

## CHAPTER FOUR

### THE JUDICIAL FUNCTION IN HANS Kelsen: CREATION AND DISCRETION

#### I. INTRODUCTION: THE JUDICIAL FUNCTION IN HANS Kelsen VERSUS CLASSICAL POSITIVISM AND THE LEGAL ARGUMENTATION THEORIES

The examination of interpretation in Kelsen's work in the previous chapter now allows us to delve into a central aspect of his theory: the judicial function. In recent decades, the author's thinking on this subject has received little attention, both from his critics and from the disseminators of his theory; something surprising given the abundant literature on the judicial function, methods of interpretation, and theories of judicial argumentation.

Among the reasons for this lack of interest is Kelsen's clash with traditional positions of legal positivism. These strands of positivism, analyzed in chapter two, assigned an insignificant role to judicial interpretation and, in general, to the judicial function. Indeed, the positivism of the late 18th and early 19th centuries coincided with the period of codification and the prevailing view regarding the judicial function, which limited it to the benefit of the legislator. This was initially proposed by Montesquieu in *The Spirit of the Laws*, for whom "...the judges of the nation are, as far as we know, nothing but the mouth through which the law speaks, inanimate beings who can moderate neither its force nor its rigor" (1906, p. 237). Thus, the judicial function assumed a merely declarative role as a guarantee of certainty and predictability (Bobbio, 1993, pp. 92-94).

As we have previously explained, in England the legal positivists Bentham and Austin also distrusted judicial discretion, although in a different context. Bentham criticized the common law due to its unwritten nature and the wide margin of retroactivity for judges' decisions. Austin, for his part, pointed out the dispersion and incoherence of judicial law, its lesser accessibility compared to statutory law, and the difficulties in extracting a general rule from a ruling. Overall, these criticisms reinforced the idea that the judicial function should remain subordinate to the legislator, as otherwise legal certainty would be jeopardized.

If we add to these positions the onslaught of natural law, neo-natural law, realist and argumentation theories, we understand the little attention received by the judicial function proposed by Kelsen. After the Second World War, these approaches insisted on expanding the interpretive work of judges to incorporate moral or political principles into positive law. For example, for Ronald Dworkin the positivist model was incapable of accounting for the complexity of law and, to test the positivist theses, he put the problem of the judicial function on the table. While positivists such as Kelsen and Hart upheld the possibility of judicial discretion and interpretation (within the system of rules) when there is no rule applicable to the specific case, Dworkin proposed the identification of meta-legal principles for the resolution of such cases (Hart, 1998, p. 332).

Dworkin attacked the theory of the discretionary function of judges by enunciating the thesis of the "correct answer", which is found in the identification of legal principles to resolve difficult cases. He even proposed the metaphor of Judge Hercules, capable of finding those moral principles and values necessary to properly integrate the law, a metaphor clearly influenced by Plato, which appeals to the wise ruler to find the correct answer in the government of the *polis*. Dworkin also criticized the conception of law as a system or set of norms, as positivists claim; in his opinion, this view ignores that, alongside norms, there are political principles and guidelines identifiable by their content and

argumentative force as part of the law (1977, pp. 8–27, 43–60; 2014, p. 591).

Since the 1970s, these critiques gained ground and even went so far as to declare the end of legal positivism.<sup>1</sup> The consequence was a narrative centered on political and moral principles, which relegated the contributions of legal positivism and led to the politicization of law in several democracies. In this context, Kelsen's work was dismissed as excessively formalist, despite containing useful tools for understanding the jurisdictional function within a normative framework.

Thus, when reviewing Kelsen's most iconic work, it is evident that the judicial function does not appear as an independent treatise, but rather as part of a general framework. *Pure Theory of Law* devotes a specific segment to this topic, in the chapter on the hierarchical construction of the law, where it addresses issues such as the constitutive nature of the judgment, its connection with general norms, the discussion surrounding gaps in the legal system, and the power of courts to generate norms of general scope. This is a relevant, albeit limited, treatment that must be understood in dialogue with other sections of the work where the author alludes to the judicial function. Precisely for this reason, there is a need to reconstruct and articulate these ideas within a unified framework, so that the reader has an integrated and systematic view of Kelsen's conception of the judicial function.

## II. THE JUDICIAL FUNCTION AS A PRODUCER OF LEGAL NORMS

The examination carried out in chapters one and two allowed us to observe how the judicial function was relegated for a long

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<sup>1</sup> An example of this position can be found in Atienza, M., & Ruiz Manero, J. (2007). Dejemos atrás el positivismo jurídico. *Isonomía. Revista de Teoría y Filosofía del Derecho*, (27), pp. 7–28. Disponible en: <https://isonomia.itam.mx/index.php/revista-cientifica/article/view/384> (last consulted September 18, 2025).

time to a marginal role within classical legal theories, until it was reduced to a declarative role without creative capacity. In contrast, the work of the Viennese jurist offers a different framework, where the jurisdiction is an active part of the dynamic process of legal production. This conception is decisive in the construction of a model where judges do not function solely as enforcers of general norms, but also as producers of individual norms endowed with full legal validity. In this sense, Kelsen's analysis of the judicial function becomes a pillar of his normative theory, as it allows us to understand how judicial interpretation and decision are integrated into the legal system as acts of normative creation.

From his early writings, such as the *Grundriss einer allgemeinen Theorie des Staates*, Kelsen placed the functions of the state as essential to the creation of the state order and the self-production of the legal order. Following the traditional theory of the unitary conception of the state's power, he divided the state powers into three: the legislative, the executive, and the judicial, corresponding to the three *fundamental functions* of the state. These three are interrelated and produce the state's legal system and the dynamic theory of law.

Now, since every function of the State is a function of Law, the theory of the functions of the State must conceive Law in its functioning, that is, from the perspective of the *legal dynamics*. Therefore, the function of the State is *a function creator of Law*; it is the graduated (or staggered) and successive process of establishing the norms. If we take into account that the *three* traditional functions of the State can be reduced in principle to *two*, bringing together Jurisdiction and Administration within the *broad* concept of execution of laws, we can affirm that the contrast between creation and application of the Law, commonly expressed in the opposition between legislation and execution, between *legis latio* and *legis executio*, is by no means rigid and absolute, but only very relative; because it merely means the relationship between two successive stages of the process of producing Law.<sup>2</sup>

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<sup>2</sup> It seems there is not an English translation of *Grundriss einer allgemeinen Theorie des Staates*. Into Spanish it was translated by Recasens and Azcarate. See

This conception of law as a self-producing entity, in whose productive process the function of applying norms performed by the courts is included, was later developed and specified by Kelsen in his *Pure Theory of Law*. An essential characteristic of law is to regulate its own production, and in this task, judges and courts play a role of utmost significance by issuing judgments and individualizing the norm. Normative self-production is the essential sign of law's autonomy vis-à-vis other social science disciplines; in particular, it distinguishes it from political theory and schools of natural law.

Normative self-production occurs in different ways: when a norm prescribes the procedure through which another norm is produced, as occurs with the law-making process established in the Constitution, it is the most obvious of all. According to the dynamic nature of law, a norm is valid to the extent that its production process adheres to that established by another norm of a higher nature, recalling the vision of law as a system of staggered legal norms. The relationship between the norm that instructs how to create another is aptly represented by the "spatial image" of supra- and subordination. Thus, the regulating norm is the superior norm, and the created norm is the lower-level one.

In this sense, Kelsen points out that the legal system is a tiered system, that is, composed of norms at different levels and never of norms established at the same hierarchical level, as the school of legal concepts maintained. Thus, the validity of a norm rests on another higher norm that creates it, and this in turn on another higher norm. Within this tiered system of norms are the constitution, then the laws issued by legislative bodies, and finally, the rulings issued by judges, whose validity rests on the law applied by the judge to resolve a specific case (Kelsen, 2002, p. 232).

However, the creation of general and individual norms produced by the Constitution implies the determination of the State

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Kelsen, H. (1934). *Compendio de la teoría general del Estado* (L. Recasens Siches & J. de Azcarate, Trans.). Bosch-Casa Editorial, pp. 189-190.

bodies empowered to issue those norms. It is the Constitution that empowers the courts and judges to apply the general laws issued by the legislative body; even in common law systems, the Constitution itself grants this power to the courts (Kelsen, 2002, p. 232).

Thus, the constitutions of modern states establish legislative bodies specialized in creating general norms applicable to the courts and administrative bodies; for this study, we are interested only in the courts, that is, those charged with the jurisdictional function. However, the articulation of these three levels (constituent power, legislative power, and courts) is not always necessary. Occasionally, the constitution omits the legislature and the law, empowering the courts directly to produce the norms they will apply in specific cases (Kelsen, 2002, p. 235).

By asserting that the courts produce law, Kelsen opposed the German Historical School, led by Savigny. As previously explained, this school held that law was created and validated by the spirit of the people and not by legislation or custom; consequently, its roots were deeply rooted in the identity of the German people. Kelsen also opposed the sociological theory of French law, which replaced the notion of the people with that of social solidarity. For Kelsen, both the German Historical School and the French sociological school were based on pre-existing rights, not established by legislation or customary law, and were therefore variants of the doctrine of natural law, whose dualism resides in the existence of a law prior to state production, and another produced by human beings through the state. In contrast, the law created by positive law is solely a human creation and is reflected in legislation and custom (2002, p. 238).

The first task of the court is to determine whether the customary or statutory rule is produced in accordance with the procedures of the Constitution. However, the relationship of the courts as those charged with the application of customary law is not entirely different from the application of statutory law. Indeed, comparatively, the court charged with the application of customary law must clearly establish whether custom produced

a customary rule, just as the court charged with the application of a rule produced by legislation must ascertain the validity and follow-through of the production process of the legislative rule to be applied (Kelsen, 2002, p. 232).

However, rules established by legislation or customary law must be applied by competent courts. Consequently, these enforcement bodies must be empowered by the legal system; in other words, the legal system must specify under what circumstances a particular person acts as a judge or a group of persons as a court, as well as the procedures by which general rules will be applied (Kelsen, 2002, p. 240).

The application of a rule to a specific case through a judgment involves the production of an individual legal rule. Sometimes, the general rule stipulates or determines how the particular rule produced by the court or judge should be concretized or individualized; however, on other occasions, it does not specify this, and it is up to the judicial body to perform an interpretation. Thus, in Kelsen's opinion, general rules addressed to judicial bodies have a dual effect:

- a) Determine the conditions under which these bodies are competent, and
- b) Specify the content of the rules produced in the resolutions and sentences of the judges (2002, p. 240).

According to Kelsen, these two functions correspond to the two main types of legal norms existing in the legal framework: formal or procedural norms and substantive or fundamental norms. Formal law refers to all norms regulating the organization and conduct of the courts, such as codes of civil or criminal procedure; while substantive law determines the material content of judicial acts, resolutions, and judgments, as is the case with any of the main legal disciplines. For a judge's judgment to be valid, it must adhere to both procedural and substantive law, since both normative systems are intrinsically related, and the validity

of the individual norm produced by the judicial body depends on their compliance (Kelsen, 2002, p. 241). As noted in previous paragraphs, the general norms produced in accordance with the Constitution not only specify the procedure and jurisdiction of the judicial body but frequently also the material content of the judgments as individual norms. This is particularly true in criminal law, where the discretion and free judgment of criminal judges in issuing their sentences is reduced (Kelsen, 2002, p. 242).

This self-restraint of criminal judges, postulated by Kelsen, is inherited from the Enlightenment tradition of Beccaria's criminal law and has been attacked in recent decades by the anti-Enlightenment theory of the criminal law of the enemy. According to the argument of Jakobs, one of its main theorists, the criminal law of the enemy does not punish an illicit act sanctioned by criminal laws but rather the potential risk of an individual who is allegedly dangerous to society due to his repeated behavior. In other words, the essentialist theory of the person as enemy obliges the State to impose an anticipated sentence qualified as a security measure to prevent future criminal acts. While classical criminal law punished a past act considered a crime, in contrast, the criminal law of the enemy combats future dangers and attempts to eliminate the danger by bringing forward punishability and directing the sentence to future events, and not to the sanctioning of past acts (Jakobs and Cancío Melía, 2003, pp. 23, 32, 33, 38 and 40).

Kelsen's position on the judicial function reaffirms the idea of a law in permanent normative construction, where each judgment is integrated into the system as a creative act with full legal validity. By placing judicial production within the same creative dynamic characteristic of other state bodies, Kelsen breaks with the classic and reductionist view of the judge as a mere enforcer of the law. This conception opens the door to the analysis of jurisdictional decisions not only as individual acts, but also as sources through which the process of normative self-production is completed. The following section is precisely focused on this

point, aimed at examining how judicial decisions are inserted into the system of rules and become an essential part of the positive legal framework.

### III. THE JUDICIAL FUNCTION AS NORMATIVE SELF-PRODUCTION AND THE SYSTEM OF RULES AS A FRAME OF REFERENCE

As previously stated, one of Kelsen's main contributions to the study of judicial decisions is to consider them as sources of law. In this sense, their role is not only as measures for the simple application of current law, just as the school of classical positivism considered it. For Kelsen, legislation and custom are considered the traditional sources of law, the essential sources, so to speak. However, in his opinion, the individual legal norms contained in judgments are also sources and form part of positive and current law. As sources of law, they constitute the next lower level of the general norms on the basis of which they were produced (Kelsen, 2002, p. 243).

In this sense, the Constitution is the source of the general legal norms produced by the state apparatus; in turn, the general legal norm is the source of the judgment issued by a court or judge and constitutes an individual norm; finally, the judgment must be considered the source of the obligations and rights stipulated between the litigating parties and the authorizations granted to the authority for the execution of the judgment. All these sources are the only ones relevant to the jurist. It should be kept in mind that the term "sources of law" also refers to non-positive legal sources such as any type of representation influential in the creation of law, such as moral and political principles, social facts, legal theories, and doctrine which are irrelevant to Law. While positive legal sources are binding, the rest are not unless a positive law rule grants them that status (Kelsen, 2002, p. 243).

When postulating the State as the producer of positive law, it is very important to keep in mind that a norm belongs to a specific legal community because it was produced in accordance

with the procedures and guidelines dictated by a norm of that same legal order, by the Constitution, and, ultimately, based on the determinations of the basic founding norm of a given state legal order. Essential to Kelsen's considerations is the assumption that the application of law is, at the same time, the production of law. Unlike traditional theory, there is no opposition between legal application and production: "It is erroneous to distinguish between acts of production and acts of application of law... every legal act is simultaneously the application of a higher norm and the production, determined by it, of a lower norm" (Kelsen, 2002, p. 244).

In the ideal Plato's state, judges can resolve all cases at their own discretion, without being limited by a general norm and guided solely by the idea of good and divine justice (Plato, 2020, pp. 332-342; 1999, pp. 201-204). This is not the case in Kelsen's state design, where, on the one hand, jurisdictional decisions are based on a higher norm that determines both the jurisdictional body empowered to issue it and the procedure to be followed in its application; and, on the other hand, in some cases, it also determines the content of the norm.

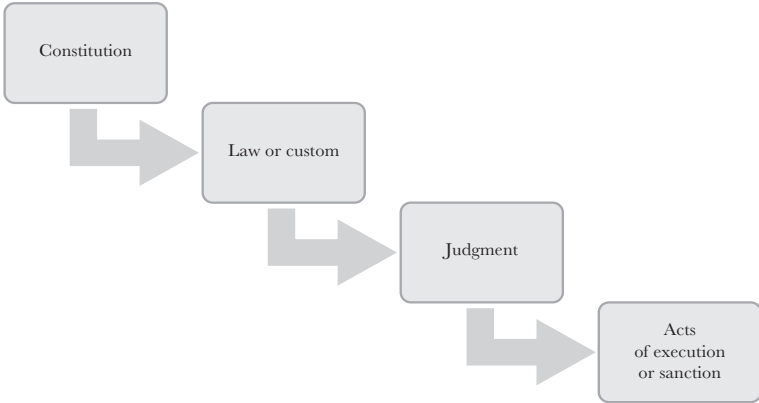
However, in many other cases, only the clarification of the jurisdictional body and the procedure is required, without saying much or nothing about the content of the decision; in this case, the court or judge will be responsible for establishing that material content. If the material content of decisions and judgments is not determined, the jurisdictional bodies are prevented from acting freely or resorting to political and moral principles to provide content for their decisions and must submit to the system of rules from which they derive their powers and the procedures for their action. This is because, ultimately, their decision will always be the result of the application of a general rule that determined the conditions under which they ruled (Kelsen, 2002, p. 245).

This is the role played by the court ruling, an act inherent to the jurisdictional function. This function in no way has a merely declarative character (as the word "jurisdiction" seems to imply

and as current theory assumes) as if the Law were already concluded in the law, that is, in the general norm, and should only be expressed or found in the act of the court. This is not the case, rather, the function called jurisdiction is absolutely constitutive of Law, it is productive of Law in the proper sense of the word. For the singular determination of a concrete factual situation, to which a specific legal consequence must be linked, and the particular linking of this consequence to that situation, constitutes a form of creation of Law, which is verified in the judicial sentence; and only through it can it be carried out. That is why the judicial sentence is an individual legal norm; it is the individualization or concretization of the general or abstract norm; it is, in short, the continuation of the producer and determining process of Law that goes from the general to the particular. The lack of clarity of this Kelsenian postulate came from the prejudice of reducing law to the general norm, in other words, of the erroneous identification between Law and law.

Kelsen's conception of the dynamics of law, the judicial decision, although in an intermediate zone, is located almost at the end of the process of legal production, which begins with the Constitution. It is then followed by the issuance of a general norm resulting from legislation or custom, and these then lead us to the judicial judgment or resolution. Thus, the production of legal judgments by the courts involves an act of individualization and determination of law in an uninterrupted and staggered manner, as shown in figure 2.

FIGURE 2: THE DYNAMICS OF LAW AND THE TIERED ORDER

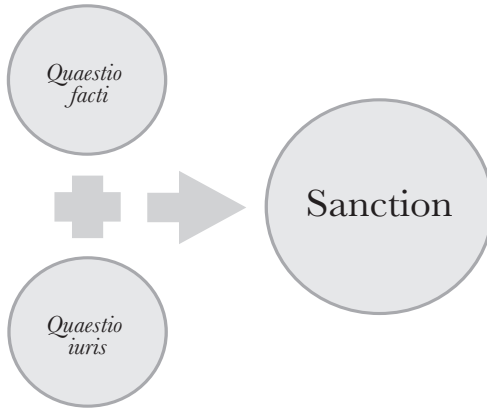


SOURCE: Prepared by the author based on Kelsen, 2002, p. 246.

As can be seen in figure 3, the judgment is not yet at the base of the scale of legal norms; after these are still the acts of execution or sanctions produced by the same judgments or judicial resolutions.

To apply the general rule, the court must determine whether the case under review meets the abstract conditions established in the general rule to identify the specific sanctioning consequence provided for therein. This requires two steps: first, determining whether a valid general rule exists, and second, linking the fact to a specific sanction. As shown in figure 3, the court must answer a question of fact (*quaestio facti*) and a question regarding the existence of the right (*quaestio iuris*). Once these two checks have been made, the body can now specifically order the sanction established *in the abstract* by the rule, as explained in the following figure.

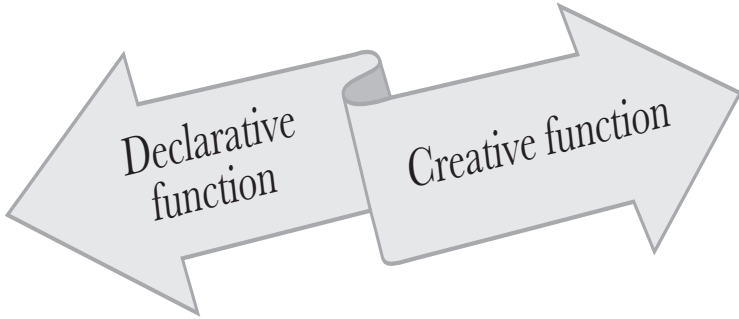
FIGURE 3: CONDITIONS OF THE JURISDICTIONAL ACT



SOURCE: Prepared by the author based on Kelsen, 2002, pp. 246-247.

In other words, a court ruling lacks a merely declarative nature, as most people and even many jurists assume. The function of the judicial body is not merely to discover and reformulate the law established by the legislative assembly, as something concluded, fixed, and closed to any process of normative production. On the contrary, as illustrated in figure 4, jurisdiction has a dual function: first, it is declaratory when it discovers and formulates the law applicable to the specific case; and second, it is constitutive and produces individualized and concrete norms.

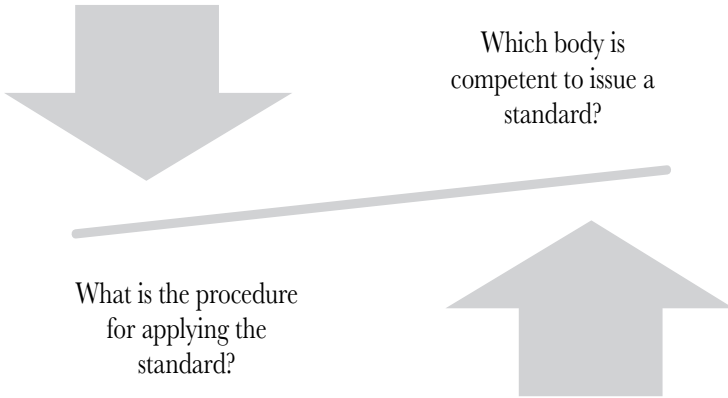
FIGURE 4: THE DUAL FUNCTION OF THE COURT



SOURCE: Prepared by the author based on Kelsen, 2002, p. 247.

Regarding its first function, when the court must apply to a specific case rules generally recognized as valid in a legal system, it must determine whether the applicable rule was issued by the constitutionally empowered body and in accordance with the constitutionally recognized procedure, whether by legislative or customary means. Thus, the first question a jurist must ask when resolving a specific case is to determine which body is competent to determine the application of a rule and, secondly, what procedure is provided by the legal system for applying that rule (Kelsen, 2002, pp. 247-248). These two questions posed by the jurisdiction are illustrated in figure 5.

FIGURE 5: THE JUDGE'S DOUBLE QUESTION



SOURCE: Prepared by the author based on Kelsen, 2002, p. 248.

Thus, the Kelsenian conception allows us to understand the judgment not only as the outcome of a dispute, but as a constituent part of the normative machinery. By recognizing it as a source of law, the reductionist view of classical tradition is overcome and its role in the continuity of the staggered process of determining law and legal production is affirmed. This perspective grants the judicial body an active role in the dynamics of the legal system, without exceeding the limits of the system of rules that empowers it. From here, the ground is prepared to address an immediate consequence of this production: the coercive nature that every norm acquires when it becomes an individualized mandate through a judicial decision, a decisive aspect in the structure and validity of positive law.

#### IV. THE COERCIVE NATURE OF THE LAW BY JUDICIAL ORDER

The recognition of the judgment as a source of law within the normative framework, explained in the previous section, naturally

leads to the question of its binding force. It is not enough to affirm the creative function of jurisdiction without examining how this creation becomes effective within the legal system. For Kelsen, the validity of an individual norm is related not only to its insertion into the normative hierarchy, but also to its coercive nature, an essential element in defining law as a specific order compared to other systems of social regulation.

The fact that a constitutional norm is not clearly a coercive act, as it is a general norm located at the highest level of the legal system, does not imply that the norms of constitutional law lack that character, and in Kelsen's opinion, this is not sufficient reason to reject the definition of law as a coercive order, as some classical constitutionalists assume. Precisely the verification carried out by the judicial body regarding the validity and constitutionality of the norm to be applied to a specific case makes that norm obligatory, and this is where its coercive character lies. In other words, the coercive character derives from the determination of the constitutional validity of the norm. The verification in the judicial ruling that the norm was produced constitutionally makes that norm obligatory and applicable to the specific case, a situation that did not exist before the declaration.

Thus, the acts of enforcement of the norm and the specific sanction possess a constitutive and coercive character at the same time. Indeed, the specific norm, by establishing a specific sanction against a specific person, is created by the judgment and was invalid before its issuance by the judicial body. This method of producing norms overcomes the persistent prejudice held by jurists of considering law only as composed of general norms and ignoring judgments as individual legal norms that provide continuity to the process of creating law and define its coercive nature (Kelsen, 2002, p. 248).

Notwithstanding the constitutive nature of the individualized rule in the judgment, when the parties to the trial consider the determination contained in the judgment to be incorrect, they may object to it in a higher court and, once this controversy is re-

solved, the judgment will acquire the nature of *res judicata* and an objective meaning for the litigating parties, concluding the process of creating a new legal rule (Kelsen, 2002, p. 249).

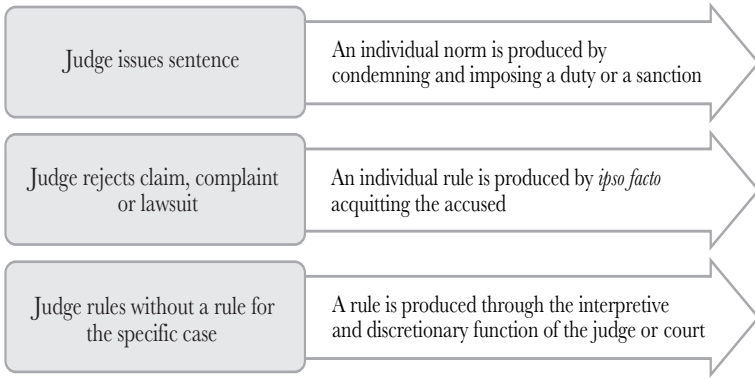
In this way, the coercive aspect of the judgment cannot be understood as incidental, but rather as a constitutive condition of its legal existence. The judicial decision individualizes the sanction and makes a previously latent provision mandatory, granting the law its ability to impose itself on social life. With this approach, Kelsen distances himself from both classical formalism and moralizing views, emphasizing that coercion arises from the normative process itself. This perspective opens the way to the analysis of the following problem: the scope of judicial discretion in the absence of general norms and the way in which the jurisdiction responds by creating law in cases where the legislator remains silent.

#### V. NORMATIVE PRODUCTION IN THE ABSENCE OF NORMS AND RANGE OF JUDICIAL DISCRETION

Although the production of positive law by the jurisdictional bodies is evident when the court or judge admits the claim or complaint and issues a ruling on its merits, it is not so when they reject the admission, acquitting the accused *ipso facto*; however, such an act by the judge also creates positive law. Indeed, the judgment produced by applying the valid legal order has constitutive effects, and it also has them when the jurisdiction rejects the claim or acquits the accused because it considers that there is no valid general rule linking a sanction to the conduct of the defendant or accused in a criminal case. Thus, the legal order regulates human conduct not only when it mandates a certain behavior, making it obligatory, but also negatively when it permits a conduct by not prohibiting it. Both cases are acts constituting law, because what is not legally prohibited is legally permitted. By rejecting the claim or acquitting the accused, the court applies the legal order, allowing the defendant or accused to engage in the conduct that produced the judgment in the claim or complaint which lacks a rule (Kelsen, 2002, p. 252).

It is also possible for the legal system to authorize the court to issue a rule when there is no general legal rule imposing a specific obligation on the defendant or accused. Thus, judges have three different avenues for producing law, as illustrated in figure 6.

FIGURE 6: THE DIFFERENT FORMS OF NORMATIVE PRODUCTION OF THE JURISDICTION



SOURCE: Prepared by the author based on Kelsen, 2002, pp. 248-249.

In the latter case, the court is empowered to develop an individual legal rule for the specific case in dispute, the content of which is not predetermined by a general rule produced by legislation or custom. It may also happen that the court does not apply the legal rule it considers unjust, invalid, or unconstitutional and, instead, applies one that empowers it to create substantive or fundamental law (Kelsen, 2002, p. 253).

Although some jurists claim that the judicial body acts similarly to the legislature, this comparison is not accurate, since legislation produces general legal norms, while the judicial body is only authorized to produce individual norms valid for the specific cases in question. Furthermore, it must be considered that the judicial body's discretion is less than that of the legislature, whose discretion is barely limited by the broad powers granted by the Constitution to produce general norms (Kelsen, 2002, p. 253).

Even when the content of the individual legal norm produced by the court is delimited by a general rule, a certain amount of discretion must be provided for by the judge or court in the law-making function. This is because it is impossible for the general rule to foresee all the factual circumstances of specific cases. Indeed, the general rule is merely a frame of reference within which the individual norm produced by the court must be produced within this narrow or broad framework. For example, in rules regarding moral liability, it is impossible to foresee all possible damages and the amounts of compensation, which the judge determines by considering the entire context of the affected person, social, and economic. The scope for discretion is very broad when the general rule only authorizes the production of individual legal norms without predetermining their content, as in the example of moral damages and their compensation; in contrast, it is narrow when it leaves little room for judicial discretion, as should be the case in criminal matters (Kelsen, 2002, pp. 253-254).

It should be noted that when no general rule establishes the content of the individual rule to be issued by the court, this individual rule has retroactive force. The same occurs when the judge or court applies to the case under consideration an individual rule created by them, which content was not defined by any general legal rule. Indeed, when the individual rule links a sanctioning consequence to conduct, at the time it occurred, it did not constitute any unlawfulness, and it becomes unlawful precisely through the individual rule established in the court ruling (Kelsen, 2002, p. 254).

Now, the act of creating individual rules by the judge or court in the absence of a rule for the specific case prevents the emergence of what traditional theory calls gaps in the law. Indeed, the legal system is always applied by a jurisdictional body to resolve any specific case, even if that legal system does not have a general rule to regulate the conduct of the defendant or accused; in other words, when it does not impose a specific obligation that the plaintiff or public prosecutor points out as unfulfilled. This

is because such conduct is negatively regulated; that is, since it is not legally prohibited, it is consequently permitted by the legal system, which prevents the existence of the alleged gaps in the law (Kelsen, 2002, p. 254).

According to the traditional school of thought that postulates gaps in the law, valid law lacks a specific rule to resolve a specific case, and the court resolves by filling the gap by producing an individual rule. The essential argument of the classical school lies in the observation that the application of valid law is logically impossible, given the absence of a major necessary premise, that is, the existence of a general legal rule. Kelsen points out that this theory is erroneous because when the legal system does not impose obligations on an individual, their behavior is permitted. For Kelsen, “the application of the valid legal order is not logically impossible” because while there is no such rule as a kind of major premise, in contrast, the application of the legal order as a system is possible because it possesses an internal logic; in other words, the logical application of the law is not excluded. Those who postulate the existence of gaps in the law actually do so to create a rule located outside the legal order and the system of rules, and they obey political and moral reasons (Kelsen, 2002, pp. 255-256).

Kelsen’s denial of gaps in the law reveals the internal consistency of the legal system, capable of always offering a normative response without needing to resort to external moral or political criteria. In this view, even the absence of an express obligation is transformed into authorization, which reaffirms the self-sufficiency of positive law. Thus, judicial discretion does not represent an uncontrolled void, but rather a power limited by the institutional framework that delimits both the bodies and the procedures. The conclusion is clear: in Kelsenian theory, jurisdiction never operates in a space devoid of rules, but within a dynamic structure where each decision produces law and preserves the validity of the system. Against this background, the following problem becomes better understood: how the courts, in addition to pro-

ducing individual norms, can generate provisions with general implications, an aspect that opens the door to the analysis of the following topic.

## VI. THE PRODUCTION OF GENERAL RULES BY JUDICIAL BODIES

The preliminary examination of normative production in the face of judicial silence and judicial discretion allows us to take a further step toward a broader dimension of the courts' work. It is not only a matter of resolving specific cases through individual rules, but also of recognizing that, under certain conditions, judicial bodies generate provisions with general scope. This transition opens the discussion of precedents as a manifestation of the judicial function in its creative aspect, where an isolated decision becomes a rule with expansive force for similar cases.

Judicial bodies, especially courts of last resort, in addition to the specific and individualized rules issued when resolving specific cases, can also produce general rules, which occurs, for example, when they issue so-called precedents. A precedent arises when the solution provided by the judicial body for a specific case is applicable to similar cases, producing substantive or fundamental law. It must always be kept in mind that precedents are only binding on similar cases, and consequently, determining whether the cases are similar takes on paramount and decisive importance. Here, one could criticize Kelsen by pointing out that no case is exactly the same as another; however, Kelsen himself recognizes that cases are never exactly the same in all respects. Consequently, the equality of cases that interests us for the production of precedent consists of their "agreement with respect to certain essential points". The question of what these essential elements are can only be answered based on the general rule itself, created as a precedent, since there are the facts on which the judicial decision was made, that is, their equality or similarity with the facts referred to and the reasoning provided by the jurisdiction, which

will make the precedent applicable to other cases (Kelsen, 2002, p. 259).

In Kelsen's view, when courts produce general norms through precedents, they begin to compete with the legislative body, and this situation can give rise to two basic types of legal systems. In the first type, the production of legal norms is entirely concentrated in the legislative body, which is the only body empowered to produce them; here, the courts can only apply general norms to specific cases previously determined by the legislature. These centralized models are inflexible in the face of changing social circumstances that judges and courts must face. In addition, in democratic systems, broad legislative consensus is required to amend or enact laws. However, these legal systems offer the advantage of legal certainty, where the decisions of judicial bodies are to a certain extent predictable, and the expectations of the litigants are relatively guided as to the fate of their claims (Kelsen, 2002, pp. 259-260).

The opposite of this system is one in which the legislative act is decentralized and, consequently, judges and courts must rule according to their free interpretation. This system is justified by the thesis that no case is entirely similar to another and that the application of general rules that predetermine the content of judicial decisions will produce unsatisfactory results due to the unrestricted adherence of the judicial bodies to these rules. A radical decentralization of normative production, even if flexible, lacks legal certainty. Consequently, in this system, the parties subject to a trial cannot in any way predict the outcome of the judicial decisions in which they are involved, nor can they know what is prohibited and what is permitted and will only experience the consequences of the judicial decision. Typically, this system is based on the demand for greater flexibility in the name of a presupposed justice which can be extremely difficult to define; this is a way of expressing the school of free interpretation of law initiated by Plato (Kelsen, 2002, p. 260).

For Kelsen, a variant of the school of free interpretation of law is found in realist theories, which postulate that since cases

are distinct from one another, a ruling cannot be based on a general legal norm produced externally by the legislative body, but rather on a norm centered on the “reality” of the specific case itself. Here, just law is associated with social reality and can only be found through a careful examination of society and never in general, abstract state legislation (Kelsen, 2002, pp. 260-261).

Kelsen considers common law to be a separate system, where general rules are not primarily produced by the legislative body but rather come from custom and are applied by the courts. This system is especially favorable to a judicial system that works by precedent and is characteristic of Anglo-American models. However, the theory emanating from common law when it maintains that only the courts produce law, it is as “unilateral” as the European statutory law systems where it is considered that the judicial bodies do not produce any law, and only apply a law previously created by the legislative assembly. While continental law maintains that there are only general rules, the common law system only recognizes individual norms. For Kelsen, the truth “lies halfway”. Indeed, judicial bodies do produce law, generally in the form of individual norms, and, exceptionally, they have a general character through the issuance of precedents.

FIGURE 7: NORMATIVE PRODUCTION SYSTEMS



SOURCE: Prepared by the author based on Kelsen, 2002, p. 260.

The study of the production of general rules by the courts shows Kelsen's balanced position in relation to the extreme conceptions of continental law and common law. Far from reducing the jurisdictional function to the simple application of general rules or absolutizing it as the sole source of law, his approach recognizes in judgments an intermediate space for the creation of regulations with both individual and general effects. This perspective allows us to assess the role of jurisdiction within a tiered legal order and, at the same time, directs reflection toward the ultimate meaning of the judicial function in Kelsenian theory, an issue that requires a broader and more critical look in the final section of the chapter.

## VII. FINAL REFLECTION

A review of the various sections shows how jurisdiction, in Kelsen's view of judicial function, does not occupy a secondary place within

the system; on the contrary, it intervenes in the production of law through decisions with normative effects. Rather than being reduced to a voice reproducing the legislator's will, the judge becomes a decisive actor within the dynamics of the legal system, without breaking with the hierarchical structure that guarantees coherence and validity.

An analysis of the judicial function as a creator of individual norms and even general norms through precedents reveals the ongoing tension between predictability and flexibility. Kelsen's conception does not ignore the value of legal certainty, but neither does it deny the need for spaces of regulated discretion. The judicial ruling expresses this dual condition: on the one hand, it maintains continuity with higher norms; on the other, it introduces unique determinations to respond to the demands of each case. This avoids both absolute rigidity and arbitrariness.

The coercive nature of law, highlighted in these pages, confirms the importance of judicial intervention. An individualized rule not only closes a dispute but also transforms an abstract possibility into a concrete mandate endowed with binding force. Jurisdiction gives practical life to the system, as it translates general provisions into enforceable orders. In this operation, the core of normative positivism is clearly observed: validity rests on proper production, and coercion guarantees social effectiveness.

Reflecting on the silence of the law and the supposed existence of gaps in the law also provides a fundamental nuance. Contrary to traditional concepts that imagined impossible to fill the gaps, Kelsen maintains that all non-prohibited behavior is permitted. From this perspective, the judge never faces an absolute void, but rather the task of defining the scope of what is permitted or punishable within the regulatory framework. Jurisdiction thus appears as a creative body, but one always limited by the tiered structure of the law.

Regarding the production of general norms, a comparative analysis between centralized and decentralized systems shows the importance of maintaining a balance. Kelsen recognizes that

precedent can become a source of law, although he warns of the risks of a judiciary that replaces the legislature. The contribution of this perspective is to emphasize that judicial creativity does not constitute unlimited power, but rather a controlled derivation of the legal system. Consequently, pure theory maintains its coherence as a system while explaining specific phenomena in legal practice.

These ideas compel us to reconsider common perceptions of the judicial function. Classical tradition reduced it to a declarative office; critical currents expanded it to conceive it as a broad political exercise. Kelsen proposes a middle ground: jurisdiction creates law, but it does so within a framework that preserves the unity of the system. This position invites reflection on the role of judges in today's democracies, where the tension between security and justice remains open.

In summary, the review undertaken in these pages allows us to recognize the judicial function as a decisive axis in the architecture of modern law. A review of classical positivism clearly shows how reducing the role of judges to a purely declarative role proved functional in historical contexts where codification sought to guarantee certainty and predictability. However, this conception soon demonstrated its limits by obscuring the creative capacity that inevitably accompanies the application of law. The work of Hans Kelsen appears in this context as a turning point, as it proposes understanding the judge not only as an enforcer of general norms, but as a participant in a continuous process of normative production.

*Pure legal theory*, by conceiving the legal system as a dynamic system of graduated norms, grants the judge a constitutive role within the normative framework. The judgment ceases to be the passive voice of the law and becomes an individual norm with full legal validity. In this framework, each judicial decision is not limited to closing a particular dispute; on the contrary, it is integrated into the system as an act of lawmaking. The originality of this approach lies in its ability to show how the application of law

is simultaneously the production of law, such that there is no rigid boundary between legislating and judging, but rather a continuity of functions within a process of normative self-production.

Kelsenian analysis takes on greater relevance when considering coercion as an indispensable element of law. It is not enough to affirm the existence of individual norms created by judges; it is necessary to emphasize that these norms acquire binding force and are imposed through acts of execution. Judicial decisions transform abstract possibilities into concrete mandates, thereby demonstrating the normative system's social effectiveness. This dimension distinguishes law from other normative orders, such as morality or religion, by emphasizing its validity in the capacity to compel and sanction.

The reflection on normative silence and the supposed existence of gaps in the law adds a decisive nuance. In contrast to currents of thought that imagined impossible-to-fill gaps, Kelsen maintained that all non-prohibited behavior is permitted. This assertion eliminates the idea of absolute gaps in the law and places the court in a creative position, one always limited by the institutional framework. The judge does not act in a realm without rules, but within a system where discretion is channeled toward controlled normative solutions. The originality of this position lies in its rejection of the use of gaps to justify the introduction of external moral criteria, since the law itself possesses mechanisms to resolve any case.

An examination of the production of general norms through precedents complements this view. For Kelsen, judges, in certain circumstances, generate provisions with general scope; however, he warns of the risks of equating such production with legislative production. The balance lies in recognizing the creative value of jurisdiction without absolutizing it. Neither the classic reduction, limiting the judge's role to that of a mere enforcer, nor the exaggeration of some contemporary models that turn the judge into a covert legislator, are satisfactory. Kelsen's proposal invites us to consider the judge as a controlled producer of law, whose indi-

vidual and even general decisions are always inserted within the hierarchical structure of the normative order.

This review reveals that the debate on the judicial function is not limited to the historical sphere. In contemporary democracies, the tension between legal certainty and substantive justice, between predictability and flexibility, persists. The Kelsenian perspective offers a middle ground to avoid both empty formalism and the excessive politicization of the judicial function. By emphasizing that judicial production is limited by higher norms, *Pure Theory of Law* provides a framework for understanding the legitimacy of decisions without appealing to indeterminate moral principles. At the same time, by recognizing the creativity of judges, it opens up space for responding to the complexity of social life without sacrificing the coherence of the system.

In this sense, the final reflection invites the reader to reconsider the traditional image of the judge. Far from being a subordinate actor or a covert legislator, the judge, in Kelsen's view, is an agent who ensures the continuity of law through concrete normative decisions. His task is not to discover a pre-existing law or invent solutions outside the system, but rather to produce law within a self-regulating and self-reproducing order. This conception remains relevant in current contexts, where the judiciary faces growing demands for grounding, transparency, and democratic legitimacy.

The contribution of this research is to systematically articulate Kelsen's disparate ideas on the judicial function and present them in dialogue with contemporary legal issues. In doing so, it not only recovers the richness of Kelsenian theory but also offers the reader a critical tool for assessing the limits and scope of jurisdiction in democratic societies. However, one question remains unavoidable: how far can judicial creativity go without jeopardizing legal certainty? The answer lies neither in the exaltation of discretion nor in its absolute suppression, but in the construction of a balance, the same one to which Kelsen aspired when he placed the judge within a process of normative self-production.

Thus, the conclusions are not intended to close the debate, but rather to encourage its continuation. The judicial function will continue to be a subject of dispute in a world where social demands change rapidly, and judges are forced to respond with decisions that go beyond specific cases. Returning to Kelsen's approach does not mean returning to the past but rather finding in it a starting point for critically reflecting on the present and projecting into the future a conception of jurisdiction that integrates security, creativity, and legitimacy.