

## CHAPTER ONE

# LEGAL CERTAINTY IN THE POSITIVIST TRADITION: FROM CODIFICATION TO KELSENIAN NORMATIVISM

### I. PROBLEM STATEMENT AND DELIMITATION

At the heart of the legal positivist project developed by western legal culture are the following essential questions: where can we find the current law? What is the most appropriate method for locating the law applicable to a particular case? Thus, for example, a good citizen would be willing to know the rules to follow in their daily life, while a judge charged with resolving a particular case is obliged to identify the specific rule to resolve it. However, identifying specific legal rules was not always a simple task; such challenges existed since the times of Roman law and were a central concern of legal positivism from its origins until the development of Hans Kelsen's *Pure Theory of Law*.

Today, these questions regain their importance in the face of a legal environment that has diversified its sources of production since the end of World War II and, rapidly, since the fall of the Berlin Wall, the democratic opening, and the collapse of the socialist bloc in Europe, processes that accentuated economic and cultural globalization in the West. These events sometimes excessively expanded the sources of law, and it now seems more difficult to identify where the applicable legal norms are to resolve particular cases as practicing attorneys, judges, or legal researchers. Indeed, in contrast to the legislation issued by state legisla-

tive bodies, there appears a wide range of material called *soft law* whose vagueness and ambiguity openly compete with the law; or in the face of rulings by international human rights courts where due process guarantees are upheld, multiple non-governmental organizations (NGOs) emerge seeking to impose their agenda on these courts by promoting rights that are difficult to legitimize and do not exist in national constitutions or international conventions. While the measured expansion of the sources of law enriches it, the excesses of this proliferation have reduced the legal certainty necessary for a proper life in society. While legal certainty has always been relative and it was never desirable to make it an ideological project, today it is in danger in the face of the proliferation of these supposed sources of legal production and the “methodological diversification” for identifying the law. If we add to this the decoding process that constitutional law has undergone in recent decades, the outlook will seem discouraging. Thus, in this chapter I reflect on legal certainty in the history of the positivist legal tradition from its beginnings to Kelsen’s contributions as an initial path to answering these questions and problems; of course, for reasons of space, it is impossible to provide an exhaustive account of this tradition here.

## II. THE ORIGINS: THE *CORPUS IURIS CIVILIS*

To begin with, it should be noted that legal positivism has as its necessary antecedents Justinian’s Compilation and the legal and political thought of Thomas Hobbes. Both the compilation of Roman law carried out by the Emperor Justinian (through his principal jurists: Tribonian, Theophilus, and Dorotheus) and the legal and political thought of Hobbes involved a similar project: the need to identify law more precisely in order to consolidate the power of monarchical government.

In the vast universe of Roman law, the Eastern Roman Empire required a compilation that would allow for the accurate identification of the norms needed to consolidate Justinian’s imperial

ambitions. Justinian needed a legal system to legitimize himself as the imperial ruler of the Eastern Empire, which he consolidated through military means. Thus, for example, the *Codex of Justinian* enshrined the emperor's power as the ultimate source for resolving legal disputes:

If the Imperial Majesty had examined a case in his capacity as judge, and the parties had pronounced a verdict in his presence, let all the judges under our jurisdiction know absolutely that it is law not only for the cause for which it was pronounced, but also for all analogous ones, because what is greater, what is more holy than the Imperial Majesty? Who is filled with such pride as to despise the thought of the prince, when the authors of ancient law also clearly and definitively declare that constitutions emanating from an imperial decree have the force of law? ... And we declare that every interpretation of laws made by the emperor, whether on petitions, or in lawsuits, or in any other way, is to be considered valid and unquestionable. For if at present only the emperor is permitted to make laws, then also in interpreting laws he must be worthy of his imperial authority alone (Justinian, 1889).

Justinian's program sought to reestablish the Roman Empire and, at the same time, establish a robust bureaucracy for that imperial power, combined with Christian orthodoxy and a more efficient legal system. Furthermore, this new legal order based on Roman law made it easier to identify the legal norms necessary to defend the rights of subjects of the Empire.

Indeed, on February 13rd, 528, Justinian announced his decision to undertake a reform of his judicial system, a task that had been pending for his predecessors. Among the objectives of his reform was to eliminate those outdated, superfluous, obscure, and contradictory aspects of his legal system. The revision of Roman law aimed to improve the efficiency of its legal system and to precisely identify Roman and ecclesiastical law for the resolution of jurisprudential disputes and dilemmas (Atkinson, 2000, pp. 15-32). As established in the Preface to Justinian's *Institutes*,

the empire was justified not only by the use of arms, but also by a law that gave to each individual what was his and rejected the “iniquities of slanderers”, those who claimed the existence of a law where none existed:

It is fitting that Imperial Majesty should not only be honored by arms but also strengthened by laws, so that both times of war and peace, may be well governed, and that the Roman prince may remain victorious not only in battles with enemies, but also by rejecting the iniquities of slanderers by legitimate means, and may become as much a religious observer of law as a victor over vanquished enemies (Justinian, 1889, p. 3).

The need to precisely identify law is evident from the beginning of the *Institutes*. These are defined as an exposition of the laws of the Roman people “in a concise and simple manner, and then with a diligent and very exact interpretation each thing is explained” (Justinian, 1889, p. 5). Here, “civil laws” refers to the positive laws of the Roman people, recovered by Justinian. Furthermore, in the second title of the *Institutes*, Justinian, after providing the concept of justice and recognizing the existence of natural law by defining it as that taught by nature to all animals of heaven, earth, and sea, defines the project of the *Corpus Juris Civilis* as a project to identify civil law but not natural law:

1. But law is divided thus: civil or *ius gentium*. All peoples, who are governed by laws and customs, use a law, partly their own, part common to all men; for the law that any people constitutes for itself is proper to the city itself and is called civil law; but the one that natural reason establishes among all men, this is equally observed by all peoples, and is called *ius gentium*, because this law is used by all peoples... 2. But civil law is surnamed by the name of each city, like that of the Athenians; for if someone wanted to call the laws of Solon or Draco the civil law of the Athenians, they would not be wrong. And thus also we call the law used by the Roman people, the civil law of the Romans... 11. But natural laws, which are equally observed among all peoples, established

by a certain divine providence, always remain firm and immutable; But those that any city establishes for itself are often changed either by tacit consent of the people or by another law subsequently issued (Justinian, 1889, pp. 6-7).

As can be seen from the paragraph transcribed above, civil law corresponds to what centuries later was called positive law and, unlike the immutable natural law, it is a law that is reformable and in constant change. It is important to observe how Roman law, even when it privileged civil law, did not ignore natural law, to which the *Corpus Iuris Civilis* frequently referred. In other words, although the origins of legal positivism can be precisely traced back to Roman law and Justinian's compilation, natural law was still one of the sources recognized by Justinianian law; the refusal to recognize natural law as a source of law took place several centuries later, with the Enlightenment legal positivists of the 18th century onward.

### III. THE RENAISSANCE: THOMAS HOBBS AND THE ARGUMENT FROM AUTHORITY

As Floris Margadant explains, Justinian's compilation was recovered by jurists at the University of Bologna from the end of the 11th century and from there spread throughout Europe to create the so-called common law of monarchies (1986, p. 402). Later, at the beginning of the Renaissance, Hobbes undertook the project of creating a political theory to consolidate European monarchies, the immediate antecedent of nation states.

In a brief review of positivist thought, we can highlight Hobbes's polemic with Coke. In this polemic, Hobbes fought against the *common law* and defended the sovereign's power to establish law and its statutory power. Like most philosophers and jurists of the time, Hobbes examined the transition from the state of nature to the civil state; during this transition, he asked himself whether the laws of the state of nature (laws of natu-

re) were binding. Hobbes's response to this question was of the utmost importance and represented an important precedent for modern positivist thought. According to Hobbes, a person was only obligated to respect them in conscience, that is, before themselves and before God; however, when faced with other people, they were only obligated to respect them to the extent that other people respected them. In other words, a person was obligated to respect the natural law rule "thou shalt not kill" as long as the people with whom they interacted were also willing to respect this fundamental norm. Otherwise, the person attacked could defend themselves by killing whoever tried to take their life. In the state of nature, where all people are equal and have the right to use force to enforce their interests, there was never complete certainty that the law was respected by all, and consequently, the law lost its effectiveness. The state of nature constituted a perpetual state of anarchy where the law of the strongest prevailed and all men fought against each other to achieve or preserve their own interests.

The only way out of this state of nature of permanent war, unbearable for human beings, was through the creation of the State and the placement of all its power in the monarchical government. With the law imposed by the monarch by the sword, people would respect the rule "thou shalt not kill", which not only obeyed the dictates of their conscience or the cold calculations of their individual interests, but also the law of the King-State made it binding under any circumstance, and whose force was irresistible, obliging them to respect it even when they lacked the will to do so (Bobbio, 1993, pp. 51-52). This monopolization of the State's coercive power entailed a corresponding concentration of power to create the norms regulating social relations; in effect, the State alone was responsible for producing clear, precise legal norms aimed at regulating human behavior, and only these norms had the support of the State to be obeyed. According to Hobbes, when the State was created, laws of nature ceased to operate (which, even in the State of nature, was not respected) and

the only valid and current law was civil or statutory law (Bobbio, 1993, p. 52).

In his work *Leviathan*, without ignoring the principle of representation, Hobbes pointed out that the institution of the State arose when a multitude of men agreed or agreed that one man or a certain assembly of men should be granted, by a majority, the possibility of representing all. Thus, each of them, both those who voted for and those against, had to authorize the actions of that man or assembly as if they were their own, in order to live in peace among themselves and be protected from other men. Consequently, all the rights and powers of the one or those who were conferred sovereign power by popular consent derived from the State institution; in other words, the State and its monarch were the only legitimate source of law (Hobbes, 2005, p. 179). The identification of a single source of law contributed to strengthening legal certainty and consolidating state power.

In a late work, written in old age, *Dialogue between a Philosopher and a Student of the Common Laws in England*, Hobbes denied the legitimacy of the *common law* and recognized as the only law that produced by state authority. Thus, in an illuminating passage, the philosopher, in supporting legislation produced by the state, replied to a law student that legal knowledge is an art, but not the art of any man, nor of many, no matter how wise. In Hobbes's view, it was not wisdom that produced law, but authority. He also affirmed the obscurity of the expression "legal reasoning" because those words referred to the reason of the judge or of all the judges assembled without the king, as supreme reason (*summa ratio*) and true law; Hobbes refuted this kind of reasoning as inconsistent with the authority of the State because no one could create a law except the legislative power, and all the laws of England were made by its King in consultation with the nobility and the members of parliament, of whom not one was a learned lawyer (Hobbes, 1840).

#### IV. CONSOLIDATION: ENLIGHTENMENT POSITIVISM AND CODIFICATION

Continuing with what was discussed in the previous section on Hobbes, his thought not only legitimized monarchy as the preferred form of government but also shaped the first modern theory of the State as the primary source of law. The distinction he established between state of nature and the State (civil law) opened up a horizon later deepened by European legal positivists of the 18th and 19th centuries, who ultimately rejected natural law definitively, a process culminating with Kelsen in the 20th century. This transition marks the starting point for understanding how Enlightenment positivism consolidated the centrality of the legislator in the production of regulations.

Monarchical absolutism and the abuses of power committed by various kings provoked a reaction that, during the Enlightenment, promoted the theory of the separation of powers, the modern conception of criminal law, and political representation as the foundations of the new State. These contributions, aimed at limiting arbitrariness and strengthening legal certainty, paved the way for modern positivism. In this sense, what is presented in the following sections should be read as an introductory map, an overview of the ideas of Montesquieu, Beccaria, Savigny, exegetical codification, and the approaches of Bentham and Austin. It is an overview that anticipates and contextualizes the discussion in the following chapter, where these same currents will be analyzed from the specific perspective of the judicial function and in greater detail.

##### 1. *Montesquieu and the Enlightenment Foundations of Judiciary*

Having expounded his theory of the separation of powers when examining the English Constitution, Montesquieu considered that judges, in their interpretation of the law, should avoid

any type of overstepping of the legal text. The theory of the separation of powers, in the strict sense, obliged judges to adhere to the text of the law and respect the provisions of the legislator as the producer of the specific legal norm. When examining the activity of the three branches of government in Chapter Eleven of *The Spirit of the Laws*, Montesquieu, in addition to advocating a popular origin for judges, in accordance with a theory of representativeness, pointed out that judges should be subordinate to the law; otherwise, one would live in a permanent state of legal uncertainty:

The power of judging should not be entrusted to a tribunal but should be exercised by persons drawn from the body of the people at certain times of the year and in such manner as the law prescribes, to form a court that will last only as long as necessity demands... But if the courts are not to be fixed, the sentences should be so fixed as not to differ in the least from the express text of the law. If they represented a particular opinion of the judge, we would live in society without knowing precisely the obligations it imposes on us (Montesquieu, 1906, pp. 229-230).

In short, Montesquieu's proposal reduced the judge to an operator subordinate to the legal text, thereby guaranteeing security and predictability in legal relations. This image of the judiciary, outlined within the Enlightenment horizon, offers an initial conceptual framework for understanding how Beccaria's criminal theory and Savigny's historical reflection, among other later developments, deepened the debate on the limits and scope of the jurisdictional function.

## 2. *Beccaria and Legal Certainty in Criminal Matters*

Beccaria's contribution to Enlightenment thought centers on the conviction that legal certainty constitutes the cornerstone of

any legitimate criminal justice system. The judge's role is not to create law or expand the scope of provisions, but rather to apply with absolute fidelity the rules previously established by the legislator. Only in this way can citizens foresee the consequences of their actions and trust that the sanction will be exactly as established by law, without discretionary additions or changing interpretations. The clarity and consistency of the rules, consequently, become guarantees of security against arbitrariness.

In this context, Beccaria warned that a judge who imposes a sentence higher than that provided for by law does not add justice, but rather an undue punishment that undermines the social contract and erodes public confidence in the rule of law (Beccaria, 2015, p. 21). Hence, proportionality and literal application of the sentence were not merely technical requirements, but essential demands for preserving individual liberty and consolidating a predictable legal order. Criminal certainty, understood as the strict subordination of the judge to the legislative mandate, thus becomes one of the most lasting contributions of Enlightenment thought to legal positivism.

Beccaria's thinking not only affirmed the principle of criminal certainty but also paved the way for a more detailed reflection on the judicial function, a question that will be developed in greater depth in the next chapter.

### *3. Overview of Codification and Exegesis*

One of the most important historical events in the emergence of modern positive law can be found in the codification movement that emerged in Europe and America in the late 18th and early 19th centuries. This movement ranged from the creation of the constitutions of American and European national states to the codification of their civil and criminal legislation, beginning with the Napoleonic Code. This rationalist movement aimed to locate all the norms of a discipline in a single book. Constitutions would place all the supreme and fundamental norms of the Sta-

te in the document called the Constitution; civil codes, for their part, would locate the entirety of this discipline in a single book. It is impossible, in this space, to expand on the extensive narrative required to examine, even partially, the codification phenomenon. Suffice it to note that it meant the definitive recognition of the State and its legislators as the sole creators of legal norms.

The representatives of the State, gathered in a constituent assembly or in an ordinary legislative body that promulgated the constitution and ordinary laws, respectively, were confirmed as the sole and primary sources of law. With state codification as a historical fact, natural law disappeared as a source of law or judicial interpretation, except when specifically incorporated by the legislator. The constitutionalization of fundamental laws and the process of codification of civil and criminal law was an Enlightenment phenomenon whose rationalist aspiration lay in considering it feasible to systematize the fundamental laws of the State in a single book. Codification, as a phenomenon specific to the legal tradition of the West, did not occur in all countries; for example, in Anglo-Saxon countries it occurred partially or was nonexistent.

For Bobbio, the codification phenomenon was important for positivism for the following reasons:

1. Codes served as a kind of specialized manuals where jurists sought to resolve all or most of the main legal problems they faced; in effect, when there is a constitution or a code, jurists seek to resolve legal controversies by consulting these sources and totally or partially ignoring others such as natural law or custom;
2. An argument of authority operated for the production of law, that is, the will of the constituent or the ordinary legislator was considered endowed with sufficient legitimacy and authority to dictate the norms;
3. The production of norms centered on legislative bodies forced jurists to think about the theory of separation of powers and, consequently, to consider the judge as the

mouth of the law and never as a producer of legal norms, otherwise he would invade the sphere of competence of the legislator;

4. The codes provided legal certainty by providing a body of stable laws to regulate social relations and resolve controversies. Otherwise, a judge's decision would be arbitrary, and citizens would lack any possibility of predicting the outcome of judicial deliberations (Bobbio, 1993, pp. 92-94).

The school of exegesis in France during the 19th century, following the emergence of the Napoleonic Code, advocated codification. Codification favored the identification of law and legal certainty, and also fostered the cult of law and legal statism, as identified by Julien Bonnecase, one of the main exponents of this school, who in his *Traité élémentaire de droit civil* presented the main characteristics of this school of thought:

- The cult of the text of the law.
- The predominance of the legislator's intention in the interpretation of the legal text.
- The deeply statist nature of this doctrine.
- The school's favor by the argument from authority (Bonnecase, 1997, p. 45).

Thus, the members of the exegesis school argued for the following:

- They ignored the importance that natural law had in the West for two millennia, considering positive law as the only legal source. For them, natural law was only relevant when it was incorporated into positive law;
- They constructed a rigidly statist position on the sources of law, that is, only legal norms produced or recognized by the State through the principle of the omnipotence of

the legislator are considered legal norms. This, in addition to denying natural law as a source of law, also implied the denial of any other type of positive law, such as customary, judicial, and scientific law;

- Any interpretation, including judicial interpretations, meant *seeking the intention of the legislator*; that is, if the only valid law was that produced by the legislator, its interpreters should specify the legislator's will when its meaning and scope are not immediately evident from the text of the norm;
- Respect to the argument from authority and for the purposes of legal production, the supreme authority was the legislator (Bobbio, 1993, pp. 99-102).

As Bobbio points out, the recourse to the argument from authority, practiced to this day, is a principle of the utmost importance for the legal profession; it is not due to a bad habit of jurists or a mentality anchored in a "pre-scientific phase", but to the very nature of law as a technique of social organization that establishes in a binding manner for people what is lawful or unlawful; this makes it necessary to attribute to a person the power to determine the lawfulness of social behaviors so that their determination is not questioned, and this person is precisely the legislator (Bobbio, 1993, p. 102).

These notes provide a preliminary understanding of the importance of codification and exegesis in the consolidation of modern positive law. Later in this work, both topics will be explored from more specific perspectives, with an analysis aimed at demonstrating their scope and limitations within the Western legal tradition.

#### 4. *Savigny and the German Historical School*

The historical school of law in Germany in the late 18th and early 19th centuries, whose greatest exponent was Savigny, is responsible for an unprecedented attack on natural law and the co-

dification movement. Without going into too much detail for reasons of space, it is important to remember that in his work, *Of the Vocation of Our Age for Legislation and Jurisprudence*, he emphasized the significance of the German legal tradition and the individuality of the people as producers of law, always within a specific historical context. It was precisely this appeal to the historical tradition of the people that dealt a severe blow to natural law, whose teachings were based on the universal rationality of human beings, a concept rejected by Savigny in favor of the particularity of the nation and its historical development.

However, Savigny's critique was not limited to natural law. He also highlighted the risks of a hasty codification that sought to confine law to rigid formulas. Legal vitality, in his view, could not be exhausted in a code conceived as a closed totality, as this would impoverish the natural evolution of law and subject it to an inertia incapable of responding to the needs of society. Against this tendency, he insisted that law lives in history, is renewed by the life of the people, and can only be organized when it has reached sufficient maturity (Savigny, 2015, p. 20).

Savignian criticism emerges as a twofold precedent: on the one hand, it questions the abstract universality of natural law; on the other, it warns against the excesses of codification and exegetical formalism. Both fronts are fundamental to understanding the transition toward a more complex positivism, where legal certainty is sought not in immutable dogmas, but in the balance between the historicity of institutions and positive normativity.

##### 5. *Bentham and Austin* *in the Enlightenment Context*

The Enlightenment rationalist project in favor of codification, legal certainty, and the precise identification of norms had one of its main exponents in Jeremy Bentham at the beginning of the 19th century. Bentham presented an argument against the common British law due to the uncertainty it produced in judicial

decisions, its retroactivity, and the contradiction of the democratic principle inherent in the law produced by a legislative body. One of its main criticisms of the common law, it was about its nature as unwritten law, which allowed judges great discretion when issuing their rulings; this was independent of the interests the judges served in tipping the scales in favor of their clients and, on occasion, their outright corruption in selling out and unjustifiably delaying their rulings. Instead of rights, for Bentham the common law provided the British with “pure illusions”, while they had to endure punishments imposed by judges that were “sad realities.” The only way to solve this problem was to have a written code that would provide the British with certainty regarding their rights and duties. He expressed this in a petition prepared for the government and citizens to draft a code, when he pointed out that England needed a codification, with its respective sections, from which the British could learn by reading them, what the relevant rights and obligations were in each case (Bentham, 1843, p. 547).

Another British author who favored codification and contributed significantly to nineteenth century positivism was Austin, a British jurist and professor at the University of London, who completed his training in Germany. Among Austin's contributions, his conception of positive law stands out, which he distinguished first from natural law and then from moral laws.

Austin distinguished between different laws: natural laws, moral laws and positive laws; only the latter were the subject of the study of law or of legal science. Natural law consisted of natural laws, which were divine laws related to the religious sphere. In contrast, human laws were positive or moral; the former were those emanating from a higher and legitimately constituted authority, consisting of obligatory mandates issued by the higher authority to other subjects in a position of subordination, coercively obeyed by the person in a position of subordination; this supra-subordination relationship is the one existing between a governed and a ruler. On the contrary, although they are also

human laws, moral laws lacked this supra-subordination relationship and were commands issued between people located at the same hierarchical level (Austin, 1869, pp. 171-176). Thus, Austin, when beginning his course in jurisprudence, defined the object and scope of his subject of study as follows: the subject matter of law is positive law. This law, in the strict and plain sense, is law established by political authorities superior to those politically inferior. In this way, Austin pointed out that of the laws or set of rules established by men for men, some of them were established by people placed in a politically superior position, located in a position of sovereignty over others placed in a position of subjection; by people who exercise government supremely and over others subordinate to it. The aggregate of the rules thus established, or a part of that aggregate, is the proper subject matter of law, general or particular, said Austin. But unlike natural law or the law of nature (meaning by these expressions, the law of God), the aggregate of rules established by politically superior powers is frequently called positive law and positive right, or law existing by position (Austin, 1832, pp. 1-2).

Austin resolved the problem of legal certainty by pointing out that the study of law should only include positive law created by the authorities empowered for that purpose; natural law and moral laws were not the subject of the study of the science of law or jurisprudence. With other arguments and continuing the criticism of the common law Austin distinguished between legislative law and judicial law produced by judges, thus formulating a severe criticism of the latter based on the following reasons: *a)* judicial law was less accessible to know and had less weight than legislative law; *b)* judicial law was produced *ex post facto*, that is, applied retroactively by judges; *c)* judicial law was imprecise, dispersed and incoherent, this due to the enormous difficulty involved in reviewing the documents produced in a trial and the enormous problem existing in extracting a general rule from a sentence; *d)* it was extremely complicated in judicial law to identify valid norms because judges issue different resolutions in similar cases or be-

cause the contexts valued by judges in one case could not always be applied to others.

In this way, the jurists of the European Enlightenment consolidated modern positivism towards the end of the 19th century. The search for greater legal certainty as one of the essential objectives of legal positivism had, before Kelsen, the following essential characteristics: *a)* the recognition of the State as the sole source of normative production; *b)* the acceptance of the dogma of legislative omnipotence and of the law as a rationalist project to modify society; *c)* the abandonment of natural law; *d)* the movement in favor of codification; *e)* the criticism of judicial law and common law. With these premises, a line of thought was outlined which, beyond its introductory nature, will find a more precise development in subsequent chapters, where the implications of this conception regarding the judicial function and legislative supremacy will be examined in greater detail.

#### V. SYSTEMATIZATION: HANS KELSEN, THE NORMATIVE ORDER AND THE SCIENCE OF LAW

On these bases, Kelsen refined the work of the positivists who preceded him by developing a theory of law. Kelsen was not a continuator of the positivist tradition of the 18th and 19th centuries but rather the most important innovator of legal positivism according to the context of the first half of the 19th century. The main points that allowed Kelsen to renew the objective of legal certainty pursued by positivism are set out as follows: 1) the identification of the State with law; 2) the location of law within the scientific field; 3) the continuation of the debate against natural law.

Regarding the recognition of the State as the sole source of normative production, Kelsen proposed the identification of the State with law. While for positivists of previous generations it was essential to recognize the State as the primary source of normative production, Kelsen developed a much more sophisticated theory of the authority of the State as a source of legal produc-

tion. This is a formal theory of authority, which is summarized by stating that authority is that which is empowered to issue legal norms. For Kelsen, valid law is that produced by State agents formally empowered to produce them; these powers are attributed to them by a tiered system of norms, with the Constitution at the apex. Thus, the legislator is an authority because it produces general laws, while administrative authorities and judges are formally producers of specific legal norms when they apply the laws or issue judgments, respectively. Moreover, all these norms form a legal order or system of specific legal norms that define the characteristics of the national or state normative order; thus, the State is identified as a normative system. Considering the coercive nature of legal norms, any State can be defined as a system of coercive norms:

But once it is recognized —as pure legal theory has done— that the State is a coercive order of human conduct; and once it is demonstrated —as that theory has also done— that this coercive order cannot be an order distinct from the legal one, because in a community there is not and cannot be but one coercive order constitutive of it, it is also demonstrated that every vital manifestation of the State, every “state act” must be a legal act: for no human action can be qualified as a state act except on the basis of a legal norm, by virtue of which, on the other hand, said action is imputed to the State, that is, to the unity of the legal order; and it is demonstrated, finally, that the State as a person is nothing other than the personification of the legal order, and that the State as power is nothing other than the efficacy of said order. In this way, the dualism of State and law disappears... (Kelsen, 2019a, pp. 93-94).

The identification of law with the State brought Kelsen sharp criticism of his supposed authoritarianism. These accusations are unfounded because, in addition to his democratic affiliation, they ignore the fact that this identity is merely formal. Kelsen never referred to the political and ideological content of these norms.

In other words, formally, a State is identified with the normative order for two main reasons: first, because the coercive system of norms is produced by the State bodies empowered to do so, and second, because the State is subject to that same normative order. If preferred, an act of authority is governmental as long as it is carried out or executed in accordance with the formal procedures established by that same State, which is independent of the political or ideological characteristics of that act. The proposed identity of the State with law is a continuation of the argument from authority put forward by the positivist tradition and existing in natural law on distinct philosophical grounds. It's a different matter to identify the state as democratic or authoritarian, which depends on the political-ideological content of the norms and not on the law itself or its sources of legal production. The same applies to identifying the state as a capitalist or socialist state, which depends on its specific economic policy and not on the law as a coercive system of norms.

Secondly, Kelsen, like none of his legal positivist predecessors, made the best effort to place law within the domain of science, something never attempted in the history of legal positivism with Kelsen's scientific scope and pretensions. To begin with, Kelsen divided the sciences into causal sciences and normative sciences, placing law in the latter field. Kelsen stated that the former aspires to acquire knowledge of facts and factual events by identifying causes, that is, the cause and its consequent effect; these sciences include, for example, physics, biology, and physiology. When human behavior is studied by identifying its causal laws, social sciences such as psychology, sociology, and ethnology emerge, all of which seek to explain human behavior by identifying its cause-and-effect relationships. Although the latter belong to the social sciences, they are causal sciences of the same species as biology, according to Kelsen. Normative sciences, on the other hand, ignore the principle of causality and apply the principle of imputation; they explain human behavior not as it develops in the factual or natural order, but in relation to the norms that prescri-

be how such behavior should unfold. Normative sciences include ethics and law (Kelsen, 2019b, pp. 24-25).

In the causal or natural sciences, the principle of causality implies that “if condition A is met, consequence B will occur.” Here, the condition is a cause and the consequence its effect. Furthermore, no human or superhuman will intervenes in the realization of the latter. This principle could be stated as follows: if a metal is heated, it expands. In contrast, the principle of imputation in normative sciences indicates that “if condition A is met, consequence B must occur”. Although the consequence does not always occur, a human act does intervene. It can be stated as follows: whoever commits homicide must be punished with imprisonment. This is clearly the realm of law (Kelsen, 2019b, pp. 26-27).

Law, as a normative science, is concerned with the study of legal norms, no more and no less; in other words, legal knowledge is directed toward understanding norms and their grouping in a normative system that confers the character of legal or unlawful acts on certain human behaviors:

As soon as law is determined as a norm (or, more precisely, as a system of norms, as a normative order), and legal science is limited to the knowledge and description of legal norms and the relationships they constitute between the facts determined by them, law is limited in relation to nature, and legal science, as a normative science, in relation to all other sciences that aspire to knowledge of factual events through causal laws. Thus, a secure criterion is finally achieved to univocally separate society from nature and social science from natural science (Kelsen, 2002, p. 89).

Now, here Kelsen made both a right and a wrong decision. While his placement of law within the normative sciences was correct, as was the delimitation of its object of study, in contrast, the definition of natural sciences as causal sciences is a mechanistic definition that is obsolete in the current conditions of scientific development and contemporary philosophy of science, even

from the moment of its formulation. Indeed, since 1934, when Kelsen published the first edition of *The Pure Theory of Law* and where he separated the sciences into causal and normative sciences, the sciences of nature as causal sciences was a notion that was beginning to be rapidly abandoned, mainly due to the discoveries of physics, the critique of classical mechanics, the development of Max Planck's quantum theory (1900), Einstein's theory of relativity (1905), and Niels Bohr's theory of the atom (1913), all of which would have revolutionary effects on the development of science and contemporary thought. Now, Kelsen's nineteenth century definition of science was an error that does not affect the position of law within the normative sciences. A strange paradox, Kelsen would be criticized for his causalist position regarding the natural sciences, which contaminated his precise statement that legal norms are the object of knowledge of the science of law.

#### VI. THE CRISIS: THE POST-WAR PERIOD AND THE RELATIVIZATION OF LEGAL CERTAINTY AT THE BEGINNING OF THE 21ST CENTURY

In general, legal positivism and the work of Hans Kelsen faced a crisis during the last third of the 20th century arising from three powerful fronts: first, the emergence of international human rights law; second, the formidable development of moral political philosophy that followed the publication of John Rawls, *A Theory of Justice* (1971); third, the notable renewal of natural law philosophy in the last thirty years with authors such as Ronald Dworkin with *Taking Rights Seriously* (1977) and John Finnis with *Natural Law and Natural Rights* (1980).<sup>1</sup> All three fronts constituted a renewal of the historical debate on natural law versus legal positivism, against which the latter was at a clear disadvantage after the humanitarian

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<sup>1</sup> A comprehensive account of the development of contemporary natural law can be found in Saldaña Serrano, J. (2012). *Derecho natural. Tradición, falacia naturalista y derechos humanos*. UNAM-Instituto de Investigaciones Jurídicas.

debacle caused by the Second World War. Indeed, the Universal Declaration of Human Rights (1948), promulgated by the United Nations General Assembly, and the subsequent development of human rights in international conventions set the tone for the doctrinal development of these rights linked to various ethical schools: Kantian, Aristotelian-Thomistic, and other diverse influences. Faced with such an intellectual challenge, after Kelsen, legal positivism lacked sufficient theorists to develop a new theory that would adapt to the context generated by human rights and confront the criticism of natural law and moral political philosophy.

Also contributing to this was Kelsen's unfortunate debate against natural law in his book *What is Justice?* (Kelsen, 1992). In this brief essay, and in his eagerness to criticize what he called natural law absolutism (the need for a standard of just conduct with absolute validity), he declared himself a moral relativist and conducted an insufficient investigation of moral political philosophy, particularly of thinkers such as Aristotle and Kant. This widely disseminated work contributed nothing to his *Pure Theory of Law* or to his debate in favor of democratic constitutionalism; on the contrary, it opened a vulnerable front for him due to the superficiality of its historical analysis of natural law (Kelsen, 1988). Furthermore, it appeared at a time when moral relativism was being overtaken by theoretical developments such as that of John Rawls, whose *Theory of Justice* ushered in the golden age of contemporary moral political philosophy. Paradoxically, both books were published in 1971.

The unfortunate consequence of the crisis of positivism at the end of the 20th century was the weakening of legal certainty, caused by the proliferation of a wide variety of supposed sources of norms, mostly of a political nature. This gave rise to an anti-enlightenment and anti-positivist movement that seeks rights where they do not exist; it seeks them beyond the rights contained in constitutions and international human rights treaties, and it is often judges who produce these rights without any support in positive law.

In this regard, representative bodies should proceed, through a democratic, rational, and balanced exercise, to affirm the human rights yet to be enshrined in international treaties. Indeed, although the State remains the primary source of positive norms, international law has been added as one more. In this regard, it should be kept in mind that the rights developed by doctrine or those promoted by some civil society organizations do not always refer to legal rights; they are often presupposed rights, as defined by Kelsen, that is, rights that lack positivity and binding force.

In short, the search for legal certainty, a central concern of Kelsen and the positivist tradition, survives as a fundamental theme of legal theory. However, this certainty is at risk of foundering in the face of the politicization of rights discourse that has occurred over the last thirty years. Indeed, the identification and demand for rights that do not exist in national or international legal norms that recognize them jeopardizes the main achievements of human rights by relativizing them and generating legal uncertainty regarding their scope. Legal certainty should be a concern not only of positivism, but also of judges concerned with the full validity of human rights. Human rights, once positivized in international sources, could represent the prelude to an international legal order that coordinates state legal systems, as Kelsen envisioned in his reflections on international law.