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HANS KELSEN'S PURE THEORY OF LAW AS CRITIQUE OF THE "AUTHORITARIAN" UNDERSTANDING OF LAW AND JURISPRUDENCE

In this paper, I analyse Hans Kelsen's understanding of jurisprudence and law – by contrasting the normative-dogmatic understanding, which I will call "authoritarian". By establishing the primacy of politics and rejecting the prescriptive function of jurisprudence, Hans Kelsen enabled a democratic concept of law (and of jurisprudence), and at the same time a critical and political approach. Kelsen defines the law from a dynamic perspective, which justifies the constant changeability of the law – and in this respect the primacy of democratic politics over dogmatic jurisprudence. The normative basis for Kelsen's understanding of jurisprudence is his relativism, which is based on a moral position on the autonomy of the individual.

Key words: *Hans Kelsen. — Jurisprudence. — Democracy. — Pure Theory of Law. — Relativism.*

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1. INTRODUCTION

The subject of jurisprudence (law) leads many scholars to believe that the description of law can and should influence politics and judicial decision-making. The boundaries between science and politics or between jurisprudence and law are therefore blurred. If the law is not a human labour – insofar as a constantly and arbitrarily changeable and changing phenomenon (as the main thesis of legal positivism claims)[1] – but considered as part (i.e., as a derived content) of a higher "order" ("morality", "justice", "state", "people's spirit", etc.), jurisprudence gains the sovereignty of interpretation over the possible contents of the law. Accordingly, jurisprudence would have the task of being capable to decide whether the content of law is "legal". This understanding of legal sciences runs counter to both scientific knowledge and the democratic purpose (Dreier 2018, 55), because on the one hand it does not "merely" describe the law, but prescribes and evaluates it, and, on the other hand, it negates the power of democratic politics to shape and interpret the law.

In my paper, I argue that Hans Kelsen's Pure Theory of Law offers an alternative to this "authoritarian" understanding of jurisprudence. Kelsen aimed to grasp the law in terms of its *form and function*, without wanting to stipulate its content. The Pure Theory of Law is by no means the "doctrine of *a pure law*". It takes the "impurity", the constant changes and the changeability of positive law as the basis of scientific knowledge, and it concentrates not on the content but rather on the form of law, which allows for the recognition of its *specifica differentia* in regard to other social phenomena and especially other normative standards. Kelsen defined the law as a content-free form of a specific way of thinking and functioning. Jurisprudence, as a non-political description of legal forms and functions, and law, as a democratically determined content, can be combined in the Pure Theory of Law – but they cannot be brought together in a common task (i.e., in a scientifically "well-founded" legal prescription). However, Kelsen's understanding of jurisprudence is not "democratic" solely because it would support only democracy (i.e., it would recognize only democratic law as law), but it makes a democratic way of legal thinking possible (through scientific arguments) without advocating for a political ideology.

In this paper, I describe Kelsen's understanding of jurisprudence and, more specifically, of law as the possible basis for an anti-authoritarian, critical legal policy. Kelsen understood science as pure knowledge of an object

[1] This opinion is expressed in the most radical way (ultimately negating the scientific nature of jurisprudence) in Kirchmann 1990, 23.

"created" using the method. (1) Accordingly, he refused to pre-determine the law through jurisprudence: this understanding, of course, diminishes the importance of jurisprudence, because it should "only" analyse the law as a form and not evaluate its content, or control its practice. (2) Because the Pure Theory of Law refrains from pre-determining the law, it allows judges to determinate what the law is. According to the logic of the Pure Theory of Law, it arises in a dynamic, step-by-step process (*Stufenbaulehre*) in which the law is applied and established at the same time at every level (up to the first and the last). These dynamic aspects are clearly expressed in the so-called realistic Kelsen reading of the Nanterre and Genoa schools, therefore, I will also briefly refer to those schools. (3). This understanding of jurisprudence also allows politics to be recognized as part of the law. (4) The Pure Theory of Law does provide an apolitical description of legal application, but its anti-ideological-critical approach is therefore a prerequisite for critical (in this term: political) legal studies. (5.) Finally, I try to answer the question whether and why Kelsen's idea of jurisprudence can serve as a basis for a pluralist, democratic society.

2. KELSEN'S UNDERSTANDING OF SCIENCE

Kelsen's main scientific achievement is the Pure Theory of Law, which he put forth, on the one hand, to set up a comprehensive theory of positive law (Kelsen 2008a, 15, 50), and, on the other hand, to "clean up" the earlier legal thinking of all ideological, historical, political (etc.) elements (Kelsen 2008a, 3, 29, 47). His academic interest was devoted to the question of how the law can be grasped from a *purely* legal perspective (Jestaedt 2014a, 4). By starting from the Kantian hypothesis that knowledge determines the object, and not vice-versa (Jestaedt 2010, 189), he took a cognitive reductionist position (Kelsen 2008a, 35): What he described was not the law in all its aspects, but the law (i.e., norm) as the subject of scientific investigation. Kelsen distinguished the subject of Pure Theory of Law not only from "being", but also from values that belong to the "ought" (Kelsen 1967a, 84). As Matthias Jestaedt sums up (Jestaedt 2008, XXXII), the demarcation from "being" excludes a positivism with reference to facts (*legal positivism without naturalism*), while the demarcation from the "ought" (as value) overcomes natural law (*normativism without moralism*).

Kelsen wanted to keep science (as pure knowledge) and politics (as active ideology) separate, because "political convictions – and what would political will be without political conviction – are as little objective and as relative in their values as religious ones" (Kelsen 2013a, 134, translated by author).

Kelsen was convinced that science should remain neutral in relation to values because these have different contents. In this respect, it is unscientific *per se* to recognize something as "right", "good", "moral", or "beautiful" – these terms are not the result of knowledge but rather an ideological component (and consequence) of subjective will. According to Kelsen, science should not pursue anything other than pure knowledge. It is not authorized or able to determine the end purpose: "[t]he scientific statement must not imply that something is an end" (Kelsen 1971, 352).

He understood science as a method; in this respect, he noted a "methodological contradiction between scientific-causal and political-normative ways of thinking" (Kelsen 2013a, 124, translated by author). In contrast to "Platonic" science, which strives for ideals, Kelsen proclaimed

"[t]hat knowledge is only sought for the sake of knowledge, and that this knowledge is not directed towards an external purpose, that its result must not be determined by the needs of will and action. [...] Therefore, science is above all natural science." (Kelsen 1933a, 103, translated by author)

The purpose of science is therefore to describe its subject without making value judgements and thereby justifying political actions.

3. JURISPRUDENCE AS PURE KNOWLEDGE

Kelsen's understanding of science is also expressed in his Pure Theory of Law, which refrains from any evaluation and determination of the content of the law. Such a jurisprudence cannot and does not determine the content of the law in advance – it focuses on the form and functional logic in or according to which the different legal contents are possible:

"The view that it is possible to achieve new law through mere cognitive interpretation of applicable law [...] is rejected by the Pure Theory of Law. [...] [I]t cannot decide between the possibilities it has indicated; it must leave this decision to the judicial body that is responsible, according to the legal system, for applying the law" (Kelsen 2017, 607–608, translated by author).

Because Kelsen kept jurisprudence and judicial application separate, as well as conceptualizing judicial decision-making (the so-called "application of law") as the creation of law, his formalistic-relativistic legal theory allows the law-concretizing actors (legislation and "application of law") to shape the content of the law. The Pure Theory of Law withdraws into the role of an observer of the legal form and the logic of legal functions.

The purely descriptive point of view gains a certain explosiveness – or difficulty – especially in jurisprudence, because legal *norms* are its objects.[2] Although legal science is a normative science, i.e., it describes the norms, it should not want to have a normative effect on the law (Lepsius 2013a, 42). Its normativity is not a normative prescription of what the law should be, but a pure description of the legal norms as they are. In the case of the legal norm, its existence is expressed normatively (and not in terms of "being", even if Kelsen had tied the norm more closely to "will" in his later work). The possible confusion between the mere description of the norm and the normative determination of legal content stems from the special form of existence of the object to be described. However, jurisprudence does not stipulate what should be legal, it only describes what the legal norm sets as to be "ought", and it analyses the functional logic and structure in which the norms exist as "ought".

The Pure Theory of Law is normative with regard to its object (it deals with norms) (Kelsen 2017, 139), and in its method (no causality) (Kelsen 2008b, 161), but not – like the doctrine of natural law or "order thinking" – in its function (Bobbio 2014, 49). Because the norms are not statically prescribed (for example in the form of a "higher order"), legal science can either generate a static through dogmatic – then it would already act in a normative and law-generating manner (Lepsius 2012, 43), or, as Kelsen did, it can describe the dynamics without determining the result. The Pure Theory of Law does not aim to prescribe the correct behaviour for anyone through its findings, it can "only" describe which behaviour is likely to be expected by law, i.e., which behaviour corresponds to the legal regulations. The task of jurisprudence is therefore (in contrast to judicial application) to list possible meanings of the norms, but it cannot and should not control the judgements. If jurisprudence provided more than the descriptions of the given legal situation, it would impose obligations on the people – as if it were itself a legal authority.

Oliver Lepsius comments critically that "the legal scholars [grant] themselves a law-generating competence" (Lepsius 2008, 18, translated by author). Legal science thereby asserts a claim to authority (Jestaedt 2014b, 8) – above all against democratic legal policy and free judicial decision-making. Such an "authoritarian" understanding of jurisprudence ultimately amounts to the supremacy of jurisprudence over judicial application. The idea that jurisprudence should dominate judicial decision-making – or that judges should follow jurisprudence – is highly problematic in terms of democratic politics, because the law would then not appear as a variable product of

[2] On the normative character of jurisprudence, see Jestaedt 2017, 255.

democratic politics but as a normative "knowledge" of an extra-political actor such as jurisprudence. A normative understanding of jurisprudence does not tolerate pluralistic democracy because it does not understand positive law as a product of (democratic) politics but as a necessary (and eternally valid) derivative of a "higher" order or a dogmatically prefabricated system.

Carl Schmitt was therefore right – although he meant his statement affirmatively and not critically – when pointing out that "[t]he great times of jurisprudence are by no means democratic or constitutional times in the sense of the liberal concept of democracy or the rule of law" (Schmitt 1936, 16, translated by author). In contrast to Kelsen, Schmitt attributed a normative function to jurisprudence because – in the spirit of the German Historical School[3] – he preferred a "scientific law" instead of a scientific description of the law. Jurisprudence à la Schmitt tries to determine the law through systematization and dogmatization and to make it dependent on the path that judges and legal politics should follow. "Scientific law" is contrary to legal positivism, according to which the law is the product of political will.

Schmitt repeated this understanding of jurisprudence even after the Second World War as critique of positivism, which, according to him, grants jurisprudence a purely technical role (Schmitt 1950, 14). Schmitt wanted to use jurisprudence to inhibit political dynamics, i.e., jurisprudence should not only describe the law but also prescribe and substantively determine it: "The scientific jurist is not [...] a mere function of a somehow 'posited' ought and its positing of positions" (Schmitt 1950, 30, translated by author). Such an understanding of jurisprudence negates the relationality and fluidity of law, and it takes over the tasks of the politics.

Schmitt's jurisprudence concept tried to uphold the autonomy of the law, i.e., not as a mere technique of legislation (von Bogdandy 2020, 7, 27). In his texts on (European) jurisprudence, he in fact wrote against the "nihilistic mechanization" of jurisprudence.[4] Legal positivism – the Pure Theory of Law as well as its radical-realistic reading – has to repeatedly confront the reproach of nihilism.[5] However, relativism – both as a political idea of a pluralistic democracy and as a prerequisite for free scientific discourse (see Chapter 5) – is misunderstood as nihilism; jurisprudence – like other sciences – cannot and should not take over task from politics – i.e., from

[3] As a requirement for a scientifically based judicial application and a practice-oriented jurisprudence, see i.a. Savigny 1814, 126.

[4] It is how Schmitt described the purpose of the lecture he gave in Bucharest in1944; quoted in: Mehring 2017, 858.

[5] Against these reproaches see Sénac 2013, 108; Dreier 2019, 62.

social debates and struggles – of setting values. This is also the problem with legal dogmatics, because it forgets the original political conflicts; in this respect, the relative, controversial political solutions would be elevated to objective ones (Lepsius 2019, 125).

Both the concept of "scientific law" and that of normative jurisprudence are based on the idea of setting meta-juristic boundaries ("state", "people", "order", "nature of matter", etc.) to positive law. In this case, jurisprudence would have the task of "recognizing" the meta-positive legal framework and context. Jurisprudence would thus assume the function of legal policy and practice. Kelsen unveiled this power strategy, therefore, pure knowledge should reveal the ideological component: "Knowledge has always torn the veil that the will puts on things" (Kelsen 1933b, 79, translated by author). Accordingly, he showed that political ideologies or interests are behind any attempts of dominating positive law normatively: certain power circles can hide their own, bare power interests by calling them "natural law", "state purpose", "popular spirit", or "historical right" (Kelsen 1928, 34).

The meta-juristic justification of law is – in terms of both its legal and jurisprudential understanding – fundamentally anti-political, in regard to the formation of democratic wills (Lepsius 2013b, 177). The idea that the law can be recognized and established in advance comes close to the natural law ideal of a uniform and eternal law (Lahusen 2011, 18). Only legal positivism – especially in its dynamic version, i.e., the Pure Theory of Law – understands law as a constantly changing and changeable function, whose content can only be determined by legal and political practice.

If the law does not arise in democratically procedural and formalized "struggles" of a pluralistic society, but has to correspond to a "higher order" or a dogmatically closed system, jurisprudence is burdened with a task – namely the knowledge of the "correct" law – which contradicts the pluralistic nature of democracy. A non-positivistic jurisprudence denies the power of the legislation and the jurisdiction to create the law, as if only jurisprudence were capable (and called) to normatively recognize the "objective" (and accordingly only "correct") legal content. This notion empowers jurisprudence to decide political questions under the mantle of an "objective", "scientific" approach and to present their decisions as the only "correct" ones. This makes jurisprudence a *participant* in law instead of just remaining an *observer* of law (Lahusen 2011, 35, 39). However, jurisprudence is not a source of law but a descriptive discourse about law as an "acting" one (Guastini 2006, 93).

Therefore, Kelsen emphasizes the difference between the task of the judicial bodies, which is to create law, and that of legal science, which neither creates nor approves law but "only" describes it (Kelsen 2017, 142). Kelsen understands the scientific task as a pure description, to the extent that it also acts as a deconstruction of the veiled, pseudo-objective, ideological "jurisprudence" (Kelsen 2017, 144, 205). The Pure Theory of Law thus reveals how jurisprudence can be used as an instrument for political purposes by legal scholars presenting their opinions as "scientific" and therefore "objective" statements. Kelsen opened "the veil of his own discipline behind which it can politicize undisturbed" (Jestaedt 2006, 2, translated by author).

For this reason, the result of jurisprudence is, on the one hand, never permanent (because of the relativity of scientific knowledge), and on the other hand (as a democratic-political expectation) may never be normative-prescriptive: "Jurisprudential interpretation must carefully avoid the fiction that a legal norm always allows for only one, the 'correct' interpretation" (Kelsen 2017, 608, translated by author). From a purely scientific point of view, the only "correct" law cannot be determined. The "correctness" of the law is never an epistemological but an axiological opinion – insofar being ideologically and politically determined.

As critique, however, it can be noted that Kelsen used binary logic when contrasting jurisprudence (as knowledge) with judicial decision-making (as will). He only differentiated between knowledge of the law and its creation, as if other forms of normative (but not law-creating) statements were not possible (Jestaedt 2017, 257). However, normativity does not necessarily mean the creation of law. That is why Matthias Jestaedt pleads for the pluralization of the concept of normativity with regard to jurisprudence (Jestaedt 2017, 260). While jurisprudence cannot and may not establish (legal) norms, it can nevertheless evaluate and criticize them based on other normative standards. Whether and how jurisprudence is normative cannot be answered one-dimensionally (with the dichotomy of "either knowledge or creation"), because normativity – both within jurisprudence and with regard to law – exhibits a high degree of variability.

4. DYNAMICS OF THE LAW

By rejecting the question of what a norm – both generally and individually – should contain, the Pure Theory of Law rejects scientific relevance over political influence, and, on the other hand, it allows the freedom of judicial decision-making. As Horst Dreier writes: "The de-politicization of

jurisprudence corresponds to the insight into the political, namely – the law-creating, law-producing character of the application of law at every stage" (Dreier 2019, 64, translated by author). By keeping jurisprudence and judicial application separate, the Pure Theory of Law also proves the political character of the judicial decision-making.

The fact that the legislation is politically determined is hardly called into question. But the idea that the courts and the administrative bodies do not simply apply the norms – insofar as they exercise political power – emerges most clearly and radically in Kelsen's legal theory. It dynamically eliminates the static difference between the creation and the application of law. The indeterminacy of the norm is the reason why law is (re)produced not only in the legislature but also in the "application of the law". The legal system is not materially ("only" procedurally) closed, it is dynamically open to multiple results (Lepsius 2013a, 43). The validity of the lower norm is indeed derived from the validity of the higher norm, but its content does not stem automatically from the content of the higher norm; the content of the law presupposes a decision about it (Luzzati 1990, 129). As Oliver Lepsius writes as a critique of a materially closed, dogmatic legal system, "[t]he act of subsumption creates freedom of design [...] [o]ne can therefore hardly speak of a principle of decreasing or increasing ties in the hierarchy of norms" (Lepsius 2012, 55, translated by author).

Kelsen built the indeterminacy of the norm – i.e., the "political" (law-setting) character of the application of the law – into the functional logic of the legal system (*Stufenbaulehre*). The idea that the law is gradually becoming more and more specific within the legal system (but at the same time always new), or that each level is simultaneously the application and creation of the law, originally came from Kelsen's student Adolf Julius Merkl.[6] With his theory, Merkl revealed the productive and creative character of the "application of law", which consequently contributes to the creation of law through legal concretization:

"[The judge] himself does not have the right to know or to recognize what is right [...], he all the more has to determine decisively through his knowledge what should be right, whereby he exercises not so much a function of recognition but one of will, whereby he proceeds productively rather than receptively." (Merkl 1933a, 97, translated by author)

Kelsen borrowed Merkl's idea (Kelsen 1923, XV), so he was able to prove the political character of judicial action (Kelsen 1925, 233., Kelsen 1968a, 620), because the "application of law" is not (only) an act of knowledge but

[6] Merkl 1993a; Merkl 1993b; Merkl 1993c.

(also) one of will (Kelsen 2008a, 108). This is why Kelsen advocated the view that the judiciary represented a political power. In his famous dispute with Carl Schmitt about the "guardian of the constitution", he also demonstrated the political character of judicial activity (Kelsen 2008c, 67). He accused Schmitt of adhering to an outdated concept of an apolitical justice. Kelsen clearly stated that "there is only a quantitative, not a qualitative difference between the political character of legislation and that of the judiciary" (Kelsen 2008c, 67, translated by author).

However, because the Pure Theory of Law developed into a static status-quo way of thinking in the earlier Viennese Kelsen Orthodoxy of the post-war period (Bezemek, Somek 2018, 139), "Kelsen's Pure Theory of Law lost one of its most precious elements: its cheerful agnosticism towards the methods of interpretation, which is inevitably carried across to their application" (Bezemek, Somek 2018, 140, translated by author). The circumstance that the Pure Theory of Law does not offer a method for knowing the "correct law" turns out to be one of the main findings of Kelsen's legal theory. The indeterminacy of the norm or the non-cognitivist theory of interpretation – which is *strictu sensu* not a doctrine of interpretation because it does not provide an objective method for the knowledge of law – forms its dynamic elements, which have been lost in a static reading of Kelsen.

Therefore, Kelsen did not advocate mechanical application of the law (Dreier 2019, 11). His theory does not promise to be able to determine the "correct" law through one jurisprudential method or dogmatic: "There is absolutely no method [...] by which only one of several linguistic meanings of a norm can be identified as correct". (Kelsen 1968b, 1366, translated by author) It is not the task of jurisprudence to restrict the work of judges through methodology or dogmatic, as if the "correct" law could be found scientifically and objectively (Kelsen 2008a, 105). The lack of a classical doctrine of interpretation is often misunderstood as a deficiency of the Pure Theory of Law, as if jurisprudence should present a methodology for defining the law instead of describing the open-ended process of legal concretization (without aiming to foreshadow its result).

The power of the judiciary is also demonstrated in the fact that judgements can exceed the normative predetermined method (Jestaedt 2018, 245). As long as the act of legal concretization – regardless of whether at the level of legislation or the judicial decision-making process – is not annulled by a higher instance appointed to do so, it remains part of the legal system (regardless of its content). Judgements are therefore to be regarded as normative not because of their "correctness" but because of their legal force (*Rechtskraft*).

Instead of underpinning the illusion of a "correct" law or a purely cognitive judicial application, the Pure Theory of Law paints an ideology-free (albeit disillusioning) picture of what judges do (in reality) and how they are making law by applying it. It therefore proves – as Robert Walter actually criticizes (Walter 1993, 195) – to be decisionist. Olivier Jouanjan recognizes it as well: "the normativist flower grows into a purely decisionist fruit" (Jouanjan 2000, 73, translated by author). The decision plays an important role in Kelsen's legal theory (Kelsen 1925, 234; Kelsen 2008a, 92), albeit not as a political means for helping a pre– and over-normative "order" to break through, but as a logical (system-immanent) consequence of gradual legal concretization.

Kelsen deconstructed substantive legal thought; he did not understand law as substance but as form and relation (Kelsen 1964, 54). The non-cognitive dynamics of law comes to the fore particularly in the realistic Kelsen reading (Chiassoni 2012, 246). The dynamic aspects of the Pure Theory of Law are emphasized in this sense especially in the Nanterre (Michel Troper, Éric Millard)[7] and Genoa (Riccardo Guastini, Pierluigi Chiassoni) schools.[8] The realistic reading places the non-cognitivist, anti-ideological and anti-metaphysical – in this sense realistic – character of Kelsen's legal theory in the foreground, which therefore also overcomes the formalism and cognitivism of classical legal positivism (Jouanjan 2000, 68). This radically non-cognitivist position can thus capture the *genuinely political character* of the application of the law (Guastini 2013, 530).

The dynamic reading of the Kelsenian legal positivism rejects the idea of classical application theory by deconstructing the norm as *one* single meaning (Troper 1978, 294; Tarello 1980, 61; Guastini 2004, 27). It proves that the idea of the only correct method (i.e., the idea of the *a priori* content of the norms) is in fact the *ex post facto* legitimization of the judicial decision. Because it is always made as a choice among several (Guastini 2019, 14), or even perhaps any number of meanings (Troper 2006, 305), there is not an only legally possible one, i.e., the legal methodology does not explain the production, but rather the *presentation* of the judicial decisions (Tarello 1974, 396; Guastini 2011, 411).

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[7] For a brief description of the realistic Kelsen reading of the Nanterre School, see i.a. Troper 2006.

[8] For an introduction to the Kelsen reading of the Genoa School, see i.a. Beltrán, Ratti 2011.

Michel Troper in particular deserves great credit for developing the Pure Theory of Law where Kelsen stopped or did not remain consistently radical – so that he could avoid a complete deconstruction of the "application of law". Troper radicalizes Kelsen's theory – according to which the norm is the object of an interpretation – by understanding the norm not as the object to be interpreted but as a result of the interpretation. That means that the text is interpreted, and the norm arises as the product of a completely open-ended (because not cognitive) interpretation (Troper 1994, 89, 99). If the norm can only be "found" (but not discovered) in the interpretation, any interpretation is by definition and *qua office* lawful – at least in the last instance. This approach reveals at the same time the ideology (i.e., the political will) behind the interpretation and jurisdiction (Troper 1978, 294, 301). The justification of a judgement therefore only serves as an *ex post* justification: "Motivation seeks to create illusion" (Troper 1978, 295, translated by author). Judicial application is "a political game" (Millard 2006, 732, translated by author). Kelsen's theory denies the dogmatic, jurisprudential bondage of judicial decision-making, thereby opening the door to a political judiciary.

However, the question arises as to whether and how such an overvaluation of the judicial application – not only for the judiciary but also for the administration, which (for Kelsen) was also a law-making actor (Kelsen 1929, 7) – can be democratically legitimized.

The "application of law" (as a non-cognitivist act, insofar actually as law-making) is detached from jurisprudence – especially in the realistic Kelsen reading – but at the same time from democratic control as well. If judges interpret the law freely (and by doing so, they set it as well), it can cause a democratic-political legitimacy problem. José Luis Martí believes that the realistic consequences of Kelsen's theory would undermine both legal certainty (because of the non-cognitivist theory of interpretation) and democracy (because of the overvaluation of the judge's will as the source of the law) (Martí 2002, 269, 276).

While this critique may be true to some extent, it fails to recognize that the Pure Theory of Law is descriptive, rather than normative. It is not the fault of Kelsen if the judiciary disregards democracy and the requirement of legal certainty – but it is Kelsen's great achievement that he revealed the reality (the possible consequences and rulings) of the "application of the law". The Pure Theory of Law uncovered the *real* power in the process of the "application of law", i.e., Kelsen created the basis for a political critique of judicial law-making by describing how it functions despite ideological veils.

Kelsens was aware of the possible dangers of judicial superiority, especially with regard to the constitutional jurisdiction. As is known, he was not only the creator of the idea of judicial review, but he was also constitutional judge in Austria during the interwar period, and this is reflected in his theories, i.e. the Pure Theory of Law was shaped by Kelsen's own experiences as a judge (Techet 2021). He dealt with the issue that the "application of law" is always somehow related to law-making power, but that it must remain within the framework of the law (i.e., of the "will of the people", expressed in the parliament).

There is a contradiction between the real possibility of a political, law-making judicial review and the democratic requirement that the meaning of the constitution may only be changed in the parliament or by referendum. Kelsen thought that the strict interpretation of the words or the omission of general, overly abstract terms could provide the primacy of the democratic legislature and the constitution-making power. (Kelsen 1928a, 241) However, this argument only applies if a strict, reserved interpretation based on the wording is possible. The realistic Kelsen reading proves (Troper 2006, 305; Guastini 2019, 14) the impossibility of a strict, "objective" interpretation. The possibility of "judicial self-restraint" is actually rooted in naïve legal positivism (in the sense of *Gesetzespositivismus*), which may be necessary for democratic ideals, but which clearly contradicts the Pure Theory of Law and its skepticism towards the idea of the only correct application/method. Therefore, the contradictions between judicial power and democracy cannot be resolved theoretically. Nevertheless, the Pure Theory of Law helps us to better see the possible power of the judges, i.e., the real function of the "application of the law".

5. LAW AND POLITICS

Kelsen enabled politics to determine the law or to change it at any time (Dreier 2017, 24). The Pure Theory of Law does not strive to anticipate the autonomous decisions of the individual. In this respect, jurisprudence, as Kelsen understood it, cannot take on the task of setting norms instead of politics and judicial application: "The academic jurist who describes the law does not identify with the legal authority setting the legal norm" (Kelsen 2017, 158, translated by author). Kelsen reduced the influence and effect of jurisprudence: for the sake of its scientific nature, it must forego the influence it strives to exert on politics and society (Jestaedt 2014a, 7).

For Kelsen, however, purity does not refer to the object but to the cognition (method), which, of course, can only grasp one aspect of the "impure" reality. In a democracy in particular, the law is a dynamic, constantly changing and changeable phenomenon that cannot be perpetuated or suspended (Dreier 2010, 17). Kelsen's understanding of science is not directed against politics but against the politicization of (or by) jurisprudence. A legal science that refrains from making value decisions is *apolitical but not anti-political* – it enables people to act autonomously (Dreier 2019, 62). The self-limitation of science complements political freedom. This self-restriction enables autonomous judgements as to whether someone submits or opposes the legal norms (Bobbio 2014, 21).

The Pure Theory of Law reveals politics in and of the law because of its endogenous dynamics.[9] From a legal perspective, Kelsen was only able to grasp these endogenous dynamics of law – but he was also aware of its exogenous dynamics, e.g. from "external", political-social changes (Kelsen 2013b, 371). However, he did not link the legal-theoretical knowledge of endogenous dynamics to the factuality of the "political"; instead, he tried to "legalize" politics and limit its intensity, e.g. through constitutional jurisdiction (Ehs 2017, 139).

The condition that the law is objectively indeterminate and consequently politically determined is also a basic prerequisite for any critical legal study that analyses the law in terms of power and politics. A legal doctrine according to which the law is derived from "higher" "values" (and equated with these) not only deprives it of the legislation and the "application of the law", but it justifies it as an eternally absolute value. Moral (etc.) criticism of the law is only possible if law and morality (or other "higher values") are separated:

"By presenting the law as a branch of morality and leaving in the dark whether it means the self-evident requirement that the law should be shaped morally, or whether it means that the law as a component of morality, actually has a moral character – one tries to give law the absolute value that morality claims." (Kelsen 1933b, 77, translated by author)

Kelsen's legal doctrine invalidates meta-juristic categories ("state", "people", "order"), which prescriptive jurisprudence usually utilizes, as illegal and anti-political (anti-democratic) contents. With its *"modest" understanding of jurisprudence* and its *political understanding of law*, the Pure Theory of Law does not promise to establish any "order", as this is

[9] On the endogenous dynamic see Lepsius 2016, 12; Lepsius 2017, 157.

a genuinely political task. However, it "frees" jurisprudence of ideology (Chiassoni 2012, 240, 248) and the people from absolute legal obedience (Millard 2006, 727).

Kelsen's jurisprudential understanding thus leaves room for political or moral criticism of the law – admittedly not as jurisprudential findings, but rather as political or moral opinions (Kelsen 2017, 159). Therefore, the Pure Theory of Law, especially in its realistic reading, represents "a theory of resources for the political practice of law" (Millard 2006, 733, translated by author). This is contrary to the usual accusation that legal positivism requires and justifies blind obedience to the law (Hinghofer-Szalkay 2018, 365).

6. RELATIVISM AND AUTONOMY AS "IDEALS" OF THE PURE THEORY OF LAW

Kelsen accused (Platonic) idealism of confusing knowledge with will, which obscures the pure intellect. The idea that science necessarily leads to justice (or to other ideals), or that knowledge should serve action, legitimizes absolutist claims and ultimately religiously obscured mysticism (Kelsen 1933a, 115). Science can never claim to answer the "ultimate questions" of life. Kelsen therefore emphasized

"[t]hat rational science can never give a positive answer to the question of the nature of justice. [...] There is no such thing as absolute justice, it cannot be conceptually determined. This ideal is an illusion." (Kelsen 1933a, 117, translated by author)

In his work on Platonic justice, Kelsen wrote: "there are only interests, conflicts of interest and their solution through struggle or compromise" (Kelsen 1933a, 117, translated by author). In a pluralist society, the conflicts cannot be resolved scientifically – in the sense of recognizing the only "correct" answer.

The mixing of politics and science therefore not only misconstrues scientific research, but it also endangers democratic politics, which presupposes a value relativism. Both democracy and science require a method that allows different positions. Therefore, in his scientific as well as his legal and democratic theories, Kelsen concentrated on the method (instead of the content); his method does not promise eternity and correctness but rather "only" a limited description (instead of a normative determination) in jurisprudence (Kelsen 2017, 144, 205), "only" peace by law (Kelsen 1933b, 70), and "only" compromise in politics (Kelsen 2006a,

196). The scepticism towards definitive answers explains the links between Kelsen's ideas of science, democracy and legal concepts. Just like in science, there can be no absolute justice or rightness in democracy, and no single "correct" legal solution exists in the law.

Compromise presupposes the acceptance of the nescience about justice and truth. The eternal search for ideals would only deepen conflicts between people or pave the way for absolutist politics: "Belief in the absolute, in absolute truths and absolute values, inevitably leads to political absolutism, to autocracy" (Kelsen 2006b, 242). Democracy is therefore the method (Kelsen 2006a, 223) that allows and protects different opinions – on the one hand, through the constant changeability (i.e., temporality) of power relations (Lepsius 2013b, 175), and on the other hand, through protection of the respective minority, which can always become majority (Kelsen 2006a, 193).

However, the descriptive understanding of jurisprudence and law is not entirely free of ideology. It is also based on an ideological and political "meta-jurisprudence" (as a worldview). The freedom of values and the autonomy of the individual represent political ideals to which Kelsen feels obligated (Bobbio 2014, 50; Carrino 1987, 107, 130).

The democratic (i.e., relativistic) method presupposes – similar to science – the criticism of one's own opinion and tolerance towards other ones: "Anyone who considers absolute truth and absolute values to be inaccessible for human knowledge must not only consider their own opinion, but also someone else's contrary opinion to be at least possible" (Kelsen 2006a, 226, translated by author). Kelsen considered the prerequisite to be a certain human character – the democratic type – that is not only altruistic (Kelsen 2013a, 123) but also recognizes the "Other" in itself:

"The kind of personality that recognizes itself in the Other, he does not perceive the Other a priori as something alien, not as an enemy, but as the same and therefore as a friend; it does not perceive its ego as something unique, absolutely incomparable and unrepeatable. [...] It is the type of the relatively diminished sense of self, the type of the sympathetic, peace-loving, nonaggressive person; the person whose primary aggression instinct is not so much turned outwardly but inwardly, and it expresses a tendency towards self-criticism and an increased disposition for a feeling of guilt and a sense of responsibility." (Kelsen 1967b, 45, translated by author)

Kelsen's "idealism" not only presupposes relativism (self-criticism), it also demands individual autonomy and responsibility: if the value decisions are not prescribed but autonomous, it is up to the individual to make decisions, which they were previously handed down by religion and other idealistic

philosophies. As Kelsen wrote in 1960: "All those who do not accept this responsibility, who wish to leave the choice on God, nature or reason, feel abandoned by relativism" (Kelsen 2017b, 751, translated by author). While the theological (and then the philosophical) *total* justification of law was already being questioned in the (early) modern era, Kelsen also deconstructed the absolute power of jurisprudence over the meaning of law. He relegated jurisprudence to the role of pure description. The law is never eternally absolute in a democratic-relativistic society, it can be changed through democratic compromises.

Of course, Kelsen was well aware that altruism, tolerance, self-criticism and rational thinking – as prerequisites for neutral science and pluralistic democracy – are ideals rather than realities:

"Because for most people, perhaps for all of humanity, the solution to a problem does not necessarily lie in a term, not in a word, in the answer to a question of reason. That is why humankind will probably never be satisfied with the answer of the Sophists, but will always – be it through blood and tears – seek the path that Plato walked: the path of religion." (Kelsen 1933a, 117, translated by author)

The contrast between relativism (as ideal) and the antagonisms and absolutist claims (as reality) shows that Kelsen's "value-free" conceptions do not come entirely without normativity (Festl 2019, 323). However, his "relativistic idealism" does not lead to the suppression of other ideals; Kelsen's "idealism" merely expresses the expectation of also recognizing other ideals.

7. CONCLUSION

What are the consequences of Kelsen's understanding of jurisprudence and law for democracy? The law is located at the intersection of science and politics: it arises in a political process, but science can describe it. If jurisprudence is confused by a political conviction, i.e., if jurisprudence conveys an ideology, it does not only affect knowledge but it is also contrary to democratic purpose. That is why Kelsen emphasized that democracy does not mean an absolute content but a relativistic method in which different ideals and goals remain possible: "Democracy is [...] a discussion. That is precisely why the result of the process [...] is a compromise" (Kelsen 2006b, 241). Accordingly, it is not the goal of jurisprudence to relieve people of the burden of decision-making – as if science could justify and enforce values.

If both science and democracy are understood as methods, jurisprudence and democracy can be combined: jurisprudence conveys different opinions about the law – and at the same time it creates the basis for a society in which legal policy entails discussion and compromise.

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