

INTRODUCTION

Contemporary legal theory faces a permanent tension: what is the true scope of the judicial function within the legal system? In different legal traditions, the figure of the judge has moved between opposing poles. On the one hand, the judge has been reduced to a mere spokesperson for the law, a passive interpreter destined to safeguard legal certainty. On the other, the judge has been transformed into a central actor in the political and moral life of the community, a creator of solutions beyond the normative text. In the midst of this debate, Hans Kelsen's proposal retains a unique value by offering a normative framework that explains how judicial decisions participate in the production of law without abandoning the formal structure of the legal system.

The question of whether judges apply or produce law is not merely a theoretical speculation. It lies at the heart of current legal problems, from the expansion of constitutional review to the growing use of moral arguments in judicial practice. Contemporary judges must resolve conflicts where predictability clashes with the demand for substantive justice, and where discretion threatens to undermine the security of the system. In this context, it is pertinent to return to Kelsen, not as an author anchored in 20th century formalism, but as a thinker who developed conceptual tools to understand the normative production of judicial bodies, their coercion, and their place in the tiered structure of law.

Kelsen's work still offers useful answers to the dilemmas of the judicial function. His approach allows us to overcome both the reductionist view of the judge as a mere "mouth of the law" and the perspectives that conceive of him as a moral legislator. Kelsen

shows how each judgment not only applies a general norm but also concretizes it in an individual norm with binding force, integrated into the normative system as part of the dynamic process of legal production. With this idea, law appears as an order capable of self-production without needing to resort to external moral or political foundations.

In the Kelsenian perspective, the judicial function reveals a delicate balance. On the one hand, it depends on higher norms that determine the judge's jurisdiction and the procedures to be followed in his or her role. On the other hand, it introduces an inevitable margin of discretion, as no general norm can foresee all the facts. This tension translates into a space of controlled normative creativity, where the judge produces law while applying it. This is a challenging conception for both classical positivism and contemporary legal argumentation theories, because it recognizes the creative intervention of the courts without converting them into unlimited power.

The chapters of this work explore this itinerary with the aim of systematically reconstructing Kelsen's theory of the judicial function. The first chapter offers a historical overview, from the origins of positivism to Kelsen's initial contributions, highlighting the relationship between legal certainty and the limitation of judicial discretion. The second chapter examines in greater detail the place assigned to the judicial function within classical positivism, both in the continental civil-law tradition and in the common-law analytical tradition, to show the contrast with Kelsen's proposal. The third chapter develops the conceptual foundations of Kelsen's interpretation of law, which articulates the elements of the legal significance of conduct, normative indeterminacy, and value judgments. The fourth chapter, the core of the work, reconstructs Kelsen's vision of the judicial function as a norm-producing body, analyzing its coercive nature, the problem of gaps in the law, the margin of discretion, and the production of precedents.

Through this overview, the book seeks to offer the reader not only an organized exposition of Kelsen's texts but also a reflection on their relevance in the face of contemporary legal dilemmas. Judicial interpretation, legal certainty, discretion, and normative creativity appear here as cogs in a single mechanism. The result is an invitation to rethink the judicial function from a balanced perspective, one in which it is neither reduced to formalism nor surrendered to arbitrariness; on the contrary, it is recognized as a constitutive element in the dynamics of a law in constant development.