204-208 (1936). See also Olaf Helmer, *Perelman versus Gödel*, 46 (181) MIND 58-60 (1937).

exclusive source of all authoritative knowledge or results. This was true not only in the natural sciences, where it had almost always formed the basis of cognition, but also, if not more so, in the young social sciences.⁵⁰ Yet, Gödel destroyed the assumptions of mathematical formalists around Hilbert and Russell, Wittgenstein's mentor and doctoral sponsor,⁵¹ who all aimed at establishing a general theory to encompass 'all of mathematics' or indeed 'all of quantitative science.' Their aspiration was rendered conclusively obsolete by Gödel's incompleteness theorem that proved the insurmountability of indeterminacy.⁵² The evolutionary impact of these discourses was unquestionably profound: all modern proponents of positivism now acknowledge a much greater extent of observer bias and structural limitations while remaining focused as ever on the elimination of metaphysical influences, especially ontology and synthetic *a priori* propositions. Modern positivists identify these influences as ultimately meaningless factors because

⁵⁰ Much older roots such as Jeremy Bentham (*see infra* note 86) aside, Auguste Comte, the first modern philosopher of science developed modern positivism: *Cours de philosophie positive* (Course in Positive Philosophy, 1830-1842) and *Discours sur l'ensemble du positivisme* (A General View of Positivism, 1848). Comte's method was further developed by Émile Durkheim. In the natural sciences, most origins of positivism most can be traced back to statements far earlier than Newton ("*hypotheses non fingo*") or Galilei ("*eppur si muove*"), to Graeco-Roman antiquity. In the words of STEPHEN HAWKING, *THE UNIVERSE IN A NUTSHELL* 31 (Bantam Spectra, 2001), a present-day advocate of positivist method and philosophy, "Any sound scientific theory ... should in my opinion be based on the most workable philosophy of science: the positivist approach ... According to this way of thinking, a scientific theory is a mathematical model that describes and codifies the observations we make. A good theory will describe a large range of phenomena on the basis of a few simple postulates and will make definite predictions that can be tested." By this line of reasoning, Hawking only highlights further the close direct correlation between the quality of results achieved through positivist methodology and the quality of the underlying model employed, and the role of modeling quality in cognitive processes involving complexity.

⁵¹ Because Russell arranged 1929 for the acceptance of Wittgenstein's already published *TRACTATUS* (1921, *supra* note 44) to satisfy the University of Cambridge's dissertation requirement, it would be inaccurate to characterize him as Wittgenstein's doctoral advisor or supervisor. RAY MONK, *LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS* 255, 271 (The Free Press, 1990).

⁵² MARY TILES, *MATHEMATICS AND THE IMAGE OF REASON* 90 (London: Routledge, 1991); *cf. also* John W. Dawson, Jr., *The Reception of Gödel's Incompleteness Theorems, in GÖDEL'S THEOREM IN FOCUS* 87 (S.G. Shanker ed., Croom Helm, 1988), and JOONG FANG, *TOWARDS A PHILOSOPHY OF MODERN MATHEMATICS* 81 *et seq.* (Paideia Press, 1970).

they are not empirically verifiable, while maintaining focus on a methodology appropriate to the object of examination that ensures clarity, replicability, reliability and validity – within those regrettably inescapable limitations of indeterminacy.⁵³

Although few in numbers, positivist thinkers derivative of Auguste Comte such as Émile Hennequin⁵⁴ who, approaching positivity from a perspective of the humanities, disagreed that subjectivity inevitably invalidates observation, judgment, prediction, and generally impede the development of rules of inference.⁵⁵ While some intuitionist influences rejecting strict rational deduction and logical subsumption cannot be denied, farther-reaching effects on legal theory, and especially on Pure Theory, of such hybrid positivists with an intuitionist bend are imperceptible. Whatever point they may have asserted was instead usurped by legal anti-positivists.

Some positivists including Kelsen have interpreted linguistic indeterminacy of legal norms as evidence of the legislator's delegation of decisional criteria to the judge.⁵⁶ In this view, procedural law compensates for substantial as well as formal indeterminacy.

While near impeccable in its formal logical argument,⁵⁷ Kelsen's practical judicial application of his purely scientific, value-neutral and ideology-averse approach to legal philosophy resulted in a political miscalculation that ended his own judicial career. This theory treats law as a manifestation of formal logic rather than as a social science and seeks to separate, eliminate and ignore its political genesis. In hindsight, it seems inevitable that such a theory would

⁵³ Raymond Boudon, *Review: What Middle-Range Theories are*, 20 CONTEMPORARY SOCIOLOGY 519-522 (1991).

⁵⁴ 1859-1888. See Octave Mirbeau, *Émile Hennequin*, LE FIGARO, July 27, 1888.

⁵⁵ See ÉMILE HENNEQUIN, *LA CRITIQUE SCIENTIFIQUE* (posthumous, Paris: Perrin & Cie., 1888).

⁵⁶ HANS KELSEN, *REINE RECHTSLEHRE* 249 (2nd completely revised and expanded ed., Verlag Österreich, 1960).

⁵⁷ Roscoe Pound, *Law and the Science of Law in Recent Theories*, 43 YALE L.J. 525-36, at 532 (1933-34).

face at some point insurmountable obstacles to its acceptance in the political and moral reality of a society expected to be bound by such a value-neutral, 'nihilist' understanding of its legal norms.

PART III: THE *IMPEDIMENTUM LIGAMINIS* AND ITS RESOLUTION BY THE
“SEVER MARRIAGES”

One particular incident elucidated how limited and barely sustainable practical application of Kelsen's theoretical architecture is despite its almost impeccable formal and logical cogency. It occurred in his native Austria well before the publication of the first edition of *Pure Theory of Law*⁵⁸ and was the cause of Kelsen's notorious and highly disputed removal from the High Court bench on partisan political grounds.

Family law in Austria during the *entre-deux-guerres* was nothing short of legally chaotic, intellectually embarrassing, and reflective of the deeper political and cultural struggles of that era. Already 1868, the Austro-Hungarian Monarchy had abrogated the strict provisions of its 1855 Concordat with the Vatican regarding marriage and reinstated, albeit for its Austrian part only, the comparably moderate provisions of the 1811 Civil Code (“ABGB”).⁵⁹ But even by these somewhat more relaxed standards, Catholics did not have access to civil marriage or divorce until Hitler's 1938 annexation of Austria. Marriages between Catholics remained

⁵⁸ Although many of the fundamental ideas later summarized in *REINE RECHTSLEHRE* (“Pure Theory of Law”, 1st. ed. 1934) predated its publication by some 15 years and already clearly influenced Kelsen's jurisprudence on the Constitutional Court. See HANS KELSEN, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS. BEITRAG ZU EINER REINEN RECHTSLEHRE* (J.C.B. Mohr, 1920) and Stanley L. Paulson, *Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization*, 18 *OXFORD JOURNAL OF LEGAL STUDIES* 153-166 (1998). See also Stanley L. Paulson, *On the Origins of Hans Kelsen's Spätlehre*, in HANS KELSEN AND CARL SCHMITT. *A JUXTAPOSITION 27 et seq.* (Dan Diner and Michael Stolleis eds., Schriftenreihe des Instituts für Deutsche Geschichte Universität Tel Aviv, 1999) and Stanley L. Paulson, *Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory*, 19 *OXFORD JOURNAL OF LEGAL STUDIES* 351 (1999).

⁵⁹ ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB][CIVIL CODE]JUSTIZGESETZSAMMLUNG [JGS] No. 946/1816 (Austria).

indissoluble although the law permitted separation pursuant to ABGB § 111 in the version of 1811. Protestants, on the other hand, could divorce and remarry freely throughout the Habsburg Empire.

After the 1918 collapse of the Austro-Hungarian Monarchy, Hungary ceded the former province Deutsch-Westungarn (German West Hungary) to Austria under the 1920 Trianon Treaty⁶⁰ in partial compensation for other territorial losses suffered by the residual nation of “*Deutschösterreich*.” The ceded province of Deutsch-Westungarn, renamed “Burgenland,” was incorporated in the new republic as one of Austria’s nine federal States. The Burgenland State Legislature succeeded in 1922 at keeping Hungarian family law in full force and effect. Hungary had a tradition based on mandatory civil marriage and free availability of divorce for residents of their State regardless of faith. But in the other eight States of Austria, the only option available to separated Catholics desiring to enter a second marriage was to obtain a formal dispensation from the *impedimentum ligaminis*, the obstacle of the bond of pre-existing marriage, which could only be granted by the State based on the statutory authorization of ABGB § 83 in the version of 1811.⁶¹

Whereas the Social Democrat Party pressed for adoption of the principle of mandatory civil marriage and divorce, both of which had become the widely accepted standard in Europe at the time, the Christian Social Party blocked any changes to the principle of indissolubility of Catholic marriage for three decades. While the Christian Social Party publicly condemned the practice of occasional dispensation by the State governments, it did not seek to formally abrogate the statutory basis⁶² of ABGB § 83 since any amendment would have opened the door to calls for much broader modernization entailing inevitable secularization of family law.

⁶⁰ Treaty of Peace Between The Allied and Associated Powers and Hungary And Protocol and Declaration, signed at Trianon June 4, 1920, No. 152, 6 LNTS 188 n.l.

⁶¹ Ulrike Harmat, *Ehe auf Widerruf? Der Konflikt um das Eherecht in Österreich 1918-1938*, 121 IUS COMMUNE SONDERHEFT 73 et seq. (Klostermann, 1999).

⁶² Kelsen set forth his theoretical position in *Derogation*, supra note 35, 339-361.

Marriages “by dispensation” were tolerated as a pragmatic, uneasy compromise to alleviate the political pressure on the legislature to reform family law in general since neither Social Democrats nor Christian Socials nor German Nationalists were able to form a stable majority government following World War I. Christian Socials had made “indissolubility of Catholic marriage” a deal breaker issue for their participation in any coalition government. Yet, by tolerating dispensations, Christian Socials were able to prevent concerted political action by the arithmetically existing but ideologically irreconcilable majority of Social Democrats and anti-Marxist German Nationalists to force comprehensive family law reform. Whereas dispensations had been a relatively rare and rather cumbersome exception during the monarchy,⁶³ they suddenly became very common after 1918, known as “Sever Marriages,” named after Albert Sever, the social democratic governor of the State of Lower Austria which at the time included the city of Vienna. Sever had started 1919 to grant dispensations liberally in order to force

⁶³ Due to uncompromising fundamentalist Catholic piety of the Habsburg rulers of Austria, even – or perhaps especially – celebrities were granted dispensations only very hesitatingly and often after veritable ordeals. One famed example was the “King of Waltz” Johann Strauss, Jr. Widowed after his much-beloved first wife Henriette, he had remarried and, after his second wife Angelika had left him for a theater director, obtained a legal separation from her. Because Emperor Franz Joseph I had declined granting a dispensation, Strauss was able to marry his third wife Adele, née Deutsch, only after renouncing Austrian citizenship and accepting German citizenship that was bestowed upon him 1876 by decree of his friend and benefactor, Duke Ernst II of Saxe-Coburg and Gotha, himself an avid composer, and after converting with his Jewish fiancée (a widow then also incidentally named Strauss) to Lutheranism. Duke Ernst II granted him 1877 a regular divorce and Strauss promptly married Adele in the Lutheran court chapel of Ehrenburg castle in Coburg. Popular demand and mass petitions soon thereafter forced Emperor Franz Joseph I to “ask” Strauss to return to Vienna with his wife, where he resided until his death in 1899. In Austria, political insistence on the article of faith proclaiming the “indissolubility” of Catholic marriage had always affected the middle class only: while lower classes simply chose to “live in sin,” celebrities and upper classes practiced forum shopping and changed nationality and nominal religious affiliation – neither of which could be opposed by the *ancien régime* and its supporters beyond bigoted gossip. ROBERT DACHS, JOHANN STRAUSS: „WAS GEH' ICH MICH AN?!” GLANZ UND DUNKELHEIT IM LEBEN DES WALZERKÖNIGS (1999). See also Gerd Fesser, *Ernst II. Herzog von Sachsen-Coburg und Gotha (1818–1893). Sympathisant und Schirmherr der Liberalen*, in AKTEURE EINES ÜMBRUCHS. MÄNNER UND FRAUEN DER REVOLUTION VON 1848/49 (Helmut Bleiber/Walter Schmidt/Susanne Schötz eds, 2003). Very little had changed in Austria 50 years, one world war and at least one revolution later.

family law reform and civil marriage on a federal level by creating pressure against the status quo of Catholic dogma.⁶⁴ While only a minority of the nine Austrian State governors were Social Democrats, the Federal Chancellor's office also granted dispensations on appeal from a State governor's office. In response to Albert Sever's dispensation practice that admittedly interpreted existing law⁶⁵ extremely liberally by comparison to all its prior usage, the Federal Chancellery on August 27, 1919 issued an ordinance to the State governments that established uniform standards nationwide for the grant of marriage dispensations. It provided, *inter alia*, that a second marriage of a Catholic should be permitted only if his or her first marriage was shown to be irreparably broken and there was evidence of "seriousness and durability" of the intended second marriage. Even then this was only permitted after taking into consideration the effect of the proposed remarriage on children born to the first marriage, on estate matters, on the expectancy of a widow's pension of the first wife, the deserted spouse's attitude towards a remarriage of his or her former spouse, as well as any remarriage plans of his or her own. All these elaborate bureaucratic pitfalls, replete with value judgments and calculated to dissuade applications to the State governors' offices, were intended to portray marriage by dispensation as a narrow exception tolerable to the Catholic Church since Christian Socials needed the support of the episcopate and had to be seen as at least formally rejecting dispensation as a way of circumventing the bedrock principle of indissolubility of Catholic marriage. The empirical fact that a substantial number of Christian Social Party members had already personally availed themselves of the benefits of liberal State

⁶⁴ Thomas Olechowski, *Der Lehrer des 'Reinen Rechts'. Verfassungstheoretiker, Rechtsphilosoph, Demokrat – Zum 125. Geburtstag des 'Jahrhunderjuristen' Hans Kelsen*, WIENER ZEITUNG, October 7, 2006.

⁶⁵ *Id.* Surprisingly from an American perspective, the possibility of forum shopping in Burgenland was, perhaps due to much less readily affordable mobility after World War I, not a factor in the Austrian debate although the Austrian Constitution in Art. 82(1) (which places all jurisdiction to adjudicate in the federal domain) provides a functional equivalent to the Full Faith and Credit Clause (U.S. Const. Art. IV §1).

dispensation practice was passed over as a different matter altogether.

Because ABGB § 83 in the version of 1811 did not explicitly enumerate “dispensable” obstacles to remarriage but only made reference to “dissoluble” obstacles, the legal and political debate soon came down to the obvious question of whether the *impedimentum ligaminis* was, in fact, “dispensable” by the State,⁶⁶ given that neither civil nor canon law provided Catholics with an option for divorce in the first place. In March 1921, the Austrian Administrative Court⁶⁷ reversed on appeal a dispensation granted by the Federal Chancellor’s Office and afforded the abandoned spouse legal standing as a party to the proceedings along with an appeal as of right. The Federal Chancellor’s Office rejected this outcome. It deemed the abandoned spouse’s consent to administrative dispensation, once given, to be legally sufficient as a basis for dispensation. Because of the uncertainty created through the Administrative Court’s ruling, the federal government requested an advisory opinion from the Supreme Court. The Supreme Court held in 1921 that legal challenge and nullification of a marriage entered into by dispensation was indeed at anyone’s discretion. However, the opinion also stated that marriage by dispensation was not in and of itself a nullity unless it had been previously declared void.⁶⁸ This created the curious and absurd hybrid of a “second marriage subject

⁶⁶ This line of argument reflects of a very different understanding of the separation of church and state which is also a recognized constitutional principle in Austria. From the perspective of state law, no valid conclusion could possibly be drawn that canon law should be considered in the interpretation of any limitations on state power. While freedom of religion is constitutionally provided in Art. 14-16 STAATSGRUNDGESETZ ÜBER DIE ALLGEMEINEN RECHTE DER STAATSBÜRGER FÜR DIE IM REICHSRATE VERTRETENEN KÖNIGREICHE UND LÄNDER, R.GBL. 147/1867 (Austria), sanctioned by Emperor Franz Joseph I on December 21, 1867 incorporated in the republican constitution by reference in the BUNDES-VERFASSUNGSGESETZ [B-VG][FEDERAL CONSTITUTION] STGBL NO. 450/1920, BGBl. No. 1/1920, ART. 149 (Austria), a strict separation of church and state comparable to the American model including prohibition of the use of taxpayer funds to support religious institutions and services, does not exist in Austria to the present day.

⁶⁷ Verwaltungsgerichtshof [VwGH][Administrative Court] docket no. 1265/1921 ERKENNTNISSE UND BESCHLÜSSE DES VERWALTUNGSGERICHTSHOFES (VWSLG) (Austria).

⁶⁸ ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVIL- UND JUSTIZVERWALTUNGSSACHEN, VOL. 4, 1922, No. 155/1922, 406 *et seq.*

to nullification at any time,” leaving its fate up to challenge where literally anybody, not just interested parties but even unrelated outsiders, would have legal standing to sue for nullification of any marriage entered into by dispensation. Yet this is precisely the situation that, *faute de mieux*, remained settled in Austrian law between 1921 and 1927.

It is worth noting that under Austria’s republican post-World War I constitution, the country had adopted a novel and at the time quite unusual organization of its judiciary. That constitution, still in force today with only minor amendments,⁶⁹ co-authored in substantial part by Hans Kelsen at the request of Austria’s first post-World War I Chancellor Karl Renner,⁷⁰ provides for not less than *three* Highest Courts of the land:

- (1) The Supreme Court (“*Oberster Gerichtshof*”) has ultimate jurisdiction in civil, commercial and criminal matters;
- (2) The Administrative Court (“*Verwaltungsgerichtshof*”) is the court of last instance on appeals from acts of State and Federal governments; and
- (3) The Constitutional Court (“*Verfassungsgerichtshof*”) adjudicates constitutional matters with finality and is tasked with judicial review of legislative acts.⁷¹

⁶⁹ Constitutional amendments were primarily necessitated by the country’s accession to the European Union 1995 and in 1929 on the occasion of the restructuring of the Constitutional Court that is reviewed in this paper.

⁷⁰ This happened more or less contemporaneously with his appointment to a chair for Public Law at the University of Vienna, a consequence of his work as aide and general counsel to Austria-Hungary’s last Minister of War, Colonel-General Rudolf Stöger-Steiner. Hans-Kelsen-Institut, *Jurisprudence*, in HANS KELSEN, VERÖFFENTLICHTE SCHRIFTEN 1905-1910 UND SELBSTZEUGNISSE 48 (Matthias Jestaedt ed., J.C.B. Mohr, 2007).

⁷¹ The modern European model of constitutional review is perhaps one of Kelsen’s paramount legacies. It was first established in Austria and later, after World War II, adopted by the Federal Republic of Germany, Italy, Spain and Portugal. It features a separate constitutional court that has sole jurisdiction over constitutional matters. In this regard it differs from U.S. common law tradition where courts of general jurisdiction on any level have authority of constitutional review under jurisprudence developed since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803). See LARS VINX, HANS KELSEN’S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY ch. 5 (Oxford University Press, 2007).

In 1927, a decision of the Constitutional Court showed a way to end vexatious challenges to marriage by dispensation by appealing adverse rulings to that Court. A 1925 amendment to the Austrian Code of Administrative Procedure⁷² had established that administrative acts of government agencies – including dispensations – were reviewable only by superior administrative (*i.e.*, executive) agencies and were thus binding on the courts. The Constitutional Court, with Justice Kelsen reporting, held that the court below had no basis for jurisdiction absent statutory authority to review administrative grants of dispensation by State governors' offices⁷³ and its ruling had therefore violated the separation of powers.

In response to this decision of the Constitutional Court, the Supreme Court, in a supplemental opinion, upheld its 1921 guidelines on marriage dispensation and its reasoning given at the time. Furthermore, the Supreme Court found all grants of dispensation to be “absolute nullities” without any legal effect whatsoever – irrespective of ABGB § 83. However, to the extent that the Constitutional Court had found a jurisdictional conflict in a specific case of dispensation, the Supreme Court was forced to acknowledge that the courts were no longer authorized to review dispensations and the validity of marriages based thereon. This restated opinion resulted in directly conflicting jurisprudence by two of the three High Courts which the Supreme Court itself characterized as “unpleasant” and “unsatisfactory.”⁷⁴

⁷² ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG][GENERAL CODE OF ADMINISTRATIVE PROCEDURE] § 68 (Austria).

⁷³ Verfassungsgerichtshof [VfGH] [Constitutional Court] November 5, 1927 (ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VFSLG.] docket no. 878/1927 (Austria). [Erkenntnis vom 5. November 1927, Nr. 878 (= p. 193), Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes. Neue Folge. 7. Heft, Jahr 1927, Verlag der Österreichischen Staatsdruckerei, Wien 1928]. Subsequently, the Constitutional Court issued a second substantively analogous ruling: ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VFSLG.] docket no. 951/1928 (Austria) [Erkenntnis vom 27. Februar 1928, Nr. 951 (= p. 51), Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes. Neue Folge. 8. Heft, Jahr 1928, Vienna: Verlag der Österreichischen Staatsdruckerei, 1929].

⁷⁴ Harmat, *Ehe auf Widerruf?* *supra* note 61, at 319 *et seq.*

Opponents of the 1927 decision, primarily the Christian Social Party,⁷⁵ launched a disproportionately massive counterattack, accusing the Constitutional Court of “furthering bigamy” and serving as a “court of circumvention.”⁷⁶ Hans Kelsen personally became the principal focus of organized critique and inappropriate *ad hominem* attacks. In recognition of his substantial contributions to drafting of the Austrian post-World War I constitution,⁷⁷ Kelsen had been appointed in 1921 for a life term to the newly created Constitutional Court established under “his” new post-war constitution by the first Federal Chancellor of the new Republic, Social Democrat Karl Renner. It was only by happenstance that it fell to Justice Kelsen to be reporter on the Court’s 1927 dispensation case. In this capacity he had indeed taken substantial influence on the decision, as any reporter drafting the opinion of the Court would have. Because of his prior involvement with drafting the constitution and his appointment to the Court by Renner, Kelsen was publicly considered a Social Democrat although he never had been, and also never was thereafter, a member of any Austrian party. Christian Socials accused him of “political jurisprudence” favoring the Social Democratic Party. While there is ample evidence that Kelsen, nominally a Protestant of Jewish descent, was not in the least bit personally or philosophically interested in defending marriage by

⁷⁵ The Christian Social Party (1893-1934) was throughout its existence the political arm of the Roman Catholic Church in Austria. After the downfall of the monarchy (November 11, 1918), it was the Church’s sole political tool. Once the paramilitary Patriotic Front (Vaterländische Front) was anchored in the 1934 May constitution, the Christian Social Party was integrated in the Patriotic front and dissolved as a separate entity. In the referendum of April 10, 1938 the Patriotic Front, vocally supported by the Cardinal Archbishop of Vienna, Theodor Innitzer, voted overwhelmingly for ratification of Hitler’s *Anschluss* of Austria and integration of occupied Austria into the Third Reich. See KURT SCHUSCHNIGG, THE BRUTAL TAKEOVER: THE AUSTRIAN EX-CHANCELLOR’S ACCOUNT OF THE ANSCHLUSS OF AUSTRIA BY HITLER (Weidenfeld and Nicolson, 1971).

⁷⁶ Harmat, *Ehe auf Widerruf?* *supra* note 61, at 317.

⁷⁷ BUNDES-VERFASSUNGSGESETZ (“B-VG”) of October 1, 1920, effective since November 10, 1920, StGbl. No. 450, BGBl. No. 1 (Austria) is one of the oldest European written constitutions still in force in Europe today. KLAUS BERCHTOLD, VERFASSUNGSGESCHICHTE DER REPUBLIK ÖSTERREICH 4 (Springer, 1998).

dispensation for Catholics,⁷⁸ he was, as a leading representative of legal positivism, concerned with preserving the jurisdiction of executive agencies from encroachment by the judiciary. Consistent with this philosophical position, the draft opinion he submitted for approval to the full Court based its holding solely⁷⁹ on a separation of powers argument.⁸⁰

Substantively, Kelsen squared the circle by elegantly rationalizing, through a purely formal jurisdictional argument without even reaching the contentious issue of family law, an outcome that was long overdue in Austria. The conservative Christian-Social Party considered Kelsen the mastermind behind the

⁷⁸ HANS KELSEN, *JUSTIZ UND VERWALTUNG* (Vienna 1929) reprinted in *DIE WIENER RECHTSTHEORETISCHE SCHULE. AUSGEWÄHLTE SCHRIFTEN VON HANS KELSEN, ADOLF JULIUS MERKL UND ALFRED VERDROSS, VOL. II, 1781-1812*, *supra* note 3. Regardless, enduring *ad personam* political attacks in Austria forced Kelsen 1930 to seek an academic appointment at the University of Cologne where he taught international law until he was removed as a Jew after Hitler came to power in 1933. See biographical note preceding HANS KELSEN, *REINE RECHTSLEHRE* (Matthias Jestaedt ed.), *supra* note 4.

⁷⁹ While it is true that Kelsen was politically nonaligned and also famously declined, after his removal, to be re-nominated to the Constitutional Court on a social democratic minority party ticket, there is little doubt that the ideological outcome of the decision suited his beliefs just fine. He had been born 1881 into a Jewish middle-class family in Prague (Hans Kelsen, *Autobiographie*, in HANS KELSEN WERKE, VOL. I: VERÖFFENTLICHTE SCHRIFTEN UND SELBSTZEUGNISSE 29-91, at 75-77 (Matthias Jestaedt ed., J.C.B. Mohr, 2007)). Although Kelsen was a lifelong confirmed agnostic, he converted to Catholicism in 1905 as a matter of political expediency common in those days for jurists seeking a career in public service, and already 7 years later he converted 1912 with his bride Margarethe Bondi to Lutheran Protestantism. Horst Dreier, *Hans Kelsen (1881-1973): "Jurist des Jahrhunderts"?* in *DEUTSCHE JURISTEN JÜDISCHER HERKUNFT 705-732*, at 713 *et seq.* (Helmut Heinrichs/Harald Franzki/Michael Stolleis eds., C.H. Beck, 1993). There can be little doubt that Kelsen was not a philosophical or ideological supporter of Catholic dogma with regard to marriage and had no personal use for its political battle lines in the Austrian "Kulturkampf" (culture war) that had been going on there since 1517, through the Enlightenment and until the present day. But then few people at his intellectual level sincerely did, even at that time. Beyond representing an outsized measure of hypocrisy not uncommon in Austrian political culture at the time, it made apparent that political Catholicism was fighting a rear-guard battle in Austria not only since 1918 but one that had been in progress since the counterreformation started by the Habsburg Empire *circa* 1517 (and of which some say that it had never really ended).

⁸⁰ Predictably, it was argued, not without intellectual and historic merit and not least of all with cogent reference to Kelsen's own prior writings (*cf.* Hans Kelsen, *Die Lehre von den drei Gewalten oder Funktionen des Staates*, 17 *ARCHIV FÜR RECHTS- UND WIRTSCHAFTSPHILOSOPHIE* 374-408 (1923/24)), that the principle of separation of powers was neither absolute nor impermeable and any other result could probably have been reached easily without much if any doctrinal impurity notwithstanding this principle.

Court's 'political' decision, and it consequently accused him of judicial activism overreaching into social engineering. Scant attention was paid to the composition of the Constitutional Court that had 13 other members, all eminent jurists, most of whom were unlikely to act as mere rubber stamps, and the majority of whom would not have been appointed by Social Democrat administrations. Nor did any government body at the time consider the possibility of amending the General Code of Administrative Procedure to subject administrative acts in general, including dispensations, to judicial review. We can only conjecture that the political risk of collateral damage from permitting such judicial review was probably deemed too great by efficiency-minded lawmakers of all parties represented in government.

We cannot be sure – for the scant circumstantial evidence comes down on both sides of the issue – whether the case may not actually have been just another 'systematic' issue to Kelsen that he felt required him to stand up for the doctrinal orthodoxy of his Pure Theory. But even if it was, it was hardly the sole determining factor. A minor constitutional reform in 1929 – presided over by the Christian Social Party – provided cover to ostensibly "de-politicize" the Constitutional Court, which in reality meant only to change its political composition. Instead of having Justices elected by the legislature, they were now to be appointed by the President of the Republic upon nomination by the federal government and by both chambers of parliament. No doubt Christian Socials intended to change of precedent regarding marriage by dispensation: they nominated for appointment to the Constitutional Court the very same Justice of the Supreme Court that had authored its 1921 advisory opinion against marriage by dispensation.⁸¹ As a matter of principle, Kelsen declined the offer to be re-appointed on a Social Democratic minority ticket.⁸² His resulting ouster by this legislative intervention from "life tenure" as a relatively young man after only 10

⁸¹ Harmat, *Ehe auf Widerruf?*, *supra* note 61, at 409.

⁸² Olechowski in *WIENER ZEITUNG*, October 7, 2006, *supra* note 64.

years on the bench (1919-1929) was met with sharp criticism in the independent press and it became the subject of heated public debate.⁸³ Predictably, the new Constitutional Court promptly returned to its pre-1927 practice regarding marriage by dispensation. An ordinance of the Federal Chancellor's Office of July 5, 1930 granted the separated (so-called "abandoned") spouse a right of opposition to applications for dispensation. On the same day, the new Constitutional Court adjudicated four cases of dispensation, denied the existence of a jurisdictional conflict and re-established the pre-1927 practice upholding the voidability of marriage by dispensation.⁸⁴

PART IV: KELSEN'S SEPARATION OF POWERS ARGUMENT: BEDROCK OF THE RULE OF LAW OR MERE PRETEXT FOR RATIONALIZATION?

The 1929 restructuring of the Austrian Constitutional Court, including its reshuffling of the bench without regard to the life tenure of sitting Justices, was neither the first nor the last nor even

⁸³ Harmat, *Ehe auf Widerruf?*, *supra* note 61, at 410.

⁸⁴ *Id.* at 415 *et seq.* Because the public outcry for a meaningful reform of Austria's divorce laws became even louder as a consequence, political Catholicism chose to sidestep the constitutional debate by way of international law. *Id.*, at 399. Treaty negotiations with the Holy See began in February 1930 and a new Concordat was signed June 5, 1933. Ratification of the Concordat took place by an unconstitutional government ordinance on May 1, 1934, the day the new authoritarian constitution was proclaimed by the Austrian clerico-fascist government of Engelbert Dollfuss "*In the name of God Almighty, the source of all law*", after a bloody 15-day civil war provoked by Nazi agents among the Austrian police corps resulted in the prohibition and suppression of the Social Democratic Party, thus removing Austria's strongest anti-Nazi force from the scene of conflicts to come. See E. HUBER, DIE VERFASSUNG DES STÄNDESTAATES IN IHRER POLITISCHEN AUSWIRKUNG, (Diss. U. of Vienna, 1961). From that time until Austria's March 12, 1938 annexation by Germany, the "May Constitution" never achieved any legal significance since the "authoritarian" Austrian government neither held presidential nor legislative elections and legislated solely by way of government ordinance. Neither was family law reformed nor the existing practice of "marriage by dispensation" that was uniformly decried as unsatisfactory by all parties, albeit for different reasons. It was not until Hitler's annexation brought Nazi Germany's Marriage Act including mandatory civil marriage into effect in Austria that Catholics there received unconditional free access to divorce and remarriage (GESETZ ZUR VEREINHEITLICHUNG DES RECHTS DER EHESCHLIESSUNG UND EHESCHIEDUNG IM LANDE ÖSTERREICH UND IM ÜBRIGEN REICHSGEBIET („EHEGESETZ“), JULY 6, 1938, RGBL. I 1938, 807). Harmat, *Ehe auf Widerruf?*, *supra* note 61, at 529.

one of the worst constitutionally questionable if not outright unconstitutional acts done during Austria's rocky interbellum era. Still, the breadth and intensity of acrimonious political debate⁸⁵ succeeded at putting the lie to the suggestion that had been unrealistic and therefore unpersuasive *ab initio*: that value neutrality of judicial reasoning and construction could be expected from the application of positivist theory "without any regard to the content of the norm", *i.e.*, without any moral, metaphysical, political, economic, historical, or sociological analysis of on the merits of a norm once it was promulgated under threat of compulsion by state power. It ought to have been clear – and it probably was at least to some conservatives in Austria at the time – that the roots of positivism hearkened back to Jeremy Bentham (1748-1832), the father of classic utilitarianism and one of the greatest visionaries of progressive social reform of all time. Far ahead of his day, Bentham had called for general elections, women's suffrage, numerous demands of modern feminism, abolition of the death penalty, animal rights, legalized homosexuality, and freedom of the press⁸⁶ – almost all concepts still anathema to political Catholicism in interwar Austria. They would have also been aware that Bentham had been awarded 1792 honorary citizenship by revolutionary France along with George Washington, Friedrich Schiller and Johann Heinrich Pestalozzi.⁸⁷ The same could be said about his legacy developed further by the utilitarian positivist John Austin.⁸⁸ Bentham had also laid the foundation for some of the notions developed more fully by Kelsen in the Pure Theory by concluding that there is no complete law that is not either imperative or 'deimperative.' To Bentham as to Kelsen,

⁸⁵ *Id.* at 410.

⁸⁶ H. L. A. Hart, *Bentham. Lecture on a Master Mind*, 48 PROCEEDINGS OF THE BRITISH ACADEMY. 279-320 (1962). See also H.L.A. Hart, *Bentham's Of Laws in General*, in H.L.A. HART, *ESSAYS ON BENTHAM. STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 105-126 (Clarendon Press, 1982).

⁸⁷ ELIE HALEVY, *LA FORMATION DU RADICALISME PHILOSOPHIQUE* 3 vols. (Paris: Presses Universitaires de France, 1995).

⁸⁸ WILFRED E. RUMBLE, *THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH CONSTITUTION* (Athlone Press, 1985).

incomplete norms, in contradistinction, are fragments of complete norms and hence legal definitions, exceptions, norms referring to other norms or setting out legal fictions is merely a part of the antecedents (the if-clause) of complete norms. A complete norm is one that is equivalent to the complete expression of the legislator's will in respect of a given conduct.⁸⁹ While Kelsen had not publicly articulated personal political views that might have forced recusals in certain cases, his contemporaries would have been lacking informed judgment not to realize that the leading positivist of his day had been an intellectual disciple of the man who had created systematic legal positivism in the first place.

Had Kelsen's Constitutional Court attempted comprehensive interpretive analysis, it would have found a whole cadence of arguments pointing it in the direction ultimately taken by historic events:

Teleological construction would have suggested that a procedural statute enacted by substantially the same legislature at the proposal of the same coalition government that opposed dispensation only two years earlier was very unlikely to have included among its intended purposes a resolution of the Gordian knot of Austrian moral-political ideology that had been identified repeatedly as a deal breaker in coalition negotiations by the largest minority party in the sitting government.

Historical analysis would have exposed the relative weakness of a strict and absolute separation of powers argument in light of more ambiguous recent precedent as well as existing legislative, judicial and executive practice.

Political, economic and sociological analysis would have indicated that, despite Austrian society's remarkable polarization and its need for postwar unity and recovery, social conservatism, and claims of legitimacy by organized state religion, had remain entrenched in still largely agrarian, mostly rural Austria.

⁸⁹ See Jeremy Bentham in H.L.A. Hart, *Bentham's Of Laws in General*, *supra* note 85, at 93-109 and 153-183.

Had Kelsen's Constitutional Court applied such a perhaps methodologically less elegant and philosophically less consistent, but analytically broader and more realistic comprehensive mix of analytic interpretive tools⁹⁰ rather than rely solely on the purity of structural and formal logic in a hierarchy of norms, the vast preponderance of conventional analysis would have suggested that the outcome reached by reporter Kelsen would, in one way or another, not be allowed to stand in 1927 Austria. Regardless of the fact that it reflected cogent logic, sound legal doctrine, and an emerging new standard borne by broad consensus in many of the legal systems of more secularized European nations at the time.

PART V: A METHODOLOGICAL TEST FOR THE RULE OF LAW:
DISCRETION IN SUPPORT OF PREDICTABILITY AND LEGAL CERTAINTY

Equally apparent from Kelsen's conduct following his removal from the Constitutional Court is that, as one of the most brilliant legal minds of the twentieth century,⁹¹ a prominent member of the widely regarded Vienna legal and academic environment of his day, he did not simply 'ignore,' or 'fail to realize' the likely consequences and implications of his choices. It follows that his insistence on the formalistic separation of powers argument did, in fact, prove the case of both his philosophical and political opponents. The Constitutional Court's ruling was by no means value-neutral

⁹⁰ The Vienna School of Legal Theory (Hans Kelsen, Adolf Julius Merkl, Alfred Verdross) had neglected interpretation in general. See Fritz Schreier, *Freirechtslehre und Wiener Schule* 321, at 322, 4 DIE JUSTIZ (1929) and Michael Thaler, *Mehrdeutigkeit und juristische Auslegung* (Vienna, New York: Springer, 1982) 18. KLAUS ADOMEIT, RECHTSTHEORIE FÜR STUDENTEN 77 (Decker/Schenk, 1979) went so far as to dismiss Kelsen's theory of interpretation as "methodological nihilism" because Kelsen had devoted himself "entirely to an elucidation of the object of interpretation," i.e., the legal norm itself, without providing any details as to how interpretation is to be done" MICHAEL THALER, MEHRDEUTIGKEIT UND JURISTISCHE AUSLEGUNG 18 (Springer, 1982), cited in Stanley L. Paulson, *Kelsen on legal interpretation*, 10 LEGAL STUDIES, vol. II 136-152, at 136 (July 1990).

⁹¹ George Henrik von Wright, *Is and Ought*, in MAN, LAW AND MODERN FORMS OF LIFE 263-81, at 263 (Eugenio Bulygin, Jean-Louis Gardies & I. Niiniluoto, eds., Kluwer, 1985).

and a mere matter of mechanical and logical application of existing statutory law to a given set of facts. Rather, his opponents' charges of either *de facto* social engineering or seizing an opportunity to demonstrate a practical application of Pure Theory as an end in itself were indeed well founded. It would be difficult to refute in hindsight the inference that Kelsen had been at least a sympathizer, if not of the Social Democrat Party platform then at least of its general socially progressive liberal agenda, and had not been at all displeased by 'logically arriving'⁹² at an outcome that would either end an archetypal manifestation of hypocrisy or at least would force broader legislative reform. Of course the Court's holding was by no means the sole possible outcome under applicable law. And of course Kelsen, a seasoned Justice of the Constitutional Court, and even more so as the author of the constitution, had been all too aware of the balance of political power and of established precedent and reasoning in the two other High Courts that had been created 1919 by his own design. The conclusion likely most accurate in hindsight does not seem unusual for an intellectual of Kelsen's standing: he simply did not care about potential repercussions so long as he could not only draw attention to his theoretical argument but also maintain intellectual rigor and methodical purity and unsettle with some realistic hope of lasting destabilization an entrenched political impasse. As historic events of the following decade showed, it took many more momentous upheavals to end the partisan and ideological stalemate in a structurally inflexible and tradition-conscious country⁹³ with a gridlocked system of coalition

⁹² Case history shows Kelsen strategizing to present an innocuously 'procedural' and 'jurisdictional' analysis rather than neutrally 'arriving' at an outcome that was otherwise not *a priori* a 'given' in the mind of the reporter. Understandable and agreeable as Kelsen's means to that end may appear to a contemporary secular observer, and as it probably already appeared to a majority in his day, suggesting that his result was deduced by open-ended neutral analysis and construction rather than by sophisticated justification derived 'backwards' from a targeted outcome is not very credible.

⁹³ Since the disintegration of the Habsburg Empire in 1918, Vienna and its highly regarded intellectual elites had suffered disconnect from the rest of the country. Population size, institutions, bureaucracy, intellectual and artistic life of this city the size of London had been assembled to meet the needs of a world power. They were lost

governments that, by its very nature, was prone to catering to two or three contrarian and ideologically alienated, irreconcilable party bases. Kelsen did in the judicial branch of government what Albert Sever had accomplished in the executive branch: he upset a fragile and dishonest ‘provisional compromise’ to avoid addressing a controversial issue by legislation in the foreseeable future. Following through on an important legal principle to its potentially undesirable consequences irrespective of personal detriment – was, however, a never-concealed characteristic of Kelsen’s view of intellectual honesty. An unwavering supporter of democracy despite its flaws, which he had recognized and analyzed in depth in his own writings,⁹⁴ he sounded an eerie foreboding of the Weimar Republic’s fate in 1933 when he spoke openly about the merits of democracy nourishing even sworn enemies at its bosom.⁹⁵

Our example of Austrian “marriage by dispensation” shows an unresolved and perhaps unresolvable quandary in the pairing of legal philosophy and methodology. When it comes to application, Pure Theory can, within certain limits that characterize the degree of legal certainty and the rule of law in a particular jurisdiction, be little more than a fig-leaf for rationalizing and justifying a desired outcome that was in truth arrived at through far more mundane and a much less intellectual processes and interests. This *modus operandi* is practiced by virtually all courts in virtually all jurisdictions at virtually all times regardless of prevailing legal theory and philosophy, albeit to varying degrees and with certain limitations depending on subject matter, social climate, legal tradition, issues at bar and parties involved. Therefore, candor in the treatment of the element of discretion and its judicial application is

on – and within the confines of – one of the smaller countries of post-World War I Europe with an overall population of some seven million.

⁹⁴ See, e.g., VOM WESEN UND WERT DER DEMOKRATIE (J.C.B. Mohr 1920).

⁹⁵ Horst Dreier, *Kelsens Demokratietheorie: Grundlegung, Strukturelemente, Probleme*, in HANS KELSSENS WEGE SOZIALPHILOSOPHISCHER FORSCHUNG 79-102 (Robert Walter/Clemens Jabloner eds., Manz 1997); and *Id.*, *The Essence of Democracy – Hans Kelsen and Carl Schmitt Juxtaposed*, in HANS KELSEN AND CARL SCHMITT. A JUXTAPOSITION (Dan Diner/Michael Stolleis eds., Bleicher 1999), at 71-79.

a true litmus test of the utility of any theory of jurisprudence. But it is also, under Kelsen's own "prediction theory," ultimately a measurement for the rule of law in a jurisdiction.

PART VI: THE PRECARIOUS LATITUDE OF STATUTORY
INTERPRETATION UNDER THE PURE THEORY OF LAW

Because Kelsen wanted the judiciary to remain independent from the speculative and ideology-infested realm of political value judgments and social engineering – something he considered the original sin of jurisprudence – his Pure Theory seeks to minimize narrowly the reach of acceptable interpretation:

The teleological vantage point of legislators – whose objective is identical with the social purpose of the statute – is not the one of formal jurisprudence that has to share the judge's viewpoint in respect of the law. Just like the latter [the judge], formal legal theory is only called upon to discover the will of the State, that is to determine how the State wishes to act under certain circumstances. The legislator's intention is not directly relevant at all to either of them and is to be considered indirectly only insofar as it is being realized by the legislator's expressed will.⁹⁶

This vote is a clear and definite rejection of both historical and teleological methods of construction and, as will be shown below, it is firmly grounded in Kelsen's theoretical and philosophical underpinnings. It was precisely his fundamentalism about

⁹⁶ Original: "[Der] teleologische Standpunkt der Gesetzgeber – deren Absicht identisch ist mit dem sozialen Zwecke des Gesetzes – ist nicht der einer formalen Jurisprudenz, die in der Betrachtung des Rechtes den Standpunkt des Richters zu teilen hat. So wie dieser hat die juristische Formaltheorie nur den Willen des Staates zu ergründen, d.h. festzustellen, wie der Staat unter gewissen Umständen handeln will. Die Absicht des Gesetzgebers kommt für beide als solche, d.h. unmittelbar überhaupt nicht, mittelbar aber nur insoferne in Betracht, als sie durch den geäußerten Willen des Gesetzgebers realisiert wird." HANS KELSEN, HAUPTPROBLEME DER STAATSRECHTSLEHRE ENTWICKELT AUS DER LEHRE VOM RECHTSSATZ (J.C.B. Mohr, 1911) reprinted in: HANS KELSEN WERKE, VOL. 2: VERÖFFENTLICHTE SCHRIFTEN 1911 285 (Matthias Jestaedt ed., J.C.B. Mohr, 2008).

separation of powers being the bedrock of the rule of law that lead to his attempt to keep the judiciary out of the business of lawmaking at all cost, be it by renouncing a delegation of authority to fill gaps in the law or by opposing any other method of “interpretive” construction that is *de facto* legislative by its nature or result.⁹⁷ Kelsen cannot be said to have based a historic, politically divisive and indeed explosive decision lightly on a superficial and formalistic separation of powers argument. In order to understand his reasoning, it behooves us to examine the positivist view of a statute’s long and tortured road from deliberative politics to law.

Kelsen’s philosophical groundwork for the Pure Theory was completed long before its first publication 1934. Much of its theoretical basis had already been presented well before World War I in Kelsen’s habilitation thesis⁹⁸ at the University of Vienna. This first major theoretical treatise, *Main Problems in the Theory of Public Law, Developed from the Theory of the Legal Proposition*,⁹⁹ was centered in the best Neo-Kantian fashion¹⁰⁰ on the dichotomy between the Is and the Ought developed extensively in 19th century German legal philosophy and presented insofar no novel approach.¹⁰¹ But Kelsen, as he later professed, took it upon himself to justify the autonomy of the law “in contradiction to social ‘is’ that can be comprehended ‘sociologically,’”¹⁰² and the thrust of Pure Theory grew out of his

⁹⁷ Hans Kelsen, *On the Theory of Interpretation*, 10 LEGAL STUDIES 127, at 135 (1990).

⁹⁸ A *Habilitationsschrift* is a post-doctoral dissertation that is a prerequisite for the *venia legendi* required to make a lecturer eligible for tenure track at universities in the Central and East European tradition.

⁹⁹ HAUPTPROBLEME DER STAATSRECHTSLEHRE, *supra* note 96.

¹⁰⁰ Stanley L. Paulson, *Läßt sich die Reine Rechtslehre transzendental begründen?* 21 RECHTSTHEORIE 155 (1990); ERICH KAUFMANN, KRITIK DER NEUKANTISCHEN RECHTSPHILOSOPHIE. EINE BETRACHTUNG ÜBER DIE BEZIEHUNGEN ZWISCHEN PHILOSOPHIE UND RECHTSWISSENSCHAFT (J.C.B. Mohr, 1921).

¹⁰¹ By contrast, Kelsen has also been called an “obstetrician of Neo-Hegelian philosophy” based on the catalytic effect of his work and the intense theoretical debate he triggered. See, e.g., Wolfgang Kersting, *Neuhegelianismus und Weimarer Staatsrechtslehre. Zum kommunitaristischen Etatismus Hermann Hellers*, in DER WILLE ZUR DEMOKRATIE. TRADITIONSLINIEN UND PERSPEKTIVEN 195 *et seq.*, 204 (Uwe Carstens and Carsten Schlüter-Knauer ed., Duncker & Humblot, 1998).

¹⁰² Hans Kelsen, *Foreword to Main Problems in the Theory of Public Law* in *NORMATIVITY AND NORMS* 30 (Stanley L. Paulson and Bonnie Litschewski Paulson trans., Clarendon Press

demand for preserving that methodological dualism.¹⁰³ Still, if the Is of politics and the Ought of law are to be kept as neatly separated as Kelsen demanded, the temptation to shift issues fraught with irreconcilable political differences from the legislative agenda to the judicial docket, and thus take them out of open political debate, can be overwhelming – as had been done with Austrian family law after 1918. Similar phenomena are quite familiar in American jurisprudence on civil and fundamental rights. There, due to the *de facto* impracticability of constitutional amendments in a politically divided society, we find subjects of substantial moral and political disagreements are almost always framed as questions of interpretation of the “bland formulations” in the Bill of Rights. As such, they are left to a judiciary that almost invariably draws criticism from one or the other side of the aisle for purported activism.¹⁰⁴ This is a pure Kelsenian view. Therefore it would be of particular interest to us to understand process and theoretical conception in Pure Theory of the transition from political discourse *de lege ferenda* to judicial decision *de lege lata*.¹⁰⁵ But this analysis does not get us far with Kelsen because, despite the fact that this formative process of a norm is clearly a continuum, a rationally

1998). However, his foreword to the second printing 1923 is altogether different than the foreword to the first printing. Only the latter has been made available in English translation, *ibid*.

¹⁰³ Hent Kalmo, *From Politics to Law: the Decisive Moment. Second draft* (unpublished) 7. Paper presented at the Edinburgh Festival of Legal Theory, May 28, 2008–June 1, 2008, University of Edinburgh School of Law, *available at* <http://www.law.ed.ac.uk/festivaloflegaltheory/>.

¹⁰⁴ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115(6) YALE L.J. 1369 (2006).

¹⁰⁵ Neo-Kantian Georg Simmel, himself positioned between relativism and positivism, who had influenced Kelsen’s early work on many levels, used the example of the Jewish dietary law. Its prohibitions may once have relied on a belief about inherent dangers of certain food and may have been capable of falsification by rational proof of its harmlessness. But, Simmel argues, the rule only acquired the “dignity of a true Ought” when this chain of rationalization or justification is cut so that the rule now takes on the form of an unconditional command without its underlying rationale – a process that makes the rule now incapable of explanation. GEORG SIMMEL, *EINLEITUNG IN DIE MORALWISSENSCHAFT. EINE KRITIK DER ETHISCHEN GRUNDBEGRIFFE* 55 (3rd ed., Cotta, 1911) (1892-3). This event (or, in the case of Simmel’s example, more likely a development) resulted in “cutting the teleological chain at a link that will from this day forward justify itself.” *Ibid.* at 25. MARIO G. LOSANO, *FORMA E REALTÀ IN KELSEN* 93 (Edizioni di Comunità, 1981).

verifiable “decisive moment” for an Is becoming an Ought cannot be identified by any means because, in Kelsen’s words, “it is a fact not fathomable for a legal construction, it is legally a mystery.”¹⁰⁶ Because the Ought is, as a consequence, defined by outright groundlessness,¹⁰⁷ positive law is separated from its origin and sources in the moral and political debate, rendering immaterial its entire extended historical development versus the snapshot of a legislative command. With a norm’s enactment completed and its entry into force, the law’s substantive propositional content, once an arguable empirical finding, a prevailing tradition, a majority preference or the result of a negotiated compromise, is now transformed into an ahistorical, unconditional and, “groundless” imperative. “Institutionally, a transition from the Is to the Ought takes place when the political agreement [underlying legislation] solidifies into a legal norm so that the prescription inscribed into the norm becomes unfathomable – independent of the considerations that prompted its adoption.”¹⁰⁸ It is easy to see why Kelsen would, in agreement with Rousseau¹⁰⁹ and Montaigne,¹¹⁰ consider this moment of ‘frozen expression of society’s preferences’ as the formative event determining the “ready will of the State.”¹¹¹ Pure Theory’s attempts at

¹⁰⁶ “eine für die juristische Konstruktion nicht erfassbare Tatsache, ist juristisch ein Mysterium.” HAUPTPROBLEME DER STAATSRECHTSLEHRE, *supra* note 96, at 334.

¹⁰⁷ *Grundlosigkeit*, *see id.* at 334.

¹⁰⁸ Hent Kalmo, *From Politics to Law: the Decisive Moment*, *supra* note 103, at 9.

¹⁰⁹ ROUSSEAU, JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 229 (G.D.H. Cole trans., Dutton, 1973 [1762]): “Every free action is produced by the concurrence of two causes; one moral, i.e., the will which determines the act; the other physical, i.e. the power which executes it ... The body politic has the same motive powers; here too force and will are distinguished, will under the name of legislative power and force under that of executive power.”

¹¹⁰ Jacques Derrida, *Force of Law: “the Mystical Foundation of Authority,”* 11 CARDOZO L.REV. 939 (1989-1990) quotes Montaigne’s dictum about the “mystical foundation of the authority of laws.” Kelsen’s reference to the “legal mystery” (*see supra* note 106) is not entirely conclusive because it is a mystery purposefully created.

¹¹¹ HANS KELSEN, HAUPTPROBLEME DER STAATSRECHTSLEHRE, *supra* note 18, at 361. *But see* ALEXANDER HOLD-FERNECK, DER STAAT ALS ÜBERMENSCH. ZUGLEICH EINE AUSEINANDERSETZUNG MIT DER RECHTLEHRE KELSSENS 53 (Fischer, 1926). Kelsen responded to Hold-Ferneck in *Der Staat als Übermensch. Eine Erwiderung* (Julius Springer, 1926) but he could not refute Hold-Ferneck’s fundamental points. *Cf.* HANS KELSEN-ALEXANDER HOLD-FERNECK, LO STATO COME SUPERUOMO, UN DIBATTITO A VIENNA X. (Antonio Scalone ed., Giapichelli, 2002). Sovereignty was a loaded concept for Kelsen:

restraining statutory interpretation and minimizing canonical formulae¹¹² all failed to influence practice because part of Kelsen's underlying structural formalism based on strict dualisms in the tradition of Kant's departure from metaphysical idealism, on a dichotomy between Nature and Reason, on Is and Ought, empirical and mathematic, analytic and *a priori* 'pure' and synthetic¹¹³ is logically flawed notwithstanding its considerable systematic¹¹⁴ and epistemological merits because rationality is only a partial aspect of social reality. Joseph Raz, prominent among modern scholars significantly influenced by Kelsen,¹¹⁵ showed this logical flaw in his 1967 Oxford dissertation.¹¹⁶ No matter how 'pure' a highly differentiated theory, principled purity and intellectual rigor do not, and likely cannot, secure practical viability in a society that is in

"We can derive from the concept of sovereignty nothing else other than what we have purposely put into its definition." HANS KELSEN, *PEACE THROUGH LAW* 41 (University of North Carolina Press, 1944). See also Kelsen's international considerations voiced already much earlier in *Id.*, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS* (J.C.B. Mohr, 1920).

¹¹² For a discussion of the wide variety of canonical views held in international law, domestic law and legal theory cf. Erich Vranes, *Lex Superior, Lex Specialis, Lex Posterior – Zur Rechtsnatur der "Konfliktlösungsregeln"*, 65 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 391 (2005).

¹¹³ See especially IMMANUEL KANT, *CRITIQUE OF PURE REASON (KRITIK DER REINEN VERNUNFT)*, see *supra* note 6; *CRITIQUE OF PRACTICAL REASON* (Thomas Kingsmill Abbot trans., London, New York and Bombay: Longman, Green and Co., 1898) [*KRITIK DER PRAKTISCHEN VERNUNFT*, Riga: Johann Friedrich Hartknoch, 1788]; *CRITIQUE OF JUDGMENT* (J. H. Bernard trans., London: Macmillan 1892). Kant considered the latter to be the culmination of his critical philosophy. It includes a substantial discussion of teleology. See also *Id.*, *THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT* (W. Hastie trans., Edinburgh: T&T Clark, 1887) (1790, subsequently re-published as a general introduction *Metaphysische Anfangsgründe der Rechtslehre* to *METAPHYSIK DER SITTEN* 1797).

¹¹⁴ Hans Kelsen and Niklas Luhmann, *Positivität des Rechts aus rechtswissenschaftlicher und systemtheoretischer Perspektive*, 14 *RECHTSSTHEORIE* 419-458 (1983).

¹¹⁵ Clear traces of Kelsenian theory outside the Vienna School of Legal Theory (*supra* note 3) appear also in the work of scholars of note including Gustav Radbruch, Georg Jellinek, H.L.A. Hart, Joseph Raz, Stanley L. Paulson, Norbert Hoerster, Jules Coleman, though all these writers differ from Kelsen's theories in several respects.

¹¹⁶ See Joseph Raz's Oxford dissertation, *THE CONCEPT OF A LEGAL SYSTEM. AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* (2nd ed., Clarendon Press, 1980) (1970) supervised by H.L.A. Hart. Cf. in particular 76 *et seq.* on the individuation of laws, and 92 *et seq.* on the existence of a legal system and of a basic norm.

turmoil and transition – in other words, the ordinary state of affairs almost everywhere.

Arguments against historical and teleological construction are not in short supply because few rational reasons can be given why present-day society ought to be all too rigidly bound by all the agreements and compromises solidified¹¹⁷ in a legislature whose composition likely differed significantly from the present political balance of power – an objection that cannot be defeated simply by pointing to the formal possibility of amendment or repeal, as these come often with negative externalities.

PART VII: KELSEN'S 'ANTIPOSITIVIST' PARADOX

It would be unrealistic to believe that literalism and confining construction to mere linguistic methods would not lead the judiciary back, under whatever pretext, to taking a viewpoint *de lege ferenda* – and thus into the business of the legislature¹¹⁸ – particularly in light of yawning gaps or contradictions in the law. Perplexingly enough, and against near-universal consensus, Kelsen denies in contradiction to the foregoing that genuine gaps in the law can even exist as he comments on the phenomenon of the Swiss Civil Code of 1907, Article I:

- (1) The law applies according to its wording or interpretation to all legal questions for which it contains a provision.
- (2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.
- (3) In so doing, the court

¹¹⁷ In his posthumously published treatise *GENERAL THEORY OF NORMS*, Kelsen explained solidification by the example of the non-binding nature of a promise of marriage prior to formal celebration. See *supra* note 37.

¹¹⁸ See Kelsen's commentary in the foreword to the second printing of *MAIN PROBLEMS IN THE THEORY OF PUBLIC LAW*, *supra* note 99, at xiii.

shall follow established doctrine and case law.¹¹⁹

This famously pragmatic legislative design exemplifying a positive delegation of authority is considered today by near-unanimous consensus to have proved both fortunate and useful complementing the central piece of legislation in Swiss civil law. Yet Kelsen's disfavor of this provision arises from his conclusion that the legislative discretion therein granted to the judge is unlimited whilst the "statute is formulated in such a way that the official applying the statute is not aware if the extraordinary power that is in fact delegated to him."¹²⁰ Kelsen does not say how the judge's awareness of the scope of delegated authority would matter, nor why. This 'antipositivist' paradox may serve to uphold the fiction of the legal system's unity and freedom from contradiction as one of Kelsen's favorite notions, quite comparable to his construct of a "basic norm," despite the fact that the empirical reality of any legal system contains no such thing. Kelsen's overarching concern was always that an adoption of the legislator's material point of view in the desire to address society's concerns directly would lead judges to frustrating the political compromise that each legal norm brings to expression¹²¹ – irrespective of the fact that legislative delegation of such authority *de lege ferenda* as set forth in Art. 1 of the Swiss Civil Code has an unquestionable positive basis. What happened to Kelsen's mantra that "any substantive content whatsoever can be law"?¹²² He does not offer to resolve this contradiction.

¹¹⁹ Swiss Civil Code of December 10, 1907, SR 210, available at <http://www.admin.ch/ch/e/rs/2/210.en.pdf>.

¹²⁰ Hans Kelsen, *On the Theory of Interpretation*, *supra* note 97, at 127 and 135.

¹²¹ Hent Kalmo, *From Politics to Law: the Decisive Moment*, *supra* note 103, at 12. If one follows Kelsen's concern, one would be forced to conclude that, by the implications of discretionary power, what was before a legal system is entirely surrendered to politics by the effect of a 'gap clause' like the one inaugurating the Swiss Civil Code, despite the unquestionable existence of explicit positive delegation of authority. *Id.*, at 20.

¹²² "[J]eder beliebige Inhalt kann Recht sein." HANS KELSEN, REINE RECHTSLEHRE. STUDIENAUSGABE DER 1. AUFLAGE, *supra* note 4, at 74.

Kelsen also opposed Max Weber's and Eugen Ehrlich's sociological theories of law¹²³ because, as David Hume's meta-ethical principle requires,¹²⁴ normative statements cannot be derived from descriptive or empirical statements: "Normativity is ultimately based on evaluative considerations."¹²⁵ Hence an Ought must never be deduced from an Is.¹²⁶ Opposed as he was to natural law for methodological reasons, Kelsen based his Pure Theory entirely on power.¹²⁷ But power is a sociological fact and not a proposition of legal theory. Despite the great intuitive appeal of his theory on the nature of law, it seems perilous to introduce to this realist concept the obvious fiction of a quarantined separation of inquiry in addition to, and as a functional consequence of, the separation of powers. If it were the time of Montesquieu,¹²⁸ Kelsen would have judges *never*

¹²³ HANS KELSEN, ÜBER GRENZEN ZWISCHEN JURISTISCHER UND SOZIOLOGISCHER METHODE. VORTRAG, GEHALTEN IN DER SOZIOLOGISCHEN GESELLSCHAFT ZU WIEN. (J.C.B. Mohr, 1911); *Id.*, *Zur Soziologie des Rechtes*, in 34 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 601-614 (1912); *Id.*, *Eine Grundlegung der Rechtssoziologie*, ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 839-876 (1915); *Id.*, *Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft*, 40 SCHMOLLERS JAHRBUCH FÜR GESETZGEBUNG, VERWALTUNG UND VOLKSWIRTSCHAFT IM DEUTSCHEN REICH 1181-1239 (1916); *Id.*, DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF. KRITISCHE UNTERSUCHUNG DES VERHÄLTNISSSES VON STAAT UND RECHT (J.C.B. Mohr, 1922).

¹²⁴ DAVID HUME, A TREATISE OF HUMAN NATURE Book III, Part I, Ch. I. (1740).

¹²⁵ Thus also Joseph Raz, *Reasoning with Rules*, 54 CURRENT LEGAL PROBLEMS 1-18, at 6 (Oxford University Press, 2001).

¹²⁶ Gillian Russell: *In Defence of Hume's Law*, in HUME ON IS AND OUGHT (Charles Pigden ed., Palgrave MacMillan, 2010).

¹²⁷ A lengthy and somewhat immaterial debate ensured whether a legal system, as proposed by Kelsen, consisted of coercive norms *only* (albeit supplemented by norms delegating authority which are in some way deemed to incorporate by reference coercive norms promulgated as a consequence) or whether, as H.L.A. Hart has argued, there are also "facilitative" norms – a concept not in contradiction to the Pure Theory so long as the legal system overall is coercive in nature. H.L.A. Hart, *Kelsen Visited*, *supra* note II. On the other hand, Kelsen asserted explicitly that "any substantive content whatsoever can be law," *supra* note 120; *cf. Id.*, *On the Pure Theory of Law*, 1 ISRAEL L. REV. 1 (1966). Ronald Dworkin, *The Model of Rules I*, 35 U. CHIC. L.REV. 14 (1967) deprecated this concept of law devoid of substantive criteria, valid so long as it has been formally enacted, as a "pedigree thesis." For a critical review of the Pedigree Thesis see Scott Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed* 7-8, PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES, Working Paper No. 77, March 2007, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968657. For a review of Kelsen within the history of ideas on the question "what is law?" see *Id.*, LEGALITY, 66-68, 72-72, 114-115, 176 (Belknap Press of Harvard University Press, 2011).

¹²⁸ See *supra* note 13.

look at the purpose of a rule but only at the content of the “groundless” rule itself, separating its application strictly from the deliberative stage up to and until its moment of solidification into law – perhaps because tracing the Kelsenian Ought to its causal source would necessarily annihilate it.¹²⁹ If judges were to look beyond the rule into the substance of its genesis, he remarks, they would invariably destroy the tenuous equilibrium created by the separation of powers doctrine. But Kelsen does not say how this dichotomy – that severely curtails reach and scope of interpretation – might be squared with grounding the *raison d’être* of a rule in the empirical fact of the law’s coercive power and the positive fact of its express delegation.

Kelsen recognizes, of course, that all evaluative language implies an indirect grant of discretion because “the language of the law seemingly contains a perfect determination of, for example, the matter it is conditioned upon, but in so doing it relies upon a term the content and scope of which is not determined by law or not even capable of such determination.”¹³⁰ Although adequacy of jurisprudential definitions is not the subject of this Article, it matters insofar as an analytical definition examines and explains the way a term is used in a given context. A stipulative definition, on the other hand, establishes the meaning of a term, taking the form of a command or proposal as to the term or notion’s meaning, and therefore cannot be characterized as true or false. Despite the arbitrary nature of a definitional choice, its author’s discretion is not unlimited: even in such choices it is constrained by teleological considerations, by the imperative not to mislead by lack of precision or clarity, and by the fact that the system or theory within which a definition is meant to operate may already trace out the definition to be adopted.¹³¹

¹²⁹ HANS KELSEN, DIE HAUPTPROBLEME DER STAATSRECHTSLEHRE, *supra* note 18, at 285.

¹³⁰ *Id.* at 506.

¹³¹ Eric Vranes, *The Definition of ‘Norm Conflict’ in International Law and Legal Theory*, 395-418, at 397, 17(2) *EJIL* (2006). These tenets have their roots in BLAISE PASCAL, *PENSÉES SUR LA RELIGION ET SUR QUELQUES AUTRES SUJETS* (posthumous, Paris: Port Royal, 1669-1670),

PART VIII: CONCLUSION

And so it came to pass that Kelsen, father of Austria's republican constitution, true to formal principle and consistently arguing cogent logic, by aiming to preserve the sacred constitutional principle of separation of powers destroyed the very separation of powers he had intended to protect. He did it on a stage that bore the hallmark of looming inevitability, somewhat evocative of a Greek tragedy. The legislature whose domain he had ostensibly aimed to protect now equally ostensibly "de-politicized" the bench he sat on by acting perfectly within the scope of its *domaine réservé* in accordance with the separation of powers. Kelsen, who had opportunity to be re-nominated to the "reformed" Constitutional Court on the minority ticket of the very same party that had appointed him to the Court in the first place, perplexingly declined. The record is silent about his motives. We do not know whether he had developed tedium for the battle of political principles and ideologies that is played out daily for public consumption in every society with the sole purpose to diminish, obfuscate, or distract from the enormity of the political compromises by which matters of state are generally decided. One does not serve ten years on a High Court in a political environment like interbellum Austria's which, by the time he chose to withdraw his name from re-nomination, had not changed at all from the day he was seated on the Court, not beyond those customary and usual pendulum swings of elective democracy¹³² – and take offense to common rituals and vitriolic

cited after Vranes, *ibid.*, 397 note 12: "definitions can be adopted freely and are never subject to contradiction, since nothing is more permissible than discretionarily to attribute a name to a thing which one has clearly designated. One merely has to take care that one does not abuse the freedom of attributing names by attributing the same name to two different things." See also ARISTOTLE, ORGANON V, TOPICA VI, DE DEFINITIONE, *supra* note 14, V 2 139b, VI 3 140b, VI 4 141a, 142b.

¹³² From 1919 until the dissolution of Austria's parliament by the clerico-fascist Patriotic Front in May 1934, Austria had a two-party system. German Nationalists acting as power brokers until 1934 were absorbed into Hitler's NSDAP after April 1938.

fallout of political trench warfare. Looking at the outcome overall, Kelsen's disillusioned withdrawal did not do anything to increase the appeal of positivist legal theory, as it deprived its creator of the opportunity to highlight further contradictions under cover of ultimate judicial authority. It seems more likely that Kelsen exercised a different sense of drama – his personal proclivity for the appearance of heroic victimhood inspired by his commitment to principle.

This same personality trait later led him to accept a tenured position at the University of Cologne in 1932, at a time when Hitler's steady rise to power had become very difficult for a scholar of Jewish descent to ignore as a distinct possibility, a position he promptly lost only one year after he accepted the call to Cologne. It is likely that these examples of tragic coincidences – which were actually neither but the results of almost willful political blindness on Kelsen's part – contributed much to his aura, not only as an eminent jurist but as an unusually principled mind, that paved his way to Harvard, Berkeley, and into the pantheon of legal philosophy. Socrates had demonstrated where a principled stance can lead in terms of posterity's attention to one's intellectual legacy. Much as Kelsen harbored, and candidly expressed, substantial reservations about the sociological method and strove to de-politicize judicial decision making, he knew how to allow events to craft a biography for him replete with gest that kept his brand as a scholar and thinker in play.

Pure Theory of Law is in some ways a legal equivalent of General Relativity: little understood at the time of its first publication, it is a relativist theory based on rationality, intent on eradicating the last remnants of metaphysics and natural law from legal theory. In Pure Theory, positive law may, in fact, contain 'eternal,' 'unchangeable' norms so long as they were duly enacted and have thus gained positivity, even if they originated from sources descended from natural law. Positive law may thus contain values but, as a jurisprudential theory that applies an ethos of self-restraint,

it confines itself to the perspective of an umpire-observer and must keep clear of legal and meta-legal influences.

Kelsen himself realistically concedes that the conflict between natural law and positivism will never come to a definitive end: “Positivism is not finished and will never be, just as natural law is not finished, nor will it be. The history of ideas merely shows that at times one or the other position will take precedence.”¹³³

In that Pure Theory attempts to remain content-free, it can claim that it accommodates any substantive content imaginable.¹³⁴ It cannot ensure freedom from ideology: even a mere structural and heavily procedure-based theory needs to take a position to be identifiable, and even freedom from ideology ultimately is the equivalent of a form of ideology. Reflecting on something or entering into a discourse about it¹³⁵ requires taking a position that at least for its proponent becomes an absolute.¹³⁶ Anyone sharing Kelsen’s philosophy of science would have to conclude with him (and insofar with Popper¹³⁷) that true scholarship and science must necessarily remain falsifiable, provisional, and therefore emotionally indifferent toward and detached from its subject matter. Pure Theory adopts an entirely normative position on the nature of judicial reasoning. Even

¹³³ Hans Kelsen, *Aussprache*, 3 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 53-55, at 53 *et seq.* (1927).

¹³⁴ See *supra* note 127.

¹³⁵ Here Pure Theory comes full circle to arrive at Wittgenstein’s perhaps most widely known proposition 7: “Whereof one cannot speak thereof one must be silent.” TRACTATUS LOGICO-PHILOSOPHICUS 90, *supra* note 44. This also corresponds with a discovery that gained traction at the time in quantum mechanics by Walter Heisenberg’s uncertainty principle that also proved that measuring position changed momentum and *vice versa*. Karl Popper & Carl Friedrich von Weizsäcker, *Zur Kritik der Ungenauigkeitsrelationen (Critique of the Uncertainty Relations)*, 22 (48) NATURWISSENSCHAFTEN 807–808 (1934). Law must be identifiable by non-evaluative criteria, since “[r]ules that required members of the community to resolve the very moral controversies and uncertainties that gave rise to the need for rules in the first place would be fatally deficient and unable to put an end to the Hobbesian state of affairs.” Hent Kalmo, *From Politics to Law: the Decisive Moment*, *supra* note 103, at 1.

¹³⁶ THOMAS ELSNER, DAS ERMESSEN IM LICHT DER REINEN RECHTSLEHRE, *supra* note 12, 274.

¹³⁷ KARL POPPER, DIE LOGIK DER FORSCHUNG (J.C.B. Mohr Paul Siebeck, 1934), English version: THE LOGIC OF SCIENTIFIC DISCOVERY (Routledge, 1959) and also *Id.*, CONJECTURES AND REFUTATIONS, at 256 (Routledge, 1963), notwithstanding Popper’s distancing himself from many of positivism’s overall tenets.

discretion requires under all circumstances a positive basis. Deliberative political decisions, once, if, and only if enacted, are to be treated as final. If courts are reluctant to do that in their inquiry to determine the substantive content of the law, then they act *ultra vires*. Kelsen's position on discretion is one of legal relativism; purely structural, formal, and non-evaluative.¹³⁸ The only operative criterion discretion needs to meet in Pure Theory is thus procedural and substantive due process – including, one might add, strict scrutiny under a separation of powers test.¹³⁹

¹³⁸ Hans Kelsen, *Juristischer Formalismus und Reine Rechtslehre*, in 58 JURISTISCHE WOCHENSCHRIFT 1723-1726, at 1724 (1959). Kelsen's example of Swiss Civil Code Art. 1, *supra* note 120, is a case in point.

¹³⁹ Under the U.S. Constitution, the due process clauses of the Fifth and Fourteenth Amendment have limited the legislature from the Revolutionary era till present. See most recently Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672-1807 (2012). Kelsen's concern discussed herein is the polar opposite of that and aims to limit judicial encroachment upon the prerogatives of the legislature.