

BETW E

Between Application and Creation

KELSEN'S CONCEPTION OF
THE JUDICIAL FUNCTION
VERSUS CLASSICAL POSITIVISM

FRANCISCO ALBERTO IBARRA PALAFOX
JAVIER HERNÁNDEZ MANRÍQUEZ



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*Kelsen's Conception of the Judicial Function
versus Classical Positivism*

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UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO
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INTRODUCTION

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

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

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

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

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

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

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

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).¹ 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

¹ 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.

CHAPTER TWO

THE JUDICIAL FUNCTION IN CLASSICAL POSITIVISM: CONTINENTAL CIVIL-LAW AND COMMON-LAW ANALYTICAL TRADITION

I. PROBLEM STATEMENT AND DELIMITATION

The analysis of the judicial function in classical positivism requires an initial framework to define the chapter's purpose and establish its boundaries. The main objective is to show how the role of judges was shaped in a legal model characterized by the certainty and supremacy of law. The discussion begins with the political foundations of state sovereignty and proceeds to the responses offered by the continental and anglo analytical traditions to the problem of applying the law. Following the considerations outlined at the end of the previous chapter, which highlighted the contemporary crisis of legal certainty in the face of the proliferation of sources of law lacking formal recognition, this section returns to the classical model to examine how the judicial function was once conceived as a mechanism of security and predictability. This provides a structured view of legal modernity, where the judiciary appears as a power subordinate to the law, devoid of creative leeway and limited to the execution of legislative mandates.

The periodization of this model falls between the eighteenth and nineteenth centuries, a stage in which confidence in state power and written law as guarantors of predictability crystallized. The Napoleonic Code of 1804 and French exegesis became symbols of the continental tradition, while the German histori-

cal school tempered this rigidity by affirming the historicity of law. At the same time, in England, Bentham's utilitarianism and Austin's command theory outlined an analytical positivism that transferred certainty to a system of orders issued by the sovereign, relegating custom and case law to a secondary role. The analysis of both traditions reveals a shared horizon: the need to contain judicial discretion and ensure uniformity in the application of law.

This chapter, therefore, is organized around these two strands. The first part focuses on the continental tradition, highlighting both the cult of the text promoted by exegesis and Savigny's historical reaction to the risk of excessive formalism. The second part addresses the analytical tradition, where Bentham's critique of the common law and Austin's theory of statutory law demonstrate the radical nature of a model that subordinated all legal sources to the sovereign's command. This division does not suggest an isolated treatment of these currents, but rather a comparative effort to illustrate convergences and tensions surrounding the judicial function.

The relationship with the previous chapter is evident. The first chapter offered a broad overview of the legal positivist tradition, highlighting legal certainty as a guiding principle from the *Corpus Iuris Civilis* to Kelsen's *Pure Theory of Law*. On that basis, this second chapter narrows the focus to a specific dimension: the role of judges in the classical model. It moves from a general analysis of positivism to a specific study of the judicial role, thereby clarifying how legal certainty was sustained in a system of subordination of the courts to the legislator. In this way, the book's guiding thread maintains continuity and coherence by articulating the history of legal ideas around a specific problem.

Finally, this approach opens the bridge to Kelsen's thought. If the classical model restricted the judicial function to the mechanical application of the law, the Austrian jurist elaborated a more complex normative theory in which judgments are conceived as individualized norms within a hierarchical system. The

transition is not understood as an absolute rupture, but rather as a critical overcoming of an exhausted paradigm. Consequently, the conclusion of this chapter introduces the crisis of the classical model and the need to conceptually rethink the judicial function, preparing the ground for the following chapters, which will examine in greater depth the *Pure Theory of Law* and its understanding of the judicial function.

II. PREMISES OF THE CLASSICAL MODEL: SOURCES, LAW AND CERTAINTY

The classical model of legal positivism was built upon complete trust in the law as the central and exclusive source of law. The affirmation of state sovereignty implied that all valid rules must derive from a single power with the capacity to impose binding mandates backed by sanctions. This framework absorbed and subordinated all other possible sources consolidating legislative supremacy as the foundation of certainty in social life. From this perspective, a model emerged in which legal predictability rested on the normative force of written law and on the strict limitation of judges to the role of subordinate applicators.

The concretization of this paradigm was expressed through three decisive processes: first, the consolidation of source monism and legislative omnipotence as a consequence of the principle of indivisible sovereignty; second, the Napoleonic codification and the cult of the text as a technique of predictability that sought to standardize and stabilize the law in a closed normative body; and third, the articulation of the separation of powers and the judicial function in the reflections of Montesquieu and Beccaria, who offered institutional and penal parameters to restrict judicial discretion. These three axes clarify how legal modernity built a model in which certainty, security, and the limitation of power were interwoven into the law as the cornerstone of the legal order.

1. *Monism of State Sources and Legislative Omnipotence*

The classical model of legal positivism was grounded in the idea of a monism of state sources, in which the law stood as the supreme expression of political power. The notion of sovereignty, initially articulated in Hobbes's political philosophy, posited the need for an absolute authority capable of issuing unquestionable command. The strength of this approach lay in the conviction that civil peace could only be guaranteed by an indivisible body of power, charged with promulgating norms backed by sanctions. Thus, the Hobbesian Leviathan embodied the transition to a centralized legal order, in which a plurality of sources was incompatible with the desired security (2005, pp. 134-136). Legislative omnipotence thus emerged as an inevitable correlate of a sovereign conceived as the sole creator of law.

Hobbes articulates sovereignty as an indivisible power sustained by an irrevocable institutional act by which individuals transfer their rights to a common representative. Based on this original pact, all the sovereign's actions and judgments must be regarded those of the subjects, even those who dissented at the time of the agreement. Therefore, he states: "Each of them, whether they have voted for or against, must authorize all the actions and judgments of that man or assembly of men, just as if they were their own" (Hobbes, 2005, p. 142). This concept lies at the root of legal monism: obedience does not depend on individual will, but on collective authorization, which makes the existence of parallel normative sources impossible. Positive law, consequently, is identified with the will of the sovereign; therefore, judges and magistrates lack autonomous creative power, since their function is limited to executing the law under the sovereign's command (Hobbes, 2005, pp. 142-144 and 227-229).

From this conception derives legislative omnipotence as an essential attribute of political power. The sovereign possesses the capacity to legislate, judge, control doctrines, and dispose of pro-

perty, without dividing or delegating the essence of the State. The unity of legislative power becomes a guarantee of legal certainty: justice and equity only have normative force when recognized by the supreme authority. Therefore, even natural law, custom, or private concessions lack binding effect unless they are integrated into civil law by command of the sovereign (Hobbes, 2005, pp. 146-150). This logic reveals the scope of Hobbesian legislative omnipotence: positive law is legitimized not by its moral content, but by the political authority behind it, thus consolidating the centrality of a single focus of normative production.

This view would be taken up by the analytical tradition, in which John Austin consolidated the paradigm of law as command. Jurisprudence, understood by him as the science of positive law, dealt exclusively with norms imposed by political superiors on political inferiors, excluding both morality and religion (1832, p. 1). The radical nature of this position was manifested in its rejection of the ambiguous use of the notion of natural law, since for Austin, divine laws remained on a separate plane, while the object of legal science should be restricted to those rules backed by state sanction (1832, p. 2). The introduction of the concept of command as the structural axis of the discipline offered the necessary conceptual scaffolding to sustain legislative omnipotence: to the extent that every rule derived from a general command of the sovereign, state law absorbed the entire legal phenomenon.

The relationship between command, duty, and sanction constituted the explanatory core of the monist model. For Austin, a command is, in essence, a manifestation of desire whose noncompliance entails a probable evil, called a sanction (1832, pp. 7-8). With this triad, positive law was clearly distinguished from morality and religion, since only in the former was the obligation linked to external coercion. Likewise, the English jurist differentiated between particular commands and general commands; the latter possessed the character of law, imposing duties on classes of acts and not on specific individuals (Austin, 1832, p. 15). At this point, the ideal of predictability associated with state

law was consolidated: law was identified with abstract, general, and permanent rules, whose validity rested on the authority of the sovereign. The reduction of law to positive law did not admit conceptual exceptions; thus, any norm without sanction subsisted outside the legal sphere.

In the same vein, Austin criticized the designation “law” attributed to various categories of rules that did not meet the requirements of the imperative command. He rejected the so-called moral, figurative, declaratory, permissive, and imperfect laws for lacking the support of a higher political power to endorse them with sanction (Austin, 1832, pp. 21, 21 and 30). This conceptual refinement reinforced source monism by reserving the name “law” only for provisions emanating from state authority. In this logic, even common law and judicial production were reinterpreted: custom only acquired binding force through the sanction of the legislator, and judicial decisions were understood as acts of application of the sovereign will, not as an autonomous source of law. Thus, legislative omnipotence was based on the following premise: every valid rule referred without exception to the central authority of the State, without recognizing scope for the normative creativity of other bodies.

In modern thought, Norberto Bobbio took up this tradition to show the diversity of levels in which positivism developed. In this regard, he clarifies: “By legal positivism as a theory, I understand that particular conception of law that links the legal phenomenon to the formation of a sovereign power capable of exercising coercion: the State” (2007a, p. 49). From this perspective, positivism did not emerge solely as a set of conceptual theses, but as a historical reflection of the process by which legal systems absorbed other legal sources under legislative supremacy. Coercive force, imperative theory, and the subordination of custom and jurisprudence to the law appeared as characteristics of this stage, all derived from the centrality of state power in modernity (Bobbio, 2007a, pp. 49-52). The monism of state sources was presented, then, not as an option among several, but as a historical consequence of the consolidation of sovereignty.

In summary, the monism of state sources and legislative omnipotence constituted the core of classical positivism, first articulated in the sovereign figure of Hobbes, systematized by Austin in his command theory, and reinterpreted by Bobbio in a historical and critical light. The normative concentration on the State defined the model of certainty and predictability characteristic of positivism, by excluding all alternative sources and placing the law as the ultimate foundation of law. This construction, although enriched with theoretical and ideological nuances, responded to the need to affirm the unity of the legal system in the face of the dispersion of sources, and paved the way for subsequent discussions on codification, exegesis, and the judicial function that marked the development of positivism in the continental and analytical traditions.

2. *French Codification as a Predictability Technique*

The legislative omnipotence described in the previous section found its most complete institutional expression of the era in the French civil codification. The Napoleonic Code of 1804 laid down fundamental principles for the application of law, seeking to guarantee certainty and uniformity within a territory fragmented by the regulations of the Ancien Régime. The preliminary articles defined the territorial binding force of the law, its non-retroactivity, and the prohibition of agreements contrary to public order, while imposing on judges the obligation to decide even in cases of legal silence, without empowering them to issue general provisions (*Código Napoleón*, 1809, pp. A–A1). These provisions reveal the centrality of the codified text as a guarantee of predictability: a closed, accessible, and formally supreme body of legislation over all other sources.¹

¹ The Napoleonic codification movement did not emerge from nowhere; it was based on a previous doctrinal tradition. Among its most influential figures is

In his *Preliminary Discourse on the Draft Civil Code*, Portalis philosophically justified this undertaking. For him, good civil laws constituted society's most valuable patrimony, because they moderate power, protect property, and ensure peace (2014, p. 11). Codification should be based on historical experience and adaptation to customs, avoiding both the proliferation of useless norms and the illusion of foreseeing every case. In his words, "simplifying everything is an operation on which it is necessary to reach an agreement. Foreseeing everything is a goal impossible to achieve" (Portalis, 2014, p. 12). Predictability, therefore, lay not in exhaustive detail, but in establishing fruitful principles to guide judges and citizens.

The relationship between legislator and judge was thus redefined. Portalis emphasized that the law should establish general maxims, while leaving the task of concrete application to the judge as an enlightened mediator. In this way, the impossibility of codes to exhaust reality was implicitly recognized, without relinquishing the predominance of the legislator as the primary source (Portalis, 2014, pp. 23-33). Predictability was based on the existence of a stable text to limit judicial creativity, while at the same time acknowledging the need for interpretation in order to maintain the vitality of the law in unforeseen situations.

Codification, however, entailed a risk: the emergence of an excessive cult of the text. Faced with this risk, the French jurist warned that blind adherence to the articles could paralyze civil life and stifle confidence in legal transactions. Predictability had to be distinguished from absolute rigidity: the code offered cer-

Jean Domat, who in his work *Les Loix civiles dans leur order naturel* (1689) sought to systematically order french law under rational principles inspired by roman law, and Robert Joseph Pothier, whose treatises on obligations, contracts and successions offered a detailed systematization that was directly incorporated into the Code of 1804. Both represent the transition from dispersed common law to a rational and unitary conception of private law. See: Domat, J. (1861). *The Civil Laws in their Natural Order*, 3rd ed. (F. Vilarrubias and J. Sarda, Trans. & ar-rang.). Librería de Estéban Pujal; and Pothier, R. J. (2020). *Treatise on Obligations*. Olejnik Legal Editions.

tainty through clear and uniform rules, but it had to retain the flexibility necessary to allow the use of reason and good faith in the application of the norms (Portalis, 2014, pp. 43-53). As he forcefully stated: “The function of the law is to protect us against the fraud of others, not to exempt us from the use of our own reason. Otherwise, the life of men under the surveillance of the laws would be nothing but a long and shameful state of minority; and the surveillance itself would degenerate into an inquisition” (Portalis, 2014, p. 47).

Together, the 1804 Code and the Portalis Discourse demonstrate how the technique of codification sought to reconcile legislative omnipotence with the need for predictability in social life. The codified text became a symbol of certainty and unity, while recognizing the limits of normative foresight and the complementary role of the judge. This balance explains the lasting influence of the Napoleonic model, whose authority derived both from its rational and systematic nature and from the trust placed in the written word as the foundation of legal certainty.

Napoleon’s codification consolidated the supremacy of written law as the foundation of certainty and predictability, but at the same time more clearly established the place of judges in the new institutional framework. The limitation of their normative creativity and the obligation to resolve even in cases of legal silence forced reflection on the balance of powers and the true scope of the judicial function. This debate did not arise in a vacuum: it was based on the political ideas of the 18th century, which defined the role of the courts within the state. Montesquieu’s reflections on the separation of powers and Beccaria’s on criminal legality marked the intellectual horizon within which codification was inserted. From these conceptions, we can understand how the classical positivist model sought to harmonize the authority of the law with judicial prudence, establishing a framework of guarantees against power and delimiting the interpretive function of judges.

3. *Separation of Powers and Judicial Function in Montesquieu and Beccaria*

The transition from Napoleonic codification to a modern continental conception of law cannot be understood without the decisive influence of enlightenment reflections on the balance of powers and the meaning of the judicial function. Montesquieu and Beccaria contributed complementary perspectives that made it possible to clearly define the contours of judicial activity within the new political order. Both authors agreed on the need to guarantee citizen security through clear norms, controlled institutions, and judges subordinated to the law, albeit from different perspectives: the former from a perspective of political theory and the latter from a perspective of penal philosophy.

In *The Spirit of the Laws*, Montesquieu formulated one of the most influential premises of constitutionalism: the separation of powers. In his view, political freedom depends on the peace of mind that arises when no one fears the abuse of power. Therefore, he distinguished a legislative branch, an executive branch in matters of foreign relations, and a judicial branch responsible for resolving conflicts and punishing crimes. The concentration of functions in a single person or corporation leads to despotism, as exemplified by eastern monarchies and certain Italian republics (Montesquieu, 1906, pp. 227-228). Therefore, the separation of functions was established as a practical and indispensable condition to preserve freedom against arbitrariness.²

Within this architecture, judicial power was to be designed so that its exercise would be almost imperceptible. Montesquieu

² Norberto Bobbio emphasized that the theory of the separation of powers cannot be understood as an abstract dogma, but rather as a political-legal instrument, which historically arose with the intention of containing legislative omnipotence and absolutist tendencies. His analysis of legal positivism illuminates how Montesquieu's conception is part of an effort to rationalize power within previously established normative limits, showing the connection between formal guarantees and political freedom. See: Bobbio, N. (2007). *El problema del positivismo jurídico* (E. Garzón Valdés, Trans.; 9th reprint). Fontamara.

warned of the risk of attributing it to a permanent body, as this generated the possibility of an oppressive force similar to despotism. The proposed solution consisted of the periodic election of judges from among the people, forming temporary tribunals to avoid tyranny and ensure impartiality. Within this framework, the accused, in accordance with the law, could elect or challenge their judges in serious cases, thus guaranteeing impartiality and public confidence in the courts. In this way, the power to judge was transformed into a diffuse function, detached from political or class interests, visible only through the magistracy and not through the judges as individuals (Montesquieu, 1906, p. 229).

This conception reached its best-known expression when Montesquieu described the judge as the “mouth of the law” (1906, p. 237). The court should limit itself to pronouncing the legislator’s words without adding any opinions. The judgment, therefore, had to contain the literal text of the law, so that citizens would precisely know the obligations they had assumed. The predictability of the law rested on this literalness since any scope of discretion would open the door to judicial arbitrariness. Reducing the judge to an inanimate role guaranteed legal certainty, subordinated the judicial function to the legislator, and strengthened political freedom against excessive interpretation (Montesquieu, 1906, pp. 229-230).

The balance of powers also required an institutional design in which the legislative and executive branches mutually constrained each other. In this sense, the executive branch had to be vested in a single person to act swiftly, while the legislative branch was divided into two chambers with distinct interests to prevent hegemony. The key to freedom lay in mutual checks and balances: the executive branch could participate in legislation only with a negative power, through the veto, and the legislative branch retained the ability to review its implementation without judging the person executing it. This dynamic of checks and balances constituted the essence of a political order where no single branch achieved absolute supremacy, avoiding both legislative tyranny and executive despotism (Montesquieu, 1906, pp. 233-236).

For his part, as previously mentioned, Beccaria approached the judicial function from a penal perspective, placing greater emphasis on normative predictability. In the *On Crimes and Punishments*, he affirmed that judges should not interpret the laws, since their sole function was to apply them. Judicial interpretation opens the door to uncertainty and abuse, as each magistrate could subject the law to individual passions or interests. For Beccaria, justice is ensured when laws are clear, fixed, and applied literally; under this model, judicial decisions are reduced to perfect syllogisms without personal additions (Beccaria, 2015, p. 22).

In his view, normative clarity constituted an even more fundamental principle; the obscurity of the laws forced them to rely on those who mastered legal language, leaving the people defenseless. The printed dissemination of norms thus became a conquest of liberty, because it curbed the tricks of those who profited from popular ignorance (Beccaria, 2015, p. 24). In this regard, legislative transparency reinforced social predictability and restricted opportunities for arbitrariness.³

Beccaria also provided substantive criteria for the content of criminal law. He insisted on the proportionality between crimes and penalties, rejecting equal punishments for unequal offenses, as this encouraged the commission of more serious crimes without increasing the risk to offenders. He also criticized the subjective or religious criteria historically used to grade penalties, as they led to arbitrariness and tyranny. Only social harm should be considered as a measure of the seriousness of the crime; this criterion allowed for the organization of a rational penal system (Beccaria, 2015, pp. 25-27).

³ In a contemporary context, Paolo Grossi argues that legal modernity constructed a methodological model based on the centrality of the legal text as a symbol of certainty, to the point of displacing customary traditions and more open interpretive practices. This observation is pertinent to understanding Beccaria's insistence on clear and widespread laws since his proposal reflects that modern trust in written law as the sole source of security against power. See: Grossi, P. (2003). *Mitología jurídica de la modernidad* (M. Martínez Neira, Trans.). Trotta.

Finally, Beccaria emphasized that the purpose of punishment was not revenge or the pointless torment of the offender, but rather the prevention of future harm and deterrence of society. The effectiveness of the sanction lay in its ability to discourage repeat offenses and deter others, producing the greatest preventive effect with the least possible suffering. Thus, predictability was linked not only to the literal application of the law, but also to the rationality of a proportional penal system oriented toward the public good (Beccaria, 2015, pp. 33-34).

A joint reading of Montesquieu and Beccaria reveals a common thread in the configuration of the judicial function: the need to limit discretion and subordinate the power of judges to clear and stable normative principles. Montesquieu provided the institutional architecture of the balance of powers, while Beccaria perfected the logic of penal law by linking legal certainty with clarity, proportionality, and the preventive purpose of sanctions. Both outlined a model of justice where predictability, more than a rhetorical aspiration, became an effective guarantee of freedom from arbitrary power.

III. THE JUDICIAL FUNCTION IN THE CONTINENTAL TRADITION

The judicial function in the continental tradition is understood as an continuation of the Enlightenment idea formulated by Montesquieu and Beccaria: reducing the judge to an enforcer subordinate to the law within the framework of codification. However, during the 19th century, this conception acquired a more defined shape in Europe, where two opposing models confronted each other, decisively shaping the teaching and practice of law. On the one hand, the School of Exegesis turned the code into the exclusive source of certainty, building a legal culture based on literalism and predictability. On the other hand, the German Historical School asserted the historicity of law and the active role of the judge as interpreter of the living tradition. The tension between these poles,

predictability and rigidity versus historicity and flexibility, became the core of the judicial function on the continent, leaving a legacy that anticipated later debates in analytical positivism.

1. *School of Exegesis as a Cult of the Legal Text*

The birth of the School of Exegesis is closely linked to the Napoleonic codification of 1804, but it should not be confused with it. While the previous analysis highlighted the codification process as a technique of predictability based on the authority of written law, here we seek to understand how that codification was appropriated and transformed into a method of legal interpretation and teaching. Exegesis, in effect, represents the transition from the code to a true “legal culture of the text”, where the law became the sole legitimate source of decision-making and interpretation remained subordinate to the literal inquiry of the legislator’s will.

The first phase of this school developed between 1804 and 1830, in a transitional environment described by Julien Bonnecase as foundational, and marked by the influence of the centralizing spirit of the imperial government, interested in disciplining the teaching of law. The first commentators of the French Civil Code (Delvincourt, Proudhon, Toullier, Merlin, Maleville and Chabot de l’Allier) contributed manuals and treatises that, without yet constituting a complete doctrinal body, combined legislative innovations with categories inherited from the Ancien Régime. In this sense, the initial exegesis was not a systematic doctrine, but an incipient interpretative effort whose purpose was to channel the teaching of law within the new normative framework (Bonnecase, 2020, pp. 20-26).

The period between 1830 and 1880 represented the consolidation of the school, a stage identified by Bonnecase as its second phase. During this period, professors, magistrates, and lawyers brought precision to the exegetic method and turned the inter-

pretation of the Code into a collective endeavor. Notable among these are the works of Durantou, Aubry and Rau, Demolombe, Taulier, Marcadé, Troplong, and the Belgian Laurent, who produced monumental commentaries, philosophical treatises, and manuals that extended the method's influence to university teaching. The famous phrase attributed to Bugnet, "I don't know civil law, I teach the Code Napoleon", encapsulates the spirit of this movement, where written law became the absolute horizon of certainty and predictability (Bonnesse, 2020, pp. 26-33).

Exegesis was based on an unqualified faith in the legislative will, even going so far as to maintain that, faced with contradictory or insufficient laws, the most prudent course of action for the judge would be to abstain from ruling (García Máynez, 1980, p. 333). This attitude implied a displacement of justice and equity in favor of normative literalism, which was attributed, as García Máynez noted, "a monopoly on the formulation of law" (1980, p. 337). Consequently, the judicial function was reduced to an almost mechanical operation: the application of the law was conceived as a syllogism in which the judge merely subsumed the facts under the normative premises.

From this perspective, interpretive work left no room for creativity or weighing of interests, as legal grammar imposed itself as an insurmountable limit. The analogy with biblical exegesis is eloquent: just as the interpreter sought God's will in the sacred text, the exegetical jurist was limited to discovering the legislator's will in the articles of the code. Giovanni Tarello summarized this idea by pointing out that the School of Exegesis refers both to the French and Belgian civil law scholars who commented article by article on the Napoleonic Code, and to the method and ideas shared in their teaching (Tarello, 1995, pp. 64-65).

The influence of this school was decisive in the 19th century, despite subsequent criticisms of its rigidity and formalism. In contrast to the vitality that Portalis had defended in the preliminary discourse on codification, exegetes reduced the role of the judge to that of the "mouth of the law", trusting in the omnipo-

tence of the code to contain all the law necessary to regulate civil life. In doing so, they consolidated a model of legal predictability, but at the cost of sacrificing interpretive flexibility and subjecting equity to the absolute supremacy of the legal text. This tension between predictability and rigidity would henceforth mark the evolution of continental legal theory.

2. *The Historical School and Savigny's Criticism of Codification*

The formalism of exegesis, centered on the devotion to the letter of the law, found a decisive counterpoint in the thought of Friedrich Carl von Savigny. In contrast to the idea of law reduced to a codified and self-sufficient text, Savigny proposed a historical and organic conception in which law is not identified solely with the legislative will, but also with the spirit of the people who produce and transform it over time. His criticism was directed against the notion of a code conceived as a closed totality, since, in his opinion, hasty codification risked impoverishing the vitality of law and subjecting it to an inanimate rigidity (Savigny, 2015, p. 26).

In this context, written law constitutes only a partial manifestation of law, an expression at a given moment of collective legal conscience. For Savigny, law lives in history and does not emerge artificially through an act of state will. Therefore, the legislator does not create law from nothing, but rather organizes and formalizes it. The work of codification only achieves legitimacy when it is based on a historical maturity capable of guaranteeing continuity between tradition and positive norm. Otherwise, the code becomes an empty construction, a burden of rigid formulas that are distant from the real needs of the legal community.

Savigny's opposition to the immediate codification debated in Germany at the time did not imply an absolute rejection of legislative work. The problem lay in the following premise: a code capable of anticipating all future cases and shutting down the

natural evolution of law was impossible to achieve. This is illustrated by his reflection on specific legal institutions, such as marriage, in which social experience demonstrates the law's inability to encompass all possible situations: "Marriage belongs only half to law and half to custom, making any matrimonial law incomprehensible unless considered in connection with both aspects" (Savigny, 2015, p. 37). Therefore, an overly closed code inevitably leads to gaps in the law and unfair solutions (Savigny, 2015, pp. 36-37). This example demonstrates that codification should not be conceived as a closure mechanism, but as a stage in the historical development of institutions.

A particularly significant passage from the German jurist's work states: Furthermore, addressing a given positive law unilaterally presents the danger of being dominated by its mere letter, so any means of innovation must be welcomed. But a mediocre code tends to strengthen the predominance of a rigid and lifeless conception of law (Savigny, 2015, p. 26).

This statement reveals the author's central concern: the risk of replacing the living historicity of law with a formalism that reduces the judicial function to a repetitive mechanism disconnected from social reality. At this point, the critique connects with the reaction against exegesis, whose literal method ended up stifling fairness and interpretive creativity.

As an alternative, Savigny proposed a theory of interpretation based on four elements: grammatical, logical, historical, and systematic. These constitute tools through which the jurist can reconstruct the collective thought contained in the law, without being limited to its mere literality. In precise terms, interpretation is a procedure through which the historical origin of law is recovered, thus guaranteeing its application in the present while preserving coherence with its original tradition (Ministerio de Justicia de Colombia, 1988, pp. 182–183). The method is conceived, therefore, as an exercise in balancing fidelity to the legal text with

attention to the historicity of institutions and the internal structure of the legal system.

In this sense, the German Historical School, with Savigny as its central figure, laid the foundations for a dynamic conception of law as opposed to exegetical rigidity. The judicial function ceased to be understood as a mechanical operation of subsumption and began to be conceived as a task of historical and systematic reconstruction. In this transition, the critique of excessively closed codification and the recognition of the historicity of law opened a more flexible interpretative horizon, which would mark the evolution of continental legal theory during the 19th century.

In short, the judicial function in the continental tradition was marked by the tension between rigid predictability and flexible historicity. This duality not only defined the 19th century but also prompted a need to conceptually rethink the role of the judge. This rethinking no longer came from France or Germany, but from the English analytical tradition, where positivism sought to explain law with a more systematic language centered on the notion of command.

IV. THE JUDICIAL FUNCTION IN CLASSICAL ANALYTICAL POSITIVISM

The transition from the continental tradition to the analytical tradition reveals a shift in the way the judicial function was conceived. While in Europe the discussion revolved around the cult of the legal text characteristic of exegesis and the historicity defended by Savigny, in England, under the common law, the debate shifted toward a critique of the very foundations of the system and the authority of commentators. The judicial function was no longer conceived solely as literal interpretation or historical reconstruction, but was subjected to more radical scrutiny, examining its legitimacy under criteria of utility and systematic rationality. With this, English analytical positivism sought to construct a science of law that dealt with identifiable and verifiable norms, leaving aside

both appeals to tradition and justifications based on history. At this point, it's clear that the reflections of Bentham and Austin, previously outlined within the general framework of the previous chapter, prepare the ground for the detailed examination presented below.

This new perspective, initiated with the work of Jeremy Bentham, challenged the validity of the common law and proposed reorganizing law based on the principle of utility, reducing the judicial function to the application of socially beneficial rules. Later, John Austin took this transformation to a more systematic level by formulating a theory of enacted law which the only valid source resided in the sovereign command. In this way, the English analytical tradition distinguished itself by redefining the judicial function from strictly normative and descriptive parameters, paving the way for subsequent debates that would lead to Hart's critique and Kelsen's reformulation of the judicial function.

1. *The British Common Law under Utilitarian Criticism*

Jeremy Bentham's work represents one of the most systematic and profound critiques of the foundations of English common law. In a historical context marked by the influence of William Blackstone and his *Commentaries on the Laws of England*, Bentham denounced the lack of clarity, conceptual arbitrariness, and resistance to reform that characterized the English legal system. From his perspective, the legitimacy of law could not be based on traditions or the authority of established jurists, but on an objective criterion: utility, understood as the maximization of happiness and the reduction of collective suffering (Bentham, 2010, pp. 3–5; 2017, p. 6).

Bentham identified the almost dogmatic veneration of Blackstone as a major obstacle. The authority of his work, widely disseminated and considered a reference, prevented the law from being subjected to the rational criticism necessary to perfect

them. From this perspective, a legal system incapable of censure condemned society to stagnation. Civic obedience, he argued, should be combined with free and permanent dominance, since only through criticism was it possible to purify defective institutions and strengthen socially useful ones (Bentham, 2010, pp. 12-16). In doing so, he fundamentally challenged the notion that the law should be respected without question, insistently defending the idea of moral and political progress through its subjection to constant scrutiny.⁴

Criticism of the expositor of the laws was not limited to pointing out isolated errors. Bentham denounced the harmful influence of prestigious authors who, through the weight of their name, were able to impose weak or contradictory arguments as truth. This authority became even more dangerous when exercised in the field of teaching, as generations of students replicated their teachers' judgments without subjecting them to review. Thus, attacking Blackstone's work did not represent an act of personal hostility, but a civic duty intended to free law from the conceptual shackles that hindered the possibility of reform (Bentham, 2010, pp. 20-33).

The core of Bentham's proposal lies in the principle of utility. According to his formulation, every action and every rule must be judged by its tendency to increase or decrease happiness. In this way, the community ceases to be a rhetorical fiction and is defined as the sum of the individual interests that comprise it. Any allusion to the common good loses meaning if it does not translate into effective benefits for each member of society (Bentham, 2017, p. 7). With this conception, Bentham dismantled the arguments of the common law, which, lacking verifiable criteria

⁴ Centuries later, Hart would take up this concern again by emphasizing the inadequacy of a legal system based exclusively on custom, adding that only through secondary rules (of recognition, exchange, and adjudication) can certainty be guaranteed and institutional arbitrariness avoided. See: Hart, H. L. A. (2012). *The concept of law* (3rd ed.). Oxford University Press.

to evaluate their validity, were based on indeterminate concepts such as “spirit of the constitution” or “reason of the law”.

The contrast with the alternative principles is crucial to understanding the force of his critique. Bentham rejected both the ascetic principle, which exalted suffering as a virtue, and the principle of sympathy and antipathy, which rested on arbitrary approval or disapproval. The former, taken to its ultimate consequences, would turn society into a hell, since no political order can be sustained by the renunciation of pleasure and the deliberate production of pain (Bentham, 2017, p. 12). The latter, applied largely in the common law, led to the justification of institutions and norms based on sentiments or imaginary analogies, rather than objective reasons. In this regard, Bentham pointed to the English rule on succession as an example, which gave priority to uncles over fathers in inheritance. This provision was defended by Lord Coke with an absurd metaphor: hereditary rights had a “weight” that prevented their direct transmission in the ascending line (Bentham, 2017, p. 13).

These criticisms highlight the fragility of a system where judicial decisions were not based on a calculation of utility, but rather on precedents legitimized by tradition or the rhetoric of jurists.⁵ In response to this, Bentham proposed the construction of a “natural order” of law, organized according to social utility. This order made it possible to identify and reject harmful laws, defined as those that prohibited non-perverse behavior. In his logic, the only legitimate classification of legal institutions should be based on their tendency to produce pleasure or pain, categories understandable to anyone without the need for technical jargon (Bentham, 2010, pp. 37-42).

⁵ Hart identifies this problem by pointing out that without clear adjudication rules, judicial precedent generates uncertainty. In *The Concept of Law*, he argues that the lack of secondary rules prevents judicial decisions from being certain and stable. See: Hart, H. L. A. (2012). *The concept of law* (3rd ed.). Oxford University Press.

Ultimately, Bentham's critique of the common law was not an isolated academic exercise, but an attempt to subvert the authority of a system that, by clinging to custom and the exegesis of commentators, was incapable of guaranteeing justice and social happiness. His proposal, based on the principle of utility, offered a universal and rational alternative to the caprice, conceptual confusion, and obscurity of English law. In his words, "nature has placed humanity under the rule of two sovereigns: pain and pleasure" (Bentham, 2017, p. 6), and law, including the judicial function, can only be legitimized to the extent that it serves this inescapable.

Bentham's work clearly revealed the limits of a law based on custom and doctrinal dependence on commentators, demonstrating the need for a rational legislative system oriented toward collective utility. By exposing the conceptual fragility of the common law, his thinking paved the way for a transformation of analytical positivism, in which the judicial function could no longer be sustained by tradition or precedent. This transformation found continuity in Austin, who defined law as a legislated command, denied the creative force of jurisprudence, and reduced the judicial function to the execution of general rules, reaffirming the supremacy of the legislator as the sole source of validity of law.

2. Austin and the Judicial Function in a Statutory Law System

John Austin's work contributed to the development of the analytical shift in legal positivism by proposing a model of law founded on the notion of command and the centrality of legislation as the exclusive source of validity. Unlike the emphasis placed earlier on the general theory of command and its relationship to legislative omnipotence, here it is important to highlight how this conception transformed the judicial function within the English legal system. For Austin, jurisprudence had to be configu-

red as a descriptive science of positive law, detached from moral assessments and dedicated to identifying the norms issued by a political sovereign with coercive force over its subjects (1869, pp. 6-9).

At the core of his theory, Austin articulated the conceptual triad of command, duty, and sanction, which distinguishes law from other normative systems such as morality or religion. A command is, in his terms, "a manifestation of desire" whose binding force is secured by the threat of harm in the event of noncompliance (Austin, 1869, p. 7). This analysis offers a first key to the judicial function: judges are not creators of law, but rather executors of commands already established by the legislator, applying the sanction provided to ensure obedience.

Hence Austin distinguished between general command, inherent in law, and particular command, corresponding to specific orders such as judicial resolutions. The former are abstract in nature and are directed to classes of acts or persons; the latter are occasional and apply to specific individuals. The judge, therefore, operates on a level of subordination, since his particular commands depend on the prior existence of general commands issued by the sovereign. In his words: "judicial commands are commonly occasional or particular, though the commands they are designed to enforce are commonly laws or rules" (Austin, 1869, p. 15). This classification reinforces the non-autonomous nature of the judicial function, subordinate to legislation.

The author's emphasis lies on the supremacy of statutory law over custom and precedent. He rejects the notion that custom constitutes a source of law in and of itself, since as long as it is not recognized by the courts and sanctioned by the sovereign, it remains a rule of positive morality. Similarly, judicial decisions are not an independent source since their force derives from sovereign delegation. Therefore, he states: "customary laws, considered as positive law, are not commands... and consequently are not laws or rules in the proper sense" (Austin, 1869, p. 27). With this conception, both custom and jurisprudence are located within

statutory law, reinforcing the centrality of the sovereign as the sole valid normative source.

The conceptual refinement is completed with the distinction between proper and improper laws. The former meet all the requirements of the coercive command; the latter are called laws only by analogy, as is the case with moral or religious rules, which guide conduct but lack legal sanction (Austin, 1869, pp. 126-134). This classification clearly establishes the object of analytical jurisprudence and strengthens the role of the judge as the operator of a closed system of positive norms, without the capacity to derive legitimacy from external values.

Benthamite utilitarianism is reflected in the way Austin evaluates rules. It is not a question of judging isolated acts, but rather of considering the tendency of the type of behavior regulated. Thus, stealing a small amount of money from a wealthy person may seem harmless in a specific case, but when such behavior is widespread, the security of property and, with it, social stability collapses (Austin, 1869, pp. 37-39). The judicial function then takes on an instrumental character: ensuring the uniform application of general rules dictated on the basis of utility, avoiding casuistry and ensuring certainty for the community.

In short, Austin shifted the influence of analytical positivism toward a system of legislated law, where the judicial function was limited to applying the sovereign's general commands. His proposal offered certainty and predictability at the cost of excluding any creative role for the judiciary. This vision opened a debate that would mark the subsequent development of positivism: Hart, for example, would underline the inadequacy of conceiving law as a set of orders backed by sanction, by introducing the need for rules of recognition and adjudication that explain legal practice beyond the imperative scheme. For his part, Kelsen would take the reflection even further by designing a hierarchical normative model where the judicial function is integrated as the application of valid norms within a relatively closed system, overcoming the reduction of law to individual command.

V. THE CRISIS OF THE CLASSICAL MODEL
AND THE Kelsenian THRESHOLD
OF THE JUDICIAL FUNCTION

Towards the end of the 19th century, the architecture of classical positivism showed clear signs of exhaustion. The absolute centrality of written law and the reduction of the judge to a merely declarative role eventually revealed fissures that were impossible to ignore. Exegesis, with its unrestricted trust in the literal meaning of the code, transformed the judicial function into a rigid mechanism that sacrificed equity for the sake of predictability. The Historical School, by insisting on the historicity of law, demonstrated the inadequacy of a closed and purely textual system. In the analytical tradition, Bentham and Austin refined the notion of positive law with conceptual rigor, but at the cost of relegating the judicial function to a subordinate position, limited to the execution of general commands. The result was a theoretically coherent model, but ineffective in accounting for the complexity of legal systems in changing societies.

Critics concurred in pointing out the classical model's inability to address the plurality of conflicts and the diversity of social practices. On the continent, exegetical formalism clashed with demands for flexibility and adaptation; in England, the idea of law as a legislated command failed to explain the operative force of custom, precedent, or everyday judicial practice. These tensions revealed a structural limitation: the judge could no longer be conceived as a simple "mouth of the law", since his or her role necessarily involved margins of interpretation, selection of meanings, and construction of decisions. The classical paradigm had underestimated this dimension, creating a gap between the theory and the reality of the judicial function.

In this context, Hans Kelsen's proposal emerged as a turning point. As previously noted, when outlining Kelsen's systematization of law, his proposal was based on the identification of the State with the normative order. However, in the judicial function,

this same conception took on a different nuance: instead of reducing the judgment to the simple application of a general norm, he described it as an individual norm belonging to the system itself. In this way, each judicial decision is integrated into the hierarchical structure of law and contributes to its dynamic reproduction. Kelsen also recognized that every superior norm leaves open spaces to be filled through acts of application, which grants the judge a margin of discretion. However, this discretion is not presented as unlimited power, but rather as a power controlled by the normative framework as a whole.

The transition to Kelsen can be understood, then, as a shift from a model centered on the absolute subordination of the judge to one that allows judicial creativity within strict normative limits. In contrast to the classical view, which understood the judicial function as a mechanical activity, Kelsen offered a more realistic framework in which the interpretation and production of law are intertwined. This reformulation did not represent a break with positivism, but rather its evolution toward a theory capable of more faithfully describing legal practice. The judge was no longer viewed as a mere executor and was conceived as a participant in the creation of law, always under the authority of higher norms that guarantee the unity and coherence of the system.

In sum, the crisis of the classical model opened the way for a rethinking of the place of the judiciary within positivism. The rigidity of the exegesis and Austin's analytical reduction proved insufficient, while Kelsen outlined a horizon in which the judicial function is explained as an act of normative production, limited by the legal hierarchy but indispensable to the vitality of the legal order. This marks the threshold of a new paradigm, which will be the subject of detailed analysis in the following chapters, which will examine both the general foundations of the *Pure Theory of Law* and its specific conception of the jurisdictional function.

CHAPTER THREE

KELSENIAN BASES FOR THE INTERPRETATION OF LAW

I. PROBLEM STATEMENT AND DELIMITATION

The exhaustion of the classical model of legal positivism, evident towards the end of the 19th century, revealed the inadequacy of a framework that subordinated the judge to the literal meaning of the text or to sovereign mandate. French exegesis, German historicism, and English conceptual refinement offered partial solutions, but all shared a common limitation: conceiving the jurisdictional function as a mechanical activity. As noted at the end of the previous chapter, Kelsen opened a new horizon by conceiving the judgment as an individual norm integrated into the legal order, recognizing interpretation as a necessary element of judicial practice. This chapter is based on this Kelsenian threshold, focusing on the conceptual foundations that allow us to understand his proposal from the perspective of legal interpretation.

The breadth, richness, and longevity of Kelsen's work has been given rise to diverse interpretations. However, for decades, the most widely held view was that derived from his formalist aspect, which generated fallacious ideas about his theory. In this regard, Professor Juan Antonio García Amado points out:

There are three pure falsehoods that have been heard and read about Kelsen on many occasions: (1) that his theory of the interpretation and application of law is linked to the nineteenth-cen-

tury positivism of the school of exegesis or of the jurisprudence of concepts and makes the judicial decision a mere subsumption of the facts under the norm, with complete automatism and without going beyond the conclusion of an elementary syllogism; (2) that he advocates or invites judicial and citizen obedience to unjust law, thus confusing legal obligation with moral obligation and turning into ideological positivism; (3) and that Kelsenian legal theory is imbued with statist authoritarianism, with the effect that the attitude of blind and enthusiastic obedience that so many theoretical jurists of law gave to the aberrant commands of Nazism (2010, p. 385).

These widely held perspectives obscured other aspects of his work and reduced the understanding of his theory to a rigid formalism. In contrast to these simplistic views, the following analysis focuses on the *Pure Theory of Law*, especially its second edition, with the aim of highlighting the concepts that demonstrate how Kelsen did address the interpretive dimension of law.

The chapter is organized around four axes. First, the concept of legal interpretation in Kelsen is presented, with his distinctions between authentic and scientific interpretation. Next, the legal significance of human conduct as a prerequisite for all normativity is examined. Third, the indeterminacy of law, recognized by Kelsen as inevitable in any normative order, is analyzed. Finally, value judgments in the legal system are addressed, which express the tension between facts and norms in the evaluation process. This paves the way for the study of the judicial function in Kelsen's work, which will form the core of the following chapter.

II. THE CONCEPT OF LEGAL INTERPRETATION IN HANS KELSEN

Hans Kelsen did not dedicate a systematic or exhaustive treatise to the problem of legal interpretation, which led various scholars

to point out the relative marginality of this topic in his work.¹ It is enough to note that the *first edition* of *Pure Theory of Law* does not include a specific section dedicated to legal interpretation, while the *second edition* included a brief chapter that explicitly addressed this issue (Kelsen, 2002, pp. 349-356). This historical difference is significant because it shows that Kelsen's reflection on interpretation was incorporated late and in a limited space, although it was not without theoretical relevance. In this sense, although he didn't develop a complete theory of interpretation, he did contribute fundamental elements for understanding interpretation within his normativism.

From the first pages of his work, Kelsen warned that the *Pure Theory of Law* should not be understood as a commentary on legal norms, but rather as a general doctrine of law. However, he added that its construction also included a theory of interpretation (Kelsen, 2002, p. 15). This warning reveals a key point: Kelsen did not conceive of interpretation as an external or accessory matter, but rather as a necessary element of legal science. Even though methodological purity led him to separate law from disciplines such as sociology or politics, he could not ignore the fact that the application of norms always entails an exercise in interpretation. Thus, although interpretation did not develop in Kelsen as an autonomous field, it became a cross-cutting thread running through several of the problems addressed in his theory.

The chapter on interpretation in the second edition begins with a definition that encapsulates Kelsen's perspective: "Interpretation is a spiritual procedure that accompanies the process of applying law, in the transition from a higher-level norm to a lower-level norm" (Kelsen, 2002, p. 349). This conception is

¹ For example, Isabel Lifante states: "It cannot be said that Kelsen's Theory of Law incorporates a theory of legal interpretation. We do not find in his work either an adequate reconstruction of what this activity consists of in legal practice, nor a coherent stipulative proposal". See: Lifante Vidal, I. (2018). *Argumentación e interpretación jurídica: Escepticismo, intencionalismo y constructivismo*. Tirant lo Blanch, pp. 71-90.

embedded in the hierarchical structure of the legal order, where each general norm requires concretization in individual acts to ensure its effectiveness. Interpretation, therefore, does not appear as an independent activity or an act of arbitrary creation, but rather as a necessary operation to ensure the continuity of the normative chain. At this point, we see how Kelsen links interpretation to the very essence of normativity: the staggered relationship between norms.

In the Kelsenian approach, no higher norm can exhaustively determine all the circumstances of its application. There always remains a margin of indeterminacy that requires the intervention of a body to specify the meaning of the norm in a specific case. Hence, interpretation is inevitable: no norm is so detailed that it can dispense with this process. According to Kelsen, this indeterminacy may be intentional, when the legislator deliberately leaves room for discretion, or unintentional, when it derives from ambiguities in language or contradictions between norms (2002, pp. 350-351). In both cases, the interpretative task consists of selecting one of the possibilities provided within the framework of the higher norm and giving it binding force through a specific legal act.

From this basis, Kelsen distinguishes between two clearly distinct types of interpretation: authentic interpretation and scientific interpretation. The former corresponds to the bodies that apply the law, such as judges and administrative authorities, who, when interpreting, create individual norms or lower-ranking general norms. In this sense, authentic interpretation is always productive in establishing the obligatory normative content in a given case, transforming possibilities into a binding decision (Kelsen, 2002, pp. 354-355). The latter, on the other hand, corresponds to legal science, whose task is to expose the possible meanings of norms without claiming that any of them have definitive validity. This interpretation is purely cognitive, not law-creating, and its value lies in clarifying the alternatives that the competent bodies can adopt (Kelsen, 2002, p. 356).

The difference between both types of interpretation expresses a fundamental tension in Kelsenian theory. On the one hand, authentic interpretation transforms the general norm into an individual norm, exercising an act of legal production. On the other hand, scientific interpretation does not produce law, but merely describes it, which is why it cannot claim to provide a single, correct result. From this perspective, Kelsen breaks with the hermeneutic tradition that sought a true interpretation of the norm and maintains, instead, that all legal interpretation operates within a framework of equally valid possibilities, restricted only by the limits of the normative order. The correctness of a decision does not depend on its fidelity to the supposed will of the legislator, but on its conformity with the higher norm that enables that decision.

Kelsen also emphasizes that interpretation does not necessarily lead to a single solution. Within the framework established by the higher standard, several possible responses may be possible, all in accordance with the law, although only one of them will be embodied in the act of the enforcing body. Traditional jurisprudence, by upholding the existence of a single correct judgment, confuses the task of interpretation with a fiction intended to preserve legal certainty. For Kelsen, this fiction may be useful from a political point of view, but it lacks scientific support (2002, p. 356). *Pure theory of Law*, by rejecting it, redefines interpretation as an open process, subject to controlled discretion, and not as a mechanism that guarantees the unique truth of judicial decisions.

Although the explicit treatment of the topic is brief, Kelsen offers a coherent conceptual framework with these ideas. Interpretation appears as the necessary consequence of the indeterminacy of law, structured around the hierarchical relationship between norms and differentiated according to whether it is an applied activity or a scientific endeavor. Even without a full hermeneutic theory, these elements allow us to understand the importance of interpretation in *Pure Theory of law*: far from being a marginal aspect, it constitutes the bridge between law in the

abstract and law in action. Along these lines, the examination of interpretation is linked to other essential points of Kelsenian theory, such as the legal significance of human conduct, normative indeterminacy, and value judgments in the legal system, which will be developed in the following sections of this chapter.

III. THE LEGAL SIGNIFICANCE OF HUMAN CONDUCT

In Kelsen's theory, the interpretation of law is essential to its creation and application. This means that the bodies responsible for creating and applying law in a binding manner, before specifying their substantive function, interpret. This assertion leads to a fundamental question: what is interpreted in law?

Legal interpretation cannot be reduced to a simple grammatical exercise or the literal decoding of statements. Its primary object is legal norms, understood as linguistic schemes whose meaning acquires relevance only at the moment of application. An isolated norm lacks effectiveness if it is not applied to a specific case, which is why the interpretative activity becomes the way to transform a normative text into an operational rule within social life. This process reflects the essence of Kelsen's approach: law is configured as a normative system directed toward human conduct, so understanding it requires considering both the linguistic structure of the norms and the context of their application (Kelsen, 2002, pp. 44-45). To this extent, interpretation constitutes the indispensable tool for linking legal language with the social facts to which it is addressed.

From this perspective, the interpretation of legal norms has two dimensions: in the first, norms as linguistic entities express a meaning, which is not always clear due to problems related to grammar; in the second, norms function as a scheme for conceptual explanation. In the second, Kelsen conceives law as a logical system of norms whose purpose is to regulate human conduct, a vision from which the object of legal norms, and therefore of

law, are precisely human conduct: (2002, pp. 18, 45 and 83) "...if we compare with each other the objects that, in the most varied peoples, and at the most different times, were designated as «law», it immediately appears that they all appear as arrangements of human conduct" (Kelsen, 2002, p. 44) Yet not all conduct is of interest to law, but only that which acquires legal significance, a quality attributed to it by the norms themselves.

This second dimension of the interpretation of legal norms recognizes that human life in society is part of a broader natural and empirical plane. On this plane, human life coexists with other realities that are neither legal nor social, but natural; that is, it understands social coexistence as part of nature. In the context of this natural reality to which social coexistence belongs, law is only interested in empirically perceptible human conduct, manifest in specific circumstances of time, place, and mode, and susceptible to legal significance (Kelsen, 2002, p. 16). For Kelsen, without legal norms, acts perceptible in reality would lack a specifically legal meaning, being susceptible only to causal, but not legal, interpretation (Esquivel Pérez, 1980, pp. 122–123). In other words, the legal significance of human conduct derives from the interpretive exercise of legal norms.

In this regard, the Austrian jurist points out: "In an act as an external factual event, it is not possible to simply grasp its legal significance visually or aurally, in the way, for example, we perceive the natural properties of an object, such as color, hardness, or weight" (Kelsen, 2002, p. 16). So, how is the legal significance of conduct captured? By interpreting it. In law, not only are legal norms interpreted at the grammatical level (first dimension), but also human conducts, including their intentionality, as well as values, contexts, and specific situations, which together encompass complex legal meanings and realities (second dimension).

Hans Kelsen recognized the need to interpret human conduct in order to attribute legal meaning to it. What determines whether a specific act is in accordance with or contrary to law lies not in its factuality or intrinsic nature, but in its significance through a norm of the system. In this sense, the legal norm

functions as a framework for explaining human conduct and as the main parameter of legal interpretation (Kelsen, 2002, p. 17). This framework for explaining the normative meaning of human conduct implies an interpretative exercise, since the way to determine whether an act has legal significance or not based on a norm is done through an interpretation of both elements: the conduct or fact given in reality, with all its circumstances, and the legal norm as a linguistic entity and its possible meanings.

In sum, the legal significance of human conduct does not depend on the nature of the act itself, but on the norm that incorporates it into the legal system. The same action, such as the transfer of property or the use of force, may lack legal connotation or be transformed into a lawful or unlawful act depending on the applicable regulatory framework. Therefore, law does not describe reality as a natural science would but rather structures it through normative categories capable of giving meaning to human acts. The norm functions as an instrument that delimits the boundaries between what is legally relevant and irrelevant, between what is permitted and prohibited, and between what is valuable and what is not. In this sense, interpretation is not limited to decoding words from a legal text, but is projected onto concrete social conduct, attributing meanings beyond its empirical factuality and inserting it into a normative framework. From this we understand the inseparability between legal practice and attribution of meaning, since without this process, conduct would remain a bare fact, lacking relevance to the law.

This recognition of the interpretive dimension naturally leads to the problem of indeterminacy. If all conduct obtains its legal value through the norm, the question arises of how the limits of that meaning are set when normative language is ambiguous or when several provisions can be applied to the same case. The attribution of meaning is not always linear or univocal. This opens up spaces of controlled discretion for the bodies charged with applying the law. This tension marks the transition to the next section, dedicated to normative indeterminacy, where we will examine how Kelsen identifies the causes of this openness

and how he understands that, despite it, the legal order retains its character as a system.

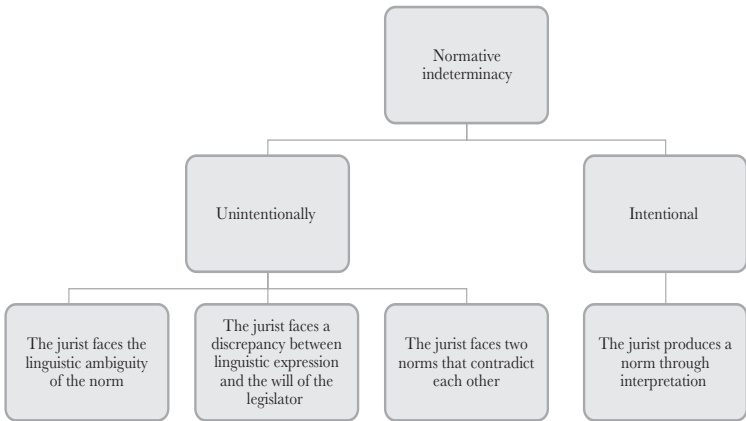
IV. THE INDETERMINACY OF LAW

When serving as a frame of reference, before establishing the legal meaning, or lack thereof, of conducts occurring in social interaction, it is necessary to determine the grammatical meaning of the expression of the legal norm. If we speak of the need to determine the meaning of norms, it is because they, in and of themselves, are indeterminate, lacking a unique, universal, and/or predetermined meaning. When trying to attribute meaning to a norm from its grammatical expression, the applying body, who also acts as interpreter, encounters several problems, such as syntactical, semantic, and pragmatic ones. Hans Kelsen acknowledges this and recognizes the indeterminacy of law, attributing it to the very nature of legal norms, namely their linguistic form (2002, p. 350).

Legal norms, from a linguistic perspective, are prescriptive propositions aimed as a whole at influencing people's conduct within their social life, with the intention of directing it (Bobbio, 2007b, pp. 44-45). This is what Kelsen refers to when he states that the causes of the indeterminacy of norms lie in their nature, since a proposition is the set of words that configure a meaning, not in isolation, but in their aggregate. Thus, one of the causes of the indeterminacy of law occurs when one of the words, or group of words comprising the norm, is ambiguous. The ambiguity of language refers to the possibility of understanding a word, even an action, in more than one possible way. Another cause of the indeterminacy of law lies in the possibility of applying two contradictory norms, whether totally or partially, and with simultaneous claims to validity. These are the causes of the so-called unintentional indeterminacy of law, in which the body that created the norms has no intention of generating normative conflicts and/or polysemous expressions, consisting basically of technical failures of said bodies (Lifante Vidal, 2018, pp. 82-83).

In *Pure Legal Theory*, in addition to unintentional indeterminacy, another type of indeterminacy of norms is also recognized: intentional and rational (Núñez Vaquero, 2014, p. 426). Unlike the first type, this type of indeterminacy is caused, even desired, by the body that created the norm and is generally embodied in norms of a general nature, the promulgation of which is carried out under the assumption that the individual norm arising from its application in court will continue the process of determining the legal act and, therefore, the law itself (Kelsen, 2002, p. 350). The basis of this indeterminacy lies in the inability of law, understood under the Kelsenian conception as a system of legal norms regulating human conduct, to exhaust all the events of social life that arise in reality, in which human conduct will be susceptible to legal significance and considered valuable or not for the law.

FIGURE 1. NORMATIVE INDETERMINACY THAT MOTIVATES JUDICIAL INTERPRETATION



SOURCE: Prepared by the author based on Kelsen, 2002, p. 350.

In conclusion, indeterminacy, whether intentional or unintentional, is always present in law, although never absolutely, but rather partially and gradually. Its causes have been precisely

pointed out by Álvaro Núñez Vaquero on three fundamental levels: “i) the possibility of attributing different meanings and the absence of legal metacriteria for choosing between them; ii) the possible contradiction between the will of the person who created the text, and the objective will expressed in the text; iii. the possible contradiction between norms” (2014, p. 427). These circumstances reveal that the norm does not offer a closed, univocal meaning, but rather a framework within which possible alternatives for its application must be chosen.

The inevitable presence of these causes should not be confused with an invitation to arbitrariness. Indeterminacy opens up spaces for discretion, but always within a hierarchical framework delimiting valid options. In Kelsen’s work, the judge or enforcing body does not choose without restrictions; instead, they select among the meanings contained in the higher norm. In this sense, the difference between indeterminacy and arbitrariness is essential: the former describes the inevitable openness of normative language and legislative design, while the latter would imply acting without any normative basis. Interpretation, therefore, does not eliminate indeterminacy, but rather channels it toward normatively justified solutions (Kelsen, 2002, p. 351).

The following examples clearly illustrate this point. When two criminal provisions appear to be applicable to the same offense with different penalties, the uncertainty arises from normative contradiction. Or when a term such as “public order” is incorporated into a civil legislation without a precise definition, the uncertainty appears in the form of linguistic ambiguity. In both cases, legal practitioners must interpret to provide certainty to the system, but they cannot do so without reference to the normative hierarchy of the legal order. The margin for decision exists, although it is controlled by the superior validity of the norms that set objective limits on the choice.

Thus, the indeterminacy of law does not invalidate Kelsenian positivism’s claim to certainty; instead, it explains why interpretation becomes an indispensable practice for maintaining

the system's continuity. The general norm establishes an open framework, and concrete application closes it in each decision. This tension forms the bridge to the next section, which examines how value judgments in the legal system more clearly express the interaction between the normative dimension and social reality.

V. VALUE JUDGMENTS IN THE LEGAL SYSTEM

By determining the legal significance of a conduct based on a norm, it is established whether that specific conduct is good or not, whether it is valuable or not. That is, once the legal significance of conduct is established considering one of the possible meanings of the norm, it can be assessed as positive or negative. Kelsen calls this judgment of the meaning of conduct a value judgment, and its meaning, positive or negative, depends on the correspondence between the conduct and the content of the norm. Therefore: "Conduct that corresponds to the norm has a positive value; conduct that contradicts the norm has a negative value. The norm considered objectively valid functions as a evaluative standard for factual conduct" (2002, p. 30). Regardless of the meaning of the value of conduct, both are considered legal values, as they are based on previously legally relevant conducts. Regarding value judgment, we are faced with a central topic in Kelsen's moral philosophy, fundamental to the interpretation of law.²

These types of judgments about conduct considering normative content reveal the deontic nature of law. Empirical judgments, in describing what is, are distinguished from value judgments, since the latter describe what *should be*, specifically what *should be* in light of what is considered valuable by law. "The actual conduct referred to in the value judgment, which constitutes the object of assessment, and which has a positive or negative value, is a real

² For a deeper understanding of the role of value judgments in Kelsen's moral philosophy, see: Sendin Mateos, J. A. (2017). *La filosofía moral de Hans Kelsen*. Marcial Pons, pp. 143-266.

fact existing in time and space, a part of reality. Only a real fact can be judged, when compared to a standard, as valuable or worthless... what is valued is reality" (Kelsen, 2002, p. 31).

However, not all reality is of interest to law, but only those aspects of it with legal consequences established in the norms. Value judgment refers to a purely legal assessment; therefore, although any given fact can be the subject of judgment, only those conducts that have been previously legally defined can be categorized as positive or negative. Conduct without legal significance, that is, conduct not previously contemplated in a norm, cannot be the subject of value judgment, at least in administrative and judicial level.

Such conduct or fact could only be subject to value judgment in the legislative body, with the precise intention of legislating it, based on its being considered valuable in light of the constitutional principles in force in a given legal system. An example of this is the way in which aeronautical law was born: From a value judgment regarding the previously unlegislated event in which man managed to fly for the first time in a hot-air balloon over the city of Paris. This human conduct was considered valuable to the community because of its implications for the safety of Parisian citizens, and it was decided to endow it with legal significance through the creation of a specific norm, thereby endowing it with legal value.

The example of aeronautical law demonstrates how norms established and applied based on value judgments are products of human will (Kelsen, 2002, p. 31). Positive law, not having its origin in nature, is a cultural, dynamic, and spiritual product whose origin lies in the will of its creator (Espinoza Gómez, 2005, p. 147). In this same sense, but from the Kelsenian perspective, the person who creates and applies law through value judgments is a human authority empowered to do so. "Hence, the norms established by men... constitute only relative values" (Kelsen, 2002, p. 31). These values, although relative, are legal, and are found in both general and individual norms.

This implies the recognition of different wills in each of the different norms and, consequently, the configuration of different values in the legal system. This situation can lead to normative conflicts due to a clash of values, because when a conduct is established as due, that is, when it is signified by a norm, the value constituted through it does not exclude the possibility of the validity of another norm in which an opposite conduct is signified, and, therefore, an opposite value (Kelsen, 2002, pp. 31-32). The conflict as such is not the existence of opposing norms and values within the same legal system, because as long as a norm is not applied, it says nothing and therefore has no impact on reality; it is merely a text on paper. The conflict is configured in its application to specific situations, since two formally valid, contradictory norms cannot be satisfied simultaneously in the same situation. In these cases, the role of the judges and their interpretive power are decisive, as they are the ones who decide the norm and, therefore, the prevailing value in each specific situation.³

Another way of producing a multiplicity of values is the subjectivity of judgments. Let me explain: for Kelsen, value judgments can be objective or subjective, depending on the objects involved. An objective judgment relates human conduct to a specific legal norm, while a subjective judgment relates human conduct to the desire or will of the person performing it (Rodríguez Manzanera, 2005, p. 620). Evidently, the author is more interested in objective judgments because they relate the *being* of actual conduct to the *ought to be* prescribed by law, establishing certain conducts as proper and positive. It could be said that objective value judgments are judgments about the legality of conducts, and subjective judgments are judgments about their moral value, each configuring general legal values and individual moral

³ In this regard, Carla Huerta recognizes the need to interpret law by conceiving it as a system of legal norms at diverse levels, in which these are interrelated, so that their meaning is systematically dependent. In this way, interpretation plays a harmonizing and integrating role in the legal system: (Huerta, 2017, p. 176).

values, respectively (Kelsen, 2002, pp. 33-34); (Sendín Mateos, 2019, pp. 221-222).

The multiplicity of moral values is linked to the individuality of conduct; therefore, there can be as many values as there are acts evaluated by the subjective judgments of each person. These values are not always of interest to law, although the bodies responsible for applying them maintain a constant dialogue with them during the performance of their functions. In contrast, the objective value judgment, central to the Kelsenian perspective, constitutes a legal statement that expresses the relationship between a conduct and a valid norm within the system, establishing an *ought to be* and configuring the normative parameter of legal assessment (Kelsen, 2002, pp.33-37).

Value judgments show that law is not limited to describing conducts; they also assign each act a meaning within the normative order. This assessment transforms social facts into legal realities, since by integrating them into a framework of what should be, it elevates them to the category of conducts relevant to the system. In doing so, it confirms that interpretation not only consists of unraveling the legal text, but also in determining the scope of these assessments, always within the limits of normative validity. This tension between fact, norm, and assessment opens the way to a decisive terrain: the way in which law, through its bodies, transforms possibilities into binding decisions.

VI. FINAL REFLECTION

Hans Kelsen's *Pure Theory of Law* reveals a structured normative order whose meaning can only be fully grasped by examining the conditions of its application. The concepts presented in this chapter—the legal significance of human conduct, the indeterminacy of law, and value judgments—demonstrate the relevance of interpretation as an inevitable operation within the system. No norm becomes effective without being projected onto a concrete fact, so the legal meaning of conduct always depends on its incorpo-

ration into the normative framework. Thus, a first conclusion is established: interpretation is not an external addition, but a necessary operation that transforms normative language into effective regulation.

The idea that human conduct lacks intrinsic legal meaning and acquires it only through norms leads to the recognition of interpretation as a cornerstone of Kelsen's vision. Law does not merely describe natural facts; it organizes them through normative categories. The attribution of meaning to an action, such as the transfer of property or the use of force, depends on its place within the system. This perspective highlights the role of the interpreter, whose task is to articulate the relationship between norm and conduct, ensuring coherence in the legal system. Interpretation thus appears as a condition for the law to function as a technique of social regulation.

Normative indeterminacy further magnifies the importance of interpretation. The language of regulations never exhaustively exhausts the conditions for application. Ambiguities, contradictions, or divergences between linguistic expression and legislative intent create spaces where adjudicating bodies must choose among several alternatives. Such openness does not imply arbitrariness, since the hierarchical framework of the system imposes limits on decisions. At this point, the permanent tension between predictability and flexibility is evident, which is resolved through the interpretative function.

Value judgments complete this picture. Once the significance of the conduct is determined, its correspondence with the norm is assessed as positive or negative. At this point, it becomes clear that the law is not limited to describing but rather introduces normative criteria for evaluation. Conduct becomes valuable or irrelevant according to its conformity with what is prescribed. This evaluative dimension demonstrates that all interpretation involves, in addition to a technical exercise, the adoption of a normative position. Even when conceived as a formal system, law depends on the interpreter's capacity to connect facts and legal values.

From this basis, interpretation cannot be reduced to a single, objective method. Kelsen insists that the system opens several decision-making possibilities, and no interpretive technique has the power to exclude another. The choice between possible meanings shifts from the strictly legal plane to the political realm, because the general rule offers alternatives that the judge must specify in the ruling. The political nature of this selection does not imply arbitrariness, but rather the recognition that positive law operates within a margin of inevitable indeterminacy.

This recognition introduces a direct link to democracy. If law left open only one valid response, a univocal principle prevailing over any other consideration would be established, closing off the space for deliberation. The possibility of interpretation thus becomes a prerequisite for a democratic order, where judges and courts discuss and decide in cases of ambiguity or the absence of a norm. As Kelsen asserts, without deliberation there is no democracy (2024, p. 107). Thus, the openness of the normative system strengthens the legitimacy of law and ensures that the judicial function is not limited to blind formalism but rather is linked to the dynamics of a pluralistic society.

In this way, the three concepts analyzed converge on a single core: interpretation in Kelsen's thought. The legal significance of conduct, normative indeterminacy, and value judgments are not isolated topics, but rather pieces of a mechanism that paves the way for understanding the judicial function. In jurisdictional application, we clearly observe how the judge transforms general norms into individual decisions, selects meanings, and defines conflicting values. The final reflection invites us to consider interpretation as a bridge between system and practice, and it finds its most complex expression in the judicial function. The following chapter will precisely explore this dimension, showing how jurisdiction becomes a privileged setting for verifying the creative force of law.

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.¹ 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

¹ 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.²

² 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

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.

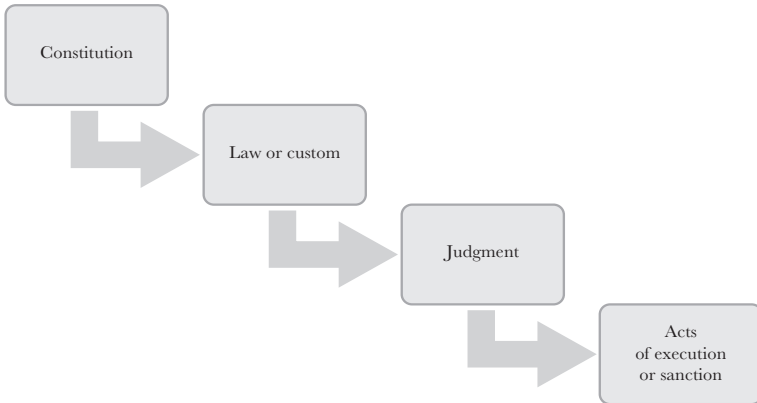
However, in many other cases, only the clarification of the jurisdictional body and the procedure is required, without saying much or nothing about the content of the decision; in this case, the court or judge will be responsible for establishing that material content. If the material content of decisions 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

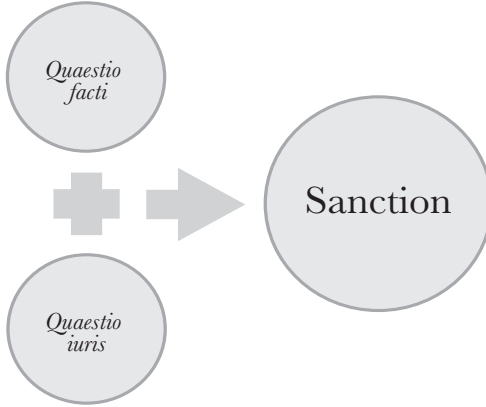


SOURCE: Prepared by the author based on Kelsen, 2002, p. 246.

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.

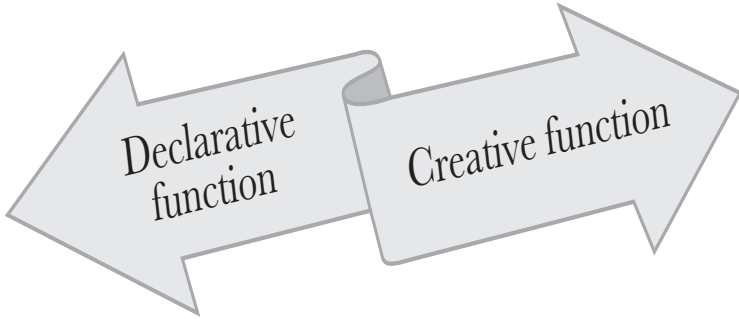
FIGURE 3: CONDITIONS OF THE JURISDICTIONAL ACT



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.

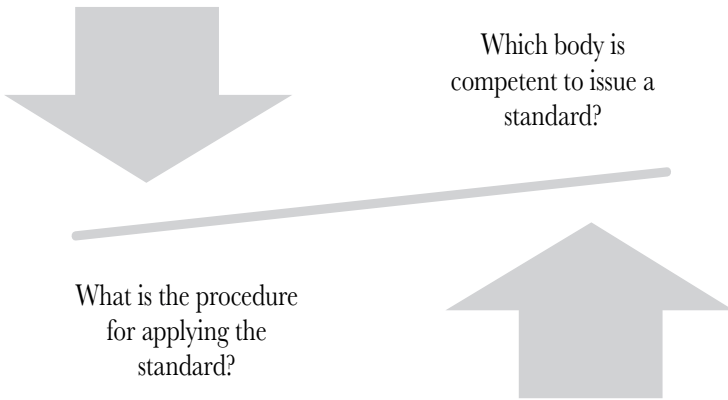
FIGURE 4: THE DUAL FUNCTION OF THE COURT



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).

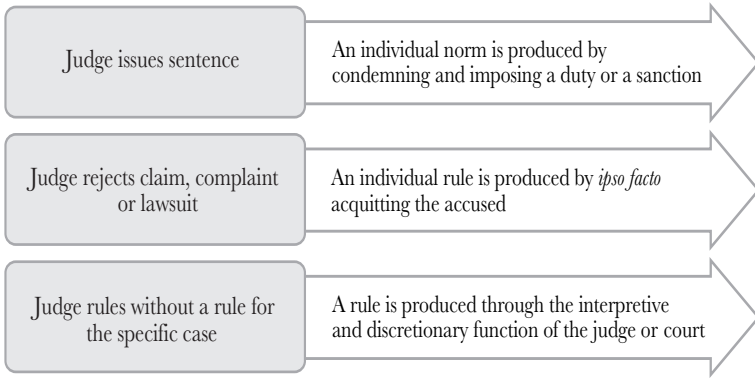
In this way, the coercive aspect of the judgment cannot be understood as incidental, but rather as a constitutive condition of its legal existence. The judicial decision individualizes the sanction and makes a previously latent provision mandatory, granting the law its ability to impose itself on social 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.

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*Between Application and Creation. Kelsen's
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en 9, 10 y 11 puntos.

LA OBRA *BETWEEN APPLICATION AND CREATION. Kelsen's Conception of the Judicial Function versus Classical Positivism* estudia la concepción kelseniana de la función judicial en contraste con el positivismo clásico. Sostiene que la actividad jurisdiccional no es una mera aplicación mecánica de normas, sino un proceso que exige interpretación y, en determinados márgenes, creación normativa. El análisis muestra cómo la teoría pura del derecho reconoce la indeterminación del lenguaje jurídico y la necesidad de decisiones que otorgan sentido al ordenamiento, sin abandonar el marco normativista. El libro examina críticamente la tensión entre formalismo y creatividad judicial, así como los límites institucionales y dogmáticos de la discrecionalidad. Mediante una lectura hermenéutica y comparativa, los autores ponen de relieve la vigencia de Kelsen frente a los debates contemporáneos sobre interpretación, constitucionalismo y el papel de los jueces en la preservación del Estado de derecho.



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