Wahlfach: Politische Philosophie und Philosophie des Rechts
Optional Course: Political and Legal Philosophy
(Einheit 3+5/Lesson 3+5: Foundations of Contemorary Legal Positivism: Kelsen & Hart)

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Erreichbarkeit / contact:

Mag. Jürgen Busch LL.M. D.E.A.
University of Vienna, Department for Legal and Constitutional History
Schottenbastei 10-16, A 1010 Wien
E-Mail: juergen.busch@univie.ac.at
Tel: +43/1/4277-34564 (office)

Weiterführende Literaturhinweise SoSe 2008 / Useful Sources and Materials Spring 08

Roger Cotterrell, The Politics of Jurisprudence. A Critical Introduction to Legal Philosophy[2], Philadelphia 2003
Michael D. A. Freeman, Lloyd's Introduction to Jurisprudence, 7th ed. London 2001
Peter Koller, Theorie des Rechts. Eine Einführung[2], Wien 1997

Main writings of Kelsen & Hart

Hans Kelsen (1881–1973): Hauptprobleme der Staatsrechtlehre (1911), Vom Wesen und Wert der Demokratie (1920)/engl. On the Essence and Value of Democracy (1929), Allgemeine Staatslehre (1925), Reine Rechtlehre/Pure Theory of Law (1st ed 1934, 2nd ed. 1960), General Theory of Law and State (1945), Allgemeine Theorie der Normen (posthumous 1979)

H. L. A. Hart (1907–1992): The Concept of Law (1961)

Internet-Links on Kelsen & Hart

Deutsch: http://de.wikipedia.org/wiki/Kelsen
http://www.univie.ac.at/staatsrecht-kelsen/index.htm
http://de.wikipedia.org/wiki/H.L.A._Hart
http://www.hanskelsen.eu

English: http://en.wikipedia.org/wiki/Hans_Kelsen
http://plato.stanford.edu/entries/lawphil-theory/
http://en.wikipedia.org/wiki/H._L._A._Hart
http://en.wikipedia.org/wiki/The_Concept_of_Law
http://plato.stanford.edu/entries/legal-positivism/
http://www.hanskelsen.eu

Text Examples

Kelsen: "The Pure Theory of Law" (1934)

I.

The Pure Theory of Law is a theory of positive law. As a theory it is exclusively concerned with the accurate definition of its subject-matter. It endeavours to answer the question, What is the law? but not the question, What ought it to be? It is a science and not a politics of law.

That all this is described as a "pure" theory of law means that it is concerned solely with that part of knowledge which deals with law, excluding from such knowledge everything which does not strictly belong to the subject-matter law. That is, it endeavours to free the science of law from all foreign elements. This is its fundamental methodological principle. It would seem a self-evident one. Yet a glance at the traditional science of law in its nineteenth and twentieth century developments shows plainly how far removed from the requirement of purity that science was. Jurisprudence, in a wholly uncritical fashion, was mixed up with psychology and biology, with ethics and theology. There is to-day hardly a single social science into whose province jurisprudence feels itself unfitted to enter, even thinking, indeed, to enhance its scientific status by such conjunction with other disciplines. The real science of law, of course, is lost in such a process.

The Pure Theory of Law seeks to define clearly its objects of knowledge in these two directions in which its autonomy has been most endangered by the prevailing syncretism of methods. Law is a social phenomenon. Society, however, is something wholly different from nature, since an entirely different association of elements. If legal science is not to disappear into natural science, then law must be distinguished in the plainest possible manner from nature. The difficulty about such a distinction is that law, or what is generally called law, belongs with at least a part of its being to nature and seems to have a thoroughly natural existence. If, for instance, we analyse any condition of things such as is called law—a parliamentary ruling, a judicial sentence, a legal process, a delict—we can distinguish two elements. The one is a sensible act in time and place, an external process, generally a human behavior; the other is a significance attached to or immanent in this act or process, a specific meaning. People meet together in a hall, make speeches, some rise from their seats, others remain seated; that is the external process. Its meaning: that a law has been passed. A man, clothed in a gown, speaks certain words from an elevated position to a person standing in front of him. This external process means a judicial sentence. One merchant writes to another a fetter with a certain content; the other sends a return fetter. This means that have concluded a contract. Someone, by some action or other, brings about the death of another. This means, legal, murder …

These external circumstances, since they are sensible, temporospatial events, are in every case a piece of nature and as such causally determined. But as elements of the system nature, they are not objects of specifically juristic knowledge, are, indeed, not legal matter at all. That which makes the process into a legal (or illegal) act is not is factuality, not its natural, causal existence, but the objective significance which is bound up with it, its meaning. Its characteristically legal meaning it receives from a norm whose content refers to it. The norm functions as a schema of meaning. It itself is born of a legal act which in its turn receives its meaning from another norm. That a certain condition of fact is the execution of a death sentence and not a murder, this quality, which is not perceptible to the senses, is arrived at only by a mental process: by confronting the act with the penal statute book and penal administration. That the abovementioned correspondence meant the conclusion of a contract resulted solely from the fact that this circumstance fell under certain rulings in the civil statute book. That an assembly of persons is a parliament and that the result of their activities is a law is only to say that the whole condition of fact corresponds to definite prescriptions in the constitution. That is to say, the content of some factual occurrence coincides with the content of some norm which is presupposed as valid …

In defining the law as norm, and in restricting legal science (whose function is different from that of the legislative and executive organs) to knowledge of norms, we at the same time delimit law from nature and the science of law, as a normative science, from all other sciences which aim at explaining causal, natural processes. In particular, we delimit it from one science which sets itself the task of examining the causes and effects of these natural processes which, receiving their designation from legal norms, appear as legal acts. If such a study be called sociology, or sociology of law, we shall make no objection. Neither shall we say anything here of its value or its prospects. This only is certain, that such legal-sociological knowledge has nothing to do with the norms of the law as specific contents. It deals only with certain processes without reference to their relation to any valid or assumed norms. It relates the circumstances to be examined not to valid norms but to other circumstances, as causes to effects. It inquires by what causes a legislator is determined in constituting these and not other norms, and what effects his ordinances have had. It inquires in what way economic facts and religious views actually influence the activities of the Courts, and for what motives men make their behavior conform to the law or not. For such an inquiry law is only a natural reality, a fact in the consciousness of those who make, or of those subject to, the norms. The law itself, therefore, it not properly the subject of this study, but certain parallel processes in nature. In the same way the physiologist, examining the physical or chemical processes which condition or which accompany certain emotions, does not comprehend the emotions themselves. The emotions are not comprehensible in chemical or physiological terms. The Pure Theory of Law, as a specific science of law, considers legal norms not as natural realities, not as facts in consciousness, but as meaning-contents. And it considers facts only as the content of legal norms, that is, only as determined by the norms. Its problem is to discover the specific principles of a sphere of meaning.

…What is here chiefly important is to liberate law from that association which has traditionally been made for it—its association with morals. This is not of course to question the requirement that law ought to be moral, that is, good. That requirement is self-evident. What is questioned is simply the view that law, as such, is a part of morals and that therefore every law, as law, is in some sense and in some measure moral …

II.

To free the theory of law from this element is the endeavour of the Pure Theory of Law. The Pure Theory of Law separates the concept of the legal completely from that of the moral norm and establishes the law as a specific system independent even of the moral law. It does this not, as is generally the case with the traditional theory, by defining the legal norm, like the moral norm, as an imperative, but as an hypothetical judgment expressing a specific relationship between a conditioning circumstance and a conditioned consequence. The legal norm becomes the legal maxim—the fundamental form of the statute law. Just as natural law links a certain circumstance to another as cause to effect, so the legal rule links the legal condition to the legal consequence. In the one case the connecting principle is causality: in the other it is imputation. The Pure Theory of Law regards this principle as the special and peculiar principle of law. Its expression is the Ought. The expression of the causality principle is Necessity. The law of nature runs: If A is, then B must be. The legal rule says: If A is, then B ought to be. And thereby it says nothing as to the value, the moral or political value of the relationship. The Ought remains a pure a priori category for the comprehension of the empirical legal material. In this respect it is indispensable if we are to grasp at all the specific fashion in which positive law connects circumstances with one another. For it is evident that this connexion is not that of cause and effect. Punishment does not follow upon a delict as effect upon a cause. The legislator relates the two circumstances in a fashion wholly different from causality. Wholly different, yet a connexion as unshakeable as causality. For in the legal system the punishment follows always and invariably on the delict even when in fact, for some reason or other, it fails of execution. Even though it does not so fail, it still does not stand to the delict in the relation of effect to cause. When we say: If there is tort, then the consequence of tort (punishment) shall (i.e. ought to) follow, this Ought, the category of law, indicates only the specific sense in which the legal condition and the legal consequence are held together in the legal rule. The category has a purely formal character. Thereby it distinguishes itself in principle from any transcendental notion of law. It is applicable no matter what the content of the circumstances which it links together, no matter what the character of the acts to which it gives the name of law. No social reality can be refused incorporation in this legal category on account of its contentual structure…

IV.

The law, or the legal order, is a system of legal norms. The first question we have to answer, therefore, is this: What constitutes the unity in diversity of legal norms? Why does a particular legal norm belong to a particular legal order? A multiplicity of norms constitutes a unity, a system, an order, when validity can be traced back to its final source in a single norm. This basic norm constitutes the unity in diversity of all the norms which make up the system. That a norm belongs to a particular order is only to be determined by tracing back its validity to the basic norm constituting the order. According to the nature of the basic norm, i. e. the sovereign principle of validity, we may distinguish two different kinds or orders, or normative systems. In the first such system the norms are valid by virtue of their content which has a directly evident quality compelling recognition. This contentual quality the norms receive by descent from a basic norm to whose content their content is related as particular to universal. The norms of morals are of this character. Thus the norms: Thou shalt not lie, Thou shalt not deceive, Thou shalt keep thy promise, etc. derive from a basic norm of honesty. From the basic norm: Thou shalt love thy fellow-men, we can derive the norms: Thou shalt not injure thy fellow, Thou shalt accompany him in adversity, etc. The question as to what, in a particular system of morals, is the basic norm, is not here under consideration. What is important is to recognize that the many norms of a moral system are already contained in its basic norm, exactly as particulars in a universal, and that all the individual norms can be derived from the basic norm by an Operation of thought, namely, by deduction from universal to particular.

With legal norms the case is different. These are not valid by virtue of their content. Any content whatsoever can be legal; there is no human behavior which could not function as the content of a legal norm. A norm becomes a legal norm only because it has been constituted in a particular fashion, born of a definite procedure and a definite rule. Law is valid only as positive law, that is, statute (constituted) law. Therefore the basic norm of law can only be the fundamental rule, according to which the legal norms are to be produced; it is the fundamental condition of law-making. The individual norms of the legal system are not to be derived from the basic norm by a process of logical deduction. They must be constituted by an act of will, not deduced by an act of thought. If we trace back a single legal norm to its source in the basic norm, we do so by showing that the procedure by which it was set up conformed to the requirements of the basic norm. Thus, if we ask why a particular act of compulsion—the fact, for instance, that one man has deprived another of his freedom by imprisoning him—is an act of law and belongs to a particular legal order, the answer is, that this act was prescribed by a certain individual norm, a judicial decision. If we ask, further, why this individual norm is valid, the answer is, that it was constituted according to the penal statute book. If we inquire as to the validity of the penal statute book, we are confronted by the State's constitution, which has prescribed rules and procedure for the creation of the penal statute book by a competent authority. If, further, we ask as to the validity of the constitution, on which repose all the laws and acts which they have sanctioned, we come probably to a still older constitution and finally to an historically original one, set up by some single usurper or by some kind of corporate body. It is the fundamental presupposition of our recognition of the legal order founded on this constitution that that which the original authors declared to be their will should be regarded as valid norm.

Compulsion is to be exercised according to the method and conditions prescribed by the first constitutional authority, or its delegated power. This is the schematic formulation of the basic norm of a legal order …

(a) This analysis of the function of the basic norm brings to light also a special peculiarity of the law—the law regulates its own growth and its own making. The unity of the legal order is a law-making unity. The law is not a system of equal, side-by-side norms: it is a hierarchy with different layers. Its formal pattern is roughly the following.

At the highest point of the individual State's legal order is the constitution—in the material sense—the essential function of which is to determine the Organs and procedure for the setting up of general law, to determine legislation. The next stage consists of the general norms, set up by legislation, whose function, in turn, is to determine not only the organs and procedure (Courts and administrative tribunals) for the individual norms, but also the content of the latter. The general norm, which links an abstract condition of fact to an equally abstract consequence, if it is to have any meaning, needs to be individualized. It must be known definitely whether there is present in concreto a condition of fact which the general norm in abstracto regulates, and for this concrete case a concrete act of compulsion must be prescribed and carried out—this also according to the abstract general norm. The agent in this is the judicial decision, the judicial power. The judicial power is by no means of a purely declaratory nature, such as the terms "laying down" and "ascertaining" the law suggest, as if in the statute, that is, the general norm, the law were already prepared and complete, simply waiting for the Courts to find it. The function of laying down the law is a properly constitutive one, it is a making of law in the real sense of the word. The relationship between the concrete condition of fact (and the discovery of its correspondence with the abstract condition) and the concrete legal consequence is specifically set up by the judicial decision. Just as at the general stage condition and consequence are joined by the statute, so at the individual stage they are joined by the judicial decision. The judicial decision is itself an individual legal norm. It is the individualization or concretization of the general, abstract norm, the individual stage of the law-making process. This conclusion is hidden only from those who see in the general norm the repository of all law, wrongly identifying law with statute.