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A CRITICAL ANALYSIS
OF HANS Kelsen'S PURE THEORY OF LAW
FROM THE POINT OF VIEW OF ARISTOTELIAN-SCHOLASTICISM

By

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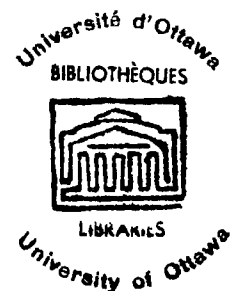
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INTRODUCTION

Life and Works

Professor Kelsen was born in 1881, in Prague. He was legal adviser to the last Emperor of Austria and creator of the Austrian Constitution in 1920 which, except for the intervening period of the Nazi regime, continues to remain in effect. At present he is Professor Emeritus at the University of California at Berkeley.

While Professor Kelsen has written more than forty works on law and legal philosophy, he is best known for his Pure Theory of Law. He has been the Dean of the Law Faculty of the University of Vienna and has also taught at the University of Cologne, the Institute of International Studies in Geneva, the University of Prague; in the United States at Harvard, Wellesley College, the University of California, and the Naval War College.

Purpose and Method of Research

It is the thought of Hans Kelsen with which this researcher has been concerned. The accomplishments of Professor Kelsen presuppose that he has, as is natural, a considerable legal and political background. But more than these, there is the presupposition of a theoretical, that is to say, a philosophical background upon which all of his

accomplishments rest. Hans Kelsen is at pains throughout his works not to hide his philosophical convictions. The examination of Professor Kelsen's philosophical convictions which lead up to his Pure Theory of Law are the heart and core of this research.

Because the research centers on Professor Kelsen's philosophical convictions, the purpose and aim of the thesis is to discover his own philosophy, why he holds it, and how his views differ from the Aristotelian-Scholastic position. When pointing out these differences, our aim is not to condemn Kelsen's thought as false, but to discover what parallel there might be between his thought and the Aristotelian-Scholastics.

It is interesting to note that in the history of thought, schools view one another from their own perspective. This is true of Kelsen with respect to the Aristotelian-Scholastics. One might expect the Aristotelian-Scholastics to do the same thing. Whether this is borne out by the facts will appear in the course of the development of our research.

As to the method followed in this research, the word research most often means to look into, to analyze, to discover. This research has been carried through by looking into, analyzing, and discovering the philosophy of Hans Kelsen, why he holds that philosophy and differs from the Aristotelian-Scholastics in his Pure Theory of Law.

The major works of Hans Kelsen with which this researcher has been concerned are those which express as clearly as possible his definitive position. There are three such books: The General Theory of Law and State, What is Justice, and The Pure Theory of Law. The second of these books is, in part, made up of various articles which Professor Kelsen has written over the years. The remaining chapters of What is Justice were written especially for the book. Those chapters, which represent previous

articles, were researched to discover if there was any significant change in Professor Kelsen's thought between the time of their publication as articles and their inclusion in the book: What is Justice. The modifications which appeared in the book, upon examination, ultimately meant the same thing as and were more technically expressed in the articles in some instances. Consequently, both the book and the original articles are of importance.

In the beginning of this introduction, we stated that Professor Kelsen had written over forty works. Not all of these works were of equal importance relative to this research. For this research is not centered around tracing the historical and evolutionary development of Professor Kelsen's thought but rather centers around a critical analysis, from the point of view of Aristotelian-Scholasticism of the definitive position of Professor Kelsen, the fruit of which is his Pure Theory of Law.

Chapter 1

WHAT KELSEN UNDERSTANDS BY THE NATURAL LAW

In Kelsen's view, the natural law theory is based upon a metaphysics which is essentially dualistic. The phenomena of nature manifested in the here and now, and known to both sense and reason, are but an imperfect copy of the beyond and the unknown. Consequently, the phenomena of the here and now must conform to the beyond.¹ All nature, owes obedience to the beyond, hence: the Natural Law. However, the beyond, as such, is unknown to either sense experience or to reason. And so the beyond tends to be understood in three general ways: as a world of ideas,² as archtypes³ for the here and now, or as a Supernatural Being.⁴

This metaphysical duality enables Kelsen to consider all metaphysical principles as falling under the Platonic view, for the beyond serves as the exemplar of the here and now.⁵

¹Hans Kelsen, The General Theory of Law and State, Cambridge, Harvard, U. P., 1946, p. 419.

²Ibid., p. 423.

³Ibid., p. 427.

⁴Ibid., p. 428.

⁵Ibid., p. 12.

God

Because the beyond is an essential part of this metaphysical duality, Kelsen insists that "If the natural law doctrine is consistent, it must assume a religious character."⁶ The reason for such an assertion, Kelsen explains this way:

It can deduce from nature just rules of human behavior only because and in so far as nature is conceived of as a revelation of God's Will, so that examining nature amounts to exploring God's Will.⁷

Kelsen's opinion is that no natural law doctrine can omit a religious character and survive. In defense of this stand, Kelsen writes:

Only thus can it be assumed that the Law deduced from nature is an eternal and an immutable law in contradistinction to Positive Law which, created by man, is only a temporary and changeable order; that the rights established by the Natural Law are sacred rights inborn in man because they are implanted in man by a Divine Nature; and that Positive Law can neither establish nor abolish these rights but only protect them.⁸

One might point out at this juncture, that the above quote not only substantiates Kelsen's opinion concerning the necessity of a God as the ultimate source of the Natural Law, but also indicates the static element of the Natural Law. What Kelsen implies is that on the one hand there is the Natural Law which is ever the same because its norms, issued by God, are ever the same. On the other hand, there is a positive law which is related to this natural law. This positive law is nothing more than the deduced applications of the Natural Law. Since

⁶Hans Kelsen, What is Justice, Berkeley, University of California Press, 1960, p. 138.

⁷Ibid.

⁸Ibid.

Positive Law adds nothing to the Natural Law, nor can it function on its own, Positive Law when subsumed under the Natural Law is also static.

Kelsen writes:

Static and dynamic systems may be distinguished by the method of "derivation" prevailing in them. The norms of an order may be directly or indirectly "derived" from its basic norm and thus obtain their validity. In the former case, the basic norm unfolds itself into norms of varying content, just as a general concept issues special concepts which are subsumed under it. The basic norm of truth, or truthfulness yields the norms: "you shall not defraud," "you shall keep your promise," etc. All these norms follow from the basic norm without requiring a special act of norm making, an act of the human will. They are all contained in the basic norm from the outset and are derivable from it by a mere intellectual operation. A dynamic system is different. Its basic norm merely empowers a specific human will to create norms. "Obey your parents" is such a basic norm. No mere intellectual operation can derive a single special norm from it. A parental order with a specific content is needed (for instance: "go to school"), that is, a special act of norm-creation or law making. This particular norm does not have "validity" simply because its content is consistent with the basic norm, as a special thing is related to a general one, but only because the act of its creation is in keeping with the rule enunciated by the basic norm, because it was made as the basic norm prescribed. The authority which has received its power from the basic norm can, in turn, delegate its jurisdiction either for the whole or for a part of its sphere. Thus parents may delegate a teacher for the education of their children, and this delegation may continue further down the line. The unity of the dynamic system is the unity of a system of delegation.

It follows that natural law ideally tends to be a static system of norms even though the question remains, whether that is possible in view of man's inadequate qualities of will and intellect. It is also evident from the preceding discussion that positive law, whose basic norm consists in the delegation of a law making authority, constitutes a dynamic system. "Positivity" actually consists in this dynamic principle. The whole contrast between natural and positive law may, in a certain sense, be presented as the contrast between a static and a dynamic system of norms. To the extent that natural law theory ceases to develop its natural order according to a static principle and substitutes a dynamic one, that is, as it is impelled to introduce the principle of delegation because it has to realize itself in application to actual human conditions, it imperceptibly changes into positive law.⁹

⁹Kelsen, General Theory of Law and State, pp. 399-400.

As for the determining factors which enter into the Natural Law, Kelsen reduces them to three: God, nature, and man.

On the part of God, He creates and prescribes through his Will. From this creation, a definite prescribed behavior can be deduced.¹⁰ This prescribed behavior is called the Natural Law. In Kelsen's opinion this means that the Divine Will inheres in nature.¹¹ Whether or not this inherence is pantheistic or not is of little moment to Kelsen. What he is saying is this:

The Will of God is identical with nature in so far as nature is conceived of as created by God and the laws of nature as expressions of God's Will.¹²

As a result of the above, the force of the laws, found as determining factors within and concerning nature, has the same character as the laws enacted by a legislation. They are commands to be obeyed. It follows, then that

Some sort of definite regulation of human behavior proceeds from nature, that is from the nature of things or the nature of man, from human reason or the Will of God.¹³

Nature

On the part of nature, values are immanent in nature. To the degree that values exist in extramental reality, to that degree is the object justified. Values reflect that other world of transcendent values, for the immediately given object must appear as a copy or a reproduction of the Absolute object. Kelsen writes:

¹⁰Ibid., pp. 325-6.

¹¹Hans Kelsen, "The Natural Law Doctrine Before the Tribunal of Justice," The Western Political Quarterly, December, 1949, p. 485.

¹²Kelsen, The General Theory of Law and State, p. 8.

¹³Ibid.

The strange phenomenon of the duplication of objects is not only found in the process of knowing, in the narrower sense of knowing nature or reality, but also in the intellectual function or "valuation," which may be considered as the cognition of values or norms, so far as it is expressed in "ought" statements. The cognition of values, as distinguished from the cognition of reality, is not concerned with explanation, but with justification. Also in this sphere it can be seen how the inquiry into the "why" (that is, here, the ground of any value expressible in an "ought") penetrates beyond that which is somehow given and attainable within the rational realm, analogous to that of natural experience, into a world of transcendent values. The immediately knowable empirical value must be represented as the emanation of that world of transcendent values in order to be value at all. There is a clear tendency, here again, to value an object, to justify some content by adding, so to speak, to the immediate object of the value judgement a second object which is in a sense behind and above it. The immediately given object must appear as the latter's copy or reproduction, so that it may be interpreted as valuable and seem justified. The positive morality, for instance, which is valid in any social community and specifically shaped according to time and place, is represented as the emanation of an eternal and divine law. Similarly in the doctrine of natural law, a natural order of human conduct arises behind the positive law of the State. The metaphysical philosophy of nature is particularly intent upon depicting the world of experience as but an inaccurate repetition of a transcendent reality and by means of its specific theory, it merely allows human cognition to reflect and not to create this empirical world. The natural law philosophy characterized above maintains the same idea when it insists that, contrary to appearances, positive law is not the free creation of a human legislator and judge, but a mere reproduction of a natural law beyond this positive law, an inadequate copy of a "law in itself," and that, for this reason, positive law has validity and value.¹⁴

Because of this relationship the object found in nature is both valuable and justified.

Among other principles which are found in nature and directly influence the natural law doctrine are the principles of causality and teleology. Causality is understood to be following norms in nature.¹⁵

¹⁴Ibid., p. 420.

¹⁵Kelsen, "The Natural Law Doctrine Before the Tribunal of Justice," p. 481.

Furthermore, nature manifests tendencies. All of these principles would, according to Kelsen, indicate that nature itself follows norms.¹⁶ And because nature follows norms, nature follows the commands of God, and therefore owes obedience to God. Upon this basis, Kelsen insists that one must conclude that all nature is involved in morality.

As long as the idea of a transcendental authority endowed with reason and will subsists there can be no difference between the connection of wrong and punishment or merit and reward on the one hand, and cause and effect on the other. For in each case, this connection must be effected by the will of the authority. Thus one cannot differentiate between the law of morality and the law of nature as long as both are considered to be the will of a deity. As long as there is a belief in the existence of a transcendental authority ruling over human society as well as nature, the will of this authority is the objective tie which holds cause and effect together, even though the human mind may separate the law of causality from the principle of retribution.¹⁷

Man

On the part of man, a law can be deduced from nature, and this law is Absolute Justice.¹⁸ For the Natural Law arises out of the nature of things. Since the natural law doctrine maintains that reality and values are one, the natural law doctrine can be termed monistic. The "ought" and the "is" are involved in the same system, and hence the derivation of what "ought to be" from what "is" is a legitimate deduction. To the degree, then, that man knows this law, the natural law is based upon a deduction. In contrast to this approach, Positivism, according to Kelsen, maintains that values are subjective and

¹⁶Kelsen, The General Theory of Law and State, p. 8.

¹⁷Kelsen, What is Justice, p. 315.

¹⁸Kelsen, "The Natural Law Doctrine Before the Tribunal of Justice," p. 485.

hence no such deduction of the "ought" from the "is" is possible.¹⁹

The "Ought"

As to the word "ought" Kelsen writes: "ought simply expresses the specific sense in which human behavior is determined by a norm."²⁰ Since norms exist in nature, a definite regulation of human behavior proceeds from nature. This ordering of human behavior is different from Positive Law because Positive Law is created by man. The Natural Law is not. Moreover, the Natural Law is higher than Positive Law to the extent that it is absolutely valid and just. Positive Law is not absolute.

Justice

Kelsen considers justice within the natural law doctrine from two points of view. In the first place, Kelsen understands justice to mean a conformity to the Absolute within a metaphysics involving the duality of the here and the beyond.

If there is an absolute reality, it must coincide with absolute value. The absolute necessarily implies perfection. Absolute existence is identical with absolute authority as the source of absolute values. The personification of the creator of the universe whose will is the law of nature as well as of society, is the inevitable consequence of philosophical absolutism. Its metaphysics shows an irresistible tendency towards monotheistic religion. It is essentially connected with the view that value is immanent in reality as a creation or emanation of the absolute good, and, consequently, with the tendency to identify truth (that is conformity with reality) with justice (that is, conformity with an absolute value). Hence a judgement about what is

¹⁹Kelsen, What is Justice, p. 174.

²⁰Kelsen, General Theory of Law and State, p. 37.

just or unjust can be as objective as a judgement about what is true or false. Value judgements can claim to be valid for everybody, always and everywhere, and not only in relation to the judging subject, if they refer to values inherent in an absolute reality or are established by an absolute authority.²¹

In the second place, Kelsen lays stress on Aristotelian justice which involves happiness. "The good is happiness and happiness is virtue."²²

In this latter type of justice, Kelsen is referring to man as here and distinguishing him from his relation to the beyond.

Thus the good, the moral value, is humanized; it is presented as virtue of man. Consequently the Ethics of Aristotle aims at a system of human virtues, among which justice is the "chief of the virtues," the "perfect virtues."²³

However, both forms of justice try to distinguish between what actions are natural and moral, and what actions are unnatural and immoral. Both, according to Kelsen, claim to be immanent in reality, in nature, and can be apprehended but not created by man.²⁴ Justice amounts to the formulas contained within the Natural Law. These formulas deal with man's inborn rights and obligations as deduced from the essence of man. Some of the formulas stemming from the natural law theory are:

To each his own
Do good and avoid evil
The Golden Rule
Midpoint between extremes
The regulator of conflict within human relations.²⁵

It is worth noting, that this list of formulas goes a little beyond the realm of justice and enters into the realm of other virtues

²¹Hans Kelsen, "Absolutism and Relativism in Philosophy and Politics," American Political Science Review, October, 1948, p. 907.

²²Kelsen, What is Justice, p. 116.

²³Ibid., p. 117.

²⁴Kelsen, The General Theory of Law and State, p. 8.

²⁵Kelsen, What is Justice, pp. 4-18.

such as charity. On the face of it, one would think that Kelsen is being tolerantly all inclusive in his efforts to give an enumeration of the possible formulas involved in the application of justice. However, as will be seen in Kelsen's critical analysis of justice, each of these formulas will be called to task. The results will present at one and the same time a far reaching indictment against the common sense approach to the concept of justice, and a challenge to overcome what might appear to be the insurmountable problems involved in the concept of justice.

Historicity

Kelsen traces the historicity of the natural law doctrine from primitive times.²⁶ According to Kelsen, nature, among primitive peoples, had a social character. Primitive peoples interpreted nature by using the concepts involved in their own societies. In this view, nature was not understood in terms of the principle of causality. Rather, primitive man interpreted the phenomena of nature according to the same principles as determined his relations with his fellow man. These relations were social norms. Social norms, of course, involved social behavior. Social behavior in turn was thought of in terms of right and wrong behavior for which there were reward and punishment respectively.²⁷

Uppermost in the primitive view, according to Kelsen, was the punishment for the wrong deed. Kelsen emphasizes the character of the

²⁶Ibid., p. 327.

²⁷Ibid., p. 328.

principles involved in punishment when he writes:

The punishment for a wrong deed is not an effect of doing something wrong. The offender in doing something wrong does not actually produce his punishment.²⁸

What Kelsen is saying is that the punishment was a consequence conditioned by the wrong action. Kelsen formulates this basic social principle this way:

If you behave rightly, you ought to be rewarded; that is a benefit ought to be bestowed upon you; if you behave wrongly you ought to be punished; that is an evil ought to be inflicted upon you.²⁹

In nature, then, Kelsen goes on to say: "the cause is responsible for the effect."³⁰ This is not the principle of causality, but the principle of retribution.

What Kelsen is suggesting is this: in the case of primitive peoples, the rule of nature as a rule of law, a norm, was involved in retribution because there were powerful spirits who operated nature in this fashion. In this sense, the cause is responsible for the effect, for the effect is imputed to the cause.

Kelsen goes on to state that the real distinction between retribution--which is based upon a norm and this norm is based upon the will or command of a Superhuman Being--and causality, evolved by man's realization that the relations between things "are independent of a human or a Superhuman will."³¹ Furthermore, the total emancipation of the principle of causality from imputation--that causality means an

²⁸Ibid., p. 329.

²⁹Ibid., p. 328.

³⁰Ibid., p. 330.

³¹Ibid., p. 330.

absolute necessity in the relation of cause and effect--prevailed until the beginning of the twentieth century. Kelsen writes:

It is probable that the principle of causality has its origin in the norm of retribution. It is the result of a transformation of the principle of imputation by which in the norm of retribution the wrong behavior is connected with punishment, the right behavior with reward. This process of transformation began in the philosophy of nature of the ancient Greeks. It is highly characteristic that the Greek word for cause originally meant guilt; the cause is responsible for the effect. One of the first formulations of the law of causality is the famous fragment of Heraclitus: "The sun will not overstep its prescribed path; if it does, the Erinyes, the handmaids of justice, will find him out." Here the law of nature still appears almost as a rule of law: if the sun does not follow its prescribed path, it will be punished. The decisive step in this transition from a normative to a causal interpretation of nature, from imputation to causality, is that man became aware that the relations between things--in contradistinction to the relations between persons--are independent of a human or superhuman will. However, the complete purification of the principle of causality from all elements of animistic--that is personalistic--thinking, the establishment of the principle of causality as totally different from that of imputation was only gradually achieved. Thus, for instance, the idea that causality means an absolute necessity in the relation of cause and effect--an idea still prevailing at the beginning of the twentieth century--is certainly a relic of the view that it is the will of an absolute, omnipotent authority which connects the effect with the cause.³²

In regard to the principle of causality, the word "necessity" may mean two things.³³ It may mean the absolute binding of a Divine Will which holds the universe together. Or, it may mean the necessary internal connection between cause and effect. To Hume, Kelsen gives the credit of proving that between cause and effect, there is no necessary internal connection. In other words, causes do not necessarily have to produce effect. Causality, Kelsen insists is a subjective principle

³²Ibid., pp. 329-30.

³³Ibid., p. 309.

of human thinking.³⁴

Because of the confusion stemming from primitive times in regard to the principle of causality and retribution, Kelsen warns that as long as a belief in God persists in a metaphysical-religious view, the normative element cannot disappear from the principle of causality. And in this case, a real distinction between causality and retribution is impossible. Likewise, within a religious-metaphysical view of the world, the distinction between causality and imputation is impossible. Finally, because of the above two points Kelsen concludes:

one cannot differentiate between the Law of morality and the Law of nature, for both norms stem from the Will of a deity.³⁵

In other words, even though the original beliefs of primitive peoples have been refined throughout the ages, the problem of God, the involvement of both man and nature as subjected to norms--or for that matter God's Absolute commands--still exist. Because of this, the inability to distinguish between causality and retribution still exists. Lastly the belief that both man and nature owe obedience to God still exists. Kelsen's inevitable conclusion is that even today within a metaphysical-religious belief, there can be no difference between the Natural Law and the laws of nature.

Natural Law and Positive Law

In regard to Positive Law Kelsen takes the view that "...Public authority has been instituted by God"³⁶ within the natural law doctrine

³⁴Ibid., p. 317.

³⁵Ibid., p. 315.

³⁶Kelsen, General Theory of Law and State, p. 412.

and hence: the attempt is made to found Positive Law on a Natural Law delegation.³⁷ Consequently, Positive Law within this attempt may be viewed as:

...A system of valid norms, as a legal order with normative validity, which exists side by side with a similarly understood Natural Law.³⁸

As a result, both the natural and positive laws are given as simultaneously valid orders. However, such a relationship presupposes the unity of a system of norms comprising both. Within the hierarchy of laws, the institutions of Positive Law, e.g., magistracy, private property, etc., are made legitimate through the higher order of the Natural Law. But in this view, according to Kelsen, Positive Law can be reduced to an emanation of the Natural Law. Within such a reduction, Kelsen states:

The making of statutes or of decisions does not freely create, it merely reproduces the true law which is already somehow in existence, and so whenever Positive Law (the copy) contradicts the Natural Law (the model or archetype), it cannot have any validity.³⁹

Kelsen carries out the full implication of this statement in regard to the State by taking the tack that because Positive Law is justified by the Natural Law, Positive Law becomes Absolute. Now if Positive Law is Absolute, then so is the legal organ which promulgates it. In this sense, the State is Absolute.⁴⁰

³⁷Ibid.

³⁸Ibid., p. 415.

³⁹Ibid., p. 416.

⁴⁰Ibid., p. 417.

Absolutism

The State, therefore is an independently existing entity apart from its subjects and to which its subjects are bound. This means, of course, that the subjects are not free. The political aspect of this form of Absolutism implies a lack of equality, for there is an essential difference between the ruler and the ruled.⁴¹ In Kelsen's view, there is, in fact, neither freedom nor equality. For the absolutist, international law is impossible because each State is absolute and subject to none other. "Such a state," Kelsen says, "tends to subsume International Law under its own Absolutism."⁴²

As two examples of the Absolutist's approach, Kelsen cites Aristotle who favored the kingdom over democracy; and St. Thomas Aquinas who, "in the Middle Ages, as his writings show, preferred the monarch over democracy."⁴³

⁴¹Kelsen, "Absolutism and Relativism in Philosophy and Politics," American Political Science Review, October, 1948, p. 908.

⁴²Ibid., p. 909.

⁴³Ibid., pp. 911-12.

Chapter II

KELSEN'S CRITICISM OF THE NATURAL LAW DOCTRINE

The inter-relationship of the arguments against the Natural Law which are to follow represent an attempt to trace the relationship of dependency of Kelsen's arguments as found interspersed throughout his works and to present them in one unit. The following series of arguments represents this unit.

The Reality of Norms

The backbone of Kelsen's arguments against the Natural Law begins with his understanding of the term "norm" as found in his description of the natural law theory. And so Kelsen argues this way: if norms exist in reality, then there is no real distinction between causality and retribution.

As long as the idea of a transcendental authority endowed with reason and will subsists there can be no difference between the connection of wrong and punishment or merit and reward on the one hand, and cause and effect on the other. For in each case, this connection must be effected by the will of the authority. Thus one cannot differentiate between the law of morality and the law of nature as long as both are considered to be the will of a deity. As long as there is a belief in the existence of a transcendental authority ruling over human society as well as nature, the will of this authority is the objective tie which

holds cause and effect together, even though the human mind may separate the law of causality from the principle of retribution.¹

But there is a distinction between causality and retribution, for retribution involves imputation and causality does not. Therefore, norms do exist in reality. "...a norm is no statement of reality...."²

Kelsen underlines the importance of the distinction between causality and retribution by giving what he understands as the essential difference between the two terms. Aside from the "ought" and "is" verbage involved in imputation and causality respectively, causality is a principle involving an infinite number of causes and effects. Imputation, on the other hand, is a principle which is finite. That to which something is imputed is the end point of imputation. One imputation does not "breed" another imputation.

The line of imputation has not, as the line of causality, an infinite number of links, but only two links. If we say that a definite consequence is imputed to a definite condition, for instance, a reward to merit, or a punishment to a delict, the condition, that is to say the human behavior which constitutes the merit or delict, is the end point of the imputation. But there is no such thing as an end point of causality. The assumption of a first cause, a prima cause, which is the analogon to the end point of imputation, is incompatible with the idea of causality, at least with the idea of causality implied in the laws of classical physics. The idea of a first cause, too, is a relic of that stage of thinking in which the principle of causality was not yet emancipated from that of imputation.³

Moreover, the connection between cause and effect is independent of a human or a superhuman act. The connection between condition and consequence in imputation, however, is dependent upon a human or a

¹Kelsen, What is Justice, pp. 315-6.

²Kelsen, General Theory of Law and State, p. 46.

³Kelsen, What is Justice, pp. 332-3.

superhuman act.⁴

The Reality of Values

If values exist in reality, then norms must exist in reality. However, as has been shown--according to Kelsen's arguments--norms do not exist in reality. Therefore, values do not exist in reality, for values hinge on norms.

Without presupposing a general norm prescribing (or forbidding) something, we cannot make a value judgment in the objective sense of this term. The value attributed to an object is not given with the properties of this object without reference to a presupposed norm. The value is not inherent in the object judged as valuable, it is the relation of this object to a presupposed norm. We cannot find the value of a real thing or of actual behavior by analyzing these objects. Value is not immanent in natural reality. Hence value cannot be deduced from reality. It does not follow that from the fact that something is, that it ought to be or to be done, or that it ought not to be or not to be done.⁵

If values do not exist in reality, then tendencies meaning "to require something" do not exist in reality.

However, the dynamic theory of natural law cannot dispense with the term "tendency," which is its very cornerstone, and as such means much more than a normal and hence predictable change. The "tendencies," from the alleged observation of which this natural law doctrine derives its basic concepts, "require" something...It requires its realization which means "completion," and existential completion is "good." The view that a tendency, that is--from the point of view of an objective science of nature--a predictable change of an observed phenomenon, "requires" its realization or completion amounts to the view that a cause requires its effect. This is...a typical teleological or normative interpretation of nature.⁶

⁴Ibid.

⁵Ibid., p. 140.

⁶Ibid., p. 76.

The Reality of Tendencies

If neither values nor tendencies exist in reality, then the deduction of the "ought" from the "is" is impossible. But, as has been shown, neither values nor tendencies exist in reality. Therefore, the deduction of the "ought" from the "is" is impossible.

Nature as a system of facts, connected with one another according to the law of causality, has no will and hence cannot prescribe a definite behavior of man. From facts, that is to say, from that which is, or actually is done, no inference is possible to that which ought to be or ought to be done. So far as the natural law doctrine tries to deduce from nature norms of human behavior, it is based on a logical fallacy.

The same holds true with respect to human reason. Norms prescribing human behavior can emanate only from human will, not from human reason; hence the statement that man ought to behave in a certain way can be reached by human reason only under the condition that by human will a norm has been established prescribing this behavior; human reason can understand and describe such behavior but cannot prescribe it. To detect norms of human behavior in human reason is the same illusion as to deduce them from nature.⁷

If norms, values and the deduction of the "ought" from the "is" do not exist in reality, then the Natural Law does not exist in reality. Norms, though, along with values and the deduction of the "ought" from the "is" do not exist in reality. Therefore, one must conclude that the Natural Law does not exist in reality.

The natural law doctrine stands and falls with the assumption that value is immanent in reality. If it is not possible to prove that an objective analysis of reality, that is, an analysis which does not already presuppose a definite value or norm, necessarily leads to the assertion of this value or norm, the natural law doctrine has no

⁷Ibid., p. 20.

foundation.⁸

God

"If nature is supposed to be created by God, then norms immanent in nature and the natural laws are the expression of the Will of God."⁹ But there are neither norms nor a Natural Law in nature. Therefore, there is no proof to support the existence of God. It is interesting to note at this juncture that Kelsen very wisely omits direct proofs against the existence of God. However, he attempts to leave the reader with the sinking feeling that if there is anything Absolute about Absolutism it is that one's belief in God is absolutely groundless.

Kelsen then goes on to argue that if norms, values, the deduction of the "ought" from the "is" and the Natural Law do not exist in reality, then these concepts must be based on something other than sense experience and the laws of cognition. As has been shown, the items in the antecedent do not exist in reality, and so they are based on something other than sense experience and the laws of cognition.¹⁰

The Dichotomy Between Positive and Natural Law

What is based upon something other than sense experience and the laws of cognition is based upon emotional and/or theological assumption. But God, norms, values, the deduction of the "ought" from the "is" and the Natural Law are things based upon something other than

⁸Ibid., p. 174.

⁹Ibid., p. 20.

¹⁰Ibid., p. 419 ff.

sense experience and the laws of cognition. Therefore these things are based upon emotional and/or theological assumptions.¹¹

From all of this Kelsen finally argues that what is based upon emotional and/or theological assumptions is no part of the science of Law.¹² But God, norms, values, the deduction of the "ought" from the "is" and the Natural Law are based upon emotional and/or theological assumptions. And so, therefore, they are in no way a part of a science of Law.

This chain of arguments comprises Kelsen's major attempt to show the absurdity of the natural law doctrine arising out of a critical analysis of that doctrine.

Justice

Having disposed of the natural law doctrine and all of its principles, Kelsen proceeds to the concept of justice. And having considered the concept of justice, Kelsen rejects it. His line of reasoning runs this way.

Value judgments of justice are subjective. They express a wish for a norm or what a norm prescribes. To say that a law is valid is to say that it exists. To say, on the other hand, that a law is just or unjust is to say that the law either does or does not measure up to a presupposed norm or, for that matter, to the expression of a wish. Unfortunately, standards of justice vary from individual to individual as wishes vary from individual to individual. So it is .

¹¹Ibid., pp. 419, 257.

¹²Ibid., p. 322.

impossible to determine any definite norm for justice. Justice, therefore is subjective and not objective.

According to the doctrine of "natural law," the norm of justice is immanent in nature--the nature of men or the nature of things--and man can only apprehend but not create or influence this norm. The doctrine is a typical illusion, due to an objectivization of subjective interests.

The values of justice do not, it is true, consist in a relation to an interest but in a relation to a norm. This norm, however, is not, as the judging person believes, objective, but dependent upon a subjective interest of his. There are, therefore, not one standard of justice only but many different and mutually inconsistent standards of this kind.¹³

Moreover, justice can never serve as a judgment about a whole social order for the very simple reason that such a judgment is impossible to prove. And the reason that it is impossible to prove is because justice cannot be empirically verified. As subjective in nature, justice refers to an unlimited amount of values based on wishes and emotions. This state of affairs forgoes any criterion for justice.

The rationalistic type, the one which tries to answer the question by defining the concept of justice by the means of human reason, is represented in the popular wisdom of all nations as well as in some famous philosophical systems. To one of the seven sages of ancient Greece, the well known saying is attributed that justice is to give to each his own. This definition has been accepted by many outstanding thinkers and especially by legal philosophers. It is easy to show that this is an empty formula, because the decisive question, what is that which is everybody's own, is not answered, and hence the formula is applicable only under the condition that this question is already decided by a social order--legal or moral--established by custom or legislation, that is to say by a positive morality or positive law. Hence the formula can be used to justify any such order, whether it is capitalistic or communistic, democratic or autocratic--which probably explains its general acceptance, but which shows that it is useless as a definition of justice as an absolute value, different

¹³ Kelsen, General Theory of Law and State, pp. 48-9.

from the merely relative values guaranteed by positive law or positive morality.¹⁴

As to the question of justice in regard to the laws of the land, this depends on how one understands justice in the emotional functions of the mind. An immediate problem arises when one stops to remember that Positive Law as a rational science is creative, while the Natural Law, as a function of the emotions is declaratory.¹⁵

This raises the problem of an adequate definition for the concept of justice. And under the circumstances such a definition cannot be made. Now to assert that there is justice but that it cannot be defined is a per se contradiction. This shows justice so inaccessible as to be impossible for human cognition. Justice, then, amounts to an irrational idea. For there are only conflicting interests and the satisfaction of the one involves the frustration of the other. Justice, then, is in the peculiar position of involving both interests and frustrations.¹⁶

Justice, furthermore, as a norm--in Kelsen's sense--varies from individual to individual. Individuals, as norms, are mutually irreconcilable. A good case in point is that democracy puts liberty as the ultimate norm, but socialism puts equality as the ultimate norm.

The norms which are actually used as standards of justice vary from individual to individual and are often mutually irreconcilable. For example, whereas the liberal regards freedom as the idea of justice (that is, believes in the norm that everybody is out to enjoy freedom), the socialist

¹⁴Kelsen, What is Justice, p. 13.

¹⁵Ibid., p. 297.

¹⁶Kelsen, General Theory of Law and State, p. 13.

sees the ideal in equality (that is, believes in the norm that everybody ought to enjoy the same economic welfare). When these two ideals are found to be incapable of simultaneous realization, the liberal prefers to have freedom at the cost of equality, while the socialist prefers equality at the cost of freedom. A social order that is just from the liberal's point of view is unjust from the socialist's point of view. Something is just or unjust only for an individual for whom the appropriate norm of justice exists, and this norm exists only for those who, for some reason or other, wish what the norm prescribes.¹⁷

One may press the argument by suggesting that our conscience may not be satisfied with anything less than absolute justification. But science, in point of fact, cannot fulfill this requirement, for absolute values are beyond rational cognition.¹⁸ What really takes place, according to Kelsen, is that each social order presupposes the answer to what justice is. Aristotle uses "to each his own" and this suits any contradictory systems because the question of what is one's own is left unanswered.¹⁹ Even if the principle of justice involves equality, how can one ignore the fact that no two men are alike? No two social orders agree even on what differences among men should be ignored so as to make them equal. For that matter even when the principle of justice involves liberty, no two social orders agree on those issues wherein the individual is free.

One might even consider the golden rule as a principle of justice. However this, too, collapses upon an analysis of what is meant by the expression "do unto others as you would have them do unto you." Such a formula amounts to the principle of pleasure. But it may be the

¹⁷Kelsen, What is Justice, p. 228.

¹⁸Ibid., p. 10.

¹⁹Ibid., p. 16

pleasure of one to inflict punishment upon another. And so the conflict of those who do and those who do not wish punishment inflicted upon themselves arises. In this sense, both the golden rule and Kant's categorical imperative are a justification for any formula.²⁰

Kelsen proceeds to consider virtue as the essence of justice and finds it wanting. For Aristotle's concept of a midpoint between extremes reduces virtue to a quantitative formula. But, as Kelsen argues, morality deals with qualities and not quantities.

The quantification of the moral value, the three-partite scheme of "too much," "mean," "too little," the essential presupposition of a mathematical-geometrical method of determining the good, is a fallacy. In the realm of moral values there are no measurable quantities as in the realm of reality as object of natural science. Ethics deals with qualities only--with the qualities of good and evil, right and wrong, just or unjust, virtuous or vicious; that is to say with conformity and nonconformity to a norm presupposed as valid. The statement that a definite human behavior is good or evil, right or wrong, just or unjust, virtuous or vicious, presupposes the assumption that something ought to be done. The statement that something ought to be or to be done, is a norm.²¹

Moreover, virtue assumes its own object, namely the good, but in point of fact, virtue leaves the content of this object undefined.

In the last analysis, the doctrine of virtue assumes many norms: e.g., one for temperance, one for fortitude, one for prudence, etc. How to be prudent and courageous at the same time is the question. And this question, according to Kelsen, is left unanswered.²² Norms come and go. The problem is to know how all can be observed at once. In view of these insurmountable problems, Kelsen concludes that virtue

²⁰Ibid., pp. 16-17.

²¹Ibid., p. 118.

²²Ibid., p. 122.

contributes nothing to values and nothing to justice.

If the history of human thought proves anything, it is the futility of the attempt to establish, in the way of rational considerations, an absolutely correct standard of human behavior, and that means a standard of human behavior as the only just one, excluding the possibility of considering the opposite standard to be just too.²³

On the other hand, if justice is happiness, and happiness is the attainment of interests, then what order, what rank, what interests shall be fulfilled? To take a different view, each individual is unique. It is natural for a conflict of interests to arise, and when there is no conflict, there is no need for justice. For justice, is the regulator of this conflict. In either of these views, justice is impossible.²⁴

In this comparison of justice with happiness, happiness is either individual or social. If individual, it is either absolute or relative. If happiness is relative, it is impossible to attain within society because of the contradictions and subsequent frustrations. This lack of attainment reduces justice to a subjective norm. Subjective norms have no place within a science of law. On the other hand, if justice is absolute, it is unknowable and hence unattainable.²⁵ For these reasons, while justice is supposed to be some sort of social happiness, there can be no social order which can give happiness to all individually. The regulation of justice, therefore, if there is to be such a regulation, is completely thrust into the hands of Positive Law.

Actually, Kelsen concludes, as can be gathered from what has been

²³Ibid., p. 21.

²⁴Ibid., p. 4.

²⁵Ibid., p. 2.

²⁶Ibid., p. 3.

said, justice is a non-normative, non-realistic formula. Justice must be excluded from a science of law.

The Possibility of a Relationship
Between Positive and Natural Law

What must now be considered is Kelsen's attack on a possible relationship between the Natural Law and Positive Law. Kelsen first of all argues from the point of view of the impossibility of two simultaneously valid systems with the same object. Kelsen is assuming that the position of the Natural Law doctrine is that both the Natural Law and Positive Law are two simultaneous and independent systems with the same object. He suggests that if two different systems of norms are given, only one can be assumed to be valid from the point of view of cognition which is concerned with the validity of norms. For, if both systems are valid, then insurmountable contradictions can arise, e.g., one system states that "A ought to be" and the other system states that "A ought not to be." Now the logical principle of contradiction holds true for empirical reality as well as for cognition.

Two systems of norms may be reducible to two different basic norms, whose difference need not be as general or essential as that between a static and a dynamic type. Two different basic norms of the same character may involve, for instance, the norm of love and the norm of the public good, or one which delegates the Pope as the deputy of God, and another which institutes the emperor or some other secular authority as supreme. If two different systems of norms are given, only one of them can be assumed to be valid from the point of view of a cognition which is concerned with the validity of norms.²⁷

As a possible solution to this problem, Kelsen suggests that both systems of norms have different objects. In this sense, both norms

²⁷Kelsen, General Theory of Law and State, pp. 407-8.

are subordinate to higher norms which impose these limitations. However, then it follows that the two basic norms are not basic norms at all. The assumption of two really different systems with the same sphere of validity is false. For both are partial orders going together to give a unified whole.

For the sake of simplicity it may here be assumed that the norms of both systems relate to the same object, to human conduct, which occurs in time and space; that is that they have the same temporal, spatial, personal, and material sphere of validity. This is true, of course, for natural and positive law, with whose relationship alone we are here concerned. It requires, therefore, no proof that a limitation of the object of the norms...and with it, the possibility of the coexistence of two normative systems with different objects, hinges upon a certain limitation of the basic norms which constitute the two systems.... It follows that the two supposed basic norms are no genuine basic norms, that the systems of norms relatively established by them and limited in object (namely, in their sphere of validity) can only be partial orders....Hence the assumption of two truly different systems is revealed as false.²⁸

In an attempt to solve this problem, Kelsen again raises the question of the real difference between the two normative systems in regard to their respective objects. The principle which Kelsen is trying to follow in regard to this problem is worth putting in his own words:

A system of norms can only be valid if the validity of all other systems of norms within the same sphere of validity has been excluded. The unity of a system of norms signifies its uniqueness. This is simply a consequence of the principle of unity, a principle basic for all cognition, including the cognition of norms whose negative criterion is found in the impossibility of logical contradiction.²⁹

In view of this principle, Kelsen suggests that the problem of two

²⁸Ibid.

²⁹Ibid., p. 410.

simultaneously valid norms with the same object can be solved if one understands the terms "norms, legal norms, legal order" to be equivocal. In one sense, a norm means what "ought" to be done. In another sense a norm means what one wills, imagines, feels like doing-- what one feels "should" be done. The realm of the first type of norms deals with "ought." The realm of the second type of norm deals with "is."³⁰

With this distinction in mind, no contradiction between the legal norm and the moral norm is possible. The reason is this: they are both involved in two different systems of cognition. The one is the legal validity of "ought." The other is the empirical validity of "is."³¹ Or to put it more forcefully, the one is a system of obligation, and the other is the empirical level of psychological motivation. Kelsen backs up this distinction with a number of arguments. In the first place, if both systems are simultaneously valid and have the same object which is "ought," the possibility of one system contradicting the other system cannot be excluded. In actual practice, no jurist is going to consider the Natural Law valid if it conflicts with Positive Law, and vice versa: "No moralist would think of letting considerations of Positive Law interfere with the validity of norms which he recognized from his point of view."³²

In the second place, if both systems are simultaneously valid, the only way for morality and legality to be recognized together is if the one or the other is delegated to its opposite. In this instance, then,

³⁰Ibid., pp. 408-9.

³¹Ibid., p. 409.

³²Ibid., p. 410.

the one or the other ceases to exist on its own, and merges with its counterpart.³³

Because of these arguments, Kelsen insists on the distinction between the Natural Law and Positive Law as a distinction of levels: the level of psychological motivation and the level of the "ought" within obligation. If this distinction is not maintained, then in actual practice, the Natural Law tends to disappear into Positive Law. In either case, Kelsen has rather nicely eliminated the Natural Law from any part of a pure theory of law.

Kelsen goes on to suggest that even a logical co-existence between Positive and Natural Laws is impossible. His argument, in brief, runs this way. Positive and Natural Law are recognized as two systems differing one from the other in their ultimate reason or validity. Positive Law and the Natural Law are not elements of the same system. Now a relationship is only possible between elements of the same system. And so a relationship between Positive Law and the Natural Law is impossible. For, on the one hand, a possible contradiction involves both systems, or on the other hand, one system tends to merge with the other system. A last possibility is the subordination of both systems as partial orders to a higher order, which Kelsen rejects for all of the reasons expressed in his proofs for the non extramental existence of norms.

Any attempt to establish a relationship between the two systems of norms in terms of simultaneously valid orders ultimately leads to their merging in terms of sub- and supraordination, that is, to the recognition of positive as natural law or of natural as positive law....

³³Ibid.

If one assumes the validity of a natural legal order, one cannot, at the same time, assume the existence of a simultaneously valid positive legal order with the same sphere of validity. From the point of view of a consistent positivism which regards the positive legal order as supreme, non-derivative, and therefore non-justifiable by reference to a superior system of norms, the validity of a natural law cannot be admitted. Likewise, from the point of view of natural law, in so far as it conforms to its pure idea, there is no room for the validity of positive law. The coexistence of a natural and a positive law as two different systems of norms is logically excluded; for a contradiction between the two is possible....It is this possibility which impels the differentiation of positive from natural law.³⁴

Furthermore, Kelsen argues that since the Positive Law represents a coercive order and the Natural Law represents a non-coercive order, a contradiction between Positive and Natural Law--as two simultaneously valid systems with the same object--necessarily exists.³⁵

Since, then, the simultaneity of two valid systems with the same object are mutually exclusive because a contradiction between them is not only possible but actual, and because the merging of the one into the other destroys the whole point of two systems, and finally because the subordination of Positive and Natural Law to higher norms is impossible, the only conclusion is that the logical coexistence of the Natural Law and the Positive Law is impossible.

Kelsen continues his critical analysis by stating:

From the point of view of the pure natural-law idea, any relationship of delegation between natural and positive law must be considered as impossible,³⁶

If Positive Law arises through the authority of the Natural Law, then the norm of delegation contradicts the basic norm of the Natural

³⁴Ibid., p. 411.

³⁵Ibid.

³⁶Ibid., p. 412.

Law. The reason is that the validity of the norms of the Natural Law rests on the objective justice of their content. But a norm arising out of the Natural Law and authorizing the validity of Positive Law means that a supreme power issues, makes this Positive Law "not because of the justice of their content but because they have been issued by this natural-law-made authority."³⁷ If the validity of Natural Law is based on the objective justice of its content and nothing else then the notion of delegation within the Natural Law is incompatible. If the validity of the Natural Law is based on a law-making authority, and nothing else, then this contradicts the notion of the objective justice of its content as the basic norm.

When the above distinction is overlooked, and such a delegation is assumed, the formulas of the Natural Law become meaningless. In this way, Positive Law replaces the Natural Law and leaves only the one norm legitimizing Positive Law. As a result, the Natural Law is reduced to an ideology of Positive Law, and renounces the validity of its own autonomous natural-law order. Consequently, not even a relationship of delegation can exist between the Natural and Positive Laws.

If it be assumed that there are, beside this delegating norm, other material norms of natural law, the delegation of positive by natural law must mean that natural law empowers positive law to replace it. This actually is the consciously or unconsciously desired result of the theory of delegation, much as it may seek to conceal it by assurances to the contrary. Of all the norms of natural law, only the one remains which delegates positive law (and in reality is no natural law norm at all). A thus denatured natural law has no other function than that of legitimizing positive law. The idea of natural law has been transformed into an ideology of positive law. The attempt to comprehend positive law as "delegated" by natural law

³⁷Ibid., p. 413.

need not concern us any further in this connection, as it represents the obvious and admitted renunciation of the assumed validity of an autonomous natural law order.³⁸

Kelsen then goes on to point out that the fact of a relationship between Natural and Positive Law is contradictory.³⁹ When Positive Law conforms to Natural Law, Positive Law is considered just. When Positive Law does not conform to the Natural Law, Positive Law is considered unjust. However, the problem arises in this: when Positive Law appears as unjust, its validity is denied so that even the fact of Positive Law disappears. The result of this turn of events is that a dispute between Positive Law and Natural Law in terms of two simultaneously valid systems disappears so even a dispute between the two is impossible.

Historically, though, the Natural Law doctrine has always insisted on the validity of Positive Law. Unfortunately, this insistence leads to the idea that the Natural Law cannot entirely exclude the idea of Positive Law. In point of fact, Kelsen insists, Positive Law tends to deal with all of the modifications of the Natural Law. And these modifications in turn tend to lead to an elimination of the Natural Law.⁴⁰

If such an elimination does not take place, at least the Natural Law has been forced to modify itself to suit Positive Law. The Natural Law, as a consequence, has allowed or directed, at its historical apex, a situation which represents, to put it in Kelsen's words:

"...the most unmitigated political Absolutism, under whose pressure a revolutionary theory had no chance to develop"

³⁸Ibid., p. 412.

³⁹Ibid., p. 414.

⁴⁰Ibid., p. 415.

as a literary movement, let alone be taught in the Universities."⁴¹

Lastly, the modern, so-called revolutionary character of the Natural Law doctrine, aimed at reforming the Natural Law theory has committed the fallacy of supposing that in fighting against a part, it is fighting against the whole of the doctrine. To eliminate an undesirable part is not to eliminate the undesirable whole. The very lack, for example, of Rousseau's teachings as self evident, indicates the obvious reason why official legal science as taught in the French Universities dropped the Natural Law doctrine.⁴²

So ends Kelsen's main arguments against the relationship between the Natural Law and Positive Law.

Kelsen's solution to the whole insoluble problem of the Natural Law is the following:

The metaphysical-religious dualism of heaven and earth, of God and world, is overcome when man, especially through the advance of empirical science finds the courage to discard the realm of the transcendent, which is beyond his experience, because it is unknowable, and therefore (a) scientifically useless hypothesis.⁴³

Summary

By way of summarizing this chapter on Kelsen's objections to the Natural Law and its relation to Positive Law, Kelsen began by trying to destroy the metaphysical foundations of the Natural Law. The reality of norms and the subsequent impossibility of distinguishing the principles of causality and retribution, or the Laws of Nature and the

⁴¹Ibid., p. 417.

⁴²Ibid.

⁴³Ibid., p. 433.

Natural Law constituted his starting point. The conclusion that norms did not exist in a transsubjective reality served as a principle for his disproving the rest of the metaphysical principles underlying the Natural Law. In answer to this, the tack was taken that Kelsen failed to distinguish between the objects which are subject to norms.

Next Kelsen treated the concept of Justice. In the main, Kelsen attempted to show that the concept of justice is made up of empty formulas which suits any contradictory system. Moreover, the basis of justice is impossible to apply either to all individually because of individual differences, or to all socially because of the insurmountable conflicts. In either case, the basis for justice seemed to be either an emotional one, or one based upon theological assumptions. The direction of the argument against Kelsen's criticism of the concept of justice indicated that his pragmatic application of the concept allowed for the contradictions, and, too, his analysis of the formulas omitted an analysis of the essence of justice in itself.

Finally, Kelsen argued against the possibility of a relationship between the Natural Law and Positive Law. First he showed that if two simultaneously valid systems exist, then both are reduced to subordinate systems under supraordinate systems. And this, Kelsen insisted was unacceptable. Interestingly enough, though, Kelsen never proves this unacceptability. Kelsen then tried to reduce the object of the Natural Law to a psychological state of mind and keep Positive Law at a level of obligation. The tacit assumption from the start, though, is that the Natural Law is a figment of the emotions. Actually, Kelsen is only throwing into perspective his own conclusions of the Natural Law with what he understands by the Positive Law. Such an

approach stands or falls on Kelsen's ability to disprove the reality of the Natural Law. Next, Kelsen tried to show the impossibility of a logical coexistence between the Natural Law and Positive Law. Here he took the view that either a contradiction might exist between them, or that one or the other would tend to merge itself with the other.

Chapter III

EXPOSITION AND DEVELOPMENT OF THE PURE THEORY OF LAW

The preceding chapters have dealt with Kelsen's understanding and rejection of the Natural Law theory along with its relationship to Positive Law. The effort has been made to show that Kelsen's approach to the Natural Law is not one of attacking from the outside, but one of revealing an impossible situation from the inside. In other words, Kelsen has tried to show that a thorough examination of the Natural Law reveals that it contains its own self destruction. If such is the case, the question naturally arises as to what Kelsen is going to offer in the line of a theory of law which will fill the void left by a defunct Natural Law. And to this question, Kelsen offers his own theory of law which he calls the Pure Theory of Law. This pure theory is positivistic in nature. Kelsen writes:

The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not a specific legal order. It is a general theory of law, not an interpretation of specific national or international legal norms; but it offers a theory of interpretation.

As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law is, not how it ought to be. It is a science of law (Jurisprudence) not legal politics.

It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the

object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.¹

Background

In order to appreciate Kelsen's theory, one must first understand the background for Positivism as Kelsen understands it. For Kelsen, modern science results from an emancipation of nature from the social sciences. Science, in Kelsen's mind, deals with purely objective facts verifiable from experience.² As a result, science differs from politics as judgments about reality differ from value judgments. Actually, politics and religion determine the world by will. To know the world, on the other hand, is to possess knowledge for its own sake. Therefore, the pure theory of law is for its own sake and is opposed to both politics and religion.³

Limitations

This background suggests certain basic limitations for the Pure Theory of Law. Kelsen begins by showing that neither the Natural Law nor Positive Law conforms to a causal necessity but rather to a necessity of "ought."

The rule of normativity must be understood in a thoroughly relative and formal sense, if it is to be taken as the form of both positive and natural law.⁴

¹Hans Kelsen, The Pure Theory of Law, Berkeley, University of California Press, 1967, p. 1.

²Kelsen, "The Natural Law Doctrine Before The Tribunal of Justice," in The Western Political Quarterly, December, 1949, p. 485.

³Kelsen, "Platonic Justice," trans. Glen Negley, in Ethics, April, 1938, p. 382.

⁴Kelsen, General Theory of Law and State, p. 393.

Again Kelsen writes:

By defining law as a norm (or, to be precise, as a system of norms or as a normative order) and by limiting the science of law to the cognition and description of legal norms and to the norm-constituted relations between the norm-determined facts, the law is delimited against nature, and the sciences that are directed toward causal cognition of actual happenings. Thereby a criterion has been ascertained according to which society can be clearly differentiated from nature, and social science from natural science;⁵

Kelsen distinguishes the Pure Theory of Law from ethics when he writes:

The thesis that law is moral by nature--in the sense that only moral social order is law--is rejected by the Pure Theory of Law not only because this thesis presupposes an absolute moral order, but also because in its actual application by the science of law prevailing in a certain legal community, this thesis amounts to an uncritical justification of the national coercive order that constitutes this community. For it is taken for granted that one's own national coercive order is a legal order. The dubious standard of an absolute morality is applied only to the coercive order of other nations. Only they disqualify as immoral and therefore as nonlaw, when they do not conform with certain postulates with which one's own coercive order conforms--for example, when they recognize or do not recognize private property, or when they are democratic or not democratic. But if one's own coercive order is law, then, according to the above mentioned thesis, it must also be moral. Such justification of the positive law may politically be convenient, even though logically inadmissible. From the point of view of a science of law it must be rejected, because it is not the task of this science to justify the law by absolute or relative morals; but to know and to describe it.⁶

The Basic Norm and Law

The basis of Positive Law is an hypothetical assumption. This is not to say, according to Kelsen, that the Natural Law is not likewise based upon an assumption. However, on the one hand, the basic norm of Positive Law justifies its own inherent validity and gives rise to the

⁵Kelsen, The Pure Theory of Law, p. 75.

⁶Ibid., p. 223.

creative aspect of law through the principle of delegation. This creativity and this delegation are subject to the universal laws of cognition. On the other hand, the Natural Law justifies the natural order of things and⁷ derives its principles deductively from the nature of things. This Law, this order, these principles and the nature of things are ultimately based upon the authority of God. Kelsen writes:

The value judgment that the creation of the first constitution is legal means that the individuals who created it were authorized to do so by a certain norm. If we do not go beyond the boundaries of national law we are unable to find any positive legal norm fulfilling such a function. It is, as we have seen, not a norm created by an act of will, but a norm presupposed in juristic thinking. We have to postulate such a norm in order to be able to maintain the "existence" of any positive legal norms and to be able to make any juristic value judgments. This conclusion cannot be avoided, for example, by tracing the authority of the "fathers of the constitution" to the will of God as is sometimes done. To do so means to predicate the validity of the constitution on the supposed fact that God gave the originators of the constitution their authority. This command of God is again a norm, a transcendental norm since it falls outside the scope of human experience, but "positive" since--according to religious belief--it was created by the act of a superhuman will. This "positive" norm can be recognized as valid only if we presuppose the norm that one shall obey the commands of God. That, however, is a norm that has not been created by any act, be it human or superhuman, but is only postulated by the human mind. If one refuses to accept a metaphysical explanation of the authority of the originators of the constitution, one is forced to stop at the norm which has here been presented as the hypothetical basic norm.⁸

The only non-scientific norm which a science of law considers is the basic norm of the legal order which serves as the ultimate source of law. Law, then, does not depend upon justice, or a substantive

⁷Kelsen, What is Justice, pp. 263, 360.

⁸Ibid., p. 223.

concept, but, as a formal concept, law depends upon the basic norm which is effective.⁹ In this sense, Positive Law becomes a purely human product and independent of any transcendent justification. No absolute values are included. Positive Law is pure hypothetical relativism. As such, the basic norm of Positive Law is a category of the mind in the same sense as Kant's categories.

To be true, this basic norm is not created by any organ of the legal community in accordance with the provisions of a higher norm. It is an assumption made in juristic thinking, but by no means arbitrary. An analysis of juristic thinking shows that jurists consider a constitution as valid only when the legal order based on it is effective. This is the principle of effectiveness. That a legal order is "effective" means that the organs and subjects of this order by and large behave in accordance with the norms of the order. An order can be effective as a whole even if one norm or other is not applied or not obeyed in certain cases where, according to its own meaning, it ought to be applied or obeyed.¹⁰

In the mind of Kelsen, the basic norm of Positive Law as a purely formal character, has far reaching consequences. The Natural Law for example, has a substantive character in "just" or "unjust." Positive Law, on the other hand serves as a basis for any law regardless of its conformity with the Natural Law, or Laws of Nature. The reason for this is that Positive Law need depend only upon the general principle of effectiveness as applied to the basic norm. The importance of the basic norm as well as an insight into its formal character, Kelsen puts this way:

Just as the transcendental logical principles of cognition (in the sense of Kant) are not empirical laws, but merely the conditions of all experience, the basic norm itself is no positive legal rule, no positive statute, because it has not been made, but is simply presupposed as

⁹Ibid., p. 224.

¹⁰Kelsen, What is Justice, p. 224.

the condition of all positive legal norms.

Objectively, they (legal acts) are only valid by virtue of their relatedness to the basic act which, thanks to the basic norm is presupposed as the original law-making fact. Any legal order, therefore, to be positive, has to coincide in some measure with the actual human conduct which it seeks to regulate.¹¹

Kelsen admits that the basic norm here described implies a bit of the Natural Law because of the assumption of the basic norm. That there is a little similarity, however, does not erase the enormous differences between the two systems. Natural Law, Kelsen insists, cannot and has not determined a measurement of justice for Positive Law without converging with Positive Law. And in this case, the Natural Law becomes meaningless.¹²

Kelsen maintains that social reality is, in fact, the result of a positive and not an imaginary Natural Law. Because man creates his own world, man avoids the pluralism of contradicting worlds. And this is accomplished through the restrictions of law. Moreover, since the world is in part man's creation, there is a relationship, a relativity between man and reality. The function of man is to create and consequently man must be free. But since there is a relativity, man must have equality. The junction of freedom and equality, lies within the laws of cognition.

To be sure, there is an undeniable conflict between absolute freedom and equality; but the subject of cognition, as pointed out is not absolutely free; he is only relatively free--free under the laws of rational cognition. This freedom is not incompatible with the equality of all subjects of cognition. The restriction of freedom by a law under which all subjects are equal is essential to philosophical relativism.

From the point of view of philosophical absolutism, on the other hand, it is not the equality of the subjects; it

¹¹Ibid., p. 436.

¹²Ibid., pp. 436-7.

is, on the contrary, their fundamental inequality in relation to the absolute and supreme being which is essential.¹³

It follows, therefore, that the problem of law is one of social technique, not social morality. Law as so distinguished from justice is called Positive Law. And this means that law and justice are two different concepts. Consequently, to say that a certain social order has a certain character is not to say that it is just or unjust.¹⁴

Fact and Norm

Kelsen next raises the question of the validity of the basic norm:

The basic norm is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, then, like a norm of natural law, apart from its merely hypothetical validity.¹⁵

To say that a norm is created by a fact is not correct. In Kelsen's view, a norm is the specific meaning of a fact. This meaning is not perceptible to the senses. To interpret the meaning of a norm as a norm is to presuppose another norm conferring on this fact the quality of a norm creating fact. As a result of an ascending series of norms, one is left with an ultimate norm which cannot be positive, that is, an absolutely objective norm, e.g., the acceptance of Christ's interpretation on how to live, presupposes his authority.

To say that a norm is created by a fact, is a figure of speech. The norm is the specific meaning of the fact, and this meaning, not perceptible by our senses, is the result of an interpretation. To interpret the meaning of a fact as a norm is possible only under the condition

¹³Hans Kelsen, "Absolutism and Relativism in Philosophy and Politics," in American Political Science Review, October, 1948, p. 908.

¹⁴Kelsen, General Theory of Law and State, pp. 5-6.

¹⁵Ibid., p. 401.

that we presuppose another norm conferring upon this fact the quality of a norm-creating fact; but this other norm, in the last analysis, cannot be a positive norm. Thus what Christ ordered us to do in the Sermon on the Mount are norms binding upon us only if we presuppose that Christ is the supreme moral authority, and to do this means that we presuppose a norm that we should obey the commands of Christ. But this norm is not, as are the commands of Christ, a positive norm, that is to say, the meaning of a fact, a norm-creating act performed in space and in time, but rather a norm the validity of which is only presupposed in our mind.¹⁶

From the above, it follows that a norm belongs to a legal order only if it arises out of a preceding norm. Consequently, the historically first constitution is binding only if it is accepted as a presupposed norm-making fact. To say that the American Fathers got their authority from God, for example, is a presupposed fact. One way of erasing the arbitrariness of the series of norms based upon an original presupposition is if the effectiveness of the law becomes evident.¹⁷

The Fact

Since science deals with facts, "Positive legal norms can be the object of a legal science. The existence--and this means the validity--of a positive norm is conditioned by the existence of facts."¹⁸ Here Kelsen is referring to the means by which legal norms are created, such as custom, legislation, etc. Through such a creation, even though called value judgments, these judgments are not opposed to reality. That is to say, they are not essentially different from reality. These judgments may be considered as appropriate means to an end. Moreover, such judgments are verifiable by experience. Kelsen puts it this way:

¹⁶Kelsen, What is Justice, p. 359.

¹⁷Ibid., pp. 359-60.

¹⁸Ibid., p. 361.

"These are facts ascertainable by the science of Law just as facts can be ascertained by the science of nature."¹⁹ A proportion arises in that as nature is the science of natural reality, Positive Law is the science of legal reality. The difference between the two lies in that Positive Law has as its basis a norm presupposed as valid.

The basic norm of a positive legal order--in contradistinction to the substantive norms of natural law prescribing a definite human behavior as in conformity with nature (and that means as just) and prohibiting a definite human behavior as contrary to nature (and that means as unjust)--has merely a formal character. It serves as a basis for any positive legal order, regardless of its conformity or nonconformity with natural law; and it has, within the science of law, a merely hypothetical character. The statements by which the science of law describes its objects as positive norms have the character of conditional propositions. As a science, it cannot state absolutely that individuals or states are obliged or entitled by legal norms to behave in a certain way. It ascertains only that under the condition that the basic norm conferring on the fathers of the constitution a law-making authority is presupposed as valid, are individuals obliged or entitled, by legal norms based on the constitution, to behave in a certain way; and only that under the condition that the basic norm instituting the custom of states as a law creating fact is presupposed as valid, are states obliged or entitled, by legal norms created by custom, to behave in a certain way. A science of law cannot itself presuppose either of these basic norms as valid, nor can it decide that any nonpositive norm is valid. To ascertain the validity of the nonpositive basic norm of a positive legal order is beyond the sphere of a science whose object is this positive legal order.²⁰

Since empirical facts do not create norms, but rather are the specific meaning of a norm, the question now arises as to what specific function do the empirical facts serve so that the norm can have meaning and exist as an object of legal science? According to Kelsen, facts do not bring norms into existence, but rather are the sine qua

¹⁹Ibid., p. 362.

²⁰Ibid., pp. 360-61.

non condition for the existence of norms. It is interesting to note that because Kelsen restricts the principle of causality to the science of natural reality, he is forced to omit this principle in regard to Positive Law. And so Kelsen explains the relation between facts and Positive Law by saying that facts are not the conditio per quam but the conditio sine qua non for the existence of norms.²¹

Furthermore, the relationship of fact as a conditio sine qua non to the existence of a norm requires another norm making "the existence of the norm dependent upon fact."²² This tripartite interdependence of norm creating a norm dependent upon a sine qua non conditioning fact does not recede indefinitely. "The series of norms is not infinite like cause and effect,"²³ says Kelsen. Rather the interdependence goes back to one ultimate norm.

The facts which condition the existence of a legal norm--the presence of the norm-creating fact and the absence of the norm-annulling fact--are therefore not the ground for the existence of the norm. They are a conditio sine qua non but not a conditio per quam. A fact entails the existence of a certain legal norm, only if there is a higher norm which makes the existence of the norm dependent upon this fact. The lower legal norm possesses validity because it was created in accordance with the provisions of the higher norm. If we ask why a certain legal norm is valid, the answer is always in terms of another (higher) norm which regulates the creation of the former (lower) norm, that means, which determines the facts that condition the existence of the former (lower) norm.

If we continue our search for reasons why the legal norms are valid, we shall ultimately arrive at a last norm, whose creation has not been determined by any higher norm. The series of reason for the validity of a norm is not infinite like the series of the causes and effect. There must exist one ultimate reason, one basic norm, which is the source of the validity of all norms belonging

²¹Ibid., p. 219.

²²Ibid.

²³Ibid.

to a certain legal order. Though the existence of every norm is conditioned by a certain fact, it is not a fact, but a norm that is the reason why all the norms of a system exist--and that means, are valid. This clearly shows that a norm is not identical with its conditioning fact.²⁴

Since causality, according to Kelsen, is involved in an infinite series, facts, or necessity, must also be involved in an infinite series. An ultimate norm, though, is not within the scope of an infinite series, and so, neither are the succeeding interdependent norms.²⁵ The hypothetically first norm upon which all other norms depend is the historically first norm. This norm is binding because all the other norms receive their validity from it within a given state. The existence, therefore, of a legal norm can be affirmed only if an act has occurred--"is"--the meaning of which is a legal norm--"ought."²⁶

With all of the preceding in mind, Kelsen writes: "the expression 'positive law' means, then, that law is a complex of norms 'posited' or created by certain acts."²⁷

Because of the norm creating authority which makes a norm dependent upon a fact, Kelsen states that "law regulates its own creation."²⁸ In this sense, then, both the norm and the sanction follow from, that is to say, are determined by the legal order. This is what is meant when Kelsen writes:

To speak of the actual behavior of those creating the norms is to say that the norm is valid even in the absence of their wills. An act is a legal act precisely because it

²⁴Ibid., p. 219.

²⁵Ibid., p. 218-19.

²⁶Ibid., p. 214.

²⁷Ibid.

²⁸Kelsen, The General Theory of Law and State, p. 39.

is determined by a legal norm. The legal quality of an act is identical with its relation to the legal norm.²⁹

Three elements, therefore, spell out the dynamic aspect of Positive Law viz., legal norms, and legal acts as determined by norms. To suggest that law is made up of only legal acts and legal norms is a mistake in Kelsen's view, for this would make law static.

The execution of this court decision--the process implying that the condemned is actually put in jail and kept there for two years--is not itself a legal norm. If we designate this process as a "legal act," thereby expressing that this act also belongs to law, then the definition of law as a system of norms would seem too narrow. Not only the execution of a legal norm, the enactment of the sanction which it stipulates, but also all acts by which legal norms are created, are such legal acts. That it regulates its own creation is a peculiarity of law which is of the utmost theoretical importance and which will later be discussed. The act through which a legal norm, general or individual, is created is therefore an act determined by a legal norm. The legal quality of an act is identical with its relation to a legal norm. An act is a "legal" act only because and only in so far as it is determined by a legal norm. It is therefore incorrect to say that law consists of norms and acts. It would be more nearly correct to say that law is made up of legal norms and legal acts as determined by these norms. If we adopt a static point of view, that is, if we consider the legal order only in its completed form or in a state of rest, then we notice only the norms by which the legal acts are determined. If, on the other hand, we adopt a dynamic outlook, if we consider the process through which the legal order is created and executed, then we see only the law-creating and law-executing acts. To this important distinction between static and dynamics of law we shall return later.³⁰

Unity of Law

Following the principle that law regulates its own creation,

²⁹Ibid., p. 37.

³⁰Ibid.

³¹Ibid., p. 132.

law becomes a unity of norm authorizing other norms according to the provisions of the original norm which authorizes these norms.³¹ This is true even in the case of a judge filling in a gap. The reason is this: as a judge, he is authorized to create an individual norm not previously contained in the law.

A norm regulating the creation of another norm is "applied" in the creation of the other norm. Creation of law is always application of law. These two concepts are by no means, as the traditional theory presumes, absolute opposites. It is not quite correct to classify legal acts as law-creating and law-applying acts; for, setting aside two borderline causes of which we shall speak later, every act is, normally, at the same time a law-creating and a law-applying act. The creation of a legal norm is--normally--an application of the higher norm, regulating its creation, and the application of a higher norm is--normally--the creation of a lower norm determined by the higher norm. A judicial decision, e.g., is an act by which a general norm, a statute, is applied but at the same time an individual norm is created obligating one or both parties to the conflict.³²

Within this framework, the law does not say what the judge will do, but what he ought to do. A judge, as a consequence, not only obeys the law, but applies the law. In this sense, only a law can be applied or obeyed. A doctrine of nature, on the other hand--from Kelsen's point of view--can neither be applied nor obeyed.³³

From the point of view of the state, its organization represents the valid efficacious norms so created by that state. The real and legal ruler of the state, therefore, is the law as stemming from the basic constitution.³⁴ Because of the unity arising out of this situation, the relationship between higher and lower norms can never be contradictory.

³¹Ibid.

³²Ibid., p. 132.

³³Ibid., p. 133.

³⁴Ibid., pp. 151-52.

Coercion and Law

Up until now, the analitical description of Kelsen's Pure Theory has revolved around the normative aspect of Positivism. Kelsen now turns his attention to the essential instrument of law. In this regard he asks what is common to the Positive Laws of all peoples, of all times, and of all places? To this question, Kelsen answers: "the threat of coercion for contrary conduct."³⁵

Law, morality, and religion, according to Kelsen, can be distinguished in terms of how each employs coercion. Law provides specific punishments for specific crimes. Morality provides no punishment but rather social disfavor. Religion provides punishments of a transcendent nature.³⁶

Because coercion enters so intimately into the concept of Law, Kelsen writes: "Law is an organization of force. Law makes use of force as a monopoly of the community, and so law pacifies the community."³⁷ Law, therefore, promotes peace.

One might ask why coercion is an essential part of Positive Law in contradistinction to both morality and religion. To this question, Kelsen answers that unlike the Natural Law, the laws of Positive Law are not self evident. An incentive, therefore, must be instituted for the opposite of the desired behavior. This incentive is coercion.

Positive law is essentially an order of coercion. Unlike the rules of natural law, its rules are derived from the

³⁵Kelsen, What is Justice, p. 236.

³⁶Ibid.

³⁷Ibid., p. 237.

arbitrary will of human authority and, for this reason, simply because of the nature of their source, they cannot have the quality of immediate self-evidence. The content of the rules of positive law lacks the inner "necessity" which is peculiar to those of natural law by virtue of their origin. Rules of positive law do not lay down a final determination of social relations. They allow for the possibility that these relations could also be otherwise determined by other rules of positive law, be it subsequently by rules of the same, be it simultaneously by rules of another legal authority. Those whose conduct is regulated in this fashion cannot be assumed to acquire, with these rules, the conviction also of their rightness and justice. It is obviously possible that their actual conduct may differ from what is prescribed by the rules of positive law. For this reason, coercion becomes an integral part of positive law. The doctrine which declares coercion to be an essential characteristic of law is a positivistic doctrine and is solely concerned with positive law.³⁸

Only the organ of the community may employ force, and in so doing the whole community is pacified. Law, therefore is a forceable means of stopping interference of one with another. The process of law has developed from retribution to prevention as a result of the coercive aspect of law.³⁹

Effectiveness

The union between the Law and the validity of the norm lies in the effectiveness of the Law. This efficacy is a general, not a universal effectiveness. A legal norm in an isolated case, therefore, can still be valid even though ineffective.⁴⁰

Duty

From the point of view of those subject to the normative legal

³⁸Kelsen, General Theory of Law and State, p. 392.

³⁹Ibid., p. 21.

⁴⁰Kelsen, What is Justice, p. 225.

order the concept of duty arises. The legal duty is valid if a sanction "ought to" occurs for the opposite of the demanded behavior. Kelsen puts it this way: "The legal duty is the behavior by the observance of which the delict is avoided. Thus the opposite of the behavior which forms a condition for the sanction is sought."⁴¹ The moral duty, on the other hand, is the behavior which the norm demands.⁴²

Inviolability

The inviolability of the law is not its observance but rather that a violation always brings a punishment. The universal law as a legal rule is a norm laying down sanctions.

Since a norm is no statement of reality, no statement of a real fact can be in contradiction to a norm. Hence, there can be no exceptions to a norm. The norm is, by its very nature, inviolable. To say that the norm is "violated" by certain behavior is a figurative expression; and the figure used in this statement is not correct. For the statement says nothing about the norm; it merely characterizes the actual behavior as contrary to the behavior prescribed by the norm.⁴³

The word "universal" is used here because neither democracy nor autocracy have each a priority on law, for law encompasses them all. These, in fact, are mere possible principles of social re-organization. They are each an ideological bend of law. Hence each is a judgment of morals or of politics. This ideological bend can take two directions: Relativism or Absolutism.⁴⁴

⁴¹Kelsen, General Theory of Law and State, p. 60.

⁴²Ibid.

⁴³Ibid., p. 46.

⁴⁴Kelsen, General Theory of Law and State, p. 5.

Political Implications

In Political Relativism, Kelsen points out, a state is the product of and dependent upon its creators. Since all contribute to its existence, there is a relation between the people and the state. This relationship therefore involves freedom and equality. Relativism implies democracy precisely because there is equality and freedom. All are free under the law.⁴⁵

In Political Absolutism, on the other hand, all are subject to the law. All, indeed are formed by the law.⁴⁶ Hence epistemological Absolutism is parallel with autocracy; and epistemological Relativism is parallel with democracy.⁴⁷

Within the organization of states, Relativism is possible because various states create treaties, and thus legislate laws. Because of this interrelationship the state, as such, must not be considered sovereign in the sense of Absolute liberty. It follows quite naturally that Absolutism is not possible among the states because there is neither the flexibility arising out of freedom nor a sense of equality enabling the states to form treaties, or legislate laws.⁴⁸

Historicity

In Kelsen's mind Locke and to some extent Kant are among the great political theorists within relativism. Christ, Hegel and Marx represent

⁴⁵Kelsen, "Absolutism and Relativism in Philosophy and Politics," pp. 908-9.

⁴⁶*Ibid.*, p. 907.

⁴⁷Kelsen, What is Justice, p. 202.

⁴⁸Kelsen, "Absolutism and Relativism in Philosophy and Politics," p. 910.

the Absolutists.⁴⁹ It is interesting to note that all five persons according to Kelsen employ some form of the Natural Law doctrine as a basis for their political theories.

However it is clear that Kelsen is viewing these five men from two different points of view in the limits which he sets for his Pure Theory of Law or Positivism. In the first place, Absolutism implies a God. But a science of Law arising out of Relativism has no place for God. Positivism, Kelsen concludes must be devoid of Religion.⁵⁰

The "Ought" and the "Is"

Positivism, moreover, maintains that law and nature are not the same reality. The "ought" from the "is," therefore, is a fallacious deduction. Since values are not factual, Kelsen writes:

To put it another way only when a statement about what should be done in accordance with a norm presupposed to be valid is the statement that something is an end, a valid judgment in the strict sense and in contradistinction to a statement about reality as a statement about what actually is done or probably will be done.⁵¹

Value judgments are conditional propositions analogous to cause and effect. The norm is understood as the cause and as the ultimate end--subjectively determined--which brings about a desired effect. Kelsen further clarifies this approach when he writes: "within a rational process referring to means and end, the assumption of an ultimate end is inevitable."⁵² Even when ends, apparently, are not assumed, there is some point that is, and hence all is.

⁴⁹Ibid., p. 912.

⁵⁰Kelsen, "The Natural Law Doctrine Before the Tribunal of Justice," p. 501.

⁵¹Kelsen, What is Justice, p. 353.

⁵²Ibid., p. 354.

The Purpose of Pure Theory

One of the purposes of the Pure Theory of Law is to analyze the various social structures. It makes no difference whether these structures are existing now, or did exist historically.⁵³

A science of Positive Law, therefore, does not attempt to answer the question as to whether or not a specific social order is just. It can, however, understand justice as the administration of the various laws within a state. Cognition, as a result, can grasp only a positive order evidenced by objectively determinable acts. Such is Positive Law, the Pure Theory of Law, and not metaphysics. Since Positive Law is not an evaluation, it is presented and not defended as just or unjust. If justice enters in--it must be repeated--then justice in the sense of Positive Law refers to the application and not to the content of the law.⁵⁴

Consequently, at the risk of destroying the dichotomy between Positive and Natural Law which he so carefully worked out in his criticism of the Natural Law doctrine, Kelsen extends the purpose of the Pure Theory to include Absolutism when he writes:

Vollends sinnlos ist die Behauptung, dass in der Despotie keine Rechtsordnung betehe, sondern Willkur des Despoten herrsche...stellt doch auch der despotisch regierte Staat irgendeine Ordnung menschlichen Verhaltens dar...Diese Ordnung ist eben die Rechtsordnung. Ihr den Charakter des Rechts abzusprechen, is nur eine naturrechtliche Naivitat oder Ueberhebung...Was als Willkur gedeutet wird, ist nur die rechtliche Moglichkeit des Autokraten, jede Entscheidung an sich zu ziehen, die Tatkigkeit der untergeordneten Organe bedingungslos zu bestimmen und einmal gesetzte Normen

⁵³Ibid., p. 295.

⁵⁴Kelsen, What is Justice, p. 353.

jederzeit mit allgemeiner oder nur besonderer Geltung aufzuheben oder abzuaendern. Ein solcher Zustand ist ein Rechtszustand, auch wenn er als nachteilig empfunden wird. Doch hat er auch seine guten Seiten. Der im modernen Rechtsstaat gar nicht seltene Ruf nach Diktatur zeigt dies ganz Deutlich.⁵⁵

Which when translated into English reads:

It is altogether senseless to assert that in despotism there exists no legal order, but that only the whim of the despot rules. Even the despotically ruled state represents some order of human relationships. This order is the legal order. To deny it the character of legality is a naivete and an arrogance in respect to natural right. What is called "whim" is only the legal potentiality of the autocrat to decide everything so as to suit himself, to determine unconditionally the activities of the subordinate organs of state, and at any time with either general or special orders to repeal or alter the lawful norms which are already laid down. Such a condition is none the less a legal situation, even if it is felt to be disadvantageous. Yet it still has its good points. This is particularly clear from the by no means rare call for a dictatorship in the modern legal state.

The implication of Kelsen's complete thought is that relativism embraces not only democracy but autocracy as well. As Strauss remarks: "Since Kelsen has not changed his attitude toward natural right, I cannot imagine why he has omitted this instructive passage from the English translation."⁵⁶

One might conclude the general consideration of Legal Positivism by pointing out that it arises out of three things: a norm creating authority, a fact--both of which can be viewed as the legal act--and the meaning or content, linked to the norm which gives the law. The existence of the legal procedure is termed "is." This procedure creates the norm whose existence is termed as valid and whose

⁵⁵Hans Kelsen, Allgemeine Staatslehre, Berlin, 1925, pp. 335-36, quoted by Leo Strauss, Natural Right and History, Chicago and London, The University of Chicago Press, 1953, p. 4.

⁵⁶Leo Strauss, Natural Right and History, p. 4.

expression is termed not "is" but "ought."

Terminology

In order to appreciate the full impact of Kelsen's Pure Theory of Law, one must appreciate Kelsen's terminology, its meaning and its relation to the Pure Theory. Among legal philosophers, the words are familiar; however, in many instances Kelsen has special meanings. The last part of this chapter deals, then, with Kelsen's terminology and its relation to the Pure Theory of Law.

Legal Personality

International Law gives rights to states. Therefore, the state is an international personality, from Kelsen's point of view. And since a legal personality is a formal concept, nothing can be deduced concerning the content of states' duties and rights. The content, Kelsen insists must be created.⁵⁷ Now such a creation involves the concept of imputation.⁵⁸

Imputation

Here Kelsen establishes the point that while the natural sciences use the category of strict causality, law uses the category, and hence principle, of imputation.⁵⁹ The principle of imputation states that within the realm of responsible behavior, the "ought" as a copula joining the subject and the predicate imputes the predicate to the subject.⁶⁰

⁵⁷Kelsen, The General Theory of Law and State, p. 249.

⁵⁸Kelsen, What is Justice, pp. 324-25.

⁵⁹Ibid., pp. 324-25.

⁶⁰Ibid., p. 325.

Actually, Kelsen is setting up a special type of conditional proposition; e.g., if a delict has been committed, a sanction ought to be imputed. "In this sense, the principle of imputation is totally different from the principle of causality,"⁶¹ writes Kelsen. The delict serves as a sine qua non condition. However, the delict does not bring the sanction into existence. The sanction brings the delict into existence. The reason is that within the Pure Theory of Law, there is no such thing as a mala in se but only mala prohibita.⁶² The whole concept of Relativism is destroyed with the inclusion of mala in se, for this would imply the Natural Law. Imputation merely designates the connection between the subject and the predicate as expressed in the word, or copula, "ought."

Imputation and Causality

Imputation, then, refers to legal responsibility in human acts. This forgoes a union of condition and consequence by the principle of causality. In fact, modern science is the result of an emancipation of the principle of causality from the principle of imputation. Kelsen says it this way:

It is evident that a science of law does not at all aim at a causal explanation of phenomena, that in propositions by which the science of law describes its object, the principle of imputation, not the principle of causality is applied.⁶³

In imputation, as expressed in hypothetical propositions, the consequence is dependent upon superhuman or human acts. This is the meaning of the

⁶¹Ibid.

⁶²Ibid.

⁶³Ibid., p. 327.

word "ought." In the principle of causality, the connection between cause and effect is independent of both human and superhuman wills.⁶⁴

Freedom

This distinction raises the question of the concept of freedom within the scope of imputation and causality. Kelsen writes: "Freedom usually means exemption from the principle of causality, and causality is (or originally was) interpreted to mean absolute necessity."⁶⁵ Freedom, Kelsen suggest, is usually understood as the backbone of imputation, but it is just the other way around. Imputation is the backbone of freedom. The reason is this: imputation is the end point of action. Causality is not. Now imputation is attributed to human acts. Therefore, imputation, as free, gives freedom to human acts. Human behavior is free because it is the end point of imputation. And this can take place even when human behavior is caused and determined.⁶⁶

Even though man feels free, if the universal law of causality is true--necessary determinism--man is not free. This principle of causality, it must be remembered, does not involve itself in the predictability of future events, but in the ideal picture of reality from the point of view of physics. As a norm, therefore, causality becomes only functional.

Kelsen further remarks: "To conciliate the freedom of the will with the universal law of causality is impossible if freedom of the will means exemption from governing the two."⁶⁷ There is no such thing

⁶⁴Ibid., p. 326.

⁶⁵Ibid., p. 334.

⁶⁶Ibid.

⁶⁷Ibid., pp. 344-45.

as responsibility in natural reality. Responsibility is constituted by a normative order. In nature, things are not free, nor is the human being free.⁶⁸

Kelsen solves the problem of freedom by suggesting that freedom and necessary causality do not exclude each other, for human behavior can be subjected to two different schemes of thought. As a result, behavior is not exempt from either strict causality or probability. Moreover, fear and punishment, hope and reward are provided for under the assumption that they will cause the desired behavior. The imputation of punishment and reward assumes a causal reaction in a given direction. Hence, imputation is different from, but analogous to, causality.

To reconcile the idea of freedom, prevailing in society as a normative order, with the law of causality, prevailing in nature as a causal order, it is not necessary to have recourse to the metaphysical religious view which is at the basis of indeterminism. Such reconciliation is possible within the field of rational science if we recognize imputation as a principle different from, but analogous to, that of causality, the one performing in the social sciences what the other achieves in the natural sciences. This seems to be a satisfactory solution of an old problem. It is the dissolution of the sham problem of an allegedly indissoluble antinomy between natural necessity and social freedom. What seems to be a contradiction between two philosophies fundamentally different and irreconcilable with each other, a rational-empirical and a metaphysical view of the world, is in truth the parallelism of two different ways of cognition, both rational and empirical, of two different methods by which cognition connects the elements of its objects with one another, the one being completely compatible with the other: the dualism of causality and imputation.⁶⁹

⁶⁸Ibid., pp. 346-47.

⁶⁹Ibid.

The Sanction

The sanction logically follows from the concept of imputation. The sanction is the punishment employed. At times physical force is employed. The sanction within the concept of the Pure Theory is one of punishment for the simple reason that punishment, historically, is preferable to reward. The sanction is a tool of the community, in contrast to a religious or a metaphysical punishment.⁷⁰ And so, to say individuals belong to a community means that they are subject to a certain behavioral pattern or common order regulating this pattern.

The Command

The common order regulating a social pattern implies a command. To say therefore, that a norm is valid is to say that it has binding force for those whose behavior it regulates.⁷¹ A command is a norm only if it is binding. A command is binding only upon the authorization or empowerment of the individual giving the command, not because the man is somehow superior, but because he is authorized. Kelsen puts it this way:

...he is authorized or empowered only if a normative order, which is presupposed to be binding, confers on him this capacity, the competence to issue commands. Then the expression of his will, directed to the behavior of another individual, is a binding command, even if the individual commanding has in fact no actual power over the individual to whom the command is addressed.⁷²

The "ought-to-ness" of a statement, on the other hand, is

⁷⁰Kelsen, The General Theory of Law and State, pp. 17-18.

⁷¹Ibid., p. 31.

⁷²Ibid., pp. 31-2.

broader in scope than the command. For neither a will, nor a command, nor in fact that an individual acts in a certain fashion are necessarily implied in the "ought-to-ness" of a statement. That a person "ought to" means that his behavior is prescribed by a norm.⁷³ Such a norm is termed valid. The corrolation of the norm together with the "ought" enables a comprehension of the specific rules of law.

Validity

However, as norms must be valid, so also must law be valid and herein lies the difference between Law and brute force. The efficacy of the law means that the law in fact brings about the desired behavior. Kelsen writes: "A norm is not valid because, but if the order to which it belongs is, on the whole, efficacious."⁷⁴ The principle of effectiveness, therefore, is only a condition for validity. Effectiveness means, that a law can be and is enforced. As a result, legal norms presuppose:

the effectiveness of the total legal order to which a norm belongs, a fact creating the norm, the presence of a fact creating the norm and the absence of a norm annulling it.⁷⁵

From a purely scientific point of view, in order to consider ethics and jurisprudence as sciences whose objects are not reality, two types of norms must be considered. The first are positive norms created by individuals. The second are the norms presupposed in the mind of the judging individual.⁷⁶ In making the distinction between ethics and jurisprudence on the level of science, Kelsen underlines the

⁷³Ibid., p. 42.

⁷⁴Ibid.

⁷⁵Kelsen, What is Justice, p. 225.

⁷⁶Ibid., p. 358.

difference between the above two norms by suggesting that "value of law"⁷⁷ means one thing, and "value of justice means another."⁷⁸ "Value of law" means that the law is applied equally to all under the law. "Value of justice" refers to the norms of justice. Now statements about the values of law are objective because they are based on verifiable facts of reality, viz., efficacy. Statements about the values of justice, on the other hand are subjective because it is impossible to verify such norms scientifically, that is, from sense or rational cognition.⁷⁹

The reason why a "value of justice" cannot be verified is that there is no mala in se; and consequently, there is no delict in se. Human behavior does not entail a sanction because it is a delict. Rather, human behavior is a delict because it entails a sanction. The Pure Theory of Law, therefore does not allow for a mala in se. As a result, before a sanction is put on human behavior, it is not a delict in the legal sense.

The sanction is made a consequence of the behavior which is considered detrimental to society and which, according to the intentions of the legal order, has to be avoided. This behavior is designated by the term "delict," the term understood in its broadest sense....The usual assumption according to which a certain kind of human behavior entails a legal sanction because it is a delict is not correct. It is a delict because it entails a sanction. From the view-point of a theory the only object of which is the positive law, there is no other criterion of the delict than the fact that the behavior is the condition of a sanction. There is no delict in itself. In the traditional theory of criminal law a distinction is made between mala in se and mala prohibita, that is conduct which is evil in itself, and conduct which is evil only because it is

⁷⁷Kelsen, The General Theory of Law and State, p. 48.

⁷⁸Ibid.

⁷⁹Ibid.

prohibited by a positive social order. This distinction cannot be maintained in a theory of positive law. The distinction is the typical element of a natural law doctrine. It proceeds from an assumption--which cannot be proved scientifically--that certain patterns of human behavior are, by their very nature, delicts. The question, however, as to whether certain human conduct is a delict cannot be answered by an analysis of this conduct; it can be answered only on the basis of a certain legal order. The same behavior may be a delict according to the law of community A, and no delict at all according to the law of community B. Different legal orders of different peoples have stigmatized very different patterns of behavior as delicts at different times.⁸⁰

Rights

Having written on the coercive and obligatory factors of Law, Kelsen turns his attention to the concept of rights as stemming from Law. Kelsen begins by pointing out that rights can be understood colloquially in three ways. A right may mean the power to do or to omit an action. Or, again, a right may mean the power over someone's actions. Finally, there is the right to something.⁸¹

Legally, a right always involves someone else's behavior. The content of a right is ultimately the fulfillment of someone's duty. Since all rights are dependent upon a presupposed norm, and rights as such are not perceptible by the senses, there are no priorities of rights strictly speaking. In fact, there can be no legal rights before there is law.⁸²

Rights, in Kelsen's view, are made first by a guarantee of the legal order. Priority of rights, therefore, is of a political and not of a scientific value.⁸³ A right, therefore is a power granted by the

⁸⁰Ibid., pp. 51-52.

⁸¹Ibid., p. 75.

⁸²Ibid.

⁸³Ibid., p. 80.

law.

It is common to classify rights in terms of their being Absolute and Relative. Kelsen, too, uses the classification of Absolute and Relative in reference to rights. However, he has a special meaning for these terms. In as much as the right of one is possible only in relation to the duty of another, "all rights are relative."⁸⁴ Likewise, all duties are relative only to the degree that there is a reference to the rights of others. In another sense, duties to one individual are relative, while duties to all, or to an undetermined number of individuals are absolute. By the same token, a right over one individual is only relative, and a right over all, or an undetermined number is absolute.⁸⁵

Within the Pure Theory of Law, though, no right or duty refers to things, but must refer to the relations of individuals.⁸⁶ Hence the right to private property does not mean the property is yours, it means that no one else but you can possess or dispose of it. The so-called priority of rights, therefore, depends upon the norms. The norms in turn depend upon the superior-inferior hierarchical relationship which characterizes a system of law from its source or constitution. This relationship goes from the least law in a steady chain of authority all the way back to the first hypothetical constitution.⁸⁷

From all that has been said, it should be clear that the state is the legal order.⁸⁸ The state cannot be apprehended by the senses.

⁸⁴Ibid., p. 85.

⁸⁵Ibid., pp. 85-86.

⁸⁶Ibid., p. 86.

⁸⁷Ibid.

⁸⁸Ibid., p. 88.

The state manifests itself through imputation, and this in turn is done through law. Morality is the product of an emotional point of view. Morality is nothing more than an ideology or a political theory, or finally a religious assumption.⁸⁹ As a result Law, as such, regulates its own creation when a choice of law is made. However, when the choice is not based upon a higher norm, then the law is a result of a political function and depends on political norms. In either case, the interpretation of law is of a political nature. The task of a scientist is simply to show the possibilities of the law and not to choose one of them, that is, to interpret them.⁹⁰

Summary

By way of summary to the Pure Theory of Law, Kelsen starts with the category of norms. Norms are enacted to induce, as motives, the desired behavior of men. Legal norms are not identical with any natural facts, but depend upon certain verifiable facts. This verifiability consists in the effectiveness of the system as a whole and in facts which constitute the creation or the annulment of particular norms. The legal norm does not, like the moral norm refer to one person only. Legal norms include at least two persons, the delict, and the one imposing the sanction.⁹¹ Moreover, the legal duty is to refrain from the delict.

Conduct prescribed by the law is demanded without any human necessarily willing it in a psychological sense. The binding force

⁸⁹Ibid.

⁹⁰Kelsen, What is Justice, p. 368.

⁹¹Kelsen, General Theory of Law and State, p. 58.

emanates from the impersonal, anonymous command. Understanding what the law is, the question as to why the law should be obeyed presents two opposing views. On the one hand, the answer might be based upon morality. That is Law represents the ideal of justice. According to this view of finding just principles in nature, Positive Law is good only if it derives its validity from nature. But even granting this, Kelsen argues, the question is still left unanswered as to why men obey just laws. And to this, Kelsen responds, the natural law has no answer.⁹² That the Natural Law assumes obedience is unacceptable to Positive Law. And the reason that it is unacceptable is because Positive Law does not accept the proposition that human behavior can be reduced to nature.⁹³

The basic norms of the Natural and Divine Laws, it follows, must be rejected. If not, then in Kelsen's mind, Positive Law would have no validity. Moreover, the Natural and Divine Law purport to be higher orders, while in point of fact, according to the Pure Theory, they are not. Finally, the Natural and Divine Laws do not have norms issued by a higher authority, but in reality presuppose norms as basic hypotheses. And so, Kelsen can conclude nothing else except that Positive Law is supreme unto itself. It need not look any higher for its own authority.

Such supremacy is characterized by a hierarchical order going back to a hypothetically first unwritten constitution and totally independent of God or nature. Obedience, then, to the decisions of a judge or an administrator can be reduced to the principle that we

⁹²Kelsen, What is Justice, p. 257.

⁹³Ibid.

ought to obey the constitution. And we ought to obey the constitution because without it society is lost.⁹⁴

⁹⁴Ibid., p. 262.

Chapter IV

THE VALIDITY OF Kelsen'S UNDERSTANDING OF THE NATURAL LAW

Absolutism

The Natural Law, its doctrines and its pseudo doctrines, depends upon a metaphysics which not only encompasses but transcends the mind. Metaphysics encompasses the mind not only because the mind is a part of reality, but because the mind is the knower of reality. Metaphysics transcends the mind because the principles, with which metaphysics deals, have their foundation in extra-mental reality.¹ This theory with its metaphysics and with its implication of a natural law is called by Kelsen: Absolutism.²

The reason for calling this theory Absolutism is that reality is not mind dependent but contains its own basic principles.³ Consequently the principles which, according to the theory of Absolutism, are contained within this reality, are the ultimate principles beyond which there are none.⁴ Likewise because of the dependence of all

¹Kelsen, General Theory of Law and State, pp. 396, 419; also Heinrich Rommen, The Natural Law, translated by Thomas R. Henley, O.S.B., St. Louis, London, Herder Book Company, 1946, p. 183.

²Kelsen, What is Justice, p. 198.

³Ibid., p. 199.

⁴Ibid., p. 111.

concrete entities upon these principles, these principles are called necessary.⁵

The Natural Law

From these principles, according to this theory of Absolutism, the human mind can formulate laws which direct man to his ultimate fulfillment. "Now the principle of the entire moral order is the last end which stands in the same relation to matters of action, as the indemonstrable principle does to matters of speculation."⁶ Since these laws have their foundation in natural reality, they are called the Natural Law. The Natural Law is distinct from, but complementary to the laws which regulate all of natural reality. These laws which regulate all of natural reality are called the laws of nature. According to the Absolutists, the difference between the Natural Law and the Laws of Nature arises out of the differences existing among natural entities which are subject to law.⁷ Some entities are rational, intrinsically free, and hence responsible. This type of an entity is man and he is subject to both the Laws of Nature and the Natural Law. Other entities are neither rational nor intrinsically free and consequently they are subject only to the Laws of Nature.

In a very general way, what has been expressed up until now is what is called Absolutism. It is this absolutism, and these metaphysical

⁵Ibid., p. 112; Rommen, The Natural Law, p. 184.

⁶St. Thomas Aquinas, Summa Theologica, trans. by the Fathers of the English Dominican Province, New York, Benziger Brothers, 1947, I-II, q. 72, a. 5; Rommen, p. 186; Leo Strauss, Natural Right and History, Chicago, University of Chicago Press, 1953, p. 127; Kelsen, What is Justice, p. 141.

⁷Rommen, p. 186; St. Thomas Aquinas, I-II, q. 1, a. 2, II-II, q. 104, a. 1.

principles and this Natural Law to which Kelsen is unalterably opposed.⁸ The course of this research has taken us from Kelsen's understanding of Absolutism through his understanding of the Natural Law, its relationship to Positive Law, to their rejection. In Kelsen's view, Relativism and the Pure Theory of Law take the place of Absolutism and the Natural Law.⁹

The Purpose of This Chapter

However, the question arises as to the validity of Kelsen's presentation of Absolutism and especially of the Natural Law. To this question is this chapter devoted. The attempt is made to center this chapter around the Natural Law. But, as will become clear, the inclusion of metaphysics becomes unavoidable.

The Basic Concepts of Absolutism

The basic concepts with which Kelsen is concerned are the common place concepts employed in a theory of Absolutism. They are: the Absolute, the Will of God, the Command of God, creation, Law, norms, morality, retribution, imputation, and causality.

Kelsen's View on Basic Concepts

In Kelsen's view, the Absolute may refer to three things:
1) super-human beings;¹⁰ 2) world of ideas;¹¹ 3) archtypes.¹² The Will

⁸Kelsen, General Theory of Law and State, pp. 411, 433.

⁹Ibid., p. 436.

¹⁰Kelsen, General Theory of Law and State, p. 423.

¹¹Ibid., p. 12.

¹²Ibid., p. 427.

of God refers to God's authority.¹³ The command of God refers to the act of demanding certain actions of His subjects. God's creation refers to what God has produced and what is subject to His authority through His commands. The law refers to the regulations which God has established for His creation. The norms are the rules and regulations which arise out of the nature of things and manifest the commands of God.¹⁴ Morality deals with what God's creatures ought to be, or to do, and with what His creatures ought not to be, or ought not to do.¹⁵ From the point of view of the Natural Law, as Kelsen understands it, there is no difference between causality and imputation.¹⁶ Causality is a principle which refers to the necessary connections among things so that if "B" is "A" is.¹⁷ Kelsen takes the position that all of these principles must be established by the Absolutists as existing extra mentally in a transsubjective reality.¹⁸ However, what the human mind knows of extra mental reality is only appearances as subject to both the conditions of sensibility and to the laws of cognition. Kelsen writes: "Value judgments can claim to be valid for everybody, always and everywhere, and not only in relation to the knowing subject."¹⁹ The concepts of the Absolutists though, go beyond sensation. Consequently they are not the proper subject for cognition. These concepts, must be based upon faith, or superstitious animism.²⁰

¹³Ibid., p. 8.

¹⁴Ibid., p. 392; What is Justice, pp. 137, 322.

¹⁵Kelsen, General Theory of Law and State, p. 392.

¹⁶Kelsen, What is Justice, p. 325; Pure Theory of Law, p. 73.

¹⁷Kelsen, What is Justice, p. 325; Pure Theory of Law, trans. by Max Knight, from 2nd. ed., Berkeley, University of California Press, 1967, p. 89.

¹⁸Kelsen, What is Justice, p. 174.

¹⁹Ibid., p. 198.

²⁰Ibid.; General Theory of Law and State, p. 421.

The implication of Absolutism, according to Kelsen, is that reality is a dual reality of the here and the beyond. The "here" makes up the appearances of things and the "beyond" makes up the essences of things. Kelsen argues, that every attempt to establish the metaphysics of the "beyond" is for nought.²¹ As a result, the beyond is an historical category of the mind based upon superstitious animism or theological assumption.²²

The full import of Kelsen's presentation of Absolutism is that there ceases to be a factual way of distinguishing metaphysical principles because within the phenomena of reality there are no essential distinctions, only appearances.²³ As a result, in his consideration of Absolutism, Kelsen tends to combine principles on the one hand and make them applicable to any phenomena on the other hand.²⁴

Thus Kelsen combines the above mentioned basic principles in the following way:

- 1) Since the commands of God and His creation stem from the Will of God, according to Kelsen, both mean the Will of God.²⁵
- 2) Laws, norms, and morality stem from the Will of God but can refer to any empirical phenomenon.²⁶ These principles cannot be distinguished among themselves because they have the same source.
- 3) Retribution, imputation, and causality all appear the same because there is nothing within the phenomena of things which can

²¹Kelsen, General Theory of Law and State, pp. 420, 429.

²²Ibid., p. 421.

²³Ibid., p. 419.

²⁴Kelsen, What is Justice, p. 181.

²⁵Kelsen, General Theory of Law and State, p. 9; What is Justice, p. 20.

²⁶Kelsen, What is Justice, pp. 141, 181.

determine any necessary differences. The differences are mind dependent.²⁷

4) In addition, those principles stemming from the Will of God, viz., the commands of God, and creation; and those principles imbedded in His creation, viz., Law, norms and morality; all amount to an exploration of God's Will.²⁸

5) Since all of these principles are manifestations of God's Will, all are the same.²⁹

6) Since all of these principles are the same, reality can be viewed either as pantheistic or dualistic. It makes no difference.³⁰ For, the whole process resulting in the conclusion of a single category, which represents all of these ideas, has no basis in empirical reality.³¹ Rather, the category is one which has been subject to historical conditions. The true history of this category, according to Kelsen, has been the failure of great minds within differing cultural milieus to establish the empirical reality or either the category of Absolutism or any of its principles.³² The Natural Law, therefore, is a fiction which is based upon emotion or superstitious animism, and which, like an empty container, has tumbled down the road of history and taken any form which the bumps in the road might knock into it. This is Kelsen's understanding of the Natural Law.

²⁷Ibid., pp. 133, 141; General Theory, p. 409.

²⁸Ibid., p. 20, 128; General Theory, p. 8.

²⁹Ibid., pp. 315, 325.

³⁰Kelsen, General Theory of Law and State, p. 433.

³¹Ibid., pp. 420, 433, 434.

³²Ibid., p. 433.

OUTLINE OF Kelsen's LINE OF THOUGHT LEADING TO HIS BASIC CONCLUSIONS CONCERNING ABSOLUTISM

(Kelsen's formal concept stemming from the logical division)	(Kelsen's first line of thought)	(Kelsen's second line of thought)	(Kelsen's third line of thought)	(Kelsen's Conclusion)
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<u>The Absolute</u>	a) superhuman beings			
	b) seminal ideas			
	c) archtypes			

The Will of God

The Command of God (1)	1) As stemming from the Will of God these principles amount to the Will of God (3:20)
<u>Creation</u> (2)	

as stemming from
the Will of God
the exploration
of these principles
amounts to an ex-
ploration of God's
Will. (3:20)
(General Th. p. 8
What is Jus. p. 138)

As manifestations
of God's Will,
they are all the
same. (1:8) &
hence dignity of
man is affronted
with Positive
Law. (1:433)

Since they are
all the same.
reality can be
either panthe-
istic or dual-
istic It
really doesn't
make any dif-
ference
(1:433)

Law (1)	2) As stemming from creation, these principles are indistinguishable (3:330)
Norms (2)	

Morality (3)	
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Retribution (1)	
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Imputation (2)	3) As stemming from morality, these principles are indistinguishable (3:315, 176-78) p. 137
Causality (3)	

(N.B. The arrow does not mean
"leads to" but "involves")

The Problem

From the point of view of the Absolutists, on the other hand, Kelsen's understanding of the Natural Law and its principles present serious problems. The Absolutists to which this researcher is referring are the Aristotelian-Scholastics.

Kelsen's Approach

In the first place the manner in which Kelsen views reality and the manner in which the Absolutists view reality differ. For Kelsen, extra mental reality is restricted to the phenomena of things.³³ Anything said about these phenomena is said within the framework of the conditions of sensibility and of the laws of cognition. Knowledge is an interpretation of the appearances presented in sensation. Such an interpretation is a synthesis of the appearances of things with the categories of the mind. Consequently an empirical fact amounts to something more than the experience of a datum of reality. Reality as known is, for Kelsen, a creation of a cosmos out of the chaos of sensation.³⁴ Any kind of a principle, therefore, which might somehow be embedded in extra-mental reality, such as a norm, would have to be established as existing extra-mentally. But norms do not have a color; they do not have a texture; they do not have a sound, nor an odor, nor a taste. Norms are not accessible to sensation. Only objects accessible to sensation are the proper subjects for cognition. Since

³³Ibid., pp. 420, 435.

³⁴Ibid., p. 434.

metaphysical principles are not the proper objects for sensation, from his point of view, Kelsen is at a loss as to how these principles can be established as real.³⁵

The Absolutist's Approach

The manner in which the Absolutists view reality, on the other hand, is entirely different. For the Absolutists, extra-mental reality is not restricted to appearance nor is knowledge the creation of an order, on the part of cognition, out of the chaos of sensation. Reality is anything which is.³⁶ The order found in the knowledge of extra-mental reality is not considered to be the result of a synthesis between sensation and the laws of cognition. There is no innate knowledge in the view of the realist, even in the Kantian sense.³⁷

What the human mind knows of extra-mental reality, therefore, is, in the view of the Absolutist, derived from extra-mental reality. Since the human mind acquires knowledge of principles, the implication is that reality possesses these principles, on the one hand and that the human mind has the capacity to abstract these principles from sensation on the other hand. "Our intellect which knows the essence of a thing as its proper object, is dependent on sense, of which the proper objects are external accidents. Hence it is from external appearances we come to the knowledge of the essences of things."³⁸ While norms, for

³⁵Kelsen, What is Justice, p. 21.

³⁶St. Thomas Aquinas, Summa Contra Gentiles, trans. by J. F. Anderson, Garden City, Image Books, 1955, Bk. II, Ch. 73.

³⁷L. M. Regis, Epistemology, New York, Macmillan Company, 1959, p. 197.

³⁸St. Thomas Aquinas, Summa Theologica, I, q. 18, a. 2.

example, do not have color, texture, sound, etc.; nevertheless there is something about tastes and sounds and textures which the mind notices and calls norms, or causes, or effects, depending upon the situation.³⁹

As a result an empirical fact for the Absolutist is not an interpretation by cognition of the mere appearances of things, nor is it a synthesis in the Kantian sense. Rather, an empirical fact is the awareness of a datum of experience the contents of which are acknowledged to be existing apart from the knower, in extra-mental reality. Truth depends upon the evidence arising out of extra-mental reality which forces the mind to make a judgment about its conformity with reality. "Truth is the conformity of mind with being, according as it says that what is, is, and that what is not, is not."⁴⁰

Metaphysical principles and the principles of the Natural Law, therefore are not principles which the Absolutists try to establish as existing beyond the appearances presented in sensation. These principles are understood to be derived from extra-mental reality precisely because they are found in extra mental-reality.⁴¹ For the realist, knowledge is a discovery. For Kelsen knowledge is a synthesis.

When Kelsen, therefore, takes the position that the Absolutists fail to prove the extra-mental validity of metaphysics and the Natural Law, he is superimposing his own epistemological approach upon a tradition which from the very start does not follow such an approach.

³⁹J. Maritain, Degrees of Knowledge, trans. by Gerald B. Phelan, New York, Charles Scribner's Sons, 1959, p. 92.

⁴⁰St. Thomas Aquinas, Summa Contra Gentiles, trans. by A. Pegis, Garden City, Image Books, 1955, 8k. I, 59.

⁴¹Regis, Epistemology, p. 197.

The only valid conclusion which Kelsen can come to, then is that within his own approach. Absolutism has no place.

Maritain brings out the dual approach of the Absolutists and Relativists very clearly when he writes:

Thus, we must distinguish between the thing as thing--as existing or able to exist for itself--and the thing as object--when it is set before the faculty of knowing and made present to it....The tragedy of modern noetic began when the scholastics of the decadent period--with Descartes in their wake--separated the object from the thing; from that point on, the thing became a problematical "lining" concealed behind the object....

In general, moderns take object as pure object, cut off in itself from any thing in which it has existence, I mean an existence independent of my cogito, an existence posited in its own right before my act of thinking and independent of it; existence which is called, in that sense, extramental without the "exteriority" having the slightest spatial meaning; it might as well be termed premental, i.e., preceding the knowledge we have of it, or even meta-logical....⁴²

The idea that objects are distributed in discontinuous groups because they are aspects (it would be better to say "inspects") or elements of knowability in certain ontological nuclei called things, the idea that they are capable of extramental existence, the idea that the law of connection between the different shapes our eyes perceive when they look at this table from different points of view is explained by the existence of a thing (precisely the table)--all this will look like a simple explanatory hypothesis among many other equally possible hypotheses. Some men even think, along with Messrs. Russell and Whitehead that according to the principle of economy (Occam's razor), it is better to do without this hypothesis. To tell the truth, that amounts to a return (in virtue of a kind of Leibnizean view, this time heroically pushed to the absolute) to the view that eliminates natural or subjective causality. It is equivalent to reducing reality to a shower of predicates without any subjects, predicates that fly around in the vast dome of heaven and that have to be tied to one another by purely formal laws. Other men, like Husserl, will try to reabsorb the thing and its existentiality into transcendental subjectivity, one function of which will be to constitute the thing inside the self. But that is just another way of suppressing the thing

⁴²Maritain, Degrees of Knowledge, p. 91.

in the authentic meaning of the word, the extramental or metalogical thing.⁴³

The Contrast of the Dual Approach

The idea that the objects of our knowledge are things existing on their own and are "...set before the faculty of knowing and made present to it"⁴⁴ presents an entirely different picture of the Natural Law than "...reducing reality to a shower of predicates without any subjects...and that have to be tied to one another by purely formal laws."⁴⁵

In the list of principles which lead up to a Natural Law, the contrasting presentations of Kelsen and the Natural Law theorists becomes quite evident:

For Kelsen Law is a category of the mind.⁴⁶ To apply it to reality is to apply it to all of reality because there are no essential differences among things. Thus, if there is a God, then all of nature is subject to God and there is no difference between the Laws of nature and the Natural Law.⁴⁷

From the point of view of the realists, Law is not just a category of the mind but refers to existential relations of things. The distinction among Laws arises out of the distinction among things.⁴⁸ Thus some things are intrinsically free to perform or not to perform certain acts, some things are not free intrinsically.⁴⁹ Certain laws will

⁴³Ibid., pp. 92-93.

⁴⁴Ibid., p. 91.

⁴⁵Ibid., p. 93.

⁴⁶Kelsen, General Theory of Law and State, p. 439; Pure Theory of Law, p. 72.

⁴⁷Kelsen, Pure Theory of Law, p. 77.

⁴⁸Rommen, The Natural Law, p. 186.

⁴⁹Ibid.

govern them both and these are called the laws of nature. Some Laws, though, must regulate free beings precisely because they are free and these laws are called the Natural Law.⁵⁰ Kelsen, missing the essential difference between existing things,⁵¹ misses the difference between the laws of nature and the Natural Law.

Kelsen argues that if norms exist in reality then there is no difference between causality and retribution.⁵² But there is a difference and so norms do not exist in reality. Since, for Kelsen, reality presents appearances only this argument from his point of view is accurate. However, for the Natural Law theorists, reality is made up of things. The very plurality of things suggests the unity of a thing so that plurality is made possible by the diversity of things. Norms, as a result, are the measure of things in as much as they are.⁵³ Since things differ among themselves, there will be varying norms according to the varying classes of things. To speak of the principle of causality is to speak of a measure of a thing in relation to its cause.⁵⁴ To speak of retribution is to speak of a certain class of beings who are rational and free.⁵⁵ The distinction between retribution and causality from the point of view of the realist is to keynote the reality of norms which are the measure of existing things.⁵⁶

⁵⁰ Ibid.

⁵¹ Kelsen, General Theory of Law and State, p. 93; What is Justice, p. 184-85.

⁵² Kelsen, What is Justice, p. 325.

⁵³ Rommen, The Natural Law, p. 172.

⁵⁴ St. Thomas Aquinas, Summa Contra Gentiles, trans. by V. J. Bourke, Garden City, Image Books, 1955, III-139.

⁵⁵ Austin Fagothey, S. J., Right and Reason, 3rd. ed., Saint Louis, C. V. Mosby Company, 1963, p. 346.

⁵⁶ Rommen, The Natural Law, p. 172.

From the point of view of Kelsen, Positive Law is a science because it can deal with facts.⁵⁷ A fact for Kelsen, as was explained before, is a Kantian synthesis. Since law for Kelsen is a formal concept, Kelsen gives meaning to this concept through an interpretation of reality. But reality presents itself as appearance and consequently the essential tool of law, viz., imputation determines the wrong act and what areas of reality are to be subject to the consequence of performing the wrong act.⁵⁸ However within the Natural Law, the freedom of certain beings to perform actions either in accord with their natures or in discord with their natures gives rise first of all to the fact that these rational beings are answerable for their actions. To be answerable is to be responsible. To be responsible gives rise to the idea that an action can be attributed in a special way to its author. This special way is called imputation.⁵⁹ Imputation, therefore, implies freedom; and responsible acts imply good or evil. Responsibility implies intrinsic freedom and intrinsic freedom implies that an entity is at times its own efficient cause. That these principles are all related in the performance of a moral act is not incompatible with the Natural Law.⁶⁰ But, that responsibility (morality), imputation, and causality are all the same within Absolutism, as Kelsen maintains is to miss the meaning of the essential objects to which these principles refer and to ignore the essential sources from which

⁵⁷Kelsen, What is Justice, p. 20; Pure Theory of Law, p. 72.

⁵⁸Kelsen, General Theory of Law and State, p. 51; Pure Theory of Law, p. 77.

⁵⁹St. Thomas Aquinas, Summa Theologica, I-II, q. 21, a. 2.

⁶⁰Ibid., I, q. 116, a. 3.

these principles arise.⁶¹

In a philosophy which reduces reality to appearances which are subject to sensation and its conditions on the one hand and the laws of cognition on the other hand, retribution, imputation and causality become indistinguishable except in the formal order.⁶²

In a philosophy, however, wherein the objects of our knowledge are things existing on their own and are "...set before the faculty of knowing and made present to it,"⁶³ the nature of the thing itself indicates rationality or the lack of it. Rationality gives rise to responsibility which, because of the very nature of the moral act, gives rise to certain necessary principles each distinct, because of its object, from the other. These principles are causality, imputation, and retribution.

As has been shown, Kelsen's position "...is equivalent to reducing reality to a shower of predicates without any subjects, predicates that fly around in the vast dome of heaven and that have to be tied to one another by purely formal law."⁶⁴ To fit the Natural Law into such a framework is highly questionable from the point of view of Aristotelian-Scholasticism.

⁶¹Rommen, The Natural Law, p. 171.

⁶²Kelsen, The Pure Theory of Law, p. 77.

⁶³Maritain, Degrees of Knowledge, p. 91.

⁶⁴Ibid.

Chapter V

AN ANALYTICAL CRITICISM OF Kelsen'S CONCEPT OF JUSTICE

In order to appreciate the concept of justice from the point of view of Aristotelian-Scholasticism, for this is what is being used to analyze Kelsen's concept of justice, a very brief contrast between Kelsen's epistemological approach and the Aristotelian-Scholastic approach must be drawn.

For Kelsen, reality presents itself as a chaos out of which the human mind creates a cosmos. Reality, in a sense, is created by human specifications to fit the human being. The specifying factors of reality are the laws of cognition.¹ Now man is a part of reality and consequently he too will be determined by the laws of cognition. To speak of man as determined by the laws of cognition is to classify man cognitively from different points of view. Thus Kelsen can speak of man either from the point of view of science, in which case man is causally determined,² or from the point of view of imputation, in which case man is legally determined.³ In a sense Kelsen presents two different men; the one is locked within the principle of causality and the other is

¹Kelsen, General Theory of Law and State, p. 435.

²Kelsen, What is Justice, pp. 344-45.

³Ibid.

freed through the principle of imputation. To speak of the nature of man, and the principle of equality in regard to justice from the Aristotelian-Scholastic point of view is to presuppose that man has an essence which is found to be the same in all men independently of the determining factors of the laws of cognition. But such an approach is incompatible with Kelsen's epistemology. Consequently the word nature in regard to man is really quite meaningless from Kelsen's point of view. Man's nature can be categorized in many ways thus giving rise to many kinds of man, e.g., the physical man,⁴ the psychological man,⁵ the legal man.⁶ Likewise, the principle of equality is a useless formula because, from the point of view of an epistemology which in part creates reality to the specifications of the human mind, equality when applied to man can mean anything. As a result the principle of justice, when the attempt is made to derive it from existential facts, becomes meaningless. Within an epistemology which creates a cosmos out of the chaos of sensation, justice is a concept to be applied to the legal man, not the physical man. For, the physical man is determined by another set of laws.⁷ Since the various natures of man are determined by the laws of cognition, to suggest that justice can be derived from the extra-mental relations of man is to presuppose that man on his own has some sort of unified nature. However such a presupposition contradicts the very epistemological foundation upon which Kelsen's philosophy is constructed. As a result, Kelsen relegates the concept of justice

⁴Ibid.

⁵Kelsen, General Theory of Law and State, p. 409, 413.

⁶Ibid.

⁷Kelsen, What is Justice, pp. 344-45.

to the "emotional man."⁸

The position of the Aristotelian-Scholastics is entirely different. For them, reality is not created to the specifications of the laws of cognition. Reality exists on its own. Knowledge is not a creation. Knowledge is a discovery. Knowledge is a becoming one with the thing known without the loss of one's own identity.⁹

The word identity suggests a being's existing on its own; and a being's existing on its own suggests the idea of a substance. Now a substance is something to the degree that it exists: To ask what is this something which is a substance and has its own identity is to ask what is the essence, the nature of this being.¹⁰

From the point of view of Aristotelian-Scholasticism, the relationship between knower and known is not the relationship between creator and created but between the discoverer and the thing discovered. The essence of man is not a series of categories which are united with the phenomena received in sensation. Rather, the essence of man is that which makes man--independently of human thought--to be a man and not some other entity. To the question: "What is the essence of man?" the Aristotelian-Scholastics answer, "Man is a rational animal."¹¹ It is this definition which is derived from existential entities called men.

Since existential entities called man have not only certain things in common, namely rationality and animality, but at the same time

⁸Kelsen, General Theory of Law and State, p. 413.

⁹Regis, Epistemology, pp. 177, 197.

¹⁰St. Thomas Aquinas, Summa Theologica, I, q. 84, a. 7.

¹¹Bernard Wuellner, Dictionary of Scholastic Philosophy, Milwaukee, Bruce Publishing Company, 1956, p. 72.

have their own unique individuality, and since reality is not static, is not simply is, but is dynamic, is also becoming, there is a relationship between what man is and what man can become. Such a relationship implies that man can become himself to the fullest. Now to become one's self to the fullest negates deprivation. To negate deprivation is to regulate the process of one's becoming. Regulation implies law. From the point of view of the Aristotelian-Scholastics, therefore the essence of man is not only his definition, his form but, as existing to the fullest, the essence of man is his end.¹²

The laws which regulate man's becoming to the fullest are called the Natural Law. The powers which stem from man's essence and enable him to reach his end are called rights.¹³

Since man is an entity made up of an essence which is the same as is found in all men and an individuality which is unique to each individual, and since man is in the process of becoming to the fullest through the proper use of his rights and in conjunction with his fellow man, the question of the proper relationships among men arises. This is the question of justice.¹⁴ Justice deals with the proper relationships among men in regard to the proper use of rights. This means that each ought to receive his due.¹⁵ What is owed to a person ought to be paid to that person. In charity one gives to the other what belongs to one's self. Justice implies therefore that an adjustment is made as to equalize a situation.¹⁶ What is made equal are the

¹²Rommen, The Natural Law, p. 17.

¹³St. Thomas, Summa Theologica, II-II, q. 57, a. 1.

¹⁴Ibid.

¹⁵Ibid., II-II, q. 58, a. 1.

¹⁶Ibid., II-II, q. 57. a. 1.

rights of man in relation to the progress he is making towards his ultimate fulfillment, when there is a question of an interrelationship with his fellow man. For each deserves his due.

Justice involves a relationship among men in which there is a debt to be fulfilled no more and no less. This debt, in its most basic aspects, comprises the rights of others. When all respect each other's rights all are equal and justice is in action. When the rights of some are usurped for the pleasure of others, justice corrects, makes aright. this injustice forcefully, if necessary, by returning to the injured parties what rightfully belongs to them. Rommen writes:

Aristotle wished to comprehend motion, development, becoming. To him, therefore, the essence, and the perfect expression of it in the individual, is also the telos, or end. The form is thus the efficient and the final cause at one and the same time. Applied to the domain of ethics, however, this means that pure being or the pure essential form is likewise the goal of becoming for the man who is to be fashioned by education into a good citizen. From the essential being results an oughtness for the individual man. In this way, from the content of the primary norm, "strive after the good," arises the norm, "realize what is humanly good," as it appears in the essential form of man. The supreme norm of morality is accordingly this: Realize your essential form, your nature. The natural is the ethical, and the essence is unchangeable.

But a criterion of actions is thereby established. Some actions correspond to nature, and hence are naturally good; others are repugnant to nature, and hence are naturally bad. This settled, Aristotle advances to the distinction between what is naturally just and what is legally just. Both are objects of justice. Justice, however, taken in the narrower sense (for in the wider sense the virtuous man is the just man purely and simply) and distinguished from morality, is directed to the other, to the fellow man, whether as equal (commutative justice) or as fellow member of the comprehensive polis-community (distributive and, in the behavior of the member with regard to the whole, legal justice). It finds expression in the natural and in the positive law. The latter originates in the will of the lawmaker or in an act of an assembly; the natural law has its source in the essence of the just,

in nature.¹⁷

From the point of view of Aristotelian-Scholasticism, the concept of justice is as meaningful as is man. The content of the formula "to each his own" is the duty to respect the rights of others within the law.¹⁸ Justice is at one and the same time as stable as is the nature of man and as flexible as man can become. Of all of the principles which have their foundation in man as man, justice is the principle which insures the wealth of the past and present, and enables man to proceed into the wonderful possibilities of the future. For, if a man does not receive his due, how is he to proceed? In fact, why proceed?

Kelsen suggests that justice arises because of a conflict of interests and if there would be no conflict of interests there would be no need for justice.¹⁹ On the contrary, the Aristotelian-Scholastics maintain that justice is not based upon interests but upon rights within the law.²⁰ When there is no conflict of interests stemming from rights, justice does not disappear, rather, it is working perfectly.

However, the sad fact is that perfect justice is seldom achieved within a total social order. The reason, though is not because the formulas are empty, nor because justice belongs to a transcendent reality beyond natural reality. The reason is twofold. On the one hand the necessary relationships involved in the dynamic aspect of a cultural milieu do not antedate the cultural milieu. These relationships evolve with the cultural milieu. Consequently man must sort out these

¹⁷Rommen, The Natural Law, pp. 16-17.

¹⁸St. Thomas, Summa Theologica, II-II, q. 58, a. 1.

¹⁹Kelsen, General Theory of Law and State, p. 13.

²⁰St. Thomas, Summa Theologica, II-II, q. 58, a. 9.

relationships after the cultural milieu has already become and at the same time attempt to anticipate what will become. In this sense there is a certain lag in the development of justice which results in harm being done to man. On the other hand, if any empirical evidence is needed to show that man, in at least some of his action, is his own efficient cause, is free, it is man's voluntary injustice to his fellow man.

In order to appreciate this analytical criticism of Kelsen's concept of justice, certain things must be kept in mind. First of all, when Kelsen speaks of equality, he draws a sharp distinction between equality as directed at the law and equality before the law. Equality before the law simply means that all offenders, not just some, will receive equal punishment for the same crime. Equality before the law, therefore, refers to Positive Law and legal procedure. Equality directed at the law involves both the justification of the law and the function of the law. In his consideration of justice, Kelsen is not talking about equality before the law, but equality as directed at the law.

The principle of equality as a postulate directed at the authority creating the law meaning equality in the law, should not be confused with the principle of equality before the law, which is directed at the authorities applying the law to concrete cases. It means that the law-applying organs shall not, in deciding a case, make a difference that is not provided for in the law to be applied, that is to say, they shall apply the law as it should be applied according to its own meaning. It is the principle of legality, of lawfulness, which is immanent in every legal order. It is presented sometimes as justice under the law. But, in truth, it has nothing to do with justice at all.²¹

²¹Kelsen, What is Justice, p. 15.

Secondly, Kelsen's concept of justice throughout his works involves four basic elements: the basis of justice, e.g., virtue,²² love,²³ equality;²⁴ the formulas for justice, e.g., to each his own,²⁵ the golden rule,²⁶ means between the extremes;²⁷ the content of the formulas, or application of the formulas, Whose own? What means? What extremes? And the last element involves how the formula is used.

What Kelsen attempts to do in his criticism of justice is to pit one element against the other so as to reduce the whole concept of justice to an absurdity.

Thirdly, there are certain areas of criticism which keep reoccurring whenever Kelsen considers the concept of justice. For example, Kelsen maintains that on the one hand Absolutism holds to a certain point, which is essential for justice, but on the other hand when the concept of justice is examined, the essential point is found to be missing. Kelsen writes:

Not very different from the principles of equality and retribution, is the golden rule--to do, or not to do, to others as we would, or would not, have them do to us. What everybody wants others to do to him, is to give him pleasure; and what everybody wants others not to do, is to give him pain. Hence the golden rule amounts to the norm: "Give pleasure to others, do not inflict pain upon them." However, it frequently occurs that it is somebody's pleasure to inflict pain upon another. If this is a violation of the golden rule, then the question arises: "What shall be done to the violator in order to prevent such violation as far as possible?" This is the question of justice. If nobody would inflict pain upon another, no problem of justice would exist. It is quite evident that the golden rule, if applied to cases of its violation, must

²²Ibid., pp. 2, 18-20.

²³Ibid., p. 12.

²⁴Ibid., p. 15.

²⁵Ibid., p. 13.

²⁶Ibid., pp. 16-17.

lead to absurd consequences; for nobody wants to be punished, even if he has committed a crime. Hence, according to the golden rule, nobody should punish a criminal. Somebody might not mind at all that others tell lies to him, since he--rightly or wrongly--thinks himself to be clever enough to find out the truth and thus to protect himself against the liar. Then, according to the golden rule, he is allowed to lie. The golden rule, taken literally, results in the abolition of law and morality. But its intention is evidently not to abolish, but to maintain, the social order. If interpreted according to its intention, the golden rule cannot, as its wording pretends, establish a merely subjective criterion of the right behavior, the right behavior of the individual being the behavior that he wishes to get from others; such criterion is incompatible with any social order. The golden rule must establish an objective criterion. Its true meaning is: "Behave in relation to others as the others shall behave in relation to you." But how shall they behave? This is the question of justice. The answer to this question is not given, but presupposed by the golden rule; it is given by an established social order--by any such order, whether just or unjust.²⁸

Justice is supposed to be a universal concept, applicable to all, but in point of fact, this is not true. This is brought out when Kelsen writes:

If our conscience requires absolute justification of our behavior--and that means the validity of absolute values --human reason is not able to fulfill this requirement. The absolute in general, and absolute values in particular, are beyond human reason, for which only a conditional, and in this sense relative, solution of the problem of justice, as the problem of justification of human behavior, is possible.

But the need for absolute justification seems to be stronger than any rational consideration. Hence man tries to attain the satisfaction of this need through religion and metaphysics. That means that absolute justice is transferred from this world into the transcendental world. It becomes the essential quality, and its realization the essential function of a superhuman being, of God, whose qualities and functions are, by definition, inaccessible to human cognition.²⁹

In addition, Absolutism cannot formulate a concept of justice which

²⁸Ibid., pp. 16-17.

²⁹Ibid., pp. 10-11.

does not merge with and give way to Positive Law. The reason for this last point becomes clear when Kelsen writes:

Man must believe in the existence of God, and that means in the existence of absolute justice, but he is unable to understand it. Those who cannot accept this metaphysical solution of the problem of justice and nevertheless maintain the idea of absolute values in the hope of being able to determine them in a rational-scientific way deceive themselves with an illusion--namely that it is possible to find in human reason certain fundamental principles from which absolute values may be deduced. But these values are, in truth, determined, in the last analysis, by the emotional elements of their mind. The determination of these absolute values, and in particular the definition of the idea of justice, achieved in this way, are but empty formulas by which any social order whatever may be justified as just.³⁰

Lastly, Absolutism cannot formulate a concept of justice which can stand the test of Kelsen's analytical criticism.

Up to here, then, these are Kelsen's considerations and aims when he treats of justice. In order to appreciate the following analytical criticism of Kelsen's concept of justice, these elements must be kept in mind.

More specifically, Kelsen, first of all, criticizes Absolutism's inability to formulate one all encompassing concept of justice which is applicable to all peoples at all times. According to Kelsen, history has shown this impossibility.³¹ Moreover, conflicting interests demonstrate that at times some are satisfied at the expense of others.³² At other times there is a compromise which solves the conflicting interests.³³

In the area of values, their rank, or hierarchy, varies according

³⁰Ibid.,

³¹Ibid., p. 21.

³²Ibid., pp. 4-7.

³³Ibid.

to the differing beliefs which one holds in regard to them. In fact, Kelsen assures the reader, nature itself is inconsistent in its inequalities.³⁴ As a result, the efforts of man to formulate a concept of Absolute justice end in empty formulas.

If the history of human thought proves anything, it is the futility of the attempt to establish, in the way of rational considerations, an absolutely correct standard of human behavior, and that means a standard of human behavior as the only just one, excluding the possibility of considering the opposite standard to be just too. If we may learn anything from the intellectual experiences of the past, it is the fact that only relative values are accessible to human reason; and that means that the judgment to the effect that something is just cannot be made with the claim of excluding the possibility of a contrary judgment of value. Absolute justice is an irrational ideal, or, what amounts to the same, an illusion--one of the eternal illusions of mankind.³⁵

Kelsen cites two schools of thought which employ and promote these empty formulas: the metaphysical-religious, and the pseudorationalistic schools. It is Kelsen's contention that all of the efforts of these two schools actually end up by showing that absolute justice is an irrational ideal. Kelsen concludes that a concept of absolute justice, therefore, must be abandoned.³⁶

In showing that a general concept of justice is meaningless, Kelsen considers first of all the uselessness of the basis upon which a concept of justice might be found. There are three such basis treated by Kelsen: happiness both individual and collective, both objective and subjective; Plato's Absolute good; and finally Christ's concept of Love.³⁷

In the case of happiness, an analysis shows that collective and

³⁴Ibid., p. 3.

³⁵Ibid., p. 21.

³⁶Ibid., pp. 22-24.

³⁷Ibid., pp. 11-13.

objective happiness upon examination prove impossible because all cannot be made happy. So happiness is reduced to a subjective and individual pursuit of interests. In the case of Plato and Christ, both promote sources which are beyond human cognition: for Plato, the Absolute good, and for Christ an inhuman love (sic). Both are inadequate to serve as a foundation for justice. From the start, Kelsen concludes, a concept of justice has no foundation, no stable reason for its own existence. Kelsen writes:

If man is more or less a rational being, he tries to justify his behavior, motivated by the emotions of his fear and desire, in a rational way, that is to say, through the function of his intellect. This, however, is possible only to a limited extent--only to the extent that his fear or desire refers to means by which some end is to be achieved; for the relationship of means to end is a relationship of cause and effect, and this can be determined on the basis of experience, which means in a scientific rational way. To be sure, even this is frequently not possible, if the means to achieve a certain end are specifically social measures. For the actual status of social science is such that we have no adequate insight into the causal nexus of social phenomena, and hence no sufficient experience which enables us to determine how certain social aims may best be attained....

If something, especially a pattern of human behavior, is justified as means to a certain end, the inevitable question arises whether this means is justifiable. This train of ideas must finally lead to the assumption of an ultimate end, which is the very problem of morality in general and justice in particular.³⁸

When Kelsen examines the formulas for justice, he finds them to be empty because they will justify any contradictory system. The conclusion is that Absolutism cannot come up with a universal concept of justice which is applicable to all peoples at all times. Justice is an irrational idea.

However, there are certain flaws in Kelsen's treatment of justice.

³⁸Ibid., pp. 9-10.

One of them is his equivocal use of the word³⁹ justice. In one instance, justice means, for Kelsen, the source or the origin of justice. This is to say, the reason for justice. In another instance, justice means the function or formula employed. Kelsen's consideration of happiness in regard to the formula of equality is an example of this. One is left wondering if happiness is the justification of equality, or equality is the justification of happiness?⁴⁰

Kelsen's consideration of Marxism and the formula of equality is another instance.⁴¹ On the one hand Kelsen shows that Marxism is the justification, the basis for equality. On the other hand, Kelsen indicates that equality is the basis for Marxism. When the justification for equality is Marxism, the formula of equality must be changed to suit what Kelsen thinks it should be. However, when the formula is changed, equality becomes the justification for Marxism. As a functional formula under the guise of a justification, Kelsen then disregards Marxism and shows the formula of equality as empty. In either the case of changing the formula of equality to suit Marxism, or the case of treating equality as the justification for Marxism and at the same time destroying equality as a formula, Kelsen never really does disprove Marxism, or the principle of equality.⁴²

Kelsen compounds this equivocation to such an extent that it becomes a running error throughout his work on justice. For example, in one sense, justice means the basis for justice or for the formula--function--employed in justice. In another sense, Kelsen treats both

³⁹Ibid., pp. 14-16, 24.

⁴⁰Ibid., pp. 3-4.

⁴¹Ibid., pp. 15-16.

⁴²Ibid., p. 15.

the justification and the formula as if they were the essence of justice.⁴³ At first glance, this may not seem to be a problem, but it is. For, to give a basis for justice is one thing. However the basis is not the essence, does not define, nor express in itself exactly what justice happens to be. Happiness, as an instance, might be the basis for justice, but happiness is not justice in se. Consequently, to define happiness is not to define justice. But Kelsen writes:

But what does it really mean to say that a social order is just? It means that this order regulates the behavior of men in a way satisfactory to all men, that is to say, so that all men find their happiness in it. The longing for justice is men's eternal longing for happiness. It is happiness guaranteed by social order. In this sense, Plato, identifying justice with happiness, maintains that only a just man is happy, and an unjust man is unhappy. The statement that justice is happiness is evidently not a final answer; it is only shifting the question. For now, we must ask: What is happiness?⁴⁴

In the first part of the above quote, justice is the cause of happiness, or the basis for happiness. In the second part of the quote, justice is identified with happiness so that the question "What is Happiness?" can be introduced. The question which Kelsen leaves unanswered is how the reader is to interpret his quoted statement.

Likewise, to give a formula, such as "to each his own," is one thing. But to define the content of the formula, that is to define the elements which go to make up the formula, is quite another thing. Unfortunately, Kelsen does not define the elements which constitute the formulas. He merely applies the formulas to examples.⁴⁵ This is why Kelsen can say that the formulas for justice fit any contradictory

⁴³Ibid., pp. 14-15.

⁴⁴Ibid.

⁴⁵Ibid., pp. 9-10.

system.

Moreover, even granting for the moment, but not conceding that the basis for justice is identical with the definition of justice, Kelsen never defines happiness; he just states it and then uses it much in the fashion of one taking a word and seeing to how many things it can apply

At the heart of the matter, Kelsen is mistaking the pragmatic aspect of justice--whether it be the formula or the basis--for the essence of justice. The formula "to each his own" is an example of this. Kelsen never really does define what the formula means. He states it and applies it. Then he reasons from the application to the essence. In other words, Kelsen makes the application of the formula the essence.⁴⁶

Happiness is another example.⁴⁷ Kelsen uses happiness as a foundation for justice. But he never states what in fact happiness is. He simply uses the word happiness in the sense of a logical division, viz., in whatever way the word happiness might be commonly used, even though the objects subsumed under the word happiness might be contradictory.

In addition, Kelsen himself admits that he does not know the necessary definition--or definitions--involved in the elements of justice.⁴⁸ Because of this, Kelsen never does analyze the nature of justice. In the case of equality, Kelsen states the formula and explains the formula not by giving the component parts and their essential

⁴⁶Ibid., pp. 13-14.

⁴⁷Ibid., pp. 1-4.

⁴⁸Ibid., p. 24.

relationship, but by giving a formula which presupposes both equality and the definition of its essential parts.⁴⁹ Now such a presupposition with its subsequent production is the idealistic fallacy. In other words, to presuppose what a thing is and then apply it and say that is what it is, is idealistic.

More important, though, the cause of a thing as well as the utility of a thing are both accidental to that thing in terms of the specific essence of the thing. To argue from what is accidental to what is essential, that is to say, to mistake the accidents for the essence is fallacious. And Kelsen does this. For example, Kelsen writes:

To one of the seven sages of ancient Greece, the well-known saying is attributed that justice is to give to each his own. This definition has been accepted by many outstanding thinkers and especially by legal philosophers. It is easy to show that this is an empty formula, because the decisive question, what is that which is one's own, is not answered, and hence the formula is applicable only under the condition that this question is already decided by a social order--legal or moral--established by custom or legislation, that is to say by positive morality or positive law.⁵⁰

When speaking of the concept of Christian justice, Kelsen writes:

This justice is beyond any social order to be established in reality; and the love which is the essence of this justice is evidently not the human instinct we call love.⁵¹

In the first example, Kelsen mistakes the application of the formula: the determination of what is one's own for the essence of the formula, viz., what is to be understood by the formula, what is the nature of the formula: "to each his own?" In the second instance, Divine Love may be at the back of justice, but it can hardly be said

⁴⁹Ibid., pp. 14-15.

⁵⁰Ibid., p. 11.

⁵¹Ibid., p. 12.

to be the essence of justice. In both instances, Kelsen falls into the fallacy of accident, for as will be shown, neither the Christians nor the Rationalists view justice in this light.

What Kelsen does in his treatment of justice is to make a list of formulas and then try them out. He sees that their applications can be contradictory. So he concludes that the applications represent nothing, and hence the formulas are meaningless. Unfortunately, as has been pointed out, Kelsen does not state exactly what the formulas mean, for example equality.⁵² He simply applies the formula. Now the identification of the pragmatic aspect of a thing with the essence of a thing results in the fallacy of accident. From this fallacy, Kelsen treats the collection of formulas and finds that none of them seem to work without involving contradictions. The characteristic of failure derived from Kelsen's test of each of the formulas, he attributes to the whole of justice universally. His final step is to conclude that there is no such thing as justice. However, this last step does not follow for Kelsen is arguing from a characteristic found in a collection to an essential note found in the essence. This is the fallacy of composition.

In summary, then, Kelsen invalidates his criticism of Justice in the following ways. First of all Kelsen equivocates the word justice by referring to the origin of justice or the function of justice when he is actually talking about the essence of justice. Now to mistake an accident or a property of a thing for the essence of a thing is the fallacy of accident. In addition, because of the above, Kelsen actually

⁵²Ibid., p. 14.

assumes the essence of justice. The resulting treatment of justice (which terminates in its being considered), an irrational idea from Kelsen's point of view, is really an idealistic assumption based upon the pragmatic analysis of a principle, the meaning of which is unknown to Kelsen, but which is arbitrarily given meaning in whatever way Kelsen sees fit.⁵³ The evidence seems to indicate that Kelsen has fallen into the Idealistic fallacy.

One can only conclude that Kelsen fails to prove his point in his general consideration of justice.

In regard to the problem of the relationship between justice and Positive Law, Kelsen quite consistently is of the opinion that the formulas of justice are meaningless.⁵⁴ Kelsen adds strength to his opinion by pointing out that when the formulas of justice are given content through Positive Law, the concept of justice disappears into Positive Law. For all practical purposes, according to Kelsen, justice and all that it represents is replaced by Positive Law.⁵⁵ Hence, there is no need for either justice or the Natural Law.

Now from the point of view of a working formula about which Kelsen writes, justice and Positive Law can be reduced to the same concept. However, from the point of view of the essential content, the definition of the formula of justice, Kelsen fails to show how Positive Law replaces justice. Yet, as has been shown, when Kelsen is speaking of justice, he means both the formula and its content.⁵⁶

⁵³Ibid., pp. 2, 5, 9, 11, 13, 14, 17, 18, 20, 24.

⁵⁴Ibid., p. 11.

⁵⁵Ibid., pp. 15, 17.

⁵⁶Ibid., p. 15.

This leads to the unfortunate conclusion for Kelsen that he is proving only that the formulas of justice are applicable to Positive Law. The reason is that he again confuses the formulas in their pragmatic aspect with the essence of justice as such. Moreover, not knowing the essence of the formulas of justice, Kelsen uses the formulas correctly or incorrectly as a justification of any law.⁵⁷

However, in any formula wherein the essence of the formula is known, the formula, as a universal principle, remains distinct from its specific application. Kelsen admits this himself when he speaks of the principle of equality before the law.⁵⁸ This implies that when a formula is well defined, the limits of the formula mold the object to which it is applied. When a formula is not well defined, the object to which it is applied molds the formula, and the formula becomes meaningless as Kelsen has so aptly shown in his general consideration of justice.

Finally, in this analytical criticism of Kelsen's concept of justice, there is the question of the sources of justice which Kelsen uses and analyzes. This subject, in this writer's opinion, is what might be commonly called "touchy." Kelsen is, after all, a great scholar. He has gone to the trouble to step outside of his own school of thought in order to give a fair and a scholarly complete appraisal of the topic about which he writes. No man, in this researcher's opinion, is so universal that his grasp of philosophy and related fields is absolutely free of scholarly error. Here, of course, one is not speaking of man's grasp of knowledge through a supernatural means, but through a natural means. And so the following criticism of Kelsen's

⁵⁷Ibid., p. 19.

⁵⁸Ibid., p. 15.

understanding of the sources of justice is meant to reflect at one and the same time Kelsen's scholarly attempts for which he should be given credit and the fact that the field of his endeavors is so broad that he does reflect the limits of human nature.

Kelsen speaks of Christian love as a basis for justice. Unfortunately, he both misquotes and misinterprets Christ in his teachings. In referring to the love which Christ taught as a possible source for absolute justice, Kelsen accuses Christ of teaching not human, but inhuman, that is to say: non human love. Kelsen writes: "...Jesus emphatically rejected human love uniting man with woman, parent with child."⁵⁹ Kelsen backs up this assertion by indirectly quoting the Bible:

"He who wants to enter the kingdom of heaven must give up home, and wife, and brothers and sisters, and parents and children."⁶⁰

To the above quote, Kelsen refers the reader to Luke, XVIII: 29, 30.⁶¹

Now the Catholic Bible puts the quotation this way:

Jesus said to them, I tell you truthfully, everyone who has forsaken home, or parents, or brother, or wife, or children for the sake of the Kingdom of God, will receive in this present world, many times their worth, and in the world to come, everlasting life.⁶²

Furthermore, the same passage in the King James Version of the Bible reads this way:

And He said unto them; Verily I say unto you, there is no man that had left house or parents or brother, or wife, or children, for the kingdom of God's sake, Who

⁵⁹Ibid., p. 12.

⁶⁰Ibid.

⁶¹Ibid.

⁶²The Holy Bible, edited by Rev. John P. O'Connell, Chicago, The Catholic Press, Inc., 1951, p. 75.

shall not receive manifold more in this present time and in the world to come life everlasting.⁶³

Both of these passages agree in themselves, and both disagree with Kelsen's quote. Now Kelsen bases his criticism of justice as stemming from Christian love on his own quote, not that of the Bible. Kelsen has put himself in the peculiar position of pitting himself against all Christianity.

However, Kelsen justifies his position with the following quote from the Bible:

If anyone comes to me without hating his own father and mother and wife and children and brothers and sisters and his very life too, he cannot be a disciple of mine.⁶⁴

Kelsen speaks of the above passage so as to give authority to the opinion that Christ taught an inhuman love in this way:

The love taught by Jesus is not human love....It is supposed to be compatible with the cruel and even eternal punishment of the sinner in the last judgment and hence with the deepest fear, the fear of God.⁶⁵

Now this research and its content is supposed to be philosophical in nature. However, it is Kelsen who brings the Love which Christ taught into his discussion on justice. And so, in regard to his opinion on the Love which Christ taught as a basis for justice, Kelsen is guilty of misinterpreting the Bible. Both the Protestant Interpreter's Bible⁶⁶ and A Catholic Commentary on Holy Scripture,⁶⁷ are agreed that the passage Kelsen directly quotes refers to those who put father, mother, etc. above the love of God, and not that one has to hate those

⁶³The Holy Bible, King James Version.

⁶⁴Ibid.

⁶⁵Ibid.

⁶⁶Interpreter's Bible, Vol. VII, Nashville Abingdon Press, 1952, p. 259.

⁶⁷A Catholic Commentary on Holy Scripture, London, Thomas Nelson & Sons, 1951, p. 1312.

people out right so as to be saved as Kelsen would have us believe.

Chapter VI

HISTORICISM VS. THE TRANSCENDENTAL HISTORICAL APPROACH

In Chapter IV, which dealt with Kelsen's understanding of the Natural Law, and in Chapter V, which dealt with Kelsen's understanding of justice, a dual method of evaluation in regard to these topics becomes clear. This duality of approach between Kelsen and the Aristotelian-Scholastics is divided into historicism and the transcendental historical approach. Since history has its place within the philosophy of law, this chapter is devoted to an appraisal of these two approaches to history as one of the sources of research in the development of the philosophy of law.

Historicism

Strauss writes: "The typical historicism of the twentieth century demands that each generation reinterpret the past on the basis of its own experience and with a view to its own future."¹

In historicism, the reinterpretation of philosophical principles within the limits of historical conditions, renders all philosophical principles essentially relativistic. For, their validity depends upon

¹Leo Strauss, What is Political Philosophy, Illinois, the Free Press of Glencoe, 1959, p. 59.

the re-evaluation given within an historical period. Consequently, the element of permanence which might exist within a philosophical system is that which is posited within a given cultural milieu.² Any attempt to subject philosophical systems, which assume that their principles are eternal and unchanging, to the test of historicism results in historicism's demonstrating that their principles are empty formulas which give birth to any mutually opposing applications. This is done by showing either that two different cultural milieus have taken contradictory positions towards one and the same principle, or that within a given cultural milieu, one and the same principle was used in contradictory fashions by many institutions. From the point of view of historicism, the element of immutability within philosophical principles is absurd. Because of this historical interpretation history and philosophy become so ~~used~~ that the latter is subject to the conditions and interpretations of the former.

The Transcendental Historical Approach

Strauss writes:

Historicism appears in the most varied guises and on the most different levels. Tenets and arguments that are the boast of one type of historicism, provoke the smile of the adherents of others. The most common form of historicism expresses itself in the demand that the questions of the nature of political things, of the state, of the nature of man, and so forth, be replaced by the questions of the modern state, of modern government, of the present political situation, of modern man, of our society, our culture, our civilization and so forth. Since it is hard to see, however, how one can speak adequately of the modern state, of our civilization, of modern man, etc., without knowing first what a state is, what a civilization is, what man's nature is, the more thoughtful forms of historicism admit

²Ibid., p. 71.

that the universal questions of traditional philosophy cannot be abandoned. Yet they assert that any answer to these questions, any attempt at clarifying or discussing them, and indeed any precise formulation of them, is bound to be "historically conditioned," i.e., to remain dependent on the specific situation in which it is suggested. No answer to, no treatment or precise formulation of, the universal questions can claim to be of universal validity, of validity for all time. Other historicists go to the end of the road by declaring that while the universal questions of traditional philosophy cannot be abandoned without abandoning philosophy itself, philosophy itself and its universal questions themselves are "historically conditioned," i.e., essentially related to a specific "historic" type, e.g., to Western man or to the Greeks and their intellectual heirs.³

Opposed to historicism is the view that man's knowledge of the nature of things is such that his ideas of these things transcend historical re-evaluation in direct proportion to the unchangeable natures of things from whence man derived his knowledge.⁴

The transcendental historical approach, is not limited to an historical interpretation of principles, because these principles answer the question of what the nature of things are independently of a given historical epic. The implication in this view is that there is a certain permanence about existential entities which transcends all historical epics. If anything, these existential entities condition history. The reason why these existential entities condition history is because these elements which prevail throughout history are from nature and are unchangeable. What is from nature and is unchangeable is not subject to and cannot be altered by the relativistic aspect of natural events.

On the contrary, the relativistic aspects of reality are subject

³Ibid., pp. 59-60.

⁴Strauss, Natural Right and History, Chicago, University of Chicago Press, 1953, p. 25.

to that which is unchangeable for two reasons. First of all, since that which is essentially from nature is unchangeable, that which is relative must, if it is to exist, take into account the unchangeable aspects of things. For, the relative cannot change that which is unchangeable. Secondly since the very word relative means related to, dependent upon the answer to the questions: "related to what?" "dependent upon what?" implies a relation to and dependence upon that which is immutable because it is naturally essential.

Consequently since history is dependent upon the progression of things and events within time and place, and the progression of things within time and place are dependent upon the potential of things and their interrelationships, all are conditioned by the natures of things which are naturally essential. For, that which is naturally essential gives rise to that which is potential.⁵

Those principles, therefore, which are naturally essential, transcend a given historical epic, or a particular situation, and enter into all historical epics and dominate all particular situations. Consequently, the approach of the Aristotelian-Scholastic is called the transcendental historical approach.⁶

These two approaches have far reaching consequences in both the consideration of Kelsen's understanding of Absolutism and Relativism in regard to the Natural Law, as well as in the Aristotelian-Scholastic's consideration of these same topics.

⁵St. Thomas Aquinas, Summa Theologica, I, q. 75, a. 5.

⁶Strauss, Natural Right and History, p. 25.

Kelsen's Historicism

For Kelsen, Absolutism and its offspring, the Natural Law, are historical categories, categories not derived from reality, but emotional reactions to reality.⁷ These emotional reactions to reality Kelsen subjects to the test of history.

Historically these categories evolved from a feeling of retribution attributable to the phenomena of nature in the simple culture of the primitives, and developed into self contradictory metaphysical systems which were somehow supposed to justify any form of government within the complex cultures of modern times.⁸

The natives attributed a sense of retribution to the more striking phenomena of nature. As history proceeded people read causal connections into the more striking clashes in nature. Finally the doctrine of the Natural Law developed sufficiently so that people tried to derive moral principles from nature. These principles in turn served as the basis of justification for man's actions and also for Positive Law. The derivation of the principles, and hence the law, is brought about, according to Kelsen, by a deduction: the "ought from the is." This "ought" is reconciled in Kelsen's view of the Natural Law to an emotional reaction toward the "is."⁹ Kelsen is suggesting that the historicity of the Natural Law is the historicity of man's superimposing his emotions upon the phenomena of nature.

⁷ Kelsen, General Theory of Law and State, pp. 419, 438 f.n.; What is Justice, p. 4.

⁸ Ibid., pp. 422-23.

⁹ Ibid., pp. 408-9,

Now, in view of the fact that the Natural Law is based not upon cognition nor upon what is contained within nature, in Kelsen's view, but rather upon the irrational and superstitious fears of man, a certain proportion arises. As the culture of man becomes more complex, so also do the varying justifications for the laws (become more complex). As a result the laws of one country often contradict the laws of another, and the laws of one period contradict that of another. The Natural Law doctrine becomes a justification for any system or contradictory systems.¹⁰ In fact to the degree that man can create a system, to that degree can he justify it through the Natural Law Doctrine, for the Natural Law Doctrine is an emotional appeal to or rejection of law. Consequently, in Kelsen's analysis, when the Natural Law coalesces with Positive Law, the Natural Law disappears into Positive Law.¹¹ When the Natural Law clashes with Positive Law a contradiction between the two is avoided because they are not on the same level. In all cases the Natural Law doctrine, as an emotional reaction to reality, can be constructed to justify any system of Positive Law. The Natural Law on its own within history has shown itself to be self contradictory.¹²

Kelsen goes on to trace, in his consideration of the historicity of the Natural Law Doctrine, the gradual emancipation of the principle of causality from extra-mental phenomena to a scientific principle of cognition in the Kantian sense. Out of this evolution emerges Positivism.¹³

¹⁰Ibid., p. 422.

¹¹Ibid., p. 439.

¹²Ibid.

¹³Kelsen, What is Justice, pp. 321-22.

Kelsen, through the tracing of these two trends within history, shows the evolution of the Natural Law theorists, pseudo religio-metaphysicians--on the one hand, and true scientists or positivists on the other hand.¹⁴

One way of giving some unity to the varying doctrines within the Natural Law and at the same time of showing the general points of departure is to trace the direction of thought which the philosophers have taken throughout history. Kelsen does this, but his point of unity is a psychological one.¹⁵ The psychological approach is perfectly consistent within Kelsen's doctrine because he feels that the Natural Law is nothing more than a psychological reaction to reality. In presenting the historicity of the Natural Law from this point of view, it is a short step to a criticism of this doctrine throughout history from a philosophical point of view. And Kelsen presents this criticism admirably.¹⁶

In summary, Kelsen's position revolves around two points. The first is historicism in which the concepts of the Natural Law and its metaphysics is subject to the reinterpretation of various historical periods. The re-appraisals of the Natural Law and its metaphysics vary according to the conditions of history to which they are subject.¹⁷ Second, the element common to all metaphysical systems and Natural Law theories is that upon which they are based namely psychological reactions.¹⁸ These psychological reactions take the form of

¹⁴Ibid., p. 322; General Theory of Law and State, p. 443.

¹⁵Kelsen, General Theory of Law and State, p. 420.

¹⁶Ibid.

¹⁷Kelsen, The General Theory of Law and State, pp. 421, 423, 442-43, 446; What is Justice, pp. 138-39; The Pure Theory of Law, pp. 64, 82.

¹⁸Kelsen, The General Theory of Law and State, pp. 409, 423, 438.

wish-fulfilling desires, superstitious animism, or theological beliefs.¹⁹

A Criticism of Kelsen's Approach

However, from the point of view of Aristotelian-Scholasticism, Kelsen's historicism is highly questionable. One reason why it is questionable is that it substitutes psychological reactions toward natural reality for the intellectual analysis of the content of reality. The point, after all, of the Natural Law is to observe and then derive principles which are inherent within nature and without which natural reality, of the variety experienced daily by man, could not exist.²⁰ That there are psychological reactions to this reality is due to the fact that one is involved in and hence confronted with reality. To mistake, therefore, the ever changing consequences of man's confrontation with reality for the knowledge of the principles necessarily inherent within and essential to reality, is to mistake the accidental for the essential. Now Kelsen does this. Not only does Kelsen continually state that the Natural Law Doctrine is irrational, and is based upon superstitious animism, but his whole approach to the historicity of the Natural Law is from this point of view. Kelsen very clearly states his position when he writes:

It is a peculiar and often discussed fact that human cognition, whenever it follows its original impulses naively and uncritically has the tendency to duplicate its object. The reason is that man is not at all satisfied with what his own senses present and his own reason comprehends. His first passionate urge for knowledge remains unsatisfied, if he is to stop within the boundaries of what is

¹⁹Ibid.

²⁰Charles N. R. McCoy, The Structure of Political Thought, New York, McGraw-Hill Book Company, 1963, p. 47.

given in his own being, with nature as he can sense and comprehend it through the energies of his own soul. The desire to penetrate into the essence of things moves him to inquire what is "behind" things. And because he cannot find an answer to this question within his experience, that is, in the sphere of the World of his senses as it is controlled and ordered by his reason, he boldly assumes a sphere beyond experience. This is the sphere which is said to hide the grounds and causes he seeks, the ideas or archetypes of all earthly things experienced, the things as they are, the "things in themselves" as they exist independently of senses and reason, a sphere which, because it is inaccessible to his senses, is at the same time said to be eternally concealed from him. This strange hypothesis, by which man produces the illusion of growing beyond himself, this curious attempt of the eternal Munchausen to climb on his own shoulders, forms the elementary kernel of all metaphysics and religion.²¹

The problem with an historical-psychological approach to the Natural Law is twofold. First, when the point of unity, that is, the universe of discourse, is restricted to the psychological factor, any differentiation among principles and theories will stem from reactions to reality. The differentiations will not stem from the intrinsic differences which might exist among the realities themselves. If these differentiations were to stem from among the realities themselves, then the analysis of the Natural Law and its metaphysics together with their varying theories would imply far more within the universe of discourse than is included in Kelsen's universe of discourse. This approach means, then, that since the universe of discourse is based upon one's psychological reactions to reality, the differentiations among the principles themselves become impossible. For example, the differentiation between imputation and causality becomes impossible because in themselves their differences are not taken into account. The principles coalesce into the same psychological reaction. Kelsen

²¹Kelsen, General Theory of Law and State, p. 419.

brings this point out when he writes:

The essence of animism is personalistic, that is socio-normative interpretation of nature--an interpretation according to the principle of imputation, not according to the law of causality.

Consequently, the concept of nature as an order of elements connected together according to the principle of causality, cannot be formed in the thinking of primitive men.²²

Only gradually could the principle of causality divest itself of all slugs of animistic, that is personalistic thinking. For example, the idea that causality means an absolutely necessary relation between cause and effect--an idea that still prevailed at the beginning of the twentieth century--is certainly a consequence of the view that it is the will of an absolute all powerful transcendental authority beyond the realm of human experience which connects the cause with the effect. If this view is abandoned, then nothing stands in the way of eliminating the element of necessity from the concept of causality and of replacing it by the element of mere probability. If, however, the element of necessity is retained, it must undergo a change of meaning--it must change from the absolute necessity of a divine will, expressed in the cause-and-effect relation, to a necessity of human thinking, that is, to the exceptionless validity of a postulate of human cognition.²³

The second point concerning the historical-psychological approach to the Natural Law and metaphysics is a consequence of the first. The second point consists in Kelsen's reducing all theories about the Natural Law and metaphysics to historical reactions, their twists and turns as these reactions are reinterpreted down through the ages. In other words, the Natural Law and metaphysics become a study in man's optimism or pessimism, courage or cowardness concerning his confrontation with reality, as he interprets reality within the various stages of history. If there are no things which are naturally essential within extra mental-reality and if there are no necessary relationships

²²Kelsen, Pure Theory of Law, trans. by Max Knight, (from second edition), Berkeley, University of California Press, 1967, p. 83.

²³Ibid., p. 85.

which exist extra-mentally among the things in reality, the history of various theoretical systems can all be considered the same, viz., the psychological study of man's reactions to the forces of nature as these reactions vary within the history of mankind. Kelsen makes this clear when he writes:

Contempt for the world and escape from it inspire pessimistic dualism, whose radical negation of natural reality and positive law will generally prevent its adoption except as an esoteric doctrine. It is, accordingly, out of the question for any system which desires to gain the support of even the majority of the educated. Consequently, a legal and political theory which corresponds to this type can be actually found only in opposition to the dominant trend of natural law doctrine, which in every respect presents itself as the natural law theory of the ruling group or class. Original Christianity and later ascetic monasticism, as well as the teachings of certain sects, revolutionary liberalism, can all be taken as carriers of that opposition which expounds the pure idea of natural law against its actuality in the dominant dogma. Also the revolutionary anarcho-socialism of today displays essential traits of this type of natural law doctrine, at least as long as it is the view of a minority and an opposition on principle.

Only that type of optimistic dualism is destined to become a "prevailing" doctrine which serenely affirms the reality of nature as well as the given order of social life. The same is true of the compromise type of resigned dualism, whose ultimate wisdom most clearly developed in the Platonic-Aristotelian philosophy, that of the compromise type in the Stoic system. It is one of the most significant facts in the intellectual history of mankind that Christianity through the Pauline development evolved from the strictly pessimistic type, primarily in the field of political and legal philosophy, towards the compromise type by leaning, in part consciously upon Stoic philosophy.²⁴

The ideas that the Natural Law and metaphysics are psychological reactions to the forces of reality and that these reactions are subject to the interpretations and conditions of various historical periods, put Kelsen in a very peculiar position. For his criticism of these

²⁴Kelsen, General Theory of Law and State, p. 443.

ideas and those historical re-evaluations is not only based upon an analysis which is psychologically orientated, his criticism is based upon an analysis which is also philosophically oriented too. Consequently Kelsen is in the position of restricting the Natural Law and metaphysics to psychological reactions as they occur in history, and then subjecting them to philosophical scrutiny.²⁵

Del Vecchio underlines Kelsen's problem when he writes:

Plato, even in his day, gave to his analysis of justice a psychological basis; but at all times, in every phase of thought, there appears a parallel between psychological and juridical doctrines. If, for example, one starts from the concept that human activity is determined essentially, in its motives, by economic reasons, it follows that Law, too, is based entirely upon economics. If, however, we criticize this psychological premise, showing the existence in the human mind of other tendencies different from the economic and not reducible thereto, for example, the feeling of just and unjust, we thereby also criticize that doctrine with regard to law.

An imperfect Psychology always produces similar imperfections and errors in Philosophy of Law.²⁶

Kelsen assumes that Absolutism is only psychologically grounded.²⁷

This means that the Natural Law is only psychologically grounded. He tries to draw a parallel between the Natural Law and Positive Law.²⁸

The parallel is one of emotion to fact. However, in his treatment of Absolutism, his approach is philosophical, not just psychological.²⁹

Consequently the parallel is destroyed. For the parallel between emotion and fact tacitly includes the idea that there is something more than just emotion, or a psychological foundation, viz., a philosophical

²⁵Kelsen, General Theory of Law and State, pp. 413, 442.

²⁶Georgio Del Vecchio, Philosophy of Law, trans. by Thomas Owen Martin, 8th ed., Washington, The Catholic University of America Press, 1953, p. 9.

²⁷Kelsen, General Theory of Law and State, p. 419.

²⁸Ibid., pp. 408-9.

²⁹Kelsen, What is Justice, p. 137.

foundation also.

Kelsen's use of historicism likewise runs into grave difficulties. Briefly, in the first place, the picture which Kelsen paints of Absolutism is one in which the whole evaluation of the Natural Law and its metaphysics rests upon the various interpretations given these principles. The interpretations in turn depend upon the conditions of varying cultural millieus. The implication is that all of the various approaches to these principles are relative to the conditions of history and consequently, there are no absolutes. There is no point at which knowledge about something can be said to be final. The whole question of truth and error is relative as Kelsen himself indicates when he writes: "The truth which is affirmed within the system is never more than a relative truth...."³⁰

However, Kelsen's historical approach presents a dilemma. On the one hand since metaphysics and the Natural Law deal with Absolutes, but the historical approach deals with the historicity and the relativity of Law, Kelsen applies a method³¹ to a subject for which it was not intended. Del Vecchio writes:

If we systematically identify the real with the ideal we deny the possibility of progress. Here is the point on which the error of the entire historical approach turns, and, on the other hand, the superiority of the classic rational school reveals itself. The simple observation of the fact, proposed by the historical approach, is not sufficient. The fact cannot give us the notion of Law. Indeed, the observation of facts presupposes an ideal intuition, because to collect juridical facts or phenomena we must first of all have criteria which distinguish that which is juridical from that which is not juridical.³²

³⁰Kelsen, General Theory of Law and State, p. 434.

³¹Ibid., pp. 442-43.

³²Del Vecchio, The Philosophy of Law, p. 133.

On the other hand assuming for the moment, but not conceding, that the Natural Law and its metaphysics are based upon psychological reactions, the historical method when applied to the Absolutists as well as to positivism, if consistent, would have to imply that both the Absolutists and the positivists are relative. But what are they relative to? They are relative to an approach, viz., historicism, which itself is relative.³³ However, the relativism which encompasses Kelsen's positivism is absolutely relative.³⁴ Kelsen's positivism contradicts the very method from which it is supposed to have sprung. Kelsen would have us accept the proposition that out of the ever relative emerges the final.³⁵

All of this means two things. First, either the historical approach is more dogmatic than the traditional approach and therefore Kelsen is substituting one form of absolutism for another, or, second, not only will Kelsen's own theory but the method by which he derived his theory, viz., historicism, disappear. On the one hand Kelsen is unwilling to admit that his system is more dogmatic than the absolutist's and consequently he is unwilling to admit his substitution of one form of absolutism for another. On the other hand, Kelsen is unwilling to admit the complete relativity of the relativity of historicism lest his system disappear with the relativity of historicism. After all, if historicism exists within the framework of complete relativism, then the implication is that historicism is not here to stay.³⁶ Consequently, Kelsen is in the peculiar position of substituting

³³Ibid., p. 134.

³⁴Kelsen, General Theory of Law and State, p. 411.

³⁵Ibid., p. 434.

³⁶Ibid., pp. 411, 436; Pure Theory of Law, p. 1.

one form of dogmatism for another in the development of his formalism. This type of dogmatism is supposed to evolve out of and be an emancipation of Absolutism.³⁷ Kelsen's dilemma is very clearly expressed when Strauss writes first of all of dogmatism in historicism.

We might think for a moment that historical political philosophy is less apt to degenerate into dogmatism than was its predecessor. But a moment's reflection suffices to dispel that delusion. Whereas for the genuine philosopher of the past all the answers of which he could possibly think were, prior to his examination of them, open possibilities, the historicist philosopher excludes, prior to his examining them, all the answers suggested in former ages. He is not less dogmatic, he is much more dogmatic, than the average philosopher of the past. In particular, the coherent reflection of the philosopher on his historical situation is not necessarily a sign that, other things being equal, his philosophic reflection is on a higher level than that of philosophers who were not greatly concerned with their historical situation. For it is quite possible that the modern philosopher is in much greater need of reflection on his situation because, having abandoned the resolve to look at things sub specie aeternitatis, he is much more exposed to, and enthralled by, the convictions of "trends" dominating his age. Reflection on one's historical situation may very well be no more than a remedy for a deficiency which has been caused by historicism, or rather by the deeper motives which express themselves in historicism and which did not hamper the philosophic efforts of former ages.³⁸

Then Strauss considers the passing away of Historicism.

Those who believe in the "primary significance of the unique and morally ultimate character of the concrete situation," and therefore reject the quest for "general answers supposed to have a universal meaning that covers and dominates all particulars," do not hesitate to offer what claim to be final and universal answers to the questions as to what "a moral situation" is and as to what "the distinctively moral traits," or "the virtues" are. Those who believe in progress toward a goal which itself is essentially progressive, and therefore reject the question of the best political order as "too static" are convinced that their insight into the actuality of such a progress "has come to stay." Similarly, historicism merely replaced one kind of finality by

³⁷ Rommen, The Natural Law, p. 103.

³⁸ Strauss, What is Political Philosophy, p. 71.

another kind of finality, by the final conviction that all human answers are essentially and radically "historical." Only under one condition could historicism claim to have done away with all pretence to finality, if it presented the historicist thesis not as simply true, but as true for the time being only. In fact, if the historicist thesis is correct, we cannot escape the consequence that that thesis itself is "historical" or valid, because meaningful, for a specific historical situation. only. Historicism is not a cab which one can stop at his convenience; historicism must be applied to itself. It will thus reveal itself as relative to modern man; and this will imply that it will be replaced in due time, by a position which is no longer historicist. Some historicists would consider such a development a manifest decline. But in so doing they would ascribe to the historical situation favorable to historicism an absoluteness which as a matter of principle, they refuse to ascribe to any historical situation.³⁹

From the point of view of the Aristotelian-Scholastics, therefore, both the presuppositions of Kelsen, in which he assumed that the Natural Law and its metaphysics are merely psychological reactions to the mysterious forces of nature, and historicism, which is his view when he traces the development of Positivism as an emancipation from the historical category of Natural Law and metaphysics, are thrown into question. Because of Kelsen's presuppositions concerning absolutism and his method of tracing its development, his conclusions do not seem to follow. Consequently we are asked by Kelsen to accept a little bit of metaphysics, and a little bit of the Natural Law so that Kelsen can construct his own system.⁴⁰

The Aristotelian-Scholastic Approach

The question now arises: what background is needed in order that the transcendental historical approach to law can be developed. Law deals with regulation. As this very general definition implies, law

³⁹Ibid., pp. 72-3.

⁴⁰Kelsen, General Theory of Law and State, p. 437.

is considered in a universal sense.⁴¹ Since regulation deals with operations, as a philosophy, law deals with the first principles of operations. Since there are beings to be regulated, the regulations for these beings will stem ultimately from the nature of the beings to be regulated.⁴² Law, therefore, is part theoretical and part practical. As the theoretical aspect of law is understood so also will the practical aspect of law be understood. Throughout history there have been conflicting theories as Kelsen points out. However, the theories have been about things, not just psychological reactions to things. Consequently there is not just one theory, not just one metaphysics but several. The Aristotelian-Scholastic theory is one. The modern theories are others. Kelsen's Pure Theory is still another, if one accepts his request to accept a little bit of metaphysics.⁴³

That these theories do exist is an empirical fact. How complete and how true these theories are, requires investigation and research. There are three fields of research from the point of view of Aristotelian-Scholasticism: the logical, the phenomenological and the deontological.⁴⁴

The logical deals with those universal principles "which are common to all juridical systems."⁴⁵ The phenomenological deals with law to the degree that it is common experience to all man. Del Vecchio writes:

To obtain a knowledge of the entire phenomenon, both in its

⁴¹Del Vecchio, The Philosophy of Law, p. 1.

⁴²Rommen, The Natural Law, p. 162.

⁴³Kelsen, General Theory of Law and State, p. 437; Rommen, The Natural Law, pp. 103, 147.

⁴⁴Del Vecchio, The Philosophy of Law, p. 2.

⁴⁵Ibid.

static phase and in its dynamic, one must study the juridical history of humanity in an all-inclusive manner, the "history of the eternal ideal, after which run in time the histories of all nations" (Vico), and spread before oneself a picture of the life of Law, in its origin, and its evolution, which will be as far as possible complete.⁴⁶

The deontological deals with the metaphysical foundations in terms of what "ought to be."

Because of these areas of research, Del Vecchio defines Law as "the science which sets forth the first principles of law, conceived by reason and founded upon the nature of man considered in itself and in its relationships with the universal order of things."⁴⁷

Del Vecchio enumerates five allied subjects which are related to the philosophy of Law. They are 1) Jurisprudence, the science of Positive Law;⁴⁸ 2) Gnosiology, the science of the "first principles of knowledge;"⁴⁹ 3) Psychology, "the science which studies the facts of the human spirit and their laws;"⁵⁰ 4) Sociology, "a general science of social phenomena;"⁵¹ and 5) Moral philosophy which deals with the transcendental relationship of man to his ultimate end.⁵²

Of particular importance to this research is the phenomenological aspect of law and the psychological aspect of law. For these are the two points on which, as has been shown, Kelsen bases his analysis of the Natural Law and metaphysics.

From the point of view of the Aristotelian-Scholastics, the phenomenological aspect of law serves as one of the sources for a thorough

⁴⁶Ibid., p. 3.

⁴⁷Ibid., p. 4.

⁴⁸Ibid., p. 7.

⁴⁹Ibid., p. 8.

⁵⁰Ibid.,

⁵¹Ibid.

⁵²Ibid., p. 10.

understanding of law because it draws together, as Del Vecchio points out, all of the contingencies of law together with their patterns of development as they have come down the ages in history. The phenomenological aspect differs from historicity in that the historicity of law properly speaking excludes theoretical speculation,⁵³ and is limited to the specific enumeration and interpretation of concrete historical views. The phenomenological approach on the contrary uses the tool of history so as "to obtain a knowledge of the entire phenomenon, both in its static phase and in its dynamic...."⁵⁴ Strauss underscores the place of history within the philosophy of law when he writes:

We must distinguish between inherited knowledge and independently acquired knowledge. By inherited knowledge we understand the philosophic or scientific knowledge a man takes over from former generations, or more generally expressed, from other; by independently acquired knowledge we understand the philosophic or scientific knowledge a mature scholar acquires in his unbiased intercourse, as fully enlightened as possible as to its horizon and its presuppositions, with his subject matter. On the basis of the belief in progress, this difference tends to lose its crucial significance. When speaking of a "body of knowledge" or the "results of research," e.g., we tacitly assign the same cognitive status to inherited knowledge and to independently acquired knowledge. To counteract this tendency a special effort is required to transform inherited knowledge into genuine knowledge by revitalizing its original discovery, and to discriminate between the genuine and the spurious elements of what claims to be inherited knowledge. This truly philosophic function is fulfilled by the history of philosophy or of science.⁵⁵

In the view of the Aristotelian-Scholastics, psychology is closely related to the philosophy of law because law is not only made by men but demands a determinate behavior of men. "Thus the norms return to the same spirit which has given them birth. Law, therefore, develops

⁵³Ibid., p. 6.

⁵⁴Ibid., p. 2.

⁵⁵Strauss, What is Political Philosophy, pp. 76-77.

entirely in the order of psychic facts; and to this order belong also, under a certain aspect, the ideals on the basis of which positive norms are evaluated."⁵⁶ The psychological aspect of law described here differs from Kelsen's in that Kelsen bases the determinate behavior arising out of the Natural Law and metaphysics upon emotional reactions. He excludes the element of psychic fact which goes beyond the emotional aspect of the psychic to encompass the very constitution of the psychic and its relationship to reality.

This constitution of the psychic and its relationship to reality can go in two opposite directions. These directions will constitute two wholly different approaches to law. Either the first principles of operation follow from the theoretical foundations of things, thus making law subject to the theoretical sciences in Philosophy,⁵⁷ or the theoretical sciences follow from the practical thus making the theoretical sciences a justification for what one does, or wants to do within the realm of what can be done.⁵⁸

For the ancients and the Medievalists, the direction of reason was from the speculative to the practical. For the moderns the direction is from the practical to the speculative.⁵⁹ The ancients refer to Heraclitus, Socrates, Plato and Aristotle in the classical Greek world and to the stoics especially Cicero in the Roman world. The Medievalists refer to the Patristic Fathers, especially Chrysostom, the Augustinian School and the Thomistic School, in a word to the Scholastics. The moderns refer to the "social contract theorists" such as

⁵⁶ Del Vecchio, The Philosophy of Law, p. 9.

⁵⁷ McCoy, The Structure of Political Thought, p. 47.

⁵⁸ Ibid., p. 197.

⁵⁹ Ibid.

Hobbes, Rousseau and Locke.⁶⁰ Finally the contemporaries refer to the Absolutists and Relativists.⁶¹

In ancient times philosophy centered around the nature of the universe. The attempt in the pre-socratic period was to know the ultimate "something" out of which reality evolved. This period was characterized by attributing this ultimate "something" to a concrete aspect of reality like water or fire. By the time of Socrates, the cosmological approach developed into the metaphysical approach: the ultimate principles which underlie all natural reality and substantiate the sensible aspect of reality.

Certain of these metaphysical principles derived from natural reality were applicable to man: man, after all, is part of nature. These principles were applicable to man in a special way for man is rational. The principles gave direction to man in terms of his own natural fulfillment. These principles, observed as inherent in and necessary to nature served as formulas for man's life because they were necessary to man for his natural fulfillment.

With Heraclitus, the obscure philosopher, the thinker who speaks in obscure symbols, the idea of the natural law for the first time emerged as a natural, unchangeable law from which all human laws draw their force.⁶²

From a knowledge of the nature of things for its own sake, the ancients proceeded to a knowledge which man could use on a practical level for his own happiness. This is what is meant by the expression: going from the speculative to the practical.

The great contribution of the Greeks in terms of the Natural Law

⁶⁰Rommen, The Natural Law, p. 80.

⁶¹Student Note, "Natural Law for Today's Lawyer," Stanford Law Review, IX, 1957, p. 474.

⁶²Rommen, The Natural Law, p. 6.

Doctrine was to develop formulas for human acts which were based upon principles derived from nature. It must be noted that these formulas singularly lacked content. Content was given to these formulas through Positive Law.

Concerning the content of the natural law Aristotle had as little to say as Plato....The silence of Plato and Aristotle finds its explanation in their idea of the natural law: they set out from the conservative conviction that the positive law wishes to realize the natural law.⁶³

Aristotle, for example, when speaking about rights simply says that man's rights are perfected within the City State.

What Aristotle suggests is that the most fully developed form of natural right is that which obtains among fellow-citizens; only among fellow-citizens do the relations which are the subject matter of right or justice reach their greatest density and, indeed, their full growth.⁶⁴

This means that the exercise of man's natural rights are given definition or content, or application through legislation. This is rather an important point, for in the ancient world natural rights were so united to Positive Law that the one could not be understood without the other. Hence the word "right" meant law, and vice versa.

Everyone is at least familiar with the distinction between legal norm and moral law even though he does not completely separate them. It must surely have come as a surprise, then, that in antiquity such a distinction, let alone a separation, was altogether wanting. This view rests substantially upon the fact that the sole and exclusive moral fulfillment of the idea of man was held to lie in citizenship.⁶⁵

The speculative approach to the Natural Law Doctrine and its definition was further developed through Roman Law. Where the Greek City States legislated Laws independently of each other, and applied the power of rights to the citizenry alone, the Romans unified Law in

⁶³Ibid., pp. 18-19.

⁶⁴Strauss, Natural Right and History, pp. 156-57.

⁶⁵Rommen, The Natural Law, p. 32.

such a fashion as to apply the concept of rights to the whole Empire. Non citizens as well as citizens had their rights and duties - albeit not in exactly the same way.

The Roman world empire, with its toleration of the legal institutions of the subject peoples, placed in the hands of the jurists still another important source of knowledge. This was the jus gentium, which arose out of actual practice and was substantially "found" by the jurists and magistrates. The jus naturale, derived from metaphysical and ethical reflection, appeared identical with the universal element in the legal systems of individual peoples.⁶⁶

To Cicero and the Roman stoics - in this writer's opinion - go the credit for the development of the close correlation between natural rights and positive laws on a universal scale which applied to the differing peoples within the Roman Empire.

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be free from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.⁶⁷

Rommen makes this further observation which is well worth quoting within this context:

⁶⁶Ibid., p. 32.

⁶⁷Cicero, The Republic, III, XXII, trans. by C. W. Keyes, in the Loeb Classical Library.

Like freemen, they are God's own children, members of a great community. The city-state has thus lost its power, and with it has disappeared the differentiation of mankind into Greeks and barbarians, into freemen and slaves.

These Stoic views are singularly impressive in an environment that was replete with despotic brutality and contempt for man....It is of far greater consequence, however, that they penetrated into Roman law, led to a recognition of the individual in private law, and elevated to the dignity of natural law the more liberal principles of the jus gentium which had developed out of the law of foreigners.⁶⁸

To Cicero and the Roman Stoics also belongs the credit for initiating a legal-philosophical problem. The problem revolved around the question of how deeply Positive Law could enter into Natural Law. The specific question dealt with legislating "filial piety." The impossibility of legislating filial piety initiated a distinction between man's rights and obligations as "man" on the one hand, and man's rights and duties as a "citizen" on the other hand.⁶⁹ The distinction became one of moral law versus Positive Law. The problem of the content of the moral law - or the Natural Law - still remained.

The development of Natural Law and Positive Law within Christian times, ranging from the first centuries A. D. to the sixteenth century, can be roughly divided into three periods: the early Christian, the Scholastic, and the late Scholastic periods. As will be seen each period contributed to the Natural Law and Positive Law both in terms of a development of a Natural Law doctrine as well as in terms of establishing a very well defined relationship between the Natural Law and Positive Law.

While the three periods are somewhat distinct not only because of their cultural and intellectual developments, all can be considered

⁶⁸Rommen, The Natural Law, pp. 24-25.

⁶⁹Ibid., p. 68.

the Christian era because, as Rommen puts it:

Christianity however, contains three ideas of decisive importance for the present problem: the idea of a supermundane, transcendent, personal God as Lawgiver in the absolute sense, the idea of Christian personality, whose eternal goal transcends the state, the law, the mores of the polis; and the idea of the Church as the institution charged with the salvation of mankind standing alongside and, in matters of faith and morals, above the will of the state. Such ideas had in the long run to affect the whole problem of natural law: not, indeed, in order to revolutionize it, but to explore it more thoroughly, to strengthen its foundations and to complete it materially.⁷⁰

The early Christians, confronted on the one hand with a fading empire and on the other hand with the problem of developing a systematic theology from the teachings of their Founder, were both skeptical of philosophy, the consequences of which were crumbling before them, and were preoccupied "with the supposed imminence of lost things."⁷¹ However, philosophy was not totally abandoned, for St. Paul wrote that the law is written in the hearts of man (C. F. Romans, 2:12-16).⁷²

Indeed the Christians adopted the broad plan of the stoic's ethical system whose distinction between primary and secondary law served a twofold purpose. For the early Christians the distinction enabled the theologians to distinguish between man as subject to the law before his fall from original grace and man after his fall from original grace.⁷³ For the Scholastics, the distinction enabled them to distinguish between the primary and secondary precepts of the Natural Law, which in turn called for a close relationship between Natural Law and Positive Law.⁷⁴

⁷⁰Ibid., p. 34.

⁷¹Ibid.

⁷²Romans, 2:12-16.

⁷³Rommen, The Natural Law, p. 36.

⁷⁴Ibid., p. 33.

In terms of a philosophical development of a philosophy of law, St. Augustine stands out as the first great medieval thinker. For him, Plato's eternal forms became the archtypes in the mind of God.

Rommen writes:

The impersonal world reason of the Stoics became the personal, all wise and all-powerful God. The purely deistic Nous of Aristotle became the Creator. God who transcends the world, but who continually sustains it through His omnipotence, directs it through His providence, and governs it according to His eternal law. This eternal law was for Augustine identical with the supreme reason and eternal truth, with the reason of God Himself, according to whose laws the inner life and external activity of God proceed and are governed.⁷⁵

Consequently, to the degree that man participates in the eternal law to that degree is the eternal law the Natural Law. From this participation the Christians not only incorporated the classical Natural Law but discovered in it a content, viz., in the second table of the Decalogue. The discovery that the Natural Law possesses, in part at least, its own content and that it is not dependent upon civil legislation for said content, this discovery brings about a significant modification of the Natural Law. Strauss writes:

It is classic natural right in this profoundly modified form that has exercised the most powerful influence on Western thought almost since the beginnings of the Christian Era. Still even this crucial modification of the classical teaching was in a way anticipated by the classics. According to the classics, political life as such is essentially inferior in dignity to the philosophic life.⁷⁶

This modification of the classical Natural Law to a Christian Natural Law doctrine not only, in part at least, solves the problem of the content of the Natural Law, but also initiates a finer relationship between the Natural Law and Positive Law, which was reached in

⁷⁵ Ibid., p. 37.

⁷⁶ Strauss, Natural Right and History, pp. 144-45.

the Scholastic period with St. Thomas Aquinas as its outstanding representative. In ancient times Positive Law gave content to the Natural Law. The distinction between Natural and Positive Law was a negative one: some obligations which would appear to be natural could not be legislated. In Christian times, not only did Positive Law give content to the Natural Law, but the Church in terms of the Ten Commandments, naturally reasoned, gave content to the Natural Law.

Since there was a content to the Natural Law which could be known by all--even though some of it could not be legislated--and at the same time the exigencies of particular times and places called for practical conclusions which were far removed from the immediately self-evident conclusions of the Natural Law, the Scholastics employed the concepts of primary and secondary law. The primary precepts referred to the immediately self-evident content of the Natural Law. The secondary principles referred to that content which because of the pressures of a given time and place, were more obscure and hence had to be reasoned out.

Now since the Christian Natural Law Doctrine, unlike the classical Natural Law, was not identical to the best regime "...but coeval with Creation and hence always actual..,"⁷⁷ and since the Natural Law was an expression of the eternal law which in turn "is the governance of the world through God's will in accordance with His wisdom,"⁷⁸ the purpose of Positive Law was "to render the citizen virtuous."⁷⁹ Rommen goes on to say:

⁷⁷Ibid., p. 144.

⁷⁸Rommen, The Natural Law, p. 45.

⁷⁹Ibid., p. 54.

It is not merely a question of maintaining order, or external peace; the law should rather act as a medium of popular education to transform those who live under common legal institutions into perfect citizens. For this very reason positive norms, determine coercive measures, and a more exact definition of the circumstances in which the general principle shall be applied, are imperative....

Here in connection with positive law which is therefore "always something pertaining to reason," St. Thomas arrives at the nature of law. It has to do with community life. On the other hand, it is distinguished from and contrasted with social ethics through its being directed to external order...It is the norm to be enforced: compulsion (vis coactiva) is proper to law, not to morality.

From this inner connection of every positive law with the lex naturalis St. Thomas rightly concludes that the positive law may not conflict with the natural law.⁸⁰

Because of the distinction between primary and secondary precepts and of the position of the Natural Law within the scheme of things two conclusions can be reached. First, Positive Law neither contradicts the Natural Law nor does the Natural Law render Positive Law unnecessary. Second, in the minds of the Scholastics, especially St. Thomas, there is no need for a state of nature so as to establish a Natural Law.⁸¹

Up to this point, then, the Natural Law passed through the stages of being distinguished from the best regime, thus sidestepping the state of nature approach, of incorporating the stoic ethics with its distinction between primary and secondary precepts, of being given content, of being established on its own as the "ought" of finality within the archtypes in the mind of God which are established by God in the naturally essential aspects of reality, and of being intimately connected with Positive Law whose object is "to render the citizen virtuous."⁸²

⁸⁰Ibid.

⁸¹Ibid., p. 53.

⁸²Ibid., p. 54.

This Natural Law Doctrine the Scholastics insist was based upon reason.⁸³

This historical development rested upon the foundations of a realism which accepted reality on its own, thus giving rise to a metaphysics. This metaphysics is both inherent in extra-mental reality and, as knowledge, is derived from extra-mental reality by the knower.⁸⁴ The relationship between metaphysics as founded in extra-mental reality and metaphysics as a body of knowledge about extra-mental reality implies a psychology of man in which he is able to abstract--or separate--metaphysical principles from the sense image which is the product of sensation.⁸⁵ Because man is in the state of almost continuously learning, this realism further implies that man is not born with innate knowledge. All knowledge, on a natural level, comes through the senses and is restricted to what is naturally knowable. On the one hand, therefore, metaphysical principles can be naturally knowable; on the other hand the truth of these metaphysical principles is established by the intellect through its referring back to the object or objects sensed. Truth for the realist is the conformity of the mind to reality as expressed in the intellect's judgement about this relationship.⁸⁶ The concept of truth for the realist implies a distinction between how man thinks--logic, its laws and relationships--on the one hand and the process of establishing what one thinks as true or false on the other hand.⁸⁷ The universality and necessity which are involved in the laws

⁸³St. Thomas Aquinas, Summa Theologica, I-II, q. 97, a. 31.

⁸⁴Rommen, The Natural Law, p. 183.

⁸⁵McCoy, Structure of Political Thought, p. 30.

⁸⁶St. Thomas Aquinas, Summa Contra Gentiles, I, 59.

⁸⁷McCoy, Structure of Political Thought, pp. 29-30; Rommen, The Natural Law, p. 16.

of the science of right reason constitute the correctness of the thinking process. The universality and necessity which are derived from extra-mental reality and which the mind, through reflection and evidence, acknowledges to be in things in extra-mental reality constitute the science of metaphysics: the study of being in as much as it is being. The necessary relationships in regard first to an entity's own being and secondly to its fellow being give rise to law. When the entity in question is man then the necessary relationship of the individual in regard to himself and in regard to his relationship with others bespeaks of a special kind of law. Since, from the point of view of the realist, these necessary relationships concerning man are derived from nature, and hence are naturally knowable, these necessary relationships are called the Natural Law.⁸⁸ This is the Aristotelian-Scholastic tradition which started in ancient times and continues to the present and is called a Natural Law Doctrine.

With the modern and contemporary philosophers enough changes take place so as to render their Natural Law doctrines radically different from the Aristotelian-Scholastic Natural Law doctrine.

The differences arise in what can be known of extra-mental reality. For the modern, the knower is restricted to the ever changing aspects of things which are presented to consciousness in sensation. The universal and necessary which is the object of the intellect is entirely different from the contingencies presented in sensation. Consequently there develops a dichotomy between intellectual knowledge and sense knowledge which forgoes the idea that the one can be derived from

⁸⁸Rommen, The Natural Law, p. 17.

the other. This means then, that man's knowledge of reality is restricted to particulars--nominalism⁸⁹--and that the correlation among these particulars is due solely to the peculiar way in which man views these particulars. In modern times this particular way takes the form of conceptualism,⁹⁰ and in contemporary times conceptualism is absorbed into the immanent laws of cognition to form positivism.

In modern times the dichotomy between universal and necessary knowledge, which had no existential import, and contingent knowledge of reality, which was based upon the sensation of particular objects, gave rise to a dialectic. The dialectic between intellectual knowledge and sense knowledge enabled the theoreticians to develop theories about reality which could be projected into reality as a working hypothesis. The confirmation of these theories depended upon their pragmatic consequences. On the other hand the dissolution of these theories depended upon how far one wanted to go in accepting the synthesis of uniting conceptualism with nominalism.⁹¹

For the rationalists in modern times, the synthesis was complete and science as a rational process was in full control of the products of sensation. For the empiricists the synthesis gradually disintegrated leaving a profound skepticism as to what, on the one hand, could be once and for all known of extra-mental reality, and, on the other hand, what the difference is between intellectual knowledge and sense knowledge.⁹²

In terms of the Natural Law, this modern approach wrought profound

⁸⁹Ibid., p. 86.

⁹⁰Ibid., pp. 87-88.

⁹¹Rommen, The Natural Law, pp. 87, 93-94, 97.

⁹²Ibid., p. 110.

changes. First of all, the theory that there is a dichotomy between intellectual knowledge and sense knowledge throws the elements of universality and necessity into what ever interpretation of reality the theorist might wish to give reality. These elements are not derived from, but are united with reality on the arbitrary decision of the theorist. Such a union is not natural in the sense of the Aristotelian-Scholastics because the union is not found in extra-mental reality. This union is projected into extra-mental reality as a particular interpretation of extra-mental reality. The theory becomes functional when applied to extra-mental reality for the universal and necessary elements are only logical.⁹³ The element of law, therefore, does not have a real foundation in extra-mental reality, but a logical foundation upon which the consistency of the theory depends.

The starting point for the modern Natural Law theorists is the projection of a theory of moral necessity into reality which is based upon utility.⁹⁴ Since the basis of utility stems from what man can do, the modern Natural Law stems from the empirical fact of man's natural powers, and this means rights. Since necessity and universality were dependent upon logic and not upon extra-mental reality, the basis of a Natural Law doctrine rested upon the rights of the individual as "reasoned." The individual became the center of the moral order and as he understood his rights and obligations so also would he create his Natural Law.⁹⁵

Since the individual's rights were the pivot points upon which a

⁹³Ibid., p. 99.

⁹⁴Ibid., pp. 102, 106.

⁹⁵Ibid.

Natural Law was founded the position of God was relegated and limited to that of creator. The role of God as an authority was restricted to religion which was based upon something other than natural reality. As a result there arose a dichotomy between morality and religious belief, between responsibility to one's self and responsibility to one's God.⁹⁶

Likewise because of this radical individualism the authority of the state, Positive Law, was relegated to the position of fulfilling the requirements needed in order to enable the individual to realize his rights. The realization of individual rights terminated in individual happiness. The aim of social morality, therefore had for its end point individual happiness.⁹⁷ The necessity for civil authority would arise out of the means which would be necessary in order to bring about this happiness. This implies that the reason for society lies in what it can furnish the individual and without which the individual would be seriously hampered. What the State represents, therefore, is a common good for all individuals. Its justification lies in the fact that the individual in a state of nature could not fulfill his rights to the degree that he does in society.⁹⁸ Since morality is a question of individual interpretation the bond existing among individuals by which the state is held together is a contract. This is the social contract theory of modern times.

The effort of modern Natural Law theorists to explain this theory lay in establishing a hypothetical man in a state of nature from which

⁹⁶ Ibid.

⁹⁷ Ibid., p. 99.

⁹⁸ Ibid., pp. 89, 94.

the need for the individual to enter into a social contract would be self evident. This means that man is not social by nature, but can become social by entering into a social contract.⁹⁹ Likewise, the need for entering into a social contract would be so self evident that the state would follow from the state of nature with the consistency and necessity of a conclusion as it follows in deductive process. However, this universality and this necessity, from which flowed the social man, were not on an existential level. They were in the realm of logic alone.¹⁰⁰

The consequences of the social contract theory were twofold. First, because of the radical individualism paramount among European scholars there were many varied and sometimes contradicting theories propounded either to explain and justify existing social institutions or to explain why existing social institutions contradict the concept of man in a state of nature and should be changed so as to compliment the ideal of man in a state of nature. All of these theories are called Natural Law doctrines. The second consequence of the social contract theory rested on the dichotomy between intellectual knowledge and sensible knowledge. Since the aspects of universality and necessity in human knowledge had no extra-mental foundation all of the social contract theories were based upon existing situations. This means that what man had made for himself was then given some sort of a plausible explanation and thereby the attempt was made to justify his existing situation. From the point of view of political theory, this meant that a justification for any form of government could be devised so as

⁹⁹Ibid., p. 89.

¹⁰⁰Ibid., p. 87.

to appear to follow with necessity from a consideration of man in a state of nature. Rommen writes:

The era of the individualist natural law, conditioned by the theory of a purely imaginary, unreal world of a state of nature and adopting as a starting point any propensity or attribute whatever of empirical human nature, brought to light nearly as many supreme principles of law and resultant natural-law systems as there were chairs and professors of natural and international law...Thus Jean Paul Richter's ironical remark contained no exaggeration: Every fair and every war brings forth a new natural law.¹⁰¹

Because of the problems which the modern Natural Law theorists presented in their consideration of a philosophy of law and political theory, the whole approach to a theoretical background for law as somehow based upon "nature" was abandoned.¹⁰² The gap it left was filled by positivism which was a return to empirical fact as interpreted within the conditions of sensation and understood by means of the laws of cognition. The philosophy of law consisted in an "...exact analysis of actually existing law, present and past. The philosophy of law should therefore not only rest upon mere external experience, but it should be restricted thereto. Every project of passing beyond it is rejected as metaphysics."¹⁰³

Positivism in this sense is a method. As to its essential feature, Rommen writes:

The essential feature of this view of reality is not the prominence assigned to the empirical knowledge of individual things, and the restricting of the mental horizon to the empirical and the individual. Whatever else there may still be is ethics and not law, for it is not a law that is immediately experienced. This attitude held relatively little danger so long as moral philosophy itself did not

¹⁰¹Ibid., pp. 105-6.

¹⁰²Ibid., p. 130.

¹⁰³Ibid., p. 124.

become positivist. But when this occurred, there resulted from methodological positivism, which relegated the natural law to the background of ethics, either a world view that was frankly materialist, or self denying skepticism, which with an almost ascetical self restraint, merely gathered, compared, and verified. Or positivism simply referred to the newly emergent science of sociology what hitherto been assigned to ethics; it tried thereby to rid itself of responsibility for answering the fateful question of the foundation of law.¹⁰⁴

The differences between the Natural Law doctrines of the ancients and the medievalists on the one hand and the modern social contract theorists on the other hand can now be stated.

Epistemologically, the ancients and the medievalists, who have come to be known as Scholastics, were moderate realists. The modern social contract theorists on the other hand were nominalists. This means that, for the Scholastics, metaphysical principles were derived from extra-mental reality. The mind was measured by extra-mental reality. For the moderns, by way of contrast, metaphysical principles were not derived from extra-mental reality, but only the particular sense qualities. For the Scholastics the connection between substance and accident, permanence and change, had an extra-mental foundation in concrete reality. For the moderns the connection between substance and accident, permanence and change, was dependent upon the innate categories of reason, for substance implies metaphysics and only the particular qualities of extra-mental things--accidents--could be known by means of sensation. Consequently, for the moderns extra-mental reality was measured by the mind, and the connection between the universal and the particular is established idealistically. This mind dependent view is called rationalism, and the innate principles which

¹⁰⁴Ibid., p. 126.

the moderns use are ontological principles, not metaphysical principles. For, metaphysical principles have their foundation in extra-mental reality whereas ontological principles have their foundation not in extra-mental reality, but in the mind.

In regard to law, the Scholastics developed their system as both a logical as well as a practical consequence of their metaphysics. The law depended upon the essences of things, which essences, in turn, were derived from extra-mental reality. Faced with a reality from which only accidents could be derived, law for the moderns was first of all a practical matter upon which a theory--existing in the abstract only--could be devised. In other words, for the Scholastics the law is based upon reason and reason is based upon the essences of things in extra-mental reality. For the moderns law is based upon the will from which arises a reasonableness which has no other foundation than the innate dispositions of the mind and the practical advantages found in the circumstances of the day. The Natural Law represents a realist approach to reality in the case of the Scholastics, and the Natural Law represents an idealistic--conceptionalistic plus nominalistic--approach for the moderns.

For the Scholastics, man was social by nature. This factor, together with the idea that law is based upon reason, precluded the necessity for either a state of nature or a social contract. Because the idea of man-being-social-by-nature implies a metaphysics, the moderns could arrive at no deeper penetration into reality than that man has a tendency to be social. The idea that sociableness is only accidental to man, coupled with the idea that law is based upon the practical gave rise to an individualism which necessitated a social contract.

For the Scholastics, the unity of society and the authority of the state arose out of the essential sociableness of man and his ultimate dependence upon God. For the modern, the unity of society and the authority of the state arose out of a contract which marks the transition from man in a state of nature to man in a state of sociality.

Conclusion

To divide the philosophy of law into roughly four periods: classical ancient, the Christian, the Modern and the Contemporary as has been done in the so called transcendental historical approach to the philosophy of law might, on the surface, tend to confirm Kelsen's historicism. Kelsen groups the first three periods into one: the Natural Law approach. This approach in turn was evaluated by Kelsen in the light of history and found wanting. Kelsen concludes: The Natural Law approach stands in stark contrast to the contemporary approach which is positivism. However, while history has its place in the interpretation, evaluation and the evolution of law, the fact remains that the ancient and medieval Natural Law theory represent a real evolution. This tradition carries on to the present day. The modern Natural Law theories, as has been shown, do not represent an evolution within the tradition of the ancients and the medievalists, but a radical breaking away from this tradition. The theories of the ancients and medievalists on the one hand and the modern Natural Law theorists on the other hand represent two radically different approaches to the philosophy of law.

When the philosophy of law is evaluated from the point of view of

historicism, law becomes essentially relative, and confined to a respective historical period. In a sense law, and especially the Natural Law, becomes a static series of contiguous theories laid side by side and attached to their corresponding historical epics. One might conjure up a series of blocks called "dominoes." Each is its own interpretation of a domino and yet each is different from the other. This is how Kelsen views the Natural Law throughout history.

In his own Pure Theory of Law, Kelsen overcomes the difficulty of such limitation by grounding law not in historical situations but in cognition. Cognition not only transcends all historical relativism and re-evaluation, but cognition can deal with cultural milieus.

Kelsen's treatment of the philosophy of law is based upon certain assumptions, namely that natural reality is measured by reason, and secondly that reason has relegated the Natural Law to the status of emotion. However, Kelsen has not proven that as a matter of fact reason is not measured by reality and that the Natural Law, consequently is not grounded in the essence of man as a relation between formal cause and final cause. If reason is measured by reality, then the measure of man is man not reason. The mind is measured by man.

Consequently, Kelsen's approach is not conclusive, for the door is left open to a realistic appraisal of the Natural Law which not only transcends the bounds of particular historical epics but develops and grows with man within particular historical epics.

As Father Lonergan, S. J. writes:

...Just as the abstract apprehension of man provides itself with abstract ontological and ethical foundations in primitive propositions from which its doctrines, criteria, norms, etc., are deduced or somehow proved, so the more concrete and historical apprehension of man provides itself with

its appropriately concrete foundations in structural features of consciousness, operating subject, by a method that has come to be named transcendental.¹⁰⁵

¹⁰⁵Bernard Lonergan, S. J., "The Transition from a Classicist World-View to Historical-Mindedness," seminar on The Role of the Church, sponsored by the Canon Law Society of America, 1966, p. 7.

Chapter VII

A CRITICAL ANALYSIS OF KELSEN'S UNDERSTANDING OF THE RELATIONSHIP BETWEEN POSITIVE AND NATURAL LAW

If one were to ask: "What is the relationship between the Natural Law and Positive Law?" the answer would depend upon how one understands the Natural Law and Positive Law. In general there are three approaches which one could take in answering the question of a relationship between the Natural and Positive Law. The first is the Aristotelian-Scholastic approach whose tradition includes the classical Greeks and medievalists. The second approach is the modern tradition which includes the social contract theorists. The third group encompasses the positivists of whom Kelsen is one.

All three groups try to determine the relationship between the Natural and Positive Laws. Each group bases its answer to the question of a relationship upon its understanding of what the Natural and Positive Laws are. What the Natural and Positive Laws are, in turn, are based upon what each group understands to be the theoretical foundations of reality. The theoretical foundations include epistemology and metaphysics. Since Kelsen is of the view that there is no distinction between the ancients and medievalists, the scholastic tradition, on the one hand, and the modern tradition on the other hand, and since there

is a radical difference between the two views,¹ it becomes necessary to state the differences. In so doing a critical analysis of Kelsen's understanding of the relationship between the Natural and Positive Law can be so much the better understood.

For the Scholastic, the central question, from the answer to which a natural law and a subsequent positive law evolve, is whether or not human nature, that is the essence of man, can be known. The answer to this question in turn depends upon whether or not the intellect can derive metaphysical principles from extra-mental reality.² If the intellect can derive universal and necessary principles from extra-mental reality, then the intellect can know that which is both universal and necessary in man. From this knowledge, a law which is necessary and applicable to all peoples in as much as they are within the species man can be naturally known. This law is called the Natural Law.³

The Scholastics take the position that the essences of things can be known through the intellect's abstracting them from sense images. What the intellect grasps of the individual is that which is found to be the same in each individual.⁴ Moreover, that which is sought in each individual is that which is not only the same in each individual, but that which is necessary so that if the element is missing that particular individual is not part of the class. Thus classes of things are distinguished by their real differences, not just by distinctions

¹Kelsen, General Theory of Law and State, pp. 421, 423, 439.

²Rommen, The Natural Law, p. 184.

³Ibid., p. 16.

⁴St. Thomas, Summa Theologica, I, q. 40, a. 3.

in the mind.⁵ These essential notes which the intellect abstracts from the sense image are, in the view of the Scholastics, ultimately derived from the entities themselves existing in extra-mental reality.

The definition and the thing are one and the same entity. Consequently what is necessary for a thing's complete existence will also be derived from the essence of the thing itself.⁶ The essence, therefore is not only that which causes a thing to be what it is and not something else, namely the form, but the fulness of the essence is that to which the thing aims in its state of becoming. The essence is both the formal cause and the final cause. As the formal cause the essence gives definition to the subject with its potentialities. As the final cause, the essence attracts the subject to become itself to the fullest. There is then a relation between the formal cause and the final cause in regard to the material subject which is realizing its potentiality. This relationship between the formal cause and the final cause is necessary because when the relationship is severed, the subject deprives itself, or is deprived of the fulness of its own existence. The relationship is universal because it applies to all individuals which have the same type of essence. The relationship is naturally knowable because the essence of the thing can be abstracted from the sense image. The essence of the thing here in question is the essence of man.

To the degree that man can understand his essence as formal cause and final cause, to that degree can man determine the necessary relationship between the two in regard to his own actions.⁷ Those actions

⁵Regis, Epistemology, 283.

⁶Rommen, The Natural Law, p. 16.

⁷Ibid., p. 211

which are within the relationship are called good because they contribute to the fulness of existence of the individual. Those actions which sever the relationship are called evil because they prevent the individual from existing to the fullest. Since the relationship between the formal and final cause is necessary and applicable to all men in as much as they are men, the question of the relationship is a question of conformity. The question of conformity is a question of regulation, of law. Thus, as St. Thomas writes: "Law is a rule and measure of acts whereby man is induced to act or is restrained from acting."⁸ The "oughtness" of human action is grounded in human nature.⁹

Since reason depends, for its contents, upon what things are, the relationship between the formal and final cause in the essence of man will be based on reason as it rightly understands this relationship. Likewise the laws arising out of this relationship together with the criterion of the rightness or wrongness of one's actions will be based upon right--as opposed to erroneous--reason. "For the law does not speak to the blind will as such, but to the will guided and informed by reason."¹⁰ The Natural Law, therefore, is based upon right reason. (As will be seen later on, right reason in the sense just explained is different than "right reason" as the moderns understand and use the term. For the moderns, the Natural Law as just explained is impossible for them to formulate because their theory of knowledge forgoes the possibility of abstracting essences from individual concrete things.) Right reason as the basis of the Natural Law is clearly stated when

⁸St. Thomas, Summa Theologica, I-II, q. 90, a. 1.

⁹Rommen, The Natural Law, p. 17.

¹⁰Ibid., p. 193.

St. Thomas writes:

Now as being is the first thing that falls under the apprehension absolutely, so good is the first thing that falls under the apprehension of the practical reason, which is directed to action (since every agent acts for an end, which has the nature of good).¹¹

As based upon reason, St. Thomas more strictly defines law as "an ordinance of reason for the common good, promulgated by him who has the care of the community."¹² Three ideas emerge from this definition. The first is that truth ultimately dictates the law,¹³ for truth is the perfection of reason. The second is that the ultimate truth is God through whose creation His imitability is established. The third is that God is the ultimate authority. The truth of human nature, therefore, dictates that man ought to seek his end within the confines of his essence.

Since human nature is naturally knowable, the first dictate is the most obvious: Do good and avoid evil. This dictate is not only natural but also most reasonable.

For men "an action is natural only in so far as it harmonizes with the law of reason. This agreement with reason is not only the mark of naturalness, of humanity, it is the stamp of virtue; our actions are virtuous or good exactly in so far as they harmonize with the commands of reason, or, in other words, precisely in so far as they follow the directions of reason and move toward the goal of man."¹⁴

Since the dictates of reason concern human action, the criterion of good and evil is human nature. For the Aristotelian-Scholastic

¹¹St. Thomas, Summa Theologica, I-II, q. 94, a. 2.

¹²Ibid., I-II, q. 90, a. 4.

¹³Rommen, The Natural Law, p. 195.

¹⁴Ibid., p. 193, quoted from Walter Farrell, O.P., A Companion to the Summa, II, 382; St. Thomas, Summa Theologica, I-II, q. 90, a. 1.

what can be said about human nature from the point of view of what ought to be done and what ought not to be done, that is, from the point of view of the content of the Natural Law is found in the second table of the decalogue. Rommen pin points the reason when he writes:

The Decalogue contains the most essential conclusions for the simple reason that its precepts do not result from an arbitrary arrangement made by God, but from the fundamental distinction of good and evil.¹⁵

However, even these conclusions serve as premises from which more remote conclusions are drawn and in turn these more remote conclusions serve as premises from which still more remote conclusions can be drawn. The second table of the decalogue may very well apply to man in all times and in all places, but the factors of different times and varied places make the more remote conclusions difficult to grasp. Consequently, the Natural Law calls for a Positive Law to establish these more remote conclusions.¹⁶ The interrelationship between the Natural Law and Positive Law is twofold. On the one hand Positive Law is necessary in order to give content to the more remote conclusions of the Natural Law. On the other hand because the Natural Law calls for Positive Law, Positive Law is ultimately based upon the same authority as is the Natural Law, namely God.¹⁷

Here, then, are two systems of law both stemming from the same authority and both with the same objective which is to make man virtuous.¹⁸ They are, then, two partial systems subsumed under a total

¹⁵ Rommen, The Natural Law, p. 51.

¹⁶ Jacques Maritain, The Rights of Man and the Natural Law, trans. by Doris C. Anson, New York, Charles Scribner's Sons, 1943, pp. 62-64.

¹⁷ Rommen, The Natural Law, pp. 35-36.

¹⁸ Ibid., p. 54; Charles N. R. McCoy, The Structure of Political Thought, New York, McGraw-Hill Book Company, Inc., 1963, p. 118.

system, namely the eternal law.¹⁹

What distinguishes one system from the other is the following. The Natural Law is, for the most part, non coercive. Positive Law is coercive.²⁰ The aim of the Natural Law primarily is to bring about the intrinsic perfection of man. The aim of Positive Law is to bring about the extrinsic perfection of man.²¹

The need for both systems, from the point of view of the Aristotelian-Scholastics, rests in the admittedly theological reason of man's fallen nature. Another reason rests on the facts that on the one hand some moral precepts cannot be legislated, for example filial piety. Consequently a morality is needed to set justice aright.²² On the other hand since knowledge does not guarantee virtue the external affairs of man in relation to his fellow man demand a guarantee of justice which goes beyond the mere knowledge of responsibility. Such a guarantee is coercion.²³ Since the decalogue, as was mentioned before, seems to be the only clearly reasoned conclusions drawn from the Natural Law, there is need for a Positive Law to compliment the Natural Law within particular times and places. This means, then, that the Natural Law is based upon reason as it rightly understands human nature. The content is independent of man's wishes, popular poles, or human legislation. The content of Positive Law, while also based upon reason, is nevertheless posited by man and may include the wishes of the people according to time and place; and, because of changing circumstance, may vary from

¹⁹Rommen, The Natural Law, p. 46.

²⁰Ibid., pp. 200-201.

²¹Ibid., pp. 213-14; St. Thomas, Summa Theologica, II-II, q. 58, a.5.

²²Rommen, The Natural Law, p. 54.

²³Ibid., pp. 253-54.

place to place and from cultural milieu to cultural milieu.²⁴ As a result, the stabilizing factor, as well as the font for Positive Law is the Natural Law.

In modern times the positions of Natural and Positive Law change radically. First of all the idea that the essences of things can be abstracted from sense images is done away with. In its place emerges the idea that the only thing that can be known of reality is the sense image. This is nominalism.²⁵ The first consequence of nominalism is that a Natural Law in the sense of the Scholastics is impossible to formulate because the intellect cannot derive universals, the essences of things, the necessary from extra-mental reality. Reality, therefore ceases to be the font from which springs the richness of reason. Rather reason takes on an autonomy which subjects reality to the framework of reason. Reality is measured by reason.²⁶ The Natural Law in modern times is based upon the autonomy of reason and serves as a theoretical, abstract background--conceptualism--from which Positive Law can be deduced. This is the rationalistic aspect of modern Natural Law theories.

Conjoined with this rationalistic aspect is the idea of absolute individualism.²⁷ Since the nature of man cannot be known--nominalism--man is no more and no less than a collection of individuals. If man is a collection of individuals then society is based upon some sort of an agreement--a contract--which serves to bind the collection together--

²⁴St. Thomas, Summa Theologica, I-II, q. 94, a. 4.

²⁵Rommen, The Natural Law, p. 93.

²⁶Ibid.

²⁷Ibid., p. 99; Strauss, Natural Right and History, p. 44.

voluntarism. The reason for entering the social contract must reside in some advantage which the individuals lacked before entering the contract. That man might be social by nature cannot be formulated by the moderns because it implies that the essences of things can be derived from extra-mental reality. The most that can be said is that individuals are inclined to be social.²⁸

The independence of the individual, the simple inclination of the individual to enter into society for some advantage, and the notion of the agreement, that is the social contract itself, all of these ideas have four consequences. The first is that society is based upon the will of the people. The second is that society is an improvement over nature. Society is the measure of man's mind and man can do anything he wishes with it. The third is that the object of Positive Law ceases to be an instrument to make man virtuous and becomes an instrument to bring about the best regime. But the best regime is one which fulfills the social contract to the fullest. Now, man enters into a social contract for his own particular advantage. The fourth consequence is that the best regime is one which serves the interests of the individuals to the fullest.

The justification for the best regime will depend upon how man is to be considered in a state of nature from which follows, with the force of logical conclusions drawn from the deductive process, what must be done. What must be done is posited as law.²⁹ In other words, since there is no metaphysics and no realistic Natural Law, a hypothetical state of nature is, in the abstract, projected into reality the consequence

²⁸Rommen, The Natural Law, p. 77.

²⁹Ibid., pp. 105-106.

of which is the social contract. Thus the state of nature becomes a model whose reason for existence is a strictly pragmatic justification for society. Since nominalism and individualism and the purpose of the state, namely to serve the interests of the individuals, keynote modern Natural Law theories, any advantage which the individual might consider important can be made the very need which man in a state of nature cannot completely fulfill thus calling for a social contract to fulfill the need.³⁰ The Natural Law in this sense is reduced to the individuals rights. Rights are reduced to the power to fulfill individual needs, and Positive Law guarantees the individual's rights. Consequently, Positive Law is anything that man wants to make law within the social contract. All that is needed is the hypothetical state of nature formulated in the abstract from which Positive Law is made to appear necessary.³¹

The necessary connection between the Natural Law and Positive Law resides within the logical connection of a conditional proposition. If one grants the antecedent one must grant the consequence. The only problem is that the opposite need not follow: if one grants the consequence, one need not grant the antecedent. The modern Natural Law theorists are faced with the consequences, namely Positive Law. Their task is to try and discover the right antecedent from which the existent Positive Law necessarily follows. However, since these theorists cannot derive metaphysical principles from extra-mental reality--nominalism--the theories on a state of nature remain forever in the abstract--conceptualism. Likewise, because the element of necessity

³⁰Ibid.

³¹Ibid., p. 106; Strauss, Natural Right and History, p. 184.

cannot be derived from extra-mental reality--nominalism--necessity becomes purely and simply a logical necessity. The consequence of reducing necessity solely to logical necessity is that the distinction between what is essential and what is accidental gradually disappears. The essential and the accidental merge into one which is at the disposal of the theorist, should he wish to employ it as a logical necessity.³²

The result of trying to determine the antecedent, from which follows with necessity an existent Positive Law while denying a metaphysics and constructing the theory within the realm of logical necessity, has produced theory upon theory not one of which has been more stable than the political regime which supports it. Likewise, because of the loss of the existential distinction between substance and accident, some theories are based upon accidents which are considered to be substantial and other theories are based upon that which is substantial but only within the realm of logic. For example laws which are based upon segregation are justified because the negro and the caucasian are different. But what is the difference between the two? The difference is grounded in nature. The difference is one of color. Such a difference demands segregation. Consequently, many of the theories resemble the Aristotelian-Scholastic theory because of a similarity in vocabulary. But, none of them can claim the validity of the Aristotelian-Scholastic theory because they are not based upon a metaphysics.

With the differences between the traditional law and the modern Natural Law theories established, a critical analysis of Kelsen's understanding between the Natural Law and Positive Law can be considered.

³²Rommen, The Natural Law, p. 99; McCoy, The Structure of Political Thought, p. 5.

Kelsen, first of all is a neo-Kantian. This means that he follows the Kantian epistemological postulate.³³ The postulate is the following. What is known of extra-mental reality are the phenomena of things. These phenomena are received into sensation through the apriori conditions of sensation, namely time and space. The union of phenomena and the senses in conjunction with the conditions for sensation is the synthetic intuition. This synthetic intuition is then categorized in cognition.³⁴ The categories are innate, and are subject to the immanent laws of cognition.³⁵ These categories are meaningless if not given content through the synthetic intuition. The thing in itself--that which lies beyond sensation, the neumenon--is unknowable. This Kantian postulate is designed to solve the problem of the dichotomy between modern rationalism and empiricism. Three ideas emerge from the Kantian postulate which is of significant importance to Kelsen. The first is that universality and necessity are not derived from extra-mental reality because these are metaphysical principles referring to the neumena of things, whereas the only thing that can be known of extra-mental reality are the phenomena of things. This means that universality and necessity are innate categories of the mind. Secondly, since a metaphysics is impossible, neither the essence of man, nor teleology, nor any other metaphysical principles refer to that which is derived from sensation. These principles are innate and subject to the laws of cognition. As a result, the human mind is very active in creating a cosmos out of the chaos of sensation.³⁶

³³Kelsen, The Pure Theory of Law, p. 72.

³⁴Immanuel Kant, Critique of Pure Reason, trans. by Norman Kemp Smith, abridged ed., London, Macmillan and Co., Ltd., 1952, pp. 150-53.

³⁵Ibid., p. 153.

³⁶Kelsen, General Theory of Law and State, p. 434.

In the realm of law, Kelsen departs from Kant's Critique of Practical Reason in which the basis of law is grounded in the categorical imperative--voluntarism--and makes the basic legal norm a category of the mind in the sense of the Critique of Pure Reason.³⁷ As will be seen it is within this framework of the Kantian postulate and Kelsen's own innovation that Kelsen on the one hand criticizes the positions of the Natural Law theorists on the relationship between the Natural and Positive Law, and on the other hand establishes his own position on this relationship.³⁸

From the point of view of his own brand of Neo-Kantianism then, Kelsen's first step is to show that Positive Law and Natural Law appear as two simultaneous systems with the same object.³⁹ Then Kelsen proceeds to show that unless they are two partial systems subsumed under a larger system, two different systems with the same object and sphere of validity are contradictory, Kelsen rejects the two sub-system approach. He argues that in this case neither system would be really independent. Moreover, the mutual contradictions which arise argue against the subsystem approach.⁴⁰

If the two systems are not correlative, the question arises as to whether or not there can be two independent and valid systems with the same object. And to this question Kelsen answers: NO. To have two simultaneous systems with the same object implies that a contradictory meaning can arise out of a categorization of one and the same object. This would put human cognition in an impossible situation.

³⁷Ibid., p. 435.

³⁸Ibid., p. 439.

³⁹Ibid., pp. 398-99.

⁴⁰Ibid., pp. 407-8.

A single object within the same category can have two meanings. The meanings can be contradictory. Kelsen Says:

If there should be two actually different systems of norms, mutually independent in their validity, because of the difference of the basic norms, both of which are related to the same object (in having the same sphere of validity), insoluble logical contradiction between them could not be excluded. The norm of one system may prescribe conduct A for a certain person, under a certain condition, at a certain time and place. The norm of the other system may prescribe, under the same conditions and for the same person, conduct non-A. This situation is impossible for the cognition of norms.⁴¹

This is to say that a category of the mind can be self contradictory, and this suggests that the mind cannot give universality and necessity to one's actions and verify it empirically. The only verification which would take place is the contradiction: "A ought to exist as such and such from a moral point of view" and "A ought not exist" in the same way from a legal point of view. This is what Kelsen means when he says that the principle of contradiction is as valid in rational cognition as it is in empirical reality.⁴²

If the Natural and Positive Laws are not partial systems subsumed under one all encompassing system and, if the two systems cannot exist as valid systems with the same object, what is the relationship between the Natural Law and Positive Law? Kelsen suggests that the solution to this problem lies in the equivocal meaning of the word "norm."

The word norm, in general, means regulation as in law, or norm can refer to a psychological well being. When one speaks of the "normal way of acting" this may refer either to law, or to psychological well being. The work norm, is equivocal in its meaning.

⁴¹Ibid., p. 408.

⁴²Ibid.

Because of the equivocal meaning of the word norm, Kelsen argues this way. In view of the facts that Positive Law posits a meaning for human action, that Positive Law regulates its own creation through logic, and that Positive Law can be verified empirically, there is no question as to the validity of Positive Law.⁴³

However, in view of the Natural Law's attempt to derive its validity from a reality which presents only the phenomena of things from the point of view of the simple fact of existence--which attempt is impossible and irrational--the so called Natural Law must be no law at all. If the Natural Law is no law at all, then Kelsen asks: "What is it?"

Kelsen suggests that the Natural Law has a meaning which is given to reality not derived from reality, a predicate, other than existence, which is attached to a subject. Since the Natural Law is in fact no law at all, it must be a feeling.⁴⁴ A feeling would explain the contradictory aspect which arises at times when the laws of cognition create one thing but our feelings are diametrically opposed to it. Feelings, after all do not lie within the laws of cognition but within the realm of the emotions. Kelsen remarks:

It is contradictory to contend that norm A (as a moral norm) and norm non-A (as a legal norm) are valid at the same time, that is, that A and non-A ought to prevail at the same time. That one is a legal and the other a moral norm does not preclude a logical contradiction if the two have been established as norms, that is, in the same sphere of the "ought" and, consequently, in the same system of cognition. No contradiction is involved, if one contends that legal norm A is valid, even though the empirical ("is") fact persists that men believe, imagine, or will that non-A, ought to be. The normative validity of the legal norm

⁴³Ibid., p. 411.

⁴⁴Ibid., p. 409.

prescribing behavior A is unaffected even by the fact that the individual who should act in obedience to this legal norm actually displays behavior non-A, and even less by his corresponding belief, imagination or volition (because he is so motivated by a moral conception). The statement that an individual has the positive legal duty to obey the mobilization order of the head of State (that is, that the corresponding legal norm has "ought" validity), does not logically contradict the statement that the same individual, for moral reasons, considers himself bound to do the contrary, that is the statement that the empirical fact of a conception or volition with this content exists.⁴⁵

Moreover the attempt to derive principles from natural reality on a metaphysical level is irrational according to Kelsen. For the mind can only know the phenomena of things, that is to say, the appearances of things. The Natural Law, therefore, is based upon something other than natural reality and the laws of cognition. All of this suggests that the Natural Law is based upon fears or emotions or superstitious beliefs. The Natural Law therefore lies within the norms of psychological reactions, not the norms of cognition.⁴⁶

As a result of Kelsen's analysis, neither the Natural Law nor Positive Law contradicts each other because they are neither within the same universe of discourse. Both, then, can be valid at the same time without involving a contradiction.⁴⁷

In a nut shell, what Kelsen is saying is this: granting a Neo-Kantian epistemology the hypothetically first normgiving norm which is a category of the mind gives meaning to man's actions in terms of law. Such a category cannot be self contradictory and so it is impossible to have two different meanings given to the same object. One of the meanings

⁴⁵Ibid., p. 409.

⁴⁶Ibid., pp. 433-35.

⁴⁷Ibid., p. 409.

must belong to some other sphere and refer to some other aspect of reality. Positive Law not only gives meaning to human action but regulates it. This can be shown empirically.

The Natural Law claims empirical validity also by suggesting that its principles can be derived from reality. However, according to Kelsen one cannot derive an "ought" from an "is" because the only thing which is presented to consciousness is the phenomenon of a thing.⁴⁸ Natural Law, therefore, must belong to some other normative order with a different object. This other normative order is the unrealistic and irrational normative order of the emotions or of religious superstition. Such an order is unrealistic--and hence irrational--because in science the phenomena gives meaning to the categories where as in the emotional sphere of things, and in religion, a meaning is given to the phenomena in such a fashion as to imply that the meaning was derived from reality. Such a reversal of process excludes the correct relationship between phenomena and cognition on a scientific level. And so the process of Natural Law is irrational.⁴⁹

There is still another area of argumentation which Kelsen uses to show the irrationality of the Natural Law Doctrine. This area lies in the fact, according to Kelsen, that when the Natural Law either agrees with Positive Law, or delegates its authority to Positive Law, Natural Law simply disappears into Positive Law. Kelsen states:

The decisive point is this: all of the endeavors of natural law Doctrine to determine an absolute value measurement for positive Law, to define justice as its archetype, ultimately converge in the idea of a formal order, in the idea of a non-contradictory system, in a

⁴⁸Ibid., pp. 434-35.

⁴⁹Ibid.

formula, in other words which is reconcilable with any positive law. The ideal of justice has ultimately no other meaning than the hypothetical basic norm of critical positivism with its function of constituting the empirical legal material as an order.⁵⁰

The reason is that when the norms of the Natural Law are based upon emotion or superstition and coalesce with the norms of Positive Law, the Natural Law in effect becomes Positive Law to the extent that the Natural Law receives its authority as law from Positive Law. For, Natural Law, as law, has no authority on its own. The effectiveness of the Natural Law, as law, stems from Positive Law. Finally, when the Natural Law delegates its authority, the Natural Law principles in effect become Positive Law and the very delineations of the Natural Law doctrine disappear. Kelsen says:

In view of the fact that positive law is not, on principle subject to limitations of at least its material and temporal validity (limitations upon the validity of the national by the international legal order may be disregarded here), the norm of natural law, which delegates the creation of positive law, cannot be allowed to have such a restriction either. If it be assumed that there are, beside this delegating norm, other material norms of natural law, the delegation of positive by natural law must mean that natural law empowers positive law to replace it. A thus denatured natural law has no other function than that of legitimizing positive laws.⁵¹

The last area of argumentation against the Natural Law doctrine lies in history. Briefly, because of the emotional and irrational character of the Natural Law Doctrine, the Natural Law has been used to justify any contradictory system. In fact, a Natural Law doctrine can be devised to justify any contradictory system.⁵²

In summary fashion, then Kelsen's treatment of the Natural Law

⁵⁰Ibid., p. 439.

⁵¹Ibid., pp. 412-13.

⁵²Ibid., pp. 416-17.

Doctrine and its relation to Positive Law takes the following steps:

1. A Neo-Kantian epistemology is tacitly presupposed.⁵³
2. The Natural Law is shown to be a system which is different from that of Positive Law.
3. Two simultaneously valid systems with the same object are shown to be impossible.
4. Kelsen shows that within the Natural Law Doctrine the attempt is made to have two simultaneous systems with the same object. He remarks: "Generally, the natural-law Doctrine seeks to maintain that both natural and positive law are given as simultaneously valid orders."⁵⁴
5. Kelsen then shows that the Natural Law is based upon emotional and/or superstitious fears while Positive Law is based upon a norm giving authority. The former is on the level of emotion and the latter is on the level of reason.
6. Kelsen shows that no contradiction is possible between the two spheres of reality.
7. Kelsen then shows that even if the Natural Law is accepted--in his sense--as soon as it delegates authority to Positive Law, the Natural Law disappears into Positive Law.
8. Finally, as a further basis for the irrationality of Natural Law, Kelsen points to empirical reality in that the formulas of the Natural Law have, in history, justified any system. Moreover, the Natural Law Doctrine can be so devised as to multiply and to justify any system man so chooses.

The critical analysis of Kelsen's understanding of the relationship between the Natural and Positive Law will revolve mainly around Kelsen's Neo-Kantian approach⁵⁵ as well as what will become clear as a Platonic view--the double image theory--which Kelsen suggests as the epistemological foundations for the Natural Law Doctrine.⁵⁶ The other points in Kelsen's criticism hinge on epistemological approach. So these other points will be considered more extensively in succeeding

⁵³Ibid., pp. 46, 407.

⁵⁴Ibid., p. 415.

⁵⁵Ibid., pp. 433-35.

⁵⁶Ibid., p. 419.

chapters.

The Scholastic sense, or the perennial sense, or the classical sense dating from the ancient Greeks--they all mean the same in this dissertation--was the first view on the Natural Law Doctrine discussed in this chapter.⁵⁷ This first view is the position taken by this writer in giving a critical analysis of Kelsen's consideration of the relation between the Natural and Positive Law. The contrast drawn, then, is between Scholasticism, and the Positivism of the Pure Theory of Law.

Kelsen's treatment of law in general presupposes a Kantian categorization. He makes this quite clear when he writes:

The decisive point is this: all the endeavors of natural law doctrine to determine an absolute value measurement for positive law, to define justice as its archetype, ultimately converge in the idea of a formal order, in the idea of a non-contradictory system, in a formula in other words, which is reconcilable with any positive law. The ideal of justice has ultimately no other meaning than the hypothetical basic norm of critical positivism with its function of constituting the empirical legal material as an order.⁵⁸

Kelsen on the other hand admits that the Natural Law Doctrine tries to derive a metaphysics from natural reality. Kelsen's approach was considered and analyzed in a preceeding chapter (Chapter IV). Kelsen's conclusion was that there is no such thing as metaphysics. This writer's analysis showed that Kelsen was "lumping together" various metaphysical approaches and treating them all the same thus invalidating his arguments against the Natural Law Doctrine and its metaphysics.⁵⁹

This writer would like to go a step further now in trying to show

⁵⁷ut supra. pp. 3-10.

⁵⁸General Theory of Law and State, p. 439.

⁵⁹ut supra, Chapter IV, pp. 64-92.

how Kelsen can so easily argue against the Natural Law Doctrine and still miss the point of the Natural Law Doctrine. For if it is shown⁷ how, from the very beginning, Kelsen's treatment of the concepts of the Natural Law Doctrine are wrong, many of his subsequent confusions--some of which have already been treated--will be clarified. Then the position of the Natural Law Doctrine can be clarified as it actually is.

"What," one might ask, "is necessary in order that a universalization of a collection of approaches to the Natural Law Doctrine might seem valid?" For, as has been shown, this universalization of a collection of approaches is precisely what Kelsen does.

The clue lies in Kelsen's description of a realist epistemology. Kelsen calls it the "image" theory.⁶⁰ In this theory, according to Kelsen, the senses are confronted with the appearances of things, but lying behind the appearances are the true natures, or essences of things. When he applies this theory to Plato, Kelsen speaks of two worlds: "...the empirical and transcendental..."⁶¹ When he speaks of Aristotle, Kelsen speaks of a rationalists approach in which substances, essences, tendencies are forms theoretically existing in natural reality; "but this metaphysics has no essential influence on that part of Aristotle's system which is particularly devoted to the problem of morality...his ethics."⁶²

The metaphysical reality of Aristotle is as unperceivable as Plato's world of ideas. The difference between the two views lies in the location of forms and principles. When Kelsen speaks of "Happiness" from

⁶⁰Kelsen, General Theory of Law and State, p. 419.

⁶¹Ibid., p. 12.

⁶²Kelsen, What is Justice, p. 113.

Aristotle's point of view, it is portrayed as an unknowable something to be grasped at. Kelsen says:

Since a rationalistic moral philosophy is not capable of determining the content of a just order...which differences between individuals are relevant and which are irrelevant...it must presuppose these determinations. This means: leave it to the state....⁶³

When Kelsen speaks of tendencies, they are forms which in themselves are without direction.⁶⁴ When Kelsen speaks of the Natural Law, as has been shown, it is a form opposing the form of Positivism. What Kelsen is doing is over objectifying forms. Kelsen implies that meta-physical principles are separate from the appearances of things. Now this is a Neo-Platonic approach to philosophy. Kelsen's approach to Aristotle's principles is strikingly similar to Plato's.⁶⁵ When he speaks of Plato's two worlds in relation to science, Kelsen writes:

This dualism between reality and idea, an imperfect world of our senses and another perfect world, inaccessible to the experience of our senses...is an element not only of Plato's philosophy; it is a typical element of every meta-physical, or what amounts to the same thing, religious interpretation of the world.⁶⁶

Among the contrasts which can be drawn from the history of philosophy the contrast dealing with the location of forms is one. Plato wrote that the perfect forms of things exist apart from the thing we experience. Aristotle wrote that forms exist in the things we experience. The medievalists agreed, for the most part with Aristotle.

In modern times, the point of view switches from the place of forms within reality to the possibility of establishing the reality of forms. The modern rationalists tried to ascertain the extra-mental reality of

⁶³Ibid., p. 133.

⁶⁴Ibid., pp. 4, 174-80.

⁶⁵Ibid., p. 195.

⁶⁶Ibid., p. 12.

forms from the point of view of human reason. Using sensation as a starting point, the empiricists tried to determine whether or not the forms of things--and hence a metaphysics--existed outside of the knowing subject.

Kant placed the forms of things in the mind as categories. The Positivists use the forms of things as laws of cognition.

The meaning and significance of forms include the categories, concepts, and metaphysical principles.⁶⁷ The contrast drawn deals with the location of forms. This is the contrast which Kelsen draws in his consideration of the history of philosophy. However, while the meaning of forms in their most general sense is acceptable, the word form in particular has many specific meanings.

One can understand the word form to mean the classification of things. In this sense Aristotle speaks of the categories of the mind, as do the Scholastics.⁶⁸ Again one can speak of metaphysical principles as the ultimate forms which the mind possesses of reality. These forms stem from a consideration of being, of substance. Most schools of thought in the history of philosophy, which consider metaphysics and the place of forms, understand them in these two senses.⁶⁹

Another meaning for form is "that which makes a thing to be what it is and not something else" or "that by which something is." These are classically accepted definitions.⁷⁰ Up to here, Kelsen uses the word "form" in these usual senses, but Kelsen misses the full

⁶⁷ Pagobert Runes, The Dictionary of Philosophy, (New York, Philosophical Library, 1942), pp. 110-12.

⁶⁸ St. Thomas Aquinas, Opuscula, I, Citta di Castello, Tiferni Tiberini, 1886, pp. 2-3.

⁶⁹ Ibid.

⁷⁰ Runes, Dictionary of Philosophy, pp. 110-12.

significance of the word form,⁷¹ namely that there is a Platonic significance and there is an Aristotelian significance. They differ radically.

For Plato, the form of a thing is its truth, its meaning, its complete perfection of which the things of this world are mere shadows.⁷² For Aristotle, the form is not only a thing's meaning but together with matter is the thing itself. There is not simply a subject matter which reflects a form, there is a subject matter which is in form. Likewise there is not only a form apart from matter, but a form within matter. Things which exist for Aristotle do not exhibit a form beyond the thing, (in the Platonic sense) but an interaction of matter and form within the same object.⁷³

One cannot divorce form from matter as is done in the double image theory unless one is speaking in Platonic terms. In other words one cannot hold out Aristotle's metaphysical principles for scrutiny as if they were separate entities underlying the reality of experience as is done in Kelsen's presentation of the double image theory.⁷⁴ Actually, Kelsen is approaching Aristotle from a Platonic point of view. Kelsen's collectivization is invalid.

As has been pointed out, Kelsen employs a Platonic conceptualization throughout his consideration of the history of philosophy.⁷⁵ This is what Kelsen means by the double image theory. Such a theory simply does not apply to all of the schools of the Natural Law Doctrine. In

⁷¹Kelsen, General Theory of Law and State, pp. 419-21, 428-29, 443.

⁷²Plato, Phaedrus, p. 247; Parmenides, 132D.

⁷³Aristotle, Metaphysics, 991b 1-3.

⁷⁴Kelsen, General Theory of Law and State, pp. 419-21.

⁷⁵ut supra, Chapter IV.

other words, the assumption that essences, substances, or forms are something other than and apart from the thing experienced reduces Kelsen's description to a double image theory. Likewise Kelsen's treatment of metaphysical principles--regardless of whose metaphysics--is reduced to a Platonic view.⁷⁶

Intermingled with this tendency is Kelsen's understanding of empirical fact or "fact of existence" or "empirical reality." For Kelsen, the simple fact of existence does not express nor for that matter does it include, the requirements which would be needed in order that a thing exist. The requirements about which this researcher is writing are those found in the content of the thing itself. The "fact of existence" merely indicates a meaningful type of predicate attached to an object of consciousness. The meaning of the expression: "fact of existence" is especially significant in Neo-Kantianism. From this meaning it is a simple step to understand that "reality" for the Neo-Kantian encompasses the past, present and future contents of consciousness. Things are real because they are found in consciousness with the characteristic of existence. These facts are made meaningful--in the Neo-Kantian twist--by the laws of cognition. As Kelsen remarks:

As soon as we cease to believe that these things have a transcendent existence, independent of our cognition, cognition must assume an active, productive role in relation to its objects. Cognition itself creates its objects, out of materials provided by the senses and in accordance with its immanent Laws.⁷⁷

One cannot stress, strongly enough, therefore, the difference between existing facts in the Kantian and Neo-Kantian senses and existing facts in the Scholastic sense. Rommen says:

⁷⁶Kelsen, General Theory of Law and State, pp. 419-21.
⁷⁷Ibid., p. 434.

Had his agnosticism not stood in the way, Kelsen could have attained to the idea of the natural law. In this conception rational nature, viewed in the Thomistic sense as a metaphysical being, is the rule of oughtness for the concrete being, and essence is the final cause of existence. Kelsen, however, does not make this latter distinction since for him being is simply existence.⁷⁸

In the Scholastic sense the "fact of existence" really means a "state of existence." "A state of existence" implies that a thing contains its own requirements for existence. Moreover these requirements are necessary and hence common to all things existing in natural reality. A state of existence implies that these necessary requirements in part at least can be known by the intellect. As a result, things which are in a state of existence are said to be sensible to sensation and intelligible to the intellect. When the intellect forms a concept based upon the most fundamental aspect of existing facts, therefore, the intellect forms a concept of something existing: being. As Rommen remarks:

Man perceives individual things through the imagination and senses, and he is thus able to apply the universal knowledge which is in the intellect to the particular thing; for, properly speaking, it is neither the intellect nor the senses that perceive: it is man who understands by means of bothBut man understands by means of senses and intellect. Consequently through intellectual activity he knows the essences from the things.⁷⁹

The concept of being always refers to facts of existence the contents of which include the requirements needed in order that things exist.

These necessary requirements common to all things are contained intrinsically within the thing itself and answer the questions: "What is it?" "What is it made out of?" and extrinsically "What makes it?" "What is its end?" Rommen states:

⁷⁸Rommen, The Natural Law, p. 147.

⁷⁹Ibid., p. 164.

Things in their reality, i.e., that which actually is, are the measure of knowledge. The entire domain of that which is (and is therefore knowable) in the context of the first principles and ultimate particulars constitutes the intellect's field of investigation.⁸⁰

When the Kantian, Neo-Kantian or Positivist speaks of "fact," "existing facts" or "facts of existence" therefore the meaning is entirely different than the implications given "fact" within scholasticism.

When Kelsen speaks of "facts" he invariably means "fact" in the Neo-Kantian sense.⁸¹ When he speaks of metaphysical principles, Kelsen is taking a Platonic approach.⁸² In other words: the facts are devoid of forms on the one hand, and when the forms are considered, they are treated as categories of the mind on the other hand. This is what is meant by a Neo-Kantian epistemological approach.

The consequences of such an approach present serious difficulties for Kelsen's consideration of the relationship between the Natural Law and Positive Law. In the first place, the approach itself unifies a diversity of points of view toward the Natural Law Doctrine in such a fashion as to make the Natural Law Doctrine appear to be an inconsistent illogical whole based upon one point of view.⁸³ Actually the "image" theory which Kelsen describes as the epistemological approach of the Natural Law theorists hardly describes the Aristotelian or Scholastic approach.⁸⁴ The consideration of forms and facts show that the varying views toward the Natural Law Doctrine cannot be so unified.

⁸⁰Ibid., p. 164.

⁸¹Ibid., p. 147; Kelsen, What is Justice, pp. 199-200.

⁸²Kelsen, General Theory of Law and State, p. 439.

⁸³Ibid., pp. 419-23.

⁸⁴McCoy, The Structure of Political Thought, pp. 3-5.

Moreover, a Neo-Kantian approach does not represent the approach which was taken by the ancients and the medievalists, especially the Thomists, toward the Natural Law Doctrine.⁸⁵

In view of Kelsen's assumption of a Neo-Kantian epistemology, therefore, Kelsen puts himself in the peculiar position of constructing a "straw man." There seems little if any objection, for example, to Kelsen's showing the real as well as logical impossibility of the co-existence of the Natural Law and Positive Law--two simultaneously valid systems with the same object--when taken within the context of a Neo-Kantian epistemology.⁸⁶ However, the relationship between the Natural Law Doctrine and Positive Law was not developed within the context of a Neo Kantian epistemology.

The question finally arises, then, what is the epistemological basis upon which a true relationship between the Natural Law and Positive Law can be founded? The question is not "Is there a possibility for an epistemological basis?" for there are other well developed epistemologies besides Neo-Kantianism, or positivism.

In regard to the other points to be considered in this critical analysis of Kelsen's understanding of the relationship between the Natural Law and Positive Law, all--the Natural Law is a different system than Positive Law; two simultaneous systems with the same object are impossible; emotion or superstitious belief is the basis for the Natural Law; the disappearance of the Natural Law into Positive through delegation--hinge upon Kelsen's Neo-Kantian approach to what he understands by Absolutism. As the true epistemological and metaphysical foundations

⁸⁵ Strauss, Natural Right and History, pp. 1-8.

⁸⁶ Kelsen, General Theory of Law and State, p. 411.

for the Natural Law Doctrine unfold, these points will become clarified and stand in sharp contrast to Kelsen's view.

By way of summary to Kelsen's approach to the Natural Law Doctrine, two points have been made. The first is that Kelsen treats the development of the Natural Law Doctrine in terms of Platonic forms. Secondly, when he considers the relationship between the Natural Law and Positive Law, Kelsen rightly or wrongly steps outside of the context of the Natural Law Doctrine and uses a Neo-Kantian epistemology. As Franciscus Schmoelz, O.P., remarked:

That would therefore be, according to Kelsen, a purely logical process without any involvement of the will...as a static basic norm which is dissolved like a general concept into the ideas that are to be subsumed under it--with the elimination of the will.⁹⁷

In so doing, Kelsen is forced to create an entirely new basis for the Natural Law Doctrine which is one of emotion or superstitious belief. Kelsen proposes this new approach so as to avoid contradictions between Positive Law and Natural Law as Kelsen understands the doctrines.

This writer suggests that on the one hand, a Neo-Kantian approach to the Natural Law presents a false picture of the Doctrine. Subsequently the emotional basis for the Doctrine is left unproved. On the other hand the over unification of the Natural Law Doctrine by means of employing Platonic forms does not express the diversity of the Natural Law doctrines adequately. As a result, Kelsen's charge that the Natural Law Doctrine is riddled with inconsistencies and self contradictions is also false.

⁹⁷Franciscus Schmoelz, O.P., Das Nature Gesetz und Seine Dynamische, Freiburg (Kraft, 1959), p. 180.

Chapter VIII

RECAPITULATION

Until now, this research paper has been devoted to two spheres of endeavor. One sphere is Kelsen's understanding of the Natural Law. Linked with this is the presentation of Kelsen's criticism of the Natural Law, its foundations, and principles, for example justice.

The second sphere is an analytical criticism of Kelsen's position from the point of view of Scholasticism. Linked with this analytical criticism, an effort was made to draw a sharp parallel between Kelsen's view and that of the Scholastics if there should be such a sharp parallel. The parallel was most general in nature. Kelsen ⁵talked about the foundations of the Natural Law, and so, too, do the Scholastics. Kelsen writes about the metaphysical, epistemological and ethical aspects of the Natural Law; the Scholastics consider these same topics.

However, upon an examination of Kelsen's understanding of the Natural Law and its foundations, the parallel between what Kelsen understands by the principles involved in such subjects as metaphysics and epistemology, and what the Scholastics understand by them, gradually broadens into a contrast.

What Kelsen understands as the Natural Law theorist's epistemology, for example, does not extend to what the Scholastics, who are Natural

Law theorists, understand as their epistemology. The parallel between Kelsen and the Natural Law theorists, as a result, is limited to the general topics but not their content. The content of the topics, upon examination, proves to be significantly different, so different in fact, that the conclusions of Kelsen appear inexplicable from the point of view of the natural theorists: hence the contrast.

One reason why Kelsen's understanding of epistemology differs from the Scholastic's is because of the equivocation involved in the terminology of the two views. In talking about empirical facts, for instance, Kelsen takes the position of a Neo-Kantian. An empirical fact is an existing phenomenon within the sphere of consciousness.¹ Anything said about this fact other than its predication of existence involves the laws of cognition, the categories of the mind. The empirical fact as an interpretation of reality is the result of a union between the categories of the mind, within the laws of cognition, and the phenomenon itself as subject to the apriori forms of sensibility. From Kelsen's point of view, the interpretation of an empirical fact does not arise out of the analysis of the contents of extra-mental reality. But rather the interpretation is a synthesis arising out of the apriori and the aposteriori. Any consideration other than existence in relation to the fact as a posteriori, is impossible for Kelsen.²

On the other hand, when talking about empirical facts, the Scholastic takes the view of a realist. The fact presented to consciousness through sensation contains its own basis of classification. The human mind does not unite with the reality in such a fashion as to form - give

¹Kelsen, General Theory of Law and State, pp. 435-36.

²Kelsen, General Theory, pp. 433-35; What is Justice, pp. 174-181.

meaning to - the fact. Rather the fact forms the mind in such a fashion that what is said about the fact arises out of the fact itself.³ Consequently, the predication of existence is not the only predicate which can be discovered through an analysis of empirical facts in the view of the Scholastic Natural Law theorists.⁴ The difficulty in going beyond a parallel between Kelsen's understanding of the Natural Law and the Scholastic's lies in not realizing the equivocal use of terms. As a result, therefore, both the Scholastics and Kelsen end up with different epistemologies while using the same terms.⁵

Another difficulty which suggests that both Kelsen and the Scholastic Natural Law theorists are not dealing with the same concepts suggests itself in the metaphysical approaches of the two views. On the one hand, Kelsen is preoccupied with the Platonic approach to metaphysics.⁶ This approach in turn stems from his understanding of the image theory of knowledge. A large segment of the Natural Law theorists neither follow the two world approach of Plato nor accept the image theory which Kelsen claims to be the epistemological approach of the Natural Law theorists.

As a result of these difficulties, Kelsen's problem regarding his treatment of the Natural Law together with its foundations can be reduced to these observations. On the one hand, Kelsen is a positivist of the Neo-Kantian variety. When he analyzes the Natural Law, his treatment of it presumes that the Natural Law theorists hold the Platonic theory of two worlds: the world of appearances and the world of essences. This interpretation of the Natural Law theory as Platonic is carried over

³St. Thomas, IV, Sententia, 9, 1, 4, Vol. I.

⁴Regis, Epistemology, New York Macmillan Co., 1959, p. 98.

⁵Ibid., pp. 93-102.

⁶Kelsen, General Theory of Law and State, p. 12; 419 ff.

into Kelsen's analysis of the theory of knowledge. The theory of knowledge, so Kelsen maintains, is an image theory and suggests that there is something beyond our senses, viz., the real essences of things. Hence for the Natural Law theorists, according to Kelsen in his description of what the Absolutists would have to hold, the really real principles of nature, e.g., values, norms, causality, etc. lie beyond the senses and form part of the metaphysical world which is inaccessible to sensation.⁷

Since this metaphysical world, in Kelsen's critical view of Absolutism, is inaccessible to sensation, a knowledge of this world would depend upon something other than the laws of cognition, for the materials which the laws of cognition classify stem from sensation. The metaphysical approach is absurd, therefore the Platonic duality together with its image theory is absurd. If metaphysics is absurd, then so are its conclusions concerning specific principles, such as justice, values, norms, etc.⁸

Kelsen's attack is not limited to the Platonists. He also attacks the rationalists, such as Aristotle. Aristotle, in Kelsen's view, starts with reason and tries to establish a metaphysics of reality. Kelsen takes the tack that ultimately Aristotle fails to establish a metaphysics of reality with reason as a starting point. In speaking of Aristotle's concept of justice, for example, Kelsen remarks that

Since a rationalistic moral philosophy is not capable of determining the content of a just order, of answering the questions what is good and what is evil, which differences between individuals are relevant and which irrelevant, ...who is equal and what is equal, it must presuppose these determinations.⁹

⁷Ibid.

⁸Kelsen, What is Justice, pp. 175-197.

⁹Ibid., p. 133.

The point which Kelsen attempts to make is that ultimately the Aristotelian view is merely a variation of the Platonic view.

Both views are concerned with the location of metaphysical principles: the one suggests a duality, the other suggests a pseudo-monism. Kelsen suggests that both are wrong. Ultimately, the correct view is the Kantian view. The Kantian view maintains that metaphysical principles existing apart from the world of sensation cannot possibly be known. Moreover, there is nothing in sensation to merit reason's acknowledgement of metaphysical principles existing extra-mentally. In this, Kant is opposed to the views of both Plato and Aristotle.¹⁰

In effect, then, Kelsen agrees with Kant, and reduces both the Platonic approach as well as the Aristotelian approach to idealism.¹¹ This is the reason why Kelsen can consider both trends in the Natural Law theory along with the metaphysics which sustains them, as one, one school of thought. For, both schools of thought assume a metaphysics. The one projects it into the beyond. The other tries to enmesh it in sensible being. You might just as well say that both fall victim to the ontological fallacy. And it is precisely the ontological fallacy against which Kelsen is fighting. Kelsen's solution is that what the Natural Law theorists understand to be metaphysical principles are nothing more than categories of the mind. In this regard, Kelsen writes:

The image theory of knowledge falls with metaphysical dualism. Cognition cannot be merely passive in relation to its object; it cannot be confined to reflecting things which are somehow given in themselves, which exist in a transcendent sphere. As soon as we cease to believe that those things have a transcendent existence, independent of cognition, cognition must assume an active, productive role in relation to its

¹⁰Kant, Critique of Pure Reason, pp. 41-44.

¹¹Kelsen, What is Justice, pp. 175-197.

objects. Cognition itself creates its objects out of the materials provided by the senses and in accordance with its immanent laws.... True, the ontological judgements no longer claim absolute truth; for they can no longer sustain themselves upon the relationship to a transcendent absolute.¹²

From Kelsen's point of view, both Plato and Aristotle, especially Plato, are the optimistic precursors of all succeeding metaphysicians. Their attempts to establish a metaphysics, albeit in different ways, is simply repeated throughout the history of Philosophy. Consequently, Kelsen feels that he is in a position to treat all metaphysical schools, together with their principles, in the same way. In other words, if they are all idealists, all trying to establish a metaphysics, all relying upon an image theory of knowledge, there is no reason why they should not be grouped together and treated accordingly. This appears to be Kelsen's reason for the collectivization of philosophies.¹³

Kelsen's method of disproving any metaphysical approach, either of the Platonic or of the Aristotelian variety falls into the following general divisions:

1. a reduction of the general approach of the philosophy to an absurdity by pointing out the contradictory consequences of the metaphysical position, e.g., Plato and the lie, true science.¹⁴
2. a reduction of the metaphysical principles - taken individually and in isolation - to meaningless principles, e.g., tendencies etc.¹⁵
3. the underlining of the metaphysician's constant readjustment of their unchanging principles to fit the incontrovertible changing facts of reality, e.g., Aristotle:¹⁶ happiness, justice, tendencies; Plato, justice etc.

¹²Kelsen, General Theory of Law and State, p. 434.

¹³Ibid., p. 419 ff.

¹⁴Ibid., p. 12 ff.

¹⁵Kelsen, What is Justice, pp. 175-197.

¹⁶Ibid., pp. 110-137.

4. a reduction of the natural law to the level of emotion, by showing that as law, the Natural Law contradicts the very concept of Positive Law.¹⁷

The inevitable consequence of this method of examination is that the metaphysicians either cannot escape their own internal contradictions, or if the attempt is made - as in the case of Aristotle - the principles become so subject to revision as to render them both useless and meaningless. In Kelsen's view:

to reduce the idea of justice to the idea of equality or unity of order means no more and no less than the replacement of the ethical by the logical ideal. It means the rationalization of the originally irrational idea of justice, the "logification" of an ideal originally alien to the logos.¹⁸

Kelsen therefore concludes:

The old truth is thus confirmed that science is unable, and therefore not entitled, to offer value judgements. This applies especially to the science of law, even if it is considered to be a science of values. Like every science of values, it consists in the cognition of values, but it cannot produce these values. It can understand norms, but it cannot create them. (For this reason, positivism decidedly rejects the specific natural law doctrine of juridical science as a source of law.) Cognition in the form of natural science, cannot produce the empirical material, it can merely construct from the material yielded by the senses a specific object. In the field of legal science, it cannot properly produce material values; it can only establish the values and acts of valuation yielded by volition as a specific object, a non contradictory system of norms.¹⁹

From all that has been said in regard to Kelsen's approach, one must conclude that Kelsen draws a sharp parallel between the ancient and the medieval metaphysicians on the one hand, and the modern and contemporary philosophers on the other hand. The parallel is this: the task of the metaphysician throughout the history of philosophy has been to establish a metaphysics. This is the reason why Kelsen can

¹⁷Kelsen, General Theory of Law and State, pp. 406-419.

¹⁸Ibid., p. 440.

¹⁹Ibid., pp. 440-41.

assert that "the natural law doctrine stands and falls with the assumption that value is immanent in reality."²⁰ The working assumption of Kelsen is that the aim of the Cartesian method is the same as the aim of the Aristotelian and the Platonic method: to establish a metaphysics.

However, the aim of some of the ancients and medievalists was to discover the ultimate principles of being, and not to establish that they do exist extra-mentally.²¹ The starting point of Kelsen, therefore, is thrown into serious question. Consequently, his method which flows from this starting point is likewise highly questionable.

The object of this dissertation is to give a critical analysis of Kelsen's Pure Theory of Law. A great deal of Kelsen's intellectual effort goes into laying a foundation for his pure theory. One of the most important points to which Kelsen devotes so much time and energy is to exclude metaphysics and the concept of the Natural Law from his Pure Theory. One might say that as the Natural Law stands or falls with the reality of values, so the Pure Theory stands or falls with the exclusion of a metaphysics. For, in Kelsen's view, there is a logical impossibility between the Natural Law and the Pure Theory of Law.²²

On the one hand, the exposition and critical analysis of Kelsen's philosophy can be summed up with these thoughts: Kelsen as a Neo-Kantian positivist views metaphysics and its offspring the Natural Law as irrational and totally incompatible with Positive Law. Metaphysics and the Natural Law are not rational views of reality but rather emotional reactions to reality. With this in mind, Kelsen develops a form of Positive

²⁰Kelsen, What is Justice, p. 174.

²¹Regis, Epistemology, pp. 109-144.

²²Kelsen, General Theory of Law and State, p. 411.

Law which is designed to present a continuity and dynamism within law which stretches through law like a web and holds the regulatory forces of mankind together. The ultimate basis of this law is a hypothesis, an assumption, which is a category of the mind. As a category of the mind, the hypothetical, basic norm is as universal and necessary as are the laws of cognition. By the same token the basic norm is as creative and dynamic as is the human mind's ability to mold the raw material of sensation.²³

Kelsen rejects metaphysics and the Natural Law because, as he understands the situation, the Natural Law theorists as a whole throughout history have failed to establish the reality of metaphysical principles. Epistemologically, according to Kelsen, the Natural Law theorists can all be traced back to the duality of two worlds: the world of senses and the world of essences both of which are based upon an image theory.²⁴ This duality is assumed if one follows the Platonic view, and, as a basis for the Natural Law, provides insurmountable contradictions. This duality becomes absurd when it is projected into reality under the guise of a pseudo-monism as in the case of Aristotle and the rationalists. For the constant revision of the principles to meet new circumstances renders the metaphysical principles meaningless. Consequently, Kelsen relegates metaphysics and the Natural Law to the realm of the emotions and superstitious fears of man. In this area the Natural Law does not contradict Positive Law because the two are on two entirely different levels.²⁵ As a result when the Natural law reacts against Positive Law the latter remains both supreme and uncontradicted. When the Natural Law reacts

²³Ibid., pp. 440-41.

²⁴Ibid., pp. 12; 419-20.

²⁵Ibid., pp. 411-15.

favorable to Positive Law, the latter is absorbed within Positive Law.

On the other hand, the findings of this research paper up to here can be summarized with these observations. Kelsen presents his exposition and criticism of metaphysics from the point of view of one who sees all of the metaphysical theories as representative of one general school of thought. This general school of thought is idealistic epistemologically. Kelsen has worked under the impression that the various sigments within this one general school of thought are contradictory and incapable of establishing their points and hence the whole system is contradictory and incapable of establishing its points.

However, the Natural Law theorists insist that such an approach is an over generalization. The various attempts at a metaphysics are at best a collection of schools of thought which often enough have no relationship to each other outside of the use of the word "metaphysics." Many of the relationships among metaphysicians go no further than the name. Likewise many of the relationships among Natural Law theorists go no farther than the name.

The Scholastic school of thought does have a tradition which dates back to ancient times, Kelsen's consideration of Aristotle and Thomas Aquinas - and all that they represent up to contemporary times - is not excluded from his treatment of the metaphysical approach.²⁶

In particular, then, the Scholastics are in a position to take exception to Kelsen's approach to the foundations of the Natural Law Doctrine. The critical analysis of Kelsen's position up to this point has revolved mainly around his over generalizations and then the Scholastic position in regard to these generalizations.

²⁶ibid., pp. 422-435; What is Justice, pp. 204-5.

It is now time to consider two areas of vital importance to both the Scholastics and to Kelsen in regard to his critical analysis of the Natural Law. These areas are the epistemological and metaphysical considerations of Scholasticism upon which a Natural Law theory is developed.

Kelsen charges the Scholastics with grounding its philosophy in idealism, with employing an image theory which leaves the mind passive in relation to its object, with constructing a metaphysics based upon projecting principles into reality which actually have their basis in the emotions and superstitious fears of man, and using these principles to construct a Natural Law doctrine which is meaningless and irrational in the face of Positive Law. These charges, according to Kelsen, not only have historical verification dating from Aristotle's attempt to project a metaphysics into reality, but upon examination these metaphysical principles, in the light of their own worth, are shown to bear out the charges.

The remainder of this research, therefore, will be devoted to a critical analysis of Kelsen's understanding of the epistemological and metaphysical foundations of that Natural Law doctrine developed by the Scholastics and dating back to the times of Aristotle.

Chapter IX

A CRITICAL ANALYSIS OF KELSEN'S UNDERSTANDING OF THE EPISTEMOLOGY OF THE ABSOLUTISTS

Since Kelsen includes all forms of Absolutism in his critical analysis of the epistemological foundations for a metaphysics, he includes the position of the Aristotelian-Scholastics. This chapter is devoted to contrasting what Kelsen considers a legitimate inclusion of epistemology into his understanding of Absolutism and what the Aristotelian-Scholastics have to say on the legitimacy of Kelsen's approach.

From the point of view of the Aristotelian-Scholastics, knowledge represents a relationship between a knowing subject and the object known.¹ Since knowledge may be true or false, these represent a special relationship between the knowing subject and the object known. For, the person whose intellect is in a state of act must determine whether or not his knowledge is true or false. To appreciate the Aristotelian-Scholastic concept of truth, what it is, what are its conditions, etc., the presupposition of truth, viz.: knowledge, should first be considered.

Knowledge for the Aristotelian-Scholastic is first of all an acquisition. It is an acquisition because the knowing subject passes from a

¹St. Thomas Aquinas, Summa Theologica, I, q. 84, a. 2.

state of ignorance to a state of knowing. St. Thomas Aquinas makes this clear when he writes:

This becomes evident from the fact that at first we are only in potentiality to understand, and afterwards we are made to understand actually.²

By the same token, the acquisition is a sort of possession by the knower, for, after acquiring knowledge, the knower has something which he did not have before. St. Thomas suggests that:

This is the perfection of a knower in so far as he knows; for something is known by a knower by reason of the fact that the thing known is, in some fashion, in the possession of the knower.³

If the knowing subject acquires something which he did not possess before, then the knowing subject must be receptive. If the knowing subject is a receiver, then that which is received must be other than the receiver. Now, in view of the fact that rational beings pass from a state of ignorance to a state of knowing, that which is known, although it is a part of the knower, must stem from something other than the knower.⁴ Consequently, the object known, in its most primitive aspects, stems from something other than the knowing subject. This is to say that the object enjoys a prior extra-mental existence. If the object known did not enjoy some prior extra-mental existence, and this is not to state the mode of existence, then both the receiver and the object to be received would be one, and such an approach is self contradictory.⁵

What, one might ask, is that which is received by the knowing subject from extra-mental reality, so that the knower can acquire a new

²*Ibid.*, I, q. 79, a. 2.

³St. Thomas Aquinas, *On Truth*, trans. by Robert W. Mulligan, Chicago, Henry Regnery Co., 1952, Vol. I, q. 2, a. 2.

⁴St. Thomas Aquinas, *Summa Theologica*, I, q. 77, a. 4, 6, 7; I, q. 79, a. 2.

⁵*Ibid.*, I, q. 84, a. 3, c.

possession? The materiality of extra-mental reality must be excluded. For if matter were that which is acquired as knowledge, then the very act of knowing would destroy the material entity as it exists extra-mentally. Moreover, if matter constituted the acquisition, the knower would grow physically in direct proportion to his acquisition. Neither of these alternatives are observed in the process of acquiring knowledge. Rather, what is observed to be acquired are the forms of things or those qualities which somehow reveal the forms or patterns of things.

Knowledge, as the Aristotelian-Scholastic understands it, is the possession of the forms of things as those things actually are. St. Thomas puts it this way:

The noblest way of possessing a thing is to possess it in an immaterial way, that is by possessing its form without its matter, and this is the definition of knowledge.⁶

Knowledge is the result of a discovery, a discovery of the contents of reality which is presented to the mind through sensation. Because the human being is part of reality, in understanding reality, he understands his own position within this reality. As Professor McCoy writes:

Without the primacy of speculative truth, all practical regulation dissolves: Man, human good, and society become simply and wholly what we want them to be.⁷

In considering the type of possession which knowledge is, according to the Aristotelian-Scholastic, two important points must be brought out. First, the knower must somehow be able to acquire his possession and also retain it.⁸ Secondly, he must have the assurance that his possession exists. St. Thomas writes:

⁶St. Thomas Aquinas, Super Librum de Causis, Lect. 8., Critical Text, Freibourg, Saffrey, 1954.

⁷McCoy, The Structure of Political Thought, p. 47.

⁸St. Thomas Aquinas, Summa Theologica, I, q. 79, a. 3, 4.

In forming the quiddities of things, the intellect merely has a likeness of a thing existing outside the soul, as a sense has a likeness when it receives the species of a sensible thing. But when the intellect begins to judge about the thing it has apprehended, then its judgement is proper to itself--not found outside in the thing. And the judgement is said to be true when it conforms to external reality.⁹

The first point implies the process of sensation, the formulation of a sense image, the process of abstracting or separating the form from the sense image and terminating in the conception of an idea. The word conception is used because the form of a thing enjoys a new existence in the mind of the knower. The form is to be received. The intellect which receives it, upon the reception, enjoys a new state of existence. The intellect is no longer a receiver nor the form receivable, but both have united to produce the first stage of knowledge.¹⁰ The act of knowledge is the act of understanding. The mind becomes one with the thing known without the mind's losing its own identity. The subject's individuality is not lost in the thing known nor vice versa. Rather, knowledge becomes a unique product, a conception of the intellect.¹¹

The second point to be considered is the assurance that what the intellect possesses--the forms of things--exists. In other words, knowledge is to possess the forms of things as those things actually are.¹² Knowledge begins with existence, for if forms do not exist, there is nothing to know, and it returns to existence for confirmation. St. Thomas writes:

Science is in the intellect. If, therefore, the intellect

⁹St. Thomas Aquinas, On Truth, I, 3.

¹⁰St. Thomas Aquinas, Summa Contra Gentiles, I, 53; Compendium Theologiae, St. Louis, Herder Book Co., 1947, pp. 38-39.

¹¹Ibid.

¹²St. Thomas Aquinas, On the Soul, IV, 1., trans. by John Patrick Rowan, St. Louis, B. Herder Book Co., 1951.

does not know bodies, it follows that there is no science of bodies, and thus perishes natural science, which treats of mobile bodies.¹³

Truth, the assurance that what one knows actually exists, cannot be in the objective representation alone because in this case, whatever the intellect knew would be true. Error would be impossible.¹⁴ Likewise, truth cannot be in the formal concept because in this case, whatever was formulated by the mind would have to exist.¹⁵ Consequently, truth must arise out of establishing the relationship between the concept and the extra-mental object which is known. Such a relationship is established in a judgement.¹⁶ The assurance that the forms which the knower possesses is based upon his referral of the concept to reality and the judgement he makes as a result of this referral. The process of referring to reality for assurance is called reflection.¹⁷ The force within reality which gives rise to the assurance that the form does exist is called evidence.¹⁸ Reflection based upon the evidence compels a judgement about the existence of the form which the mind has conceived. Truth resides in the affirmation of an actual relationship of adequation between the concept and the thing known. St. Thomas writes:

For, since the truth of the intellect is the "adequation of intellect and thing" in as much as the intellect says what is is and what is not is not, truth belongs to that in the intellect which the intellect says, not to the operation by which it says it. For the intellect to be true, it is not required that its act of understanding be adequated to the thing known, since the thing is sometimes material whereas

¹³St. Thomas Aquinas, Summa Theologica, I, q. 84, a. 1.

¹⁴Ibid.

¹⁵St. Thomas Aquinas, Summa Contra Gentiles, I, 59; I, 69.

¹⁶Ibid.

¹⁷St. Thomas Aquinas, In Metaphysicam, I, Lect. 2, n. 1945, Turin-Rome Marietti, 1950.

¹⁸St. Thomas Aquinas, Summa Theologica, I, 22, c.

the act of understanding is immaterial. Rather, what the intellect in understanding says and knows must be adequated to the thing, so that, namely, the thing be such as the intellect says it to be.¹⁹

The full arc of knowledge begins with the real in the acquisition and returns to the real for confirmation. The impact of truth resides in the confirmation that there is an adequation between the mind and the thing known. The implication is that if there is no real, there is no knowledge. If there is no knowledge, then there is no truth. Maritain puts the whole thought this way:

When I say, "I know that something exists (or can exist), I may intend to state simply that something exists (or can exist), aliquid est. In this case, my statement has to do with the mind's first movement, and so refers to the starting point of philosophy as a whole. The concrete experience it conveys also includes the entire complex of my cognitive activities, since in that experience my intellect seizes intelligible being which is its direct and proper object.²⁰

The presuppositions of the Aristotelian-Scholastic toward both a theory of knowledge as well as a theory of truth can be summarized this way:

1. There must be an extra-mental reality.²¹
2. This extra-mental reality must be accessible so that it can be known.²²
3. This extra-mental reality must be accessible so that our knowledge of it can be confirmed.²³
4. The knower must be naturally equipped with the necessary means for receiving the forms of things.²⁴

¹⁹St. Thomas Aquinas, Contra Gentiles, I, 59.

²⁰Jacques Maritain, The Degrees of Knowledge, pp. 76-77.

²¹St. Thomas Aquinas, Summa Theologica, I, q. 84, a. 1.

²²Maritain, Degrees of Knowledge, pp. 73-80.

²³St. Thomas Aquinas, Summa Theologica, I, q. 79, a. 9, c.

²⁴Ibid., I, q. 76, a. 5.

5. The knower must be able to formulate concepts about that which he receives as impressions which in turn are the effects of extra-mental reality upon the operative potencies of the senses.

6. The knower must be able to refer back to the object which is known.²⁵

7. The knower must be able to formulate a judgement about the relationship between the concept and the object known.²⁶

The above theory of knowledge together with its theory of truth represents one of the strongholds of Absolutism about which Kelsen is concerned.²⁷ The task now is to examine what Kelsen understands by this Absolutist's position and thus focus the contrast between the above theory and Kelsen's understanding of Absolutism.

From the start, Kelsen maintains that reality for the Absolutist is twofold. There is the world of the here which is accessible to sensation and can be ordered in reason, and there is the world of the beyond viz.: beyond man's experience. Of this second world, Kelsen writes:

This is the sphere which is said to hide the grounds and causes he seeks, the ideas or archtypes of all earthly things experienced, the things as they are, the "things in themselves" as they exist independently of sense and reason, a sphere which because it is inaccessible to his senses, is at the same time said to be eternally concealed from him.²⁸

Kelsen then continues:

This strange hypothesis, by which man produces the illusion of growing beyond himself, this curious attempt of the eternal Munchausen to climb on his own shoulders, forms the elementary of all metaphysics and religion.²⁹

²⁵St. Thomas Aquinas, On Truth, I, 9, c.

²⁶St. Thomas Aquinas, Summa Theologica, I, q. 76, a. 5; I, q. 79, a. 3

²⁷Kelsen, General Theory of Law and State, pp. 419-27; What is Justice, pp. 198-208.

²⁸Kelsen, General Theory of Law and State, p. 419.

²⁹Ibid.

The reason for the creation of this extra reality, this world beyond sensation, according to Kelsen, lies in man's lack of confidence in "...his own senses and his own reason...."³⁰

Kelsen writes:

Only this under valuation of his own self induces him to consider the world this self recognizes as a mere fragment, an inferior seedling of another world which is beyond its knowledge just because and as far as it is the "real," "final," "perfect" and "true" world.³¹

At this point, a rather sharp contrast can be drawn between what Kelsen has to say and what the Aristotelian-Scholastics have to say. According to Kelsen, the reality of the Absolutists is the result of a craving on the part of the knower to be assured. This craving is not satisfied through the product of sensation and intellection, so the mind projects a duplicate world existing beyond the here and now which contains these perfections and assurances.³²

Kelsen's understanding of the Absolutist's theory of knowledge presupposes two important factors: the one is innate knowledge, for, as Kelsen remarks, if the world of the beyond is inaccessible to sense experience, then our knowledge of it must be presupposed.³³ Secondly, if knowledge of the beyond is presupposed, then the task of the Absolutist is to establish the reality of the beyond. This is what Kelsen means when he writes: "The natural law doctrine stands and falls with the assumption that value is immanent in reality."³⁴

In Kelsen's view, the task of the Absolutist is to establish this

³⁰Ibid.

³¹Ibid.

³²Ibid.

³³Ibid.

³⁴Kelsen, What is Justice, p. 174.

innate knowledge as extra-mental. This is the first step towards truth. However, according to Kelsen's examination, the Absolutists fail to establish their point. In failing to do this, metaphysics never is shown to be a body of knowledge about the ultimate principles of reality. Rather in the final analysis, according to Kelsen, metaphysics is an emotional reaction to reality.³⁵

The contrast between Kelsen's approach to Absolutism and that of the Aristotelian-Scholastics comes into sharp focus at this point: Kelsen's whole examination of the Absolutists presupposes that the movement of knowledge and its establishment as real starts with the consciousness of the individual and proceeds outward as in the case of the Cartesian approach. Kelsen writes:

The value attributed to an object is not given with the properties of this object without reference to a presupposed norm....Value is not immanent in natural reality....

The natural law doctrine presupposes that value is immanent in reality and this value is absolute, or what amounts to the same thing, that a divine will is inherent in nature.³⁶

This method of proceeding from the knowing subject to the establishment of the reality of the object known, Kelsen insists, is fallacious. It is the ontological fallacy. Consequently, the supposed knowledge of reality which stems from consciousness is at best a fiction of the mind if not an emotional reaction which is super imposed upon reality. Kelsen writes:

Since a rationalistic moral philosophy is not capable of determining the content of a just order...it must presuppose these determinations. This means: leave it to the state.³⁷

However, in sharp contrast to Kelsen's understanding of the

³⁵ Ibid., pp. 137-197.

³⁶ Ibid., pp. 140-41.

³⁷ Ibid., p. 133.

Absolutist's approach, the Aristotelian-Scholastics insist that there is no innate knowledge, for the intellect cannot be in potency and act at the same time under the same conditions. St. Thomas writes:

Wherefore, we must say that the cognitive soul is in potentiality both to the images which are the principles of sensing and to those which are the principles of understanding. For this reason, Aristotle held that the intellect by which the soul understands has no innate species, but is at first in potentiality to all species.³⁸

Consequently, reality is not a projection. Reality is a discovery for the knowing subject. The movement is not from consciousness to extra-mental reality. On the contrary, the movement is from extra-mental reality to the subject who can know. The whole Aristotelian-Scholastic ideogeny revolves around the reaction of the knowing subject to its confrontation with extra-mental reality.³⁹ The reaction is not that of extra-mental reality to its confrontation with the knowing subject.

Because Kelsen does not perceive the radical difference in approach between the Aristotelian-Scholastics on the one hand and the Cartesian Rationalists on the other hand, he feels justified in considering all Absolutists as one group.⁴⁰ But as has been shown, the Absolutists cannot be considered as one group because of the radical difference in approach. As a result, Kelsen is in the peculiar position of constructing a straw man in his consideration of Absolutism, viz.: that the task of the Absolutists is to establish a reality from which they can verify the reality of their knowledge. Actually, the task of the Aristotelians was one of understanding a reality which confronted the human mind. The movement was not from the mind to reality and back to the

³⁸ St. Thomas Aquinas, Summa Theologica, I, q. 84, a. 3, c.

³⁹ Ibid., I, q. 79, a. 1-4.

⁴⁰ Kelsen, General Theory of Law and State, pp. 419-33.

mind again, but from reality to the mind and back to reality again.⁴¹

The challenge was not to prove that there was a metaphysics whose principles exist extra-mentally. The challenge was to understand the ultimate principles within extra-mental reality and without which there simply would be no extra-mental reality. In explaining the fundamental differences among the Absolutists which forgo the possibility of an epistemological unity from which a criticism on the order of Kelsen's can be derived, St. Thomas writes:

He (Aristotle) does not proceed in the same way as other philosophers in seeking truth. For he starts from the sensible and appearances and proceeds to the separate, as may be seen below, in the seventh book. But the other philosophers wanted to apply the intelligible and abstract to the sensible.⁴²

While the above quote splits Kelsen's unified approach to Absolutism, it might seem that the above quote also underline's Kelsen's assertion that the Absolutist's theory of knowledge is a mirror theory which leaves the human mind static, stripped of all creativity and dynamism. According to Kelsen, the Absolutists maintain that knowledge is a reflection of reality, that the mind acts as a mirror in reflecting an image. Truth resides in the faithfulness with which the representation reflects its object.⁴³ Moreover, because the reflection never quite satisfies what man thinks reality should be, he projects a reality beyond the world of sense and cognition. Kelsen writes:

Because of the inadequacy of the material used in the mirror (the merely human senses, the merely human reason), it is an inadequate, shadowy image of that reality or truth which is never within the reach of man. The decisive importance of this

⁴¹Maritain, The Degrees of Knowledge, pp. 76-77.

⁴²St. Thomas Aquinas, In Metaphysicam, III, Lect. I, n. 344.

⁴³Kelsen, General Theory of Law and State, pp. 419-20.

comparison of human cognition with a mirror lies in the fact that the true and real world is beyond the mirror, that is, beyond human cognition, and that whatever is comprehended in its frame--the world as man experiences it with his senses and reason--is only appearance, only the dim reflection of a higher, transcendent world.⁴⁴

The mirror theory is, in this researcher's view, perfectly consistent with what Kelsen understands by Absolutism. However, the mirror theory is not consistent with the Aristotelian-Scholastic understanding of its own theory of knowledge. In the first place, Kelsen's mirror theory presupposes innate knowledge which in turn gives rise to the duality of the here and the beyond. This is particularly clear when Kelsen argues against the mirror theory. This is what he has to say:

Yet nothing is more contradictory and therefore, incomprehensible, than the assumption that our cognition reflects a world which is inaccessible to our cognition....

Nothing is more problematic than the attempt to explain that which is given by that which is not, the comprehensible by the incomprehensible.⁴⁵

These observations can be made about the mirror theory. First, as has been shown, the Aristotelian-Scholastics insist that knowledge is not innate. Consequently, Kelsen's mirror theory does not represent the position of Absolutism as a whole. Secondly, since, according to the Aristotelian-Scholastics, knowledge of reality is not innate, the concept of the here and the beyond, the two world concept, disappears. On the contrary, metaphysics is as intimate a part of the here as the here is real. To suggest that there is a duality within reality, as Kelsen does, is to presuppose innate knowledge about reality.

Thirdly, Kelsen maintains that truth for the Absolutists lies in

⁴⁴Ibid.

⁴⁵Ibid., p. 420.

the clarity of the objective representation.⁴⁶ The ultimate clarity lies in a world beyond.⁴⁷ Actually, for the Aristotelian-Scholastics, truth cannot lie in the objective representation because if it did, then anything which is thought would have to exist. Truth lies in the conformity of the mind to reality as expressed in a judgement. Truth links the mind with the existent.⁴⁸

Finally, Kelsen insists that knowledge is a reflection of reality, much on the same order as a mirror reflecting its object.⁴⁹ However, knowledge cannot be a mere reflection of reality in the Aristotelian-Scholastic view because the intellect knows reality in terms of universal ideas, yet reality appears as singular and concrete. The intellect receives its object according to its own form, not according to the form of the thing received. In commenting on this point, St. Thomas writes:

So also the intellect, according to its own mode, receives under conditions of immateriality and immobility the species of material and mobile bodies, for the received is in the receiver according to the mode of the receiver.⁵⁰

The interaction, then, between the knowing subject and the object known is not one of the subject statically representing an image. Rather, the interaction is one of a dynamic growth on the part of the knowing subject in which the intellect becomes one with reality in a fashion which is suitable to the intellect. In this way, the intellect becomes one with the thing known without the intellect's losing its own identity.⁵¹

In summary fashion, Kelsen's approach to the epistemological

⁴⁶Ibid., pp. 419-20.

⁴⁷Ibid.

⁴⁸St. Thomas Aquinas, On Truth, I, 3.

⁴⁹Kelsen, General Theory of Law and State, p. 419.

⁵⁰St. Thomas Aquinas, Summa Theologica, I, q. 84, a. 2.

⁵¹Ibid.

position of the Absolutists follows these lines:

1. Kelsen assumes that the approach of the Absolutists is one of proceeding from the contents of cognition to their establishment as real.⁵²

2. Kelsen assumes that the Absolutists follow the mirror theory of knowledge which means that knowledge is a reflection. The intellect together with its object are static.⁵³

3. Kelsen assumes that the Absolutists project their metaphysics beyond both sensation and cognition, and thus he assumes that the Absolutists hold to some form of innate knowledge.⁵⁴

4. Kelsen assumes that truth, for the Absolutists lies in the objective representation, that is in the clarity with which the mind reflects the Absolute of the beyond. The clarity of the here and now are mere inadequate appearances of the beyond.⁵⁵

As has been shown, none of these points reflects the Aristotelian-Scholastic position as it was explained at the beginning of this chapter. Kelsen, therefore, is constructing a straw man when he groups the Absolutists together, and argues against them as a whole.

This chapter would not be complete if Kelsen's own epistemology were not scrutinized. In speaking of the attitude towards his position, Kelsen writes:

The adherent of this philosophical outlook does not know whether the things of this world and their relationships are 'really' as his senses and reason represent them, yet he declines any speculation on the ideas or archtypes of these things, the 'things' in themselves, as entirely fruitless and

⁵²Kelsen, What is Justice, pp. 175-77.

⁵³Ibid.

⁵⁴Kelsen, General Theory of Law and State, pp. 12-13, 419.

⁵⁵Ibid., p. 419.

vain.⁵⁶

In speaking of his own epistemology, Kelsen writes:

A critical theory of knowledge takes the place of metaphysics, the "transcendental" (in the sense of Kant's philosophy) that of the transcendent. Yet, this philosophy, too, is dualistic; only it is no longer a metaphysical, but epistemological, a critical dualism on which it rests.⁵⁷

In speaking of the concept of truth within the system, Kelsen writes:

The truth which is affirmed within the system is never more than a relative truth, and it appears, therefore, in comparison with a metaphysical absolute truth, as a merely formal one.⁵⁸

According to Kelsen, subjectivism is avoided. He writes:

Our type firmly wards off this danger by constant emphasis on a knowing which creates its object in conformity to laws, and by considering the demonstration of this conformity as one of its main tasks.⁵⁹

This means then according to Kelsen:

When we assume the truth of a statement about reality, it is because the statement corresponds to reality, because our experience confirms it. The statement "A physical body expands when heated" is true, because we have repeatedly and without exception observed that physical bodies expand when they are heated.⁶⁰

Now Kelsen, in using the example of a physical body, is referring to the verifiability of a synthetic statement. This means, that when synthetic statements are "efficacious,"⁶¹ they are true. Likewise when such statements are not "efficacious" they are false. Ultimately, then, Kelsen puts himself in difficulty in stating that "truth is merely formal"⁶² because the statements must be confirmed apart from their being

⁵⁶Ibid., p. 434.

⁵⁷Ibid., p. 435.

⁵⁸Ibid., p. 434.

⁵⁹Ibid.

⁶⁰Ibid., p. 111.

⁶¹Ibid., p. 110.

⁶²Ibid., p. 434.

merely thought out through the immanent laws of cognition.⁶³

The implication of this problem is that Kelsen either assumes something in reality which has the force to counter cognition's creations thus accounting for the possibility of error, or in the Cartesian sense Kelsen tries to establish some extra-mental principles. He obviously does not do the latter. Indeed throughout his works he is at pains to argue against such an approach. On the contrary, Kelsen sees the difficulty of his position and admits a bit of metaphysics.⁶⁴ The metaphysics does not refer to mere existence, for Kelsen is convinced that mere existence is neither true nor false,⁶⁵ so there must be something existing which can account for the mind's being in error. Kelsen, indeed states that the principle of contradiction is as true for empirical reality as it is for cognition.⁶⁶

And so Kelsen is in the peculiar position of denying metaphysics, but admitting a bit of it, of denying that there are transcendent principles, but nevertheless using them as an essential part of his epistemology, of asserting that truth is merely formal⁶⁷ when in point of fact he relies upon empirical verification.⁶⁸ This researcher suggests that although Kelsen argues against the mind's projection and establishment of a transcendental metaphysics--an extra-mental reality made up metaphysical principles--nevertheless his system of thought cannot escape admitting the simple fact of existence of a metaphysics. It is this simple fact of existence of metaphysical principles which the ancients, medievalists and scholastics explored. Kelsen, in misunderstanding this

⁶³Ibid., p. 435.

⁶⁴Ibid., p. 437.

⁶⁵Kelsen, What is Justice, p. 181.

⁶⁶Kelsen, General Theory of Law and State, p. 408.

⁶⁷Ibid., p. 434.

⁶⁸Ibid., pp. 110-11.

intellectual exploration, strove not to clarify the reality which he himself cannot deny, but mistakenly tried to disprove what those intellectuals were not attempting to do in the first place.

The consequences of Kelsen's approach are that he is on the primitive level of admitting a bit of metaphysics, and this admission compromises his epistemological approach.

In conclusion, this chapter has been a critical analysis of Kelsen's understanding of the Absolutist's epistemological position. One school of thought within this position is the Aristotelian-Scholastic view. This researcher presented this epistemological view. The Aristotelian-Scholastic view contrasts to such an extent with what Kelsen understands that the charge of constructing a straw man can be brought against Kelsen's treatment of Absolutism.

Finally, Kelsen's own epistemological view was scrutinized. His view is not free of internal problems. One problem revolves around his reconciling the place of truth. On the one hand truth lies in the formal order, but on the other hand truth needs empirical verification. To the question what is in empirical reality that can counter the mind's creation of a cosmos out of the chaos of sensation, and spell out error, Kelsen answers a bit of metaphysics. Yet Kelsen suggests that metaphysics is irrational. However, even this placing of metaphysics in the realm of superstitious animism presents problems, for Kelsen insists that the principle of contradiction is as valid for empirical reality as it is for cognition. Then this approach to the principle of contradiction is a metaphysical approach. If Kelsen means that the principle of contradiction is as valid for the synthetic intuition as it is for cognition, then Kelsen leaves the need for empirical verification unexplained.

for the principle refers back to cognition, not to extra-mental reality. If Kelsen refers to extra-mental reality as including the principle then there is something in reality which is as necessary and universal as the laws of cognition. However, if this latter case be accepted, then Kelsen inadvertantly links what he understands by metaphysics--superstitious animism--to the immanent laws of cognition and at this point, his whole system becomes questionable. For, Kelsen insists that metaphysics and cognition are on two entirely different levels.⁶⁹

This researcher had the privilege, not long ago, to have a personal interview, which was taped, with Hans Kelsen. As the conversation proceeded, it became evident that Kelsen's whole outlook toward the meaningfulness of philosophy, its divisions and relationships, its history and value were gauged from the point of view and contained within the framework of Kantianism. The question of truth and error were essentially Kantian; and ultimately, this means apriori.⁷⁰

⁶⁹Ibid., pp. 398-400.

⁷⁰Cf. taped conversation with Kelsen.

Chapter X

AN ANALYTICAL CRITICISM OF KELSEN'S UNDERSTANDING
OF THE METAPHYSICS OF ABSOLUTISM

According to the Aristotelian-Scholastics, metaphysics is the study of being, inasmuch as it is being. "...The leading metaphysicians of the Middle Ages agreed in declaring that Being as Being was the subject of their science."¹ The subject matter of metaphysics comprises anything which exists, and the point of view which the human mind takes concerning beings is their existence. From the start, then, metaphysics is the study of all things to the degree that they exist. When one considers things from the point of view of their existence, one is considering the most basic aspects and principles which go to make up reality.²

There is nothing mysterious about metaphysics. It is not the study of the occult. It does not reveal the secrets of the universe which are hidden from the ordinary and are revealed only to the few through some supernatural process as in the case, for example, of the metaphysician in the opera "Faust." On the contrary, metaphysics presupposes that reality is knowable.

¹Joseph Owens, The Doctrine of Being in the Aristotelian Metaphysics, Toronto, Pontifical Institute of Medieval Studies, 1951, p. 5.

²Etienne Gilson, Being and Some Philosophers, Toronto, Pontifical Institute of Medieval Studies, 1952, p. 86.

The scope of metaphysics is not restricted to the special analysis of any one aspect of reality. Rather, metaphysics considers all of reality inasmuch as it is real. Because metaphysics considers all of reality the principles which are derived from reality and subsequently formulated by the human mind must be most general. These principles must be able to be applied to anything within natural reality precisely because they can be derived from anything within the natural reality. These principles are considered within being whether it be mobile or immobile.⁴ The only qualification for metaphysics is that there be things which exist and are intelligible.

The principles which are derived from this study are those principles without which there would simply be no reality. And so these principles are called necessary principles. Moreover, in view of the fact that the principles are necessary in order for anything to exist, and as far as natural reason can determine there are no principles beyond these, they are called the ultimate principles which go to make up reality.⁵ In another sense, because these principles are not only necessary but ultimate, they are called the first principles necessary in order to have a natural reality.⁶ Moreover, since these first principles are necessary in order to have a natural reality, they are considered in this sense absolute.⁷ The word Absolute in this context does not mean static or unchanging, but rather unremovable to the degree that there is a natural

³St. Thomas Aquinas, Summa Theologica, I-II, q. 94. a. 2.

⁴St. Thomas Aquinas, In Metaphysicam, IV, Lect. 17, n. 736.

⁵St. Thomas Aquinas, In Physicorum, I, Lect. I, Turin-Rome, Marietti, 1954.

⁶Etienne Gilson, Being and Some Philosophers, pp. 161-62.

⁷St. Thomas Aquinas, Questiones Disputatae, I, 7, 6, (Parisiis, In Librariis Consociationes Santi Pauli, 1883).

reality.

Since these principles are derived from the concrete beings within natural reality, and at the same time must apply to all things which exist, they must be most general. A general principle is universal, or analogical. If a general principle is univocal, it will have the same application to the same group under the same circumstances. For example, the sensation of color depends upon the stimulation of the cones within the eye. The eye is for sight, not sound or taste. If, on the other hand, a general principle is analogical, then the principle will apply to different groups under varying conditions. For example, motion is observed in different things under different circumstances as these things are reduced from potency to act. If the application of a principle applies to one thing and merely appears to apply to another thing when, in fact, it doesn't, or, to put it another way, if the application of a principle resembles something else, but in fact is not that something else, then the analogy is said to be extrinsic. For example, an insurance company compares its strength to the rock of Gibraltar. However, if the application of a principle applies to many differing things, each within themselves and under their own conditions, then the analogy is said to be intrinsic, e.g. objects in natural reality are caused, but in different ways. When different things are affected intrinsically in similar ways, the analogical comparison among them, according to the Aristotelian-Scholastics, is said to be one of proportion, or of causality. The Aristotelian-Scholastics insist that the concept of being is intrinsically analogous.⁸

⁸St. Thomas Aquinas, Summa Theologica, I, q. 13, a. 10.

The reason for stressing the analogy of being and its principles is to underline the fact that the concept of being refers to all existent things. And since this concept encompasses all things which exist, the concept of being and its principles will vary according to the specific concrete things to which the concept and its principles are applied.

The concept of being is derived from existential concrete beings. It is the simplest of all concepts, for being has but two notes.

The more one understands being and its principles, the more one understands the constitution of concrete, existential beings and their principles. The approach to the study of being and its principles, or the approach to the study of metaphysics is to study concrete beings, and, as it were, to find their common denominators, in other words, to discover those principles which are common to all beings. The Aristotelian-Scholastic approach, therefore, is one of discovering and understanding the contents of a reality which is accessible to the human understanding by means of sensation.⁹ The approach begins with the existent and returns to the existent for confirmation.¹⁰

Another important aspect in the Aristotelian-Scholastic approach to metaphysics is the realization that the principles derived from being are one with being in concrete reality.¹¹ Although the human mind can separate these principles from being and can consider them in themselves, this does not mean that these principles can be tested as if they existed side by side with concrete beings. The relationship between a principle and being is intimate, or intrinsic. One cannot, therefore, expect to

⁹Regis, Epistemology, p. 97.

¹⁰Ibid.

¹¹Ibid.; St. Thomas Aquinas, Summa Theologica, I, q. 3. a. 5.

stumble across a tendency or bump into an essence. One stumbles across beings in progress and one bumps into realities which are definable.

Lastly, because the principles of being are necessarily one with their object, and the objects of reality differ among themselves, and consequently the human understands these principles analogically, the sources of reality are necessarily interrelated. As a result, the metaphysics of the Aristotelian-Scholastics is relative. The analogical aspect of being is one part of this relativity. The principles of metaphysics are absolute in one sense, namely, they are the sources, the foundations and the explanations for natural reality.¹² In another sense these principles are relative in that there is an interdependence among the principles which is an interrelationship.¹³ Also these principles are found in different things in different degrees. Consequently the concepts of the Absolute and the relative do not present an antithetical problem within Aristotelian-Scholastic metaphysics.¹⁴ On the contrary there is an interactionism which is within reality; and, although man on an intellectual basis can separate the principles which go into this interactionism so as to study them individually, their full comprehension must be understood in terms of their interaction.

The key to Kelsen's understanding of the Absolutist's position lies in his understanding of metaphysics. Throughout Kelsen's works, he takes the view that all forms of Absolutism can be reduced to the duality of the here and the beyond. Indeed all forms of Absolutism are ultimately involved in the same sort of dualism as that of Plato's.¹⁵

¹²St. Thomas Aquinas, Summa Theologica, I, q. 3, a. 5.

¹³Ibid.

¹⁴Etienne Gilson, Being and Some Philosophers, p. 185.

¹⁵Kelsen, General Theory of Law and State, pp. 12, 419, 421, 428; What is Justice, pp. 11, 198-99.

The question arises, though, how does Kelsen understand the dualism of Plato and subsequently the dualism of all other Absolutists?

The first hint of an answer to this question lies in the following passage:

If man had complete insight into the world of ideas, he would be able to adopt his world and especially his social world, his behavior, to its ideal pattern; and since man would become perfectly happy if his behavior corresponded to the ideal, he would certainly behave in this way. He, and hence his own empirical world, would become entirely good.¹⁶

or:

The desire to penetrate into the essence of things moves him to inquire what is "behind" things. And because he cannot find an answer to this question within his experience, that is in the sphere of the world of his senses as it is controlled and ordered by reason, he boldly assumes a sphere beyond his experience.¹⁷

In speaking of the perfection of the metaphysician's outlook, Kelsen writes:

Only now has the metaphysical dualism been perfected, a dualism consisting of a beyond, which embraces the absolute truth, and the empirical world which alone is within the reach of erring man, of transcendence and experience, of idea and reality.¹⁸

In speaking of the Epistemology of the scientific outlook Kelsen writes:

"A critical theory of Knowledge takes the place of metaphysics, the transcendental (in the sense of Kant's philosophy) that of the transcendent."¹⁹

What all of these quotes signify is this. Kelsen is under the impression that Plato is trying to explain "the thing in itself," Kant's noumenon.²⁰ Indeed, Kelsen's whole approach rests on the idea that the

¹⁶Kelsen, General Theory of Law and State, p. 13.

¹⁷Ibid., p. 419.

¹⁸Ibid., p. 423.

¹⁹Ibid., p. 435.

²⁰Ibid., p. 434.

Absolutists are trying to explain the transcendent noumenon, the thing in itself. In conversations with Kelsen, this researcher was informed by Kelsen that this was precisely his position.²¹

Once the idea that the Absolutists are trying to establish some sort of meaningful content to the noumena, then the full significance of Kelsen's remark: "...if his behavior corresponded to the ideal, he would certainly behave in this way. He, and hence his own empirical world would become entirely good,"²² takes on a Kantian significance.

What Kelsen is suggesting is this. The Absolutist employs a Kantian synthesis and then projects a metaphysics beyond the phenomena of things into the noumena. This means that in view of the fact that man's knowledge of reality is the product of a synthesis, this can be adjusted to perfection if man could know the noumena of things.²³ Kelsen is viewing the Absolutists: Plato, Aristotle, Thomas Aquinas, Hobbes, Locke, etc. as if they were Kantians who have gone astray. This Kantianism is the only thing which would explain how man could, according to Kelsen, adjust his empirical world to the ideal world if he could know the transcendent (in the Kantian sense).²⁴ For only if empirical reality were a synthesis based upon the conditions of knowledge and sensation together with the phenomena of things--which implies an unknown "X"--could empirical reality be adjusted if the "X" of reality, the noumena of reality, were to become known.

When Kelsen argues against the Absolutists, he is arguing against

²¹Cf. Taped Conversations with Kelsen.

²²Kelsen, General Theory of Law and State, p. 13.

²³Ibid., pp. 434-35, 439, 443; What is Justice, pp. 20-21.

²⁴Kelsen, General Theory of Law and State, pp. 419-44; What is Justice, pp. 137-98; Pure Theory of Law, Berkeley, University of California Press, 1967, p. 72.

assigning any meaning to the noumena on the one hand²⁵ and is insisting that the categories of the mind do not have an extra-mental reality on the other hand.²⁶ Kelsen is under the impression that the Absolutists are suggesting that there is a meaning to the noumena on the one hand and that part of that meaning involves the categories of the mind on the other hand. This means, according to Kelsen, that empirical reality is still the same Kantian synthesis in the view of the Absolutists but with this one addition, namely, if the noumenon contains the ideal patterns of things, empirical reality can be adjusted to conform and indeed become one with the noumenon.²⁷ Kelsen insists that such a view is absurd because every time the noumenon is thought to have meaning, upon examination, the meaning disappears into an empty formula.²⁸ Kelsen's whole point is to emphasize the fact that man cannot align empirical reality with the noumenon because, ultimately the noumenon is unknowable. Therefore any meaning assigned to the noumenon, like, for example, metaphysics, is neither a product of sense experience nor a product of cognition. The meaning, therefore, must be a product of the emotions, beliefs, or superstitious animism.²⁹

The only problems with Kelsen's critical analysis of and the inclusion of the Aristotelian-Scholastics in Absolutists is in that until the time of Descartes reality was not understood to be subjected to the knowing subject--as is the case with the Kantian synthesis.³⁰ On the contrary,

²⁵Kelsen, General Theory of Law and State, p. 434.

²⁶Ibid.

²⁷Ibid., pp. 419-20; What is Justice, pp. 10-11.

²⁸Kelsen, What is Justice, pp. 137-38, 176-78, 191; The Pure Theory of Law, pp. 66-69.

²⁹Kelsen, General Theory of Law and State, pp. 413-14; What is Justice, p. 11.

³⁰Regis, Epistemology, pp. 100-103.

the knowing subject was understood to be subjected to extra-mental reality. From Descartes on, the attempt has been made to make the knowing subject the pivot point upon which a metaphysics could be constructed, and reality understood.³¹

The objection to Kelsen's approach to Absolutism in general and to the Aristotelian-Scholastics in particular lies in part to an historical distinction between presentationalism and representationalism.³² Until the time of the modern rationalists, the Absolutists followed the theory of presentationalism. In this view reality was presented to the mind by means of sensation. The senses experienced reality immediately and the intellect knew it mediately. The direct object of the senses was the sensible, and the direct object of the intellect was the intelligible. To the question: what can be known? the answer was: all of reality to the degree that it is sensible and intelligible. To the question: how can one be sure that what one knows is true? the answer was that the force of evidence compelled the mind upon reflection to assert its adequation with reality.³³

With the advent of modern rationalism, presentationalism was replaced with representationalism. In this theory, the sense presented its product to consciousness and what the mind knew were the representations within consciousness. To the question what can be known? the answer was: the contents of consciousness. However, this question and its answer led to a further question: How can the knowing subject be sure that what is known is real? The answer to this question split three

³¹Ibid., pp. 91-92, 97; Rommen, The Natural Law, p. 87.

³²Wilhelmsen, Man's Knowledge of Reality, Englewood Cliffs, Prentice-Hall, 1956, pp. 14-15.

³³Regis, Epistemology, p. 95.

ways. The modern rationalists tried to bridge the mind with extra-mental reality to establish a metaphysics. The empiricists in varying degrees tried to discover a metaphysics within the contents of consciousness as represented through sensation. The former school was felt to be dogmatic. The latter school was felt to be too skeptical.³⁴

The third approach was Immanuel Kant's. He established what could be known: the phenomena of things and what could not be known: the noumena of things. Moreover there were a priori conditions for sensibility and a priori categories of the mind. The reality which the mind knew was a synthesis of the conditions for both sensation and cognition.³⁵ The problem of the thing in itself, the noumenon, the unknowable is a concept which evolved as a solution to representationalism. This problem did not exist for the ancient classical Greeks or medievalists because the question of the extent of reality and the possibility of knowing reality were not direct issues of the day. The view of the ancients and medievalists was that if one doubts the possibility of knowing, then one should go vegetate like a carrot.

The reason for drawing a parallel between the presentationalists and the representationalists lies in this. Although both schools may be using the same words, for example metaphysics, the viewpoints are so entirely different that unless the distinction between the two is strictly kept, conclusions regarding what is to be understood by metaphysics will end in complete confusion.

Since this research paper is devoted to an examination of the philosophical foundations underlying Kelsen's Pure Theory of Law, one of the

³⁴Frank Thilly and Ledger Wood, History of Philosophy, New York, Holt, Rinehart & Winston, 1964,

³⁵Kant, Critique of Pure Reason, pp. 41-42.

most important considerations is Kelsen's rejection of any Natural Law doctrine, any realistic epistemology, and any realistic metaphysics. Kelsen's technique has been first of all to consider all Natural Law theorists as one group. Methodologically, they all have been presented from the representationalists' point of view. This means that the burden of proving a metaphysics falls to a knowing subject who is confined at best to what the contents of consciousness represents to the mind.³⁶ What is presented to the senses are existing phenomena. Nothing more can be derived from extra-mental reality than the fact of existence. According to Kelsen the task of the Absolutist has been to prove that the noumenon has a meaning independently of human cognition. This meaning is a metaphysics.³⁷ Kelsen has shown that quite to the contrary, upon examination the noumenon remains unknowable and hence the metaphysical position of the Absolutists is reduced to a position which is based upon something other than either sense experience or cognition.³⁸ Therefore the efforts of the Natural Law theorists to establish a Natural Law and a relationship to Positive Law fails.³⁹

On the other hand, this research has shown that the Absolutists cannot be considered as one group. The Aristotelian-Scholastics, in the first place, do not follow representationalism but rather presentationism. The knowing subject is not confined to the contents of the consciousness but rather to extra-mental reality inasmuch as it is knowable.⁴⁰ Consequently existential facts are not limited to an appearance

³⁶Frank Thilly, and Ledger Wood, History of Philosophy, p.

³⁷Kelsen, What is Justice, pp. 198-208.

³⁸Ibid., pp. 137-174, 198-208.

³⁹Ibid.

⁴⁰St. Thomas Aquinas, Summa Theologica, I, q. 84, a. 1.

with the single predicate of existence, but are analyzable things which exist and which manifest appearances. Empirical reality, therefore, is not a synthetic creation of the mind out of the chaos of sensation, but an ordering of the mind to the contents of reality.⁴¹ Metaphysics, therefore, is not a process of projecting, establishing and giving meaning to the noumenon which by definition is unknowable. Rather metaphysics lies in the realm of the perceptible and is an effort to explain the reality which is presented to the mind by means of sensation.⁴² The Natural Law Doctrine of the Aristotelian-Scholastics therefore is not something which is projected into reality, nor is it a synthesis--in the Kantian sense--with reality. For beings in reality, according to the Aristotelian Scholastics are subject to law independently of human cognition. The doctrine is merely the way the intellect understands these laws. This is what is meant by the expression: art is subject to prudence and prudence is subject to the theoretical sciences.⁴³

Unfortunately Kelsen has not considered the possibility that the Absolutists do not represent one group. In not considering this possibility, Kelsen is open to the charge of constructing a straw man.

⁴¹Ibid., I, q. 79, a. 1,2,3.

⁴²St. Thomas Aquinas, In Metaphysicam, IV, Lect. 17, n. 736.

⁴³McCoy, Structure of Political Thought, p. 157.

Chapter XI

THE PHILOSOPHICAL FOUNDATIONS FOR THE ARISTOTELIAN
SCHOLASTIC NATURAL LAW DOCTRINE

The Natural Law Doctrine of the Aristotelian-Scholastic School of thought is derived from the theoretical position which this school holds concerning reality. The theoretical position comprises the metaphysical, psychological, and epistemological views of the Aristotelian-Scholastics.¹ Each of these views deals with some aspect of natural reality. Natural reality in turn deals with what exists. In as much as the Natural Law Doctrine is derived from and based upon the theoretical sciences,² the Aristotelian-Scholastics take the view that moral necessity is derived from the existential nature of things. This is the view which is being considered in this research paper, in contrast to all other Natural Law doctrines which are characterized as forms of Absolutism.³

Epistemologically, the Aristotelian-Scholastics are realists and presentationalists. From their point of view there is no innate knowledge. The reality which this school of thought considers is extra-mental

¹Romman, The Natural Law, n., p. 39.

²McCoy, Structure of Political Thought, pp. 31-46.

³Kelsen, What is Justice, pp. 174-209.

and naturally knowable. Knowledge for the Aristotelian-Scholastic is the possession of the forms of things as those things actually are.⁴ Truth is based upon a judgment in which the adequation of the mind to reality is asserted.⁵ The force of this judgment depends upon reflection and certitude. Certitude in turn depends upon evidence. Evidence in turn depends upon the force of extra-mental reality. This means, then, that the concepts which the mind forms about reality are derived from extra-mental reality, have their foundation in extra-mental reality and are confirmed in extra-mental reality.⁶

To Kelsen's assertion that the above theory of truth is nothing more than a mirror theory, the Aristotelian-Scholastics would object for the following reasons. First of all, in the mirror theory, the faithfulness of the reflection constitutes truth. This means that truth lies not in the adequation of the mind to reality--as in the Aristotelian-Scholastic theory, but rather in the objective representation. As was explained before, the Aristotelian-Scholastics do not take the position that truth lies in the objective representation of an object.⁷ On the contrary, they insist that truth lies in the adequation of the mind to reality as expressed in the judgment: what is is, and what is not is not.⁸ Likewise, the mirror theory can account for only the reflection of a being. It can not account for the separation and abstraction on the part of the mind which does account for a knowledge of the constitution

⁴St. Thomas Aquinas, Summa Theologica, I, q. 60, a. 2; I, q. 82, a. 1; I, q. 85, a. 6.

⁵St. Thomas Aquinas, Summa Theologica, I, q. 16, a. 7.

⁶St. Thomas Aquinas, Summa Contra Gentiles, I, 59; Jacques Maritain, Degrees of Knowledge, pp. 76-77.

⁷St. Thomas Aquinas, Summa Theologica, I, q. 84, a. 1.

⁸St. Thomas Aquinas, Summa Contra Gentiles, I. 59.

of the thing reflected.⁹ In addition, in the mirror theory, only the concrete, the singular are reflected. The mirror theory does not account for the abstract and the universal. However, the Aristotelian-Scholastics maintain that their theory of knowledge accounts for both the sense image as well as the abstract and universal concept. In the theory of the Scholastics, the synthetic sense correlates the data of sensation in the formation of a sense image. The active intellect abstracts or separates the intelligible species from the sense image and this in turn unites with the passive intellect to become a mental concept.¹⁰ This is to say that the intellect becomes one with the essence of something else without itself being destroyed. Such a conception implies that the intellect is not entirely subject to the physical limitations of material reality. For the reception of a new essence into a material body is done at the expense of the old essence. St. Thomas adds:

Moreover, no action of a cognitive power can be said to pass outside in the way in which acts of physical powers do, which go from the agent to the patient. For knowledge does not mean something flowing from the knower to a thing known, as happens in physical actions. It means rather, the existence of the thing known in the knower.¹¹

The mirror theory in no way accounts for this process of intellection, for a mirror is subject to all of the limitations of material bodies in physical reality. Kelsen's assertion,¹² therefore, that all of the Absolutists follow a mirror theory, is incorrect.

Since the Aristotelian-Scholastics take the position that knowledge is not innate and that the extra-mental reality about which they are theorizing is knowable and hence intelligible, the theories themselves

⁹Regis, Epistemology, p. 174.

¹⁰Ibid., pp. 151-174.

¹¹St. Thomas Aquinas, On Truth, II, 5, ad. 15.

¹²Kelsen, General Theory of Law and State, p. 419.

are derived from reality.¹³ One such theory explains reality in its most general aspects. This theory is an attempt to explain a thing--anything--and its relationship to existence. More precisely this theory is an explanation of being in as much as it is being.¹⁴

The metaphysical position of the Aristotelian-Scholastics which gives rise to a Natural Law Doctrine is the following. In this theory, the things in reality are more than just appearances because appearances are manifestations. The things manifested are considered in metaphysics. The point of view which is taken towards these things is their existence. In view of the fact that all things in reality exist, the intellect takes the two points--the thing and its existence--and forms a concept, a concept which includes all beings.¹⁵ However, since beings differ among themselves and also differ in degree of existence, the concept of being is analogical.

The analogy of being does not mean that the concept resembles reality as one thing resembles but is not the same as another thing. The analogy of being is not an extrinsic comparison like metaphors and similes. The analogy of being is a comparison in which two or more things possess the same ^{perfection} thing intrinsically but in different degrees. The analogy, then is one of intrinsic proportion.¹⁶ Likewise, because beings come into existence and pass out of existence there is a proportion between that which produces the being and the being as produced. The relationship between cause and effect is such that the effect is said to be

¹³St. Thomas Aquinas, Summa Theologica, I, q. 79, a. 2, 3; I, q. 84, a. 1-4.

¹⁴Joseph Owens, C.S.R., The Doctrine of Being in the Aristotelian Metaphysics, p.

¹⁵St. Thomas Aquinas, Summa Theologica, III, q. 60, a. 3.

¹⁶St. Thomas Aquinas, On Truth, II, 11.

proportioned to its cause. This means that if something comes into a state of existence, the force which produced it must at least exist sufficiently so as to bring about the production. The proportion between an effect and its cause does not mean that the cause must be the same as the effect. However, a cause is often given the name of the effect which it produces because of the relationship between the two.¹⁷ And so vitamins are called healthful because of the effect they produce within the human being. Since the power of the cause is intrinsic to the cause as well as to the effect, the naming of the cause by the effect produced is another form of intrinsic analogy. In view of the fact that beings differ among themselves in their degree of existence because of what they essentially are, and since beings interact one upon another, the concept of being which is derived from the beings in reality is said to be analogous by proper proportionality and causality.¹⁸

The expression: degrees of existence can be misleading. Kelsen is at pains to point out that existence is neutral and states that to speak of amounts of existence is absurd since existence is the same for all things existing. However, the Aristotelian-Scholastics do not mean the expression "degrees of existence" to mean what Kelsen understands by it. The Aristotelian-Scholastics are referring to the differences of things which are existing. Consequently, what is really meant by the Aristotelian-Scholastics are the degrees of being. If one considers the lamp on the table and the dog in the yard, the one lacks what the other has. The dog has life, the lamp does not. To suggest that the dog as existing has no more and no less existence than the lamp is to contradict the

¹⁷St. Thomas Aquinas, Summa Theologica, I, q. 44, a. 1.

¹⁸St. Thomas Aquinas, On Truth, XXIII, 7, 9.

obvious existential difference between the two objects. The dog as living possesses something existentially which the lamp does not possess. Life exists in the dog. Life does not exist in the lamp. The difference between the existential state of being is what the Aristotelian-Scholastics mean by degrees of existence. Kelsen in arguing against a metaphysics not only distinguishes, but separates existence from the object existing so as to consider amounts of existence. In supposedly arguing against metaphysics, Kelsen actually argues beside the point. When Kelsen's view is juxtaposed with that of St. Thomas, the difference between the two views toward the same expression becomes apparent. Kelsen writes

...it is impossible to distinguish within existence good and evil because the one as well as the other coincides with existence.¹⁹

And so Kelsen concludes to the absurdity of the concepts of good and evil when referred to extra-mental reality. On the other hand, St. Thomas writes:

Things are not distinguished from each other by their existence, for in this they are all alike....Things differ in this, that they have different natures, by which they acquire existence in different ways.²⁰

St. Thomas goes on to write:

Is...means first that which is understood after the manner of Absolute actuality. For is, when it is expressed without qualification, means to be in act, and therefore it has its meaning after the manner of a verb. But since the actuality which is the principal meaning of the verb is, is indifferently the actuality of every form, either the substantial or the accidental act, hence it is that when we wish to signify that any form or act actually inheres in any subject, we signify it by this verb is.²¹

Since the concept of being refers to anything which exists, the

¹⁹Kelsen, What is Justice, p. 181.

²⁰St. Thomas Aquinas, Summa Contra Gentiles, I, 26.

²¹St. Thomas Aquinas, In I Perih., Lect. 5, n. 22., Turin-Rome, Marietti, 1936.

principles of being are an attempt to explain the elements which all beings in natural reality have in common. The first thing, which is considered, is the constitution of being. The Aristotelian-Scholastics understand being to be made up of two intrinsic principles: potency, the capacity to be, and act, the state of being.²² These two principles explain becoming and existing. Likewise being is understood to be constituted of essence and existence. Essence expresses what a thing is in itself. In speaking of essences, the Scholastics are not referring to Kant's noumenon "the thing in itself" because the noumenon is unknowable²³ whereas essences are knowable. Likewise, the essences of things are not innate categories of the mind, in the Kantian sense, but are derived from extra-mental reality because the essences are abstracted from the sense image. Professor Renard remarks:

Essence is that which the mind of man is able to conceive; for the intellect is made to know that which is or can be; and only the essences of things are intelligible. These essences, then, do not express existence, but if actuated would participate in existence according to their capacity.²⁴

What the Scholastics mean by essence is that by which a thing is what it is and without which the thing would be something else. A tree, for example, certainly differs from an automobile. That which makes a tree a tree and an automobile an automobile is called an essence. Contrary to what Kelsen says, the Scholastics maintain that essences do not lie beyond the concrete reality: the essence is the concrete reality.²⁵

From the point of view of the Aristotelian-Scholastics, an essence

²²St. Thomas Aquinas, Summa Contra Gentiles, II, 58.

²³Kant, Critique of Pure Reason, p.

²⁴Henri Renard, S.J., The Philosophy of Being, Milwaukee, Bruce, 1956, p. 49.

²⁵St. Thomas Aquinas, De Ente et Essentia, c. I., trans. by

within natural reality is made up of matter and form.²⁶ Matter is the principle of becoming, for prime matter contains within itself all of the possible forms which can exist.²⁷ Since matter is the ground of all possibility, within natural reality matter limits existence to the degree that existents can possibly exist, hence the truism that what is impossible cannot exist. When matter is understood in terms of becoming, matter is understood in terms of potency. When matter is related to a specific concrete form, matter is understood as a cause, for matter sustains the form.²⁸ Form, on the other hand, is that which makes a thing to be what it is and not something else.²⁹ Form gives character, quality, definability to matter. Consequently, form acts directly upon matter and therefore is a cause.³⁰ Matter and form are mutual causes of each other and together they constitute an essence. Because an essence limits existence, essence and existence are said to be distinct, but not separate, principles.³¹

When Kelsen speaks of essences, he is explicitly referring to something which lies beyond both sensation and reason.³² He is not talking about essences in the Aristotelian-Scholastic sense. Yet, Kelsen uses his understanding of essences to argue against the existence of essences as understood by the Aristotelian-Scholastic.

The interplay of potency and act, essence and existence may explain the intrinsic constitution of beings; however, in view of the fact that

²⁶Ibid., c. 3.

²⁷Ibid.

²⁸St. Thomas Aquinas, In Metaphysicam, 1, V; 1, 5.

²⁹Ibid.

³⁰Ibid.

³¹St. Thomas Aquinas, Summa Theologica, I, q. 2, a. 3.

³²Kelsen, General Theory of Law and State, pp. 419-435.

the priority of a thing to itself in existential reality is self-contradictory, the motion involved in a thing's coming into existence must be considered. The interaction of one thing upon another resulting in an existential production is called causality. St. Thomas writes:

It is certain and evident to our senses that in the world some things are in motion. Now whatever is in motion is put in motion by another, for nothing can be in motion except it is in potentiality to that toward which it is in motion; whereas a thing moves inasmuch as it is in act. For motion is nothing else than the reduction from potency to act. But nothing can be reduced from potency to act except by something that is act.³³

That which does the producing is called the cause. That which is produced is called the effect. The Aristotelian-Scholastics take the position that whenever potency becomes act, whenever a possibility becomes an actuality, the possibility receives something which it did not have before, namely existence. Since it is contradictory to suggest that a possibility can give itself existence, for then it would both exist and not exist at the same time, the transition from potency to act is brought about by something else which is already in existence. This something else is called the cause. The transition is called motion. Because natural reality is involved in motion, the Aristotelian-Scholastics take the view that causality exists independently of the mind in natural reality. Causality explains the necessary connection in the reduction of a thing from potency to act.³⁴ In fact, without this interaction motion would be impossible.

When Kelsen argues against the extra-mental reality of causality, his understanding of reality is entirely different than the understanding of the Aristotelian-Scholastics. Extra-mental reality for Kelsen

³³St. Thomas Aquinas, Summa Theologica, I, q. 2, a. 3.

³⁴Ibid.

is devoid of causality. All that exists are the raw materials, phenomena, which the human mind uses to create a cosmos. Kelsen writes:

The principle of strict causality can be maintained also by interpreting it as an epistemological postulate, that is as a norm directed at human cognition demanding to seek a connection between the phenomena observable in the world of senses, to conceive these facts as cause and effect, and thus to explain reality.³⁵

When Kelsen argues against the reality of the principle of causality, he is arguing against the presence of causality beyond what he understands by sense experience. However, the Aristotelian-Scholastics are not suggesting that the principle of causality is out there somewhere beyond natural reality.

The intrinsic and the extrinsic constitution of being on the level of metaphysics is important for a Natural Law Doctrine because the limiting factor of essences and the producing factor of causes explain both regulation and necessity within natural reality. That things are constituted as single entities as long as they exist is explained by essences. A natural being is limited to its own essence as long as it exists. This means, in part at least, that a being is subject to its essence, and being subject denotes law. On the other hand, inasmuch as a thing cannot bring itself into existence, the necessary connection between a thing's non-existence and its existence is a cause. In this sense a thing is subject to a cause for its own existence. In turn, however, the cause, as a power to produce, is limited to the potentiality of the essence to be produced. For, an essence limits existence.³⁶ Inasmuch as things exist in natural reality, the essence limits its own

³⁵Kelsen, What is Justice, p. 342.

³⁶St. Thomas Aquinas, De Ente et Essentia, c. 5.

perfection. Now to be regulated as well as to regulate is to be involved in law, and normativity. To follow norms so as to exist to the fullest is valuable. The very being, in other words, is the value. The interaction of all natural reality as beings which limit and are limited and without which natural reality would not be what it is comprises the laws of nature in their most elementary form.³⁷ This is what is meant by the expression that law exists in nature.

Within this context, the laws of nature are not mere formulas devoid of content, as Kelsen suggests.³⁸ On the contrary, the existence of beings within natural reality reveal the content of the formulas. The formulas involved in the laws of nature do not exist side by side with the things governed. The formulas are one with the things governed. When Kelsen argues against laws within nature,³⁹ he argues beside the point. For he tries to disprove that law is something beyond natural reality and in the noumena.⁴⁰

There is a difference, though, between the laws of nature to which all beings within natural reality are subject and the Natural Law to which man is subject. This is the distinction in other words between physical necessity and moral necessity, the question of deriving the "ought" from the "is."

When Kelsen argues against the derivation of the ought from the is, he is quite consistent with his premises because Kelsen's reality is devoid of all necessity. There is no physical necessity because what the Aristotelians understand by metaphysical principles and these are

³⁷Rommen, The Natural Law, pp. 184-85.

³⁸Kelsen, What is Justice, pp. 174-197.

³⁹Ibid., p. 181.

⁴⁰Ibid., pp. 137-197.

the principles which science uses to describe its object--do not exist extra-mentally. As a result there are no necessary connections within natural reality. Necessity and universality are cognitional factors used to interpret the phenomena presented in sensation.⁴¹ Because there are no necessary connections extra-mentally, there are no regulatory factors within natural reality and hence no norms, no values. Extra-mental reality, for Kelsen, is made up of amounts of existence. There is nothing else there. Consequently, no predicate other than existence can be derived from extra-mental reality.

Unfortunately, when Kelsen applies his no-ought-from-an-is-theory to the Absolutists, Kelsen substitutes his understanding of natural reality for that of the Absolutists and then concludes that the Absolutist's theory is incorrect.⁴²

What, then, do the Aristotelian-Scholastics mean by moral necessity and how if at all can it be derived from existential reality? The answer lies in the regulatory aspects of essences and the necessary aspects of extrinsic causes through whose interaction natural reality appears as a harmonious dynamic and evolving whole.

If one understands the limiting aspect of an essence as a power to prevent and in turn to sustain, then one is understanding an essence from the point of view of a cause.⁴³ The essence as a regulatory cause or an intrinsic cause and the external, or efficient cause are absolutely necessary in order that a thing exist as it is. In other words, the

⁴¹Kelsen, General Theory of Law and State, p. 435.

⁴²Ibid., pp. 419-435; What is Justice, pp. 174-197.

⁴³St. Thomas Aquinas, Compendium Theologiae, c. 18; Aristotle, Physics, II, 2, 194b, 23., in The Basic Works of Aristotle, edited by Richard McKeen, New York, Random House, 1941.

interaction of these causes expresses the necessary connections without which beings simply would not exist.⁴⁴ The fact of existence of essentially different beings testifies to the harmonious interaction of these necessary connections within nature. On the other hand, the fact of existence of a natural division of beings, a hierarchy on the level of nature attests to the subordination and regulation of beings. The harmony and the hierarchy of a being ultimately depend upon the interaction of causality. For harmony and interaction depend upon movement and movement depends upon causality. This is the interaction of causality by which beings come into a state of existence, and pass from becoming to to be. The recurrence of species, the ebb and flow of nature as a dynamic evolutionary whole, all of these factors suggest order and determination. Order and determination, definition, and growth to a natural perfection suggest finality.⁴⁶ That the interactionism of nature is attracted to specific determinations, to ends, such an interaction is purposeful. Purposefulness, harmonious determination suggest design. And so the determining factor of the interactionism, because of the attraction to specific ends, entering into the nature of things, is a cause, the final cause.⁴⁷ The attraction is to become something existing, and something existing to the fullest!

The teleology which finality expresses within natural reality is absolute in this sense, that if things are to be what they are, then the means by which they become what they are, are due to a necessity, the necessity of becoming determined to one thing and not another. If

⁴⁴St. Thomas Aquinas, In Metaphysicam, V, Lect. 1, no. 751.

⁴⁶St. Thomas Aquinas, Summa Contra Gentiles, III, 19; Sententiae, II dist. I, 2, 1.

⁴⁷St. Thomas Aquinas, Sententiae, II, 1, 2, 1.

there were no determination to one thing and not another, then there would be nothing, for the power of an efficient cause would be stopped by the principle of contradiction, a.v. an efficient cause cannot produce an effect which is both possible and impossible at one and the same time under the same circumstances. That beings come into existence as determined entities suggests a necessity arising out of the attraction which final causality imposes, and not necessarily a determination superimposed by human cognition. To put the above in another way, the possibility of a thing's existing, on the one hand, excludes the impossibility of its existing. Its actual determination to one specific thing instead of another specific thing, on the other hand, necessitates all of the stages from its becoming this specific thing and not something else.⁴⁸ The determination contains its own intrinsic stages from the actualization of a potency which is determined. Consequently, things which are determined to be one thing and not another within natural reality are attracted by the end to pass through the natural stages of development towards that end.⁴⁹ The attraction of finality is so strong that, at times, the observer can notice that each stage of development to one specific end is obtained with great difficulty. Weeds growing through an asphalt driveway is an example in point.

The Aristotelians argue that because reason can recognize the teleological aspects of the present and the past with a strong degree of accuracy, but the predictability of future events is a question of a high degree of relativity, that teleology or finality depends upon something other than the categories of the mind and the laws of human cognition on a logical level. There is something in extra-mental reality which the

⁴⁸Regis, *Epistemology*, p. 398.

⁴⁹St. Thomas Aquinas, *Summa Theologica*, I, q. 44, a. 1.

human intellect recognizes as final causality but does not fully control.⁵⁰ Consequently, final causality manifests itself as a principle which is independent of human cognition on the logical level.

The Aristotelians take the view that physical necessity is final causality. When confronted with this extra-mental force, the intellect is enabled to formulate the principle that "whatever acts, acts for an end."⁵¹

If one were to ask what specifically is final about a being in reality, the Aristotelian-Scholastics would answer the essence together with all of its manifestations and relations as existing to the fullest. To the degree that a thing is what it is then, to that degree is it perfect, and to that degree does it tend toward its own end.⁵² However, in natural reality some beings are completely subject to the necessary causal connections which make up the interactionism of natural reality, and some beings manifest a certain intrinsic freedom. Some beings, in other words, are completely subject to physical necessity and some beings have a power of self determination.

In view of the fact that final causality attracts all beings to their ultimate end, final causality can be viewed in two ways: as a physical necessity, and as a necessity which attracts but does not absolutely determine a thing to its end.⁵³ Such a being which is not absolutely determined to its end, but when presented with alternatives can choose the means to his end or reject these means in favor of something else, is said to be free, and is the cause of his own actions.⁵⁴ For such

⁵⁰Regis, *Epistemology*, pp. 391-398.

⁵¹St. Thomas Aquinas, *Summa Theologica*, I-II, q. 94, a. 2.

⁵²St. Thomas Aquinas, *In Physicorum*, III, Lect. 2.

⁵³St. Thomas Aquinas, *Summa Theologica*, I-II, q. 1, a. 2.

⁵⁴*Ibid.*

a being final causality is not a physical necessity, but a necessity of another sort: a moral necessity. For such a being, the "ought" is final causality,⁵⁵ and in this sense, the "ought" is--exists--regardless of what the free being is doing.⁵⁶ In this sense, then, the "is" in general contains the "ought" as well as physical necessity. For the form as essence is the end when completed. As long as the essence exists, so also does its specific appetite for fulfillment.⁵⁷ The "is" in particular is what the moral being "ought" to do, for the ought "is" the final causality which exists as the measure of the essence,⁵⁸ regardless of what the moral being does. Moral necessity, therefore resides in the final cause. Rommen writes:

The being of a thing also reveals its purpose in the order of creation, and in its perfect fulfillment, it is likewise the end or goal of its growth and development.⁵⁹

If a free agent considers final causality in regard to himself, the "is"--existence of final causality--is the same as the ought. To the degree, therefore, that a person derives final causality from extra-mental reality, to that degree is that person deriving the ought, for the ought in this sense is the "is."

But what does it mean to exist to the fullest? To exist to the fullest means to possess that to which the appetites are measured. But the intellect is never satisfied in this life. Since the intellect is spiritual, it is not limited by materiality. Consequently, the measure of the intellect is Being as such. What man knows in this life is only

⁵⁵Ibid., I-II, q. 94, a. 2.

⁵⁶Ibid.

⁵⁷Rommen, The Natural Law, pp. 48-51.

⁵⁸Ibid.

⁵⁹Ibid., p. 49.

being as limited. Witness the old and the infirm, their appetite for knowledge continues in proportion to their physical well being even if this means nothing more than knowing the local gossip in the convalescent hospital. Likewise, the will is never satisfied in this life. Since the will is a spiritual appetite, it is not satiated by particular material goods whatever their quantity, for each is limited by materiality and so the whole is limited by materiality. But the will is not something material and hence in this sense is not limited. The very basis of freedom is grounded in the facts that on the one hand an appetite is irresistably attracted to its object only when the object is fully measured to the appetite. But, on the other hand, the element of materiality within natural reality forgoes the absolute determination of the rational appetite with the result that the will can choose one material good over another because none of them have the capacity to attract the will irresistably. What then is it that measures the mind perfectly and satisfies the will completely? It must be an unlimited Being and an absolute Good. If the Being is unlimited it is one with its goodness. But what can be described--however imperfectly--as unlimited or spiritual, and as the absolute good, is said to be infinite. All understand The Infinite as God. Within the Aristotelian-Scholastic philosophy, therefore, the absolute ultimate end of man goes beyond his natural ultimate end--happiness--to possess God. Consequently, to be one's self to the fullest, which is to take into account the essence of man: the form (rationality as well as animality) as related to the essence of man as end, is to realize that man's destiny transcends natural reality and resides with God. Man is orientated to God. Thus evil is not viewed as something existing in itself but as the deliberate,

knowing and freely choosing of--insisting upon--the limited goods of natural reality at the expense of this orientation to God. The good, on the other hand, is the deliberate, knowing and freely choosing of--really, quite insisting upon--the limited goods of natural reality which are orientated to God. To choose a good in the above manner is to perform a human, moral action. Good and evil consequently reside in one's actions as related to God. As the reality of this relationship constitutes one thing so also the truth of this relationship is one. Since truth dictates the law, the Natural Law is one with the eternal law which resides in God. This means, then, that to derive an ought from an "is" in general means to derive final causality and hence moral necessity from "is" in general, for these two principles, physical necessity and moral necessity, are forms of final causality.

But what is this final causality which is the "ought" for moral agents? To this question, the Aristotelian-Scholastics answer: the essence of man. The essence of man therefore, is not only the matter and form of man, but in another sense, the essence of man as complete, as existing to the fullest, is the natural end of man. The transcendental relationship of man in regard to his end, therefore, is what moral necessity and the moral actions of man are concerned with.⁶⁰ The sense of moral obligation is in the nature of man, not as innate knowledge, but as final cause.⁶¹ Inasmuch as man recognizes his nature as free to choose between the alternatives of contrariety, which alternatives are either in accordance with man's last end or are not in accordance with man's last end, to that degree does he experience moral

⁶⁰St. Thomas Aquinas, Summa Theologica, I-II, q. 94, a. 2.

⁶¹Ibid.

obligation.

Morality, therefore, as a transcendental relationship involving man and his ultimate end is a form of interactionism. The determination of right and wrong, good and evil are not mere deductions of an ought from an is but a relationship of potency to act, as based upon what is in act. St. Thomas writes:

Since, however, good has the nature of an end, and evil, the nature of the contrary, hence it is that all those things to which man has a natural inclination are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance.⁶²

For, the individual is free, and his moral action is a determination arising out of his place within the total scheme of interacting causal connections.

Since all things have an essential permanence as long as they exist, and at the same time, but in different respects, all things are involved in a dynamic and evolutionary motion, the determination of a moral action is derived inductively from a recognition of the necessary relations existing in reality, which concern man as man in his relationship to his ultimate end within the total scheme of things.⁶³ The existence of these necessary relationship which affect man as a moral person is called the Natural Law.⁶⁴ How man arrives at a knowledge of the Natural Law, and how he couches his concepts in the formulation of a theory, is called a Natural Law Doctrine.⁶⁵ As has been pointed out throughout this research, there are many Natural Law doctrines.

The Natural Law Doctrine of the Aristotelian-Scholastics is based

⁶²Ibid.

⁶³Rommen, The Natural Law, pp. 17, 45.

⁶⁴St. Thomas Aquinas, Summa Theologica, I-II, q. 94, a. 2.

⁶⁵Strauss, Natural Right and History, passim.

upon the metaphysical theory of reality a distinctive part of which is man.⁶⁶ One aspect of this distinctiveness, out of which arises morality and its consequent Natural Law Doctrine, the aim of which is to perfect the individual inasmuch as he is an individual, is man's association with his fellow man. If man were not free, his associations with his fellow men would be based upon physical necessity. However, because man is free, the relationships among men become responsible, moral and hence social. Man's freedom and his responsibility growing out of the Natural Law dictate that the social relations which involve man should facilitate the individual's attainment of his individual end within society.⁶⁷ The responsible freedom of the individual as a social being, then, necessitates the positing of order and harmony within society so as to insure the individual's perfection as a social being. Society, therefore, must create and adjust its regulations to fit the dynamic and evolutionary aspects of man within the cultural milieu.

The link, therefore, between the Natural Law and Positive Law is essential, in the view of the Aristotelian-Scholastics.⁶⁸ For, inasmuch as man has a human nature and inasmuch as man is naturally social, both the relationships of man on a metaphysical level as well as on a social level stem from the essence of man within the total interaction of reality.⁶⁹ Man's intrinsic freedom and the responsibility which this calls forth within the necessary relations existing metaphysically in reality flow over into how man regulates his social affairs within the dynamic and evolutionary aspects of society.⁷⁰

⁶⁶Rommen, The Natural Law, pp. 45-52, 59-62.

⁶⁷St. Thomas Aquinas, Summa Theologica, I-II, q. 94, a. 2.

⁶⁸Rommen, The Natural Law, p. 53.

⁶⁹Ibid., p. 55.

⁷⁰Ibid., p. 53.

That the Natural Law and Positive Law present themselves as two interrelated aspects of an over-all system which itself displays a dynamic interaction suggests a hierarchy in which the laws posited by man ought not be in opposition to the Natural Law. The norm of evaluation is that ultimately man ought not to create laws which oppose human nature, for in creating laws which oppose human nature, man does violence to that sense of obligation which is based upon the essence of man itself and which was designed to attract man to his ultimate end.⁷¹ From the point of view of the Aristotelian-Scholastics, therefore, there is neither a logical nor a real contradiction between Natural and Positive Laws. As Kelsen suggests, but does not agree to,⁷² when Positive Law opposes the Natural Law, Positive Law ceases to exist as law. For ultimately the need for Positive Law arises out of the nature of man, and his power to create law stems from his freedom. When this freedom is abused in the making of law, the nature of man is opposed in its relationship to his ultimate end. Such a regulation is no law at all, for its sole basis is the misuse of freedom accompanied by force.⁷³

Ultimately the primary end of the Natural Law is the intrinsic perfection of man and the secondary end is his extrinsic perfection.⁷⁴ The primary end of Positive Law is the extrinsic perfection of man and secondarily his intrinsic perfection.⁷⁵ The correlation of these two depends upon their interaction. Both treat of man, but in different ways, for both tend to perfect different aspects of man.

⁷¹Ibid.

⁷²Kelsen, General Theory of Law and State, pp. 412, 417.

⁷³Rommen, The Natural Law, pp. 53-57.

⁷⁴Ibid., pp. 16-19, 54-55.

⁷⁵Ibid.

Chapter XII

CONCLUSION

This research has been a critical investigation, from the point of view of Aristotelian-Scholasticism, into Kelsen's philosophical foundations for the Pure Theory of Law. The research not only reveals a strong theoretical opposition between the basic philosophies of Kelsen and of the Aristotelian-Scholastics, but also reveals that there is an opposition between Kelsen and the Aristotelian-Scholastics in what is to be understood by Absolutism. Consequently, this research attempted to clarify the positions of both parties. The clarification included a presentation of Kelsen's understanding and subsequent criticism of the Natural Law and its metaphysics as well as the Aristotelian-Scholastic's position on these two subjects. The investigation together with the clarification reveal some interesting problems.

The problems between Kelsen and the Aristotelian-Scholastics begin with Epistemology. The positions are clear cut and quite distinct. The Pure Theory of Law is based upon a science which is Kantian in orientation.¹ The Pure Theory of Law itself represents a unique approach to both Kant's categories of the mind and his categorical imperative.²

¹Kelsen, General Theory of Law and State, pp. 434-446.
²Ibid., p. 444.

In the Kantian system, the categories of the mind are made meaningful when given the content of sensation which in turn is a synthesis of the phenomena of reality with the senses. This synthesis is made possible by the conditions of sensibility.³ On the other hand, the categorical imperative gives meaning to natural reality in the moral affairs of man.⁴ The categories of the mind are subject to the laws of cognition. The categorical imperative is subject primarily to the will.

In Kelsen's system, the basic norm of law is a category of the mind and hence is subject to the immanent laws of cognition.⁵ However, instead of becoming meaningful through what empirical reality offers in sensation, the basic norm gives meaning to natural reality in describing and criticising the legal systems of man.⁶ As a cognitional science, therefore, whose object is law, the Pure Theory is not made meaningful through what empirical reality offers. On the contrary, empirical reality in terms of legal systems, is made meaningful through the Pure Theory.⁷ Consequently, law as science is a category of the mind, and subject only to the laws of cognition. The purpose of law is to give meaning and not to receive meaning. This is what Kelsen means when he says that law regulates its own creation.⁸

Likewise, since the Pure Theory is not derived from reality and hence does not become meaningful because of reality, but is a unique category which, through the laws of cognition gives meaning to a special

³Kant, Critique of Pure Reason, pp. 37-61.

⁴Kant, Critique of Practical Reason, trans. by Lewis White Beck, New York, Liberal Arts Press, 1956, p. 52.

⁵Kelsen, General Theory of Law and State, p. 435.

⁶Ibid., p. 434.

⁷Ibid., pp. 433-439.

⁸Ibid., p. 115 ff.

aspect of reality, the Pure Theory is not concerned with truth or falsity as is the case of empirical science.⁹ What the Pure Theory is concerned with is validity and general efficaciousness.¹⁰ According to Kelsen, empirical science describes its object through the principle of causality--which is a category of the mind.¹¹ Since this category is made meaningful through sense data as synthesized in sensation, and, indeed, the human mind creates a cosmos out of the chaos of sensation, this researcher is at a loss to explain why Kelsen says that truth is the conformity of the mind to reality.¹² On the other hand, the Pure Theory uses not a causal proposition, as do the empirical sciences, but a conditional proposition to describe its object.¹³ This conditional proposition is the principle of imputation. Since the object of the Pure Theory is to give meaning to legal systems, the rightness or wrongness of a particular system within itself is beside the point. Kelsen writes:

As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law is, not how it ought to be. It is a science of law (jurisprudence), not legal politics.¹⁴

What is of significance is the validity and efficaciousness of the system under consideration. Consequently, while truth and error are the criteria for the empirical sciences, validity and efficaciousness are the criteria for a science whose object is law. This is what Kelsen means when he writes:

It is further true that, according to Kant's epistemology,

⁹Ibid., pp. 36, 110-112.

¹⁰Ibid., pp. 42, 110-112.

¹¹Ibid., pp. 46, 110-112.

¹²Ibid., pp. 110-112.

¹³Ibid., pp. 38-39.

¹⁴Hans Kelsen, The Pure Theory of Law, trans. by Max Knight, Berkeley, University of California Press, 1967, p. 1.

the science of law as cognition of the law, like any cognition, has constitutive character--it "creates" its object insofar as it comprehends the object as meaningful whole. Just as the chaos of sensual perceptions becomes a cosmos, that is "nature" as a meaningful system, through the cognition of natural science, so the multitude of general and legal norms, created by the legal organs, becomes a unitary system, a legal order, through the science of law. But this "creation" has a purely epistemological character. It is fundamentally different from the creation of objects by human labor or the creation of law by the legal authority.¹⁵

Since Kelsen's system excludes a metaphysics and consequently good and evil, it follows, therefore, that in Kelsen's system there is no such designations as male in se but only mala prohibita.¹⁶ For, the epistemological order in which Kelsen speaks is Kantian.¹⁷

The overall effect of Kelsen's Pure Theory of Law is to make all legal systems connect one with the other like the well-spun web of a spider. The validity of law depends upon the norm giving authority, the conditioned situation, and the law's effectiveness. Law, in this sense, is an organization of force based upon the legal authority who represents the normative order. Obligation stems from the ultimate authority which is the hypothetical basic norm. As everything is relative to the conditions of sensation and cognition within Critical Idealism so that cognition creates a cosmos out of the chaos of sensation, so also human activity is relative to the basic norm within the confines of law. Therefore, Positive Law is supreme unto itself.¹⁸

The Neo-Kantian epistemological view toward reality forgoes any derivation of principles from natural reality for the simple reason that the only thing which can be known of reality is the phenomenon. Even

¹⁵Ibid., p. 72.

¹⁶Kelsen, General Theory of Law and State, pp. 51-52.

¹⁷Kelsen, Pure Theory of Law, p. 72.

¹⁸Kelsen, General Theory of Law and State, p. 411.

this phenomenon is known through the conditions of sensation and cognition. Any attempt at a further penetration into the object of sensation is an attempt to penetrate the noumenon, which by definition is unknowable.¹⁹

The importance of indicating this epistemological position lies in the fact that Kelsen views the whole history of philosophy within the framework of Kantian critical idealism. A realist metaphysics, therefore, is portrayed as an attempt to give meaning to the noumena of things, and the ultimate basis for metaphysics, God, is an assumption which can neither be proven nor disproven.²⁰ Kelsen suggests that both metaphysics and God arise out of a dissatisfaction with the data of sensation as organized through the laws of cognition. Both metaphysics and God are projected beyond sensation and cognition so as to satisfy the knowing subject. However, since this desire to be satisfied is based on something other than either sensation or cognition, it must be based upon emotion, or religious beliefs.²¹ Now neither emotion nor belief fit into the framework of a science whose object is law.²² Therefore, no philosophy which includes a metaphysics or a concept of God is a part of a science whose object is law.

By basing metaphysics and the concept of God on emotion and/or religious belief which is an attempt to give meaning to the noumena of things, Kelsen underscores his distinction between philosophy and theology or what he calls religious philosophies. A real philosophy, in

¹⁹Kelsen, General Theory of Law and State, pp. 444-45.

²⁰Ibid.

²¹Ibid., pp. 407-12.

²²Ibid.

Kelsen's view, is devoid of both metaphysics and God.²³ It encompasses only the phenomena of reality as subject to the conditions of sensation and the laws of cognition.

Kelsen's interpretation of the realist's metaphysical position and the concept of God on the one hand, and this distinction between philosophy and theology on the other hand give rise to two serious problems. For not all agree with his interpretation of metaphysics and God, nor the distinction between philosophy and theology. The Aristotelian-Scholastics do not base their metaphysics and the concept of God on a knowledge of the noumena, nor would they agree with Kelsen's distinction between philosophy and theology.

On the contrary, the Aristotelian-Scholastics derive their metaphysics from a reality which is knowable, not from that which is unknowable. The existence of God arises as an ultimate explanation for motion which is an observable phenomenon within natural reality.²⁴ God is not postulated by the Aristotelian-Scholastics so that the mind has some assurance that motion exists extra-mentally. The view that the existence of God must be postulated so as to substantiate the validity of an extra-mental reality and hence the truth about a metaphysics, starts with the modern rationalists such as Descartes. In other words, the theory which uses God as an assurance for the knowing subject that extra-mental reality together with its metaphysics exists, is a product of modern rationalism, and not Aristotelian-Scholasticism.²⁵

The ancients, medievalists, and the Aristotelian-Scholastics,

²³Ibid., pp. 434-35.

²⁴St. Thomas Aquinas, Summa Theologica, I, q. 2, a. 3.

²⁵Rommen, The Natural Law, p. 76.

accepting the existence of extra-mental reality as it is, merely tried to understand it.²⁶ This understanding of extra-mental reality gave rise to an understanding of reality's ultimate principles in as much as they were knowable through natural reason. The concept of God entered into the picture as the only possible explanation for a principle which was already accepted as existing, namely motion.

Kelsen does not consider the difference between these two epistemological approaches to metaphysics and hence extra-mental reality. Kelsen combines the approaches of both schools into the view of the modern rationalists, and then from the point of view of Kantianism, he criticizes their success in establishing an extra-mental reality which can include a metaphysics.

Kelsen's position is this: the extra-mental reality and hence philosophy is limited to what can be known. Only the appearances of things can be known as interpreted through the conditions of sensation and the laws of cognition. The attempt, therefore, of the modern rationalists to establish a metaphysics and the existence of God is for naught because both go beyond the phenomena of things.²⁷ The Aristotelian-Scholastics' position is this: the mind, not reality, is limited to that which is knowable. Hence philosophy extends to all that can be naturally known. To the degree that natural reality is knowable, to that degree can its basic principles and constitution be known. But such an understanding is called metaphysics among the Aristotelian Scholastics.²⁸

²⁶Ibid., p. 95.

²⁷Kelsen, General Theory of Law and State, pp. 433-35.

²⁸Rommen, Natural Law, p. 164.

Kelsen's problem arises because he views all metaphysical theories in the tradition of Kant and limits all approaches to metaphysics to that of the modern rationalists.²⁹ Kelsen's approach, though, does not distinguish between the ancients, the medievalists, and the Aristotelian-Scholastic view on the one hand, and the modern rationalist view on the other hand. Because of this oversight, the basis of the Pure Theory of Law is not sufficiently established to have it rest upon a presupposed, hypothetical basic norm, a category of the mind in the Kantian sense.

In speaking of a legal norm, Kelsen writes:

The specifically legal meaning of this act is derived from a "norm" whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. To put it differently, the judgement that an act of human behavior, performed in time and space, is "legal" (or "illegal") is the result of a specific, name normative, interpretation.²⁹

According to Kelsen, such a normative legal interpretation has nothing to do with human nature. For he writes:

And even the view that this act has the character of natural phenomenon is only a specific interpretation, different from the normative, namely a causal interpretation.³⁰

However, Kelsen has not shown that the basic norm must be limited to the constitutive aspect of cognition. His pure theory, consequently not only rests upon the hypothetical assumption that there is a basic norm, but also on the assumption that the regulation of this basic norm has no relation to extra-mental reality other than its enforcement, that in a phrase, this basic norm can only be a special kind of category of the mind.

In addition to the problem of metaphysics, there is the problem of

²⁹Kelsen, Pure Theory of Law, p. 4.

³⁰Ibid.

the distinction between philosophy and theology. What can be known through sensation and coordinated through the laws of cognition makes up the limits of philosophy, in Kelsen's view.³¹ As was shown above, Kelsen excludes metaphysics and God from philosophy, for he understands metaphysics to be inaccessible to human cognition. As a result, metaphysics and God are relegated to the status of belief, or superstitious animism. The far reaching importance of such a distinction lies in the dismissal of anything "theological" from Kelsen's Pure Theory of Law. This dismissal includes a Natural Law based upon an unchangeable--to the degree that things exist as they are--metaphysics.

Kelsen writes:

...an absolute value can be assumed only on the basis of religious faith in the absolute and transcendent authority of a deity.³²

This gives rise to the question as to whether or not Kelsen's distinction between philosophy and theology is adequate. If all metaphysics and their corresponding Natural Law doctrines are based upon the modern rationalists' approach, namely bridging the ideal with the real order, then they can be considered as assumptions based on a "...religious faith, in the absolute and transcendent authority of a deity."³³ However, the metaphysics and its corresponding Natural Law doctrine of the ancients, medievalists and Aristotelian-Scholastics are not based on an attempt to bridge the ideal with the real order, but rather are based upon the acceptance of reality as it is.³⁴ In the modern concept of the Natural Law, the norm to be followed is the Will of God. Authority is at the back of

³¹Kelsen, General Theory of Law and State, pp. 433-35.

³²Kelsen, Pure Theory of Law, p. 63.

³³Ibid.

³⁴St. Thomas Aquinas, Summa Theologica, I, q. 84, a. 1.

this theory.³⁵ On the contrary, for the ancients, medievalists and Aristotelian-Scholastics right reason, order, human nature adequately considered were the norms to be followed.³⁶

This researcher suggests that Kelsen does not distinguish between these two views properly for two reasons. On the one hand, Kelsen reduces all Natural Law theories to assumptions based upon an absolute authority. However, as has been shown, this is not the case. For some metaphysicians accepted from the start the extra-mental reality from which they derived their principles.³⁷ As a result, the object of the Natural Law was not simply to obey God, but to exist to the fullest. Obedience to God arose out of living to the fullest according to one's nature.

Secondly, Kelsen's working hypothesis is that all metaphysicians--and consequently their Natural Law doctrines--attempt not to accept natural reality as it is, but to establish some sort of metaphysics from which a Natural Law can be derived.³⁸ The approach, though, of the ancients, medievalists, and Aristotelian-Scholastics is not the approach of these modern theorists. Consequently, when Kelsen argues against the possibility of establishing a metaphysics, he does not disprove the fact of existence of metaphysics nor the position of the Aristotelian-Scholastics.

In view of all that has been said, the questions now arise: is Kelsen's distinction between philosophy and theology sufficiently adequate so as to restrict law to a basic assumption, from which flows a methodology

³⁵Ibid., pp. 86-87.

³⁶Ibid., p. 188.

³⁷McCoy, Structure of Political Thought, p. 31.

³⁸Kelsen, General Theory of Law and State, pp. 419 ff.

and which needs nothing else than its efficaciousness to affirm its validity, in the regulation of legal affairs? To put the question in another way, is there no other determinant in the legal regulation of human affairs than a science of law, which is only a methodology based upon a hypothetical basic assumption, whose validity arises out of its efficaciousness? Is there nothing in the object of legal systems, namely the human beings as human beings, not just their customs, from which can be derived guiding principles for the conception of the legal systems as a science? Can, finally, a science whose object is law restrict itself to an epistemological creation?

For Kelsen, the answer to these questions is obvious. The answer to these questions hinges on his distinction between philosophy and theology. The problem is that Kelsen's distinction includes more than his arguments account for, and consequently his Pure Theory of Law is not inclusive enough. Kelsen's distinction between philosophy and theology relegates all metaphysics to theology. However, his arguments take into consideration only the approach of the modern rationalists. All metaphysics is viewed from this point of view. Kelsen does not consider the point of view of the Aristotelian-Scholastics. Consequently, Kelsen's Pure Theory of Law is based upon a distinction which is not adequate.

It was suggested earlier in this research that the ancients, medievalists and Aristotelian-Scholastics followed the principle that art was subject to prudence and prudence to the theoretical sciences. For the modern Natural Law theorists, prudence was subject to art, and the theoretical sciences are subject to prudence.³⁹ In the Pure Theory of

³⁹McCoy, Structure of Political Thought, p. 32.

Law, the theoretical sciences are subject to the immanent laws of cognition as verified in empirical reality.⁴⁰ Law as theory is subject to the immanent laws of cognition and prudence is subject to art.⁴¹ Law is an organization of force based upon a cognitional theory which is devoid of empirical derivation.⁴²

Kelsen begins his work on the Pure Theory of Law by stating:

The Pure Theory of Law is a theory of positive law....Its aim is to free the science of law from alien elements....Such an approach seems a matter of course, Yet, a glance upon the traditional science of law as it developed during the nineteenth and twentieth centuries clearly shows how far removed it is from the postulate of purity; uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law. The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism) which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter.⁴³

In regard to the subsequent theory of law which Kelsen develops,

Rommen writes:

If moral philosophy and, in moral philosophy and with it, legal philosophy are to have a solid foundation, they must be a continuation of metaphysics. At least this is true of a natural system of ethics and jurisprudence, though not of a positive one which is grounded in the will as such. In this connection "being" does not denote simple existence, the imperfect form of being. It means essential being, the esse essentiae. Kelsen, who repeatedly asserts that oughtness has nothing to do with being, with the factual, and that the science of law must be constructed in a purely normologic fashion, has not heeded this distinction which is basic for the metaphysics of realism. His rationalism, therefore, leads him to a theory of law devoid of contents and constructed apart from the factual, the existent. Yet, since his

⁴⁰Kelsen, General Theory of Law and State, pp. 110-13; Pure Theory of Law, p. 72.

⁴¹Kelsen, Pure Theory of Law, p. 193.

⁴²Ibid., pp. 198-205.

⁴³Ibid., p. 1.

atheistic relativism prevents him from acknowledging with Occam a supreme omnipotent will of God as the source of all norms, Kelsen's rationalism ends by bringing him to the position that factual reality is indeed the ultimate, primordial norm, that is, the existence of the order of the civitas maxima, the factually existing world legal order. But this position is downright paradoxical in view of his ideal of a science of pure, normative law built upon the unbridgeable opposition between being and oughtness. Thus for Kelsen, precisely because he lacks Occam's supreme will which lays down the positive norm, existence and oughtness ultimately coincide. Thus he arrives at an extreme empiricism. Had he had a metaphysics, the doctrine of essential being, he would have avoided this contradiction.

For being and oughtness must in final analysis coincide. Or to express it differently, being and goodness, the ontological and the deontological or moral orders must at bottom and ultimately be one.⁴⁴

These are two protagonists in the philosophy and science of law.

They are representative of historically antagonistic views towards law.

The point of departure for the two views lies in the relationship between the Natural Law and Positive Law. In turn, the point of departure gives rise to two schools of thought: the Natural Law theorists and the positivists.

Both schools of thought claim to be dynamic and evolutionary. Both aim at a unified body of law which is universal and consistent. Both claim necessity, the necessity of human regulation, as the grounds for their scientific and philosophical investigations. Both have developed side by side throughout the history of western culture.

The degree of antagonism has varied largely due to the emphasis of cultural milieus within the evolution of Western Civilization. However, Western Civilization has considerably evolved and is progressing. Likewise, the philosophy and science of Law have evolved and are progressing in proportion to Western Civilization. The conflict between the

⁴⁴Rommen, The Natural Law, pp. 162-63.

positivists and the Natural Law has passed through the stages of the Greek City States, of the Roman Senate, of the Feudal Age, of the era of Nationalism, and now is in the era of Internationalism. Each stage has pushed both schools of thought ahead, and left a heritage of knowledge behind.

In this era of Internationalism, the lack of unity within the philosophy and science of law reflects the age. However, just as the word internationalism connotes at least a trend and a purpose towards unity, a unity which gives birth to a higher level of civilization, so also the philosophy and science of law reflect a trend and a purpose towards a unity on a higher level. Such a process reflects the dynamic and evolutionary aspect of Law.

Such a philosophical and scientific evolution is, in part, from both antagonists' point of view, a rational evolution. For, both claim law as a science with philosophical foundations, and both science and philosophy are ways of knowing. If the evolution of the philosophy and science of law is to proceed towards a point of unity, therefore, one of the first steps to be taken is the clarification of the antagonists' points of view. The positions and the problems of each school must be clearly understood by both schools of thought.

This research paper has been devoted to one aspect of the clarification of these two schools of thought through a critical analysis, from the point of view of Aristotelian-Scholasticism, of Hans Kelsen's Pure Theory of Law.

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