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1 Hans Kelsen's writings on John Austin argue that Austin's legal theory is positivism done in the wrong way, while the Pure Theory of Law is positivism done in the right way. This attack on Austin, I would like to suggest, casts an interesting light on the development of modern legal positivism.[1] H.L.A. Hart's The Concept of Law is in many respects a response to Kelsen's criticism of Austin. This is obscured, within the opening chapters of The Concept of Law, by Hart's tendency to treat Kelsen's legal theory as a variant of Austin's positivism.[2] In fact, the main outlines of Hart's attack on Austin are fully present in Kelsen's attack on Austin. It therefore seems reasonable to assume that Kelsen's discussion of Austin may have been one of Hart's inspirations. If legal positivism has managed to rid itself of the constraining influence of Austin's model of sovereignty, viz., of the view that laws are orders backed by threats issued by an un-commanded commander, most of the credit should probably go to Kelsen. But despite the fact that Hart endorses most, if not all, of Kelsen's criticisms of Austin, his overall conception of positivist legal theory is closer to Austin's than to Kelsen's. Hart's theory of law is an attempt to free the view that the existence of law is a kind of social fact from the vulnerabilities of Austinian positivism exposed by Kelsen.

2 I will also argue (albeit not originally[3]) that Hart's response to Kelsen's criticism of Austin points to a problem in Kelsen's argument for the Pure Theory of Law. Kelsen argued that the Pure Theory of Law is the only positivist legal theory that can avoid the problems he diagnosed in Austin's view since it is the only legal theory that honours the methodological requirements that ought to be met by any positivist theory of law. Hart has established beyond doubt that this is false. As a result, it has become unclear why we should prefer the Pure Theory of Law to other non-Austinian positivist theories. I will therefore suggest, finally, that Kelsen's Pure Theory of Law may have greater contemporary relevance if read as a normative theory concerned with the value of the rule of law than if read as a purely descriptive legal science.

1. Austin, Kelsen, and the Aims of Legal Theory

3 Kelsen's most extended discussion of Austinian **jurisprudence** led to the following assessment:

> Since the Pure Theory of Law limits itself to cognition of positive law, and excludes from this cognition the philosophy of justice as well as the sociology of law, its orientation is much the same as that of so-called analytical **jurisprudence,** which found its classical Anglo-American presentation in the work of John Austin. Each seeks to attain its results exclusively by analysis of positive law. While the Pure Theory of Law arose independently of Austin's famous Lectures on

> General **Jurisprudence,** it corresponds in important points with Austin's doctrine. It is submitted that where they differ the Pure Theory of Law has carried out the method of analytical **jurisprudence** more consistently than Austin and his followers have succeeded in doing.[4]

The first part of this assessment alludes to Kelsen's well-known demand that a theory of law ought to meet a double requirement of purity: Legal theory must be separated sharply from the theory of justice, which is concerned with what the content of the law ought to be from a moral point of view, as well as from legal sociology, which is concerned with inquiry into the causal effects of legal norms on people's behaviour as well as with inquiry into the causal origins of legal decisions. Only if legal theory submits to this double requirement of purity will it come to offer a theory of the law itself, and not merely of moral or social phenomena somehow related to law.[5] Elsewhere in his discussion of Austin, Kelsen adds a third requirement: An adequate theory of law must be "a general theory of law, not a presentation or interpretation of a special legal order." The Pure Theory of Law aims to "discover the nature of law itself " from a comparison of "all phenomena which go under the name of law."[6]

4 Kelsen claims that Austin's **jurisprudence** is committed to the same conception of legal theory. While Kelsen does not explicitly defend this claim, it is not hard to see why he would have made it. According to Austin, the purpose of **jurisprudence** is to "distinguish positive law ... from the various objects to which it is related by resemblance, and to which it is related, nearly or remotely, by a strong or slender analogy."[7] This project, for Austin, requires a separation of legal theory from the philosophy of justice[8] and it is clearly committed to meeting the generality requirement put forward by Kelsen. It would seem, moreover, that Austin, though he explains the existence of a legal system as a kind of social fact, is not engaged in the project of offering a legal sociology. Kelsen, then, has good reason to claim that Austinian **jurisprudence** is committed to the methodological requirements that also guide the Pure Theory of Law.

5 Kelsen argues, however, that Austin violated these methodological requirements in the execution of his jurisprudential project and that he consequently failed to offer a truly positivist legal theory. Austinian **jurisprudence,** therefore, is no longer a relevant contribution to the project of developing a general descriptive theory of the nature of law, given the availability of the Pure Theory of Law. To see whether Kelsen can substantiate this radical challenge we need to turn to the details of his attack on Austin.

2. Kelsen's Rejection of the Command Theory

6 Kelsen's attack centers on Austin's view that laws are a species of commands. Kelsen presents three general objections that clearly anticipate Hart's criticism of the command theory.[9] The first[10] starts out from the claim that if laws are commands, they must be understood as binding or obligatory commands, since law is binding or obligatory. Kelsen observes that Austin appears to agree with this demand, as he tries to explain what it means to be obliged or bound by a legal norm. According to Austin, a command is the imperative expression of a will on the part of one person that another person behave in a certain way. What makes a command binding is the fact that the person to whom it is addressed is liable to be subjected to a sanction in the case of non-compliance.[11] But this analysis of what it means for a command to be binding wrongly identifies the concept of command with the concept of binding command. The mere fact that I threaten to inflict an evil upon you in case you refuse to comply with my wish does not make it the case that you have an obligation to behave as I say. Law, as Hart would later put it, is not the 'gunman situation writ large.'[12]

7 According to Kelsen, a command is binding if and only if the person who issues it is authorized to do so by a normative order that we assume to be binding:

> A command is binding, not because the individual commanding has an actual superiority in power, but because he is 'authorized' or 'empowered' to issue commands of a binding nature. And he is 'authorized' or 'empowered' only if a normative order, which is presupposed to be binding, confers on him this capacity, the competence to issue binding commands.[13]

Kelsen's second objection is that Austin's conception of law as command fails to explain the permanence of legal norms.

Kelsen stipulates that a command can exist only for as long as two necessary conditions are met: There must be "an act of will, having somebody else's behaviour as its object, and the expression thereof, by means of words or gestures or other signs."[14] The first of these two conditions is understood by Kelsen as the continuous psychological presence of a wish on the part of the person who issues the command that the addressee behave in a certain way.

8 For the command that I act in a certain way to exist now, it is not enough for someone to have once expressed the wish that I act in a certain way. It must be the case that the person who expressed the wish still wishes me to act in that way. If some person were to give me a command to act in a certain way, and if I came to know, at a later point, that she no longer wishes me to act in that way, I would no longer stand under a command to act in that way.[15]

9 By contrast, the existence of a legal obligation is not tied to a persistent will. A law, once it has been properly enacted, will remain a binding norm until repealed, even if a wish on the part of the person who issued the law no longer exists. A statute, unless repealed, will remain binding even after all members of the parliament that enacted it have passed away.

10 For the law to come into existence, it is not even necessary that there is a shared wish on the part of the members of the legislature at the point of enactment. Most laws, as Kelsen observes, are enacted by legislators who are not even vaguely familiar with their content. What explains the persistence of laws is the continuing existence of a system of norms of which the enacted norm has come to form a part.[16] This entails that no law is a command, since no law's persistence is grounded in a continuing wish on the part of some person or group of persons.

11 Kelsen admits, finally, that some laws indeed bear a certain resemblance to commands. Some laws are, at least at the point of initial enactment, based on a wish of those superior in power that inferiors behave in a certain way. But this resemblance by no means holds true of all legal norms. A particular legal norm created through contract, for example, is as binding and authoritative on the parties as a general statutory norm. But it makes no sense to say that the parties to a contract have given themselves a command to act in a certain way. Such disanalogies between laws and commands are not limited to the sphere of contracted norms. Customary norms or democratically enacted laws cannot reasonably be interpreted as commands given by superiors to inferiors.[17] The command theory, therefore, provides a thoroughly misleading picture of the structure and functions of legal order.

3. Austin and Kelsen on Legal Duties and the Structure of Legal Norms

12 According to Kelsen, Austin's view that laws are a species of commands is not just wrong in itself. It also implies an inadequate treatment of a number of particular jurisprudential problems. Kelsen's criticism focuses on two major issues: First, Austin's conception of law entails a misrepresentation of the notion of a legal duty. Second, Austin's conception makes it impossible to develop an adequate conception of the state and of its relation to law. This second issue leads Kelsen to a third: an inadequate conception of the state's relation to international law. In this section, I will discuss the first of these three points.

13 To understand Kelsen's criticism of Austin's conception of legal duty, we must take a brief look at Kelsen's analysis of legal duty and of the structure of legal norms. According to Kelsen, every complete legal norm determines that if a person engages in a certain kind of behaviour (the 'delict'), then a sanction ought to be applied. So understood, legal norms do not, like commands, directly address themselves to those who are to be guided by the law. Rather, legal norms are addressed to those who are to execute the sanction that the law determines ought to follow the delict. In other words, legal norms authorize the application of a sanction on the condition that a delict has been committed.[18]

14 This conception of the structure of legal norms and of legal duty needs to be understood in the context of Kelsen's account of the function of legal order. Especially during the 1940's, while he was engaging with Austin, Kelsen vigorously defended the view that any genuine legal system must necessarily claim a monopoly on the legitimate use of force.[19] The use of force will be legitimate, from the legal point of view, only insofar as it has been legally authorized as a sanction that responds to a prior delict. Any other use of violence will have been made a delict that ought to be

followed by a sanction. In this way, every genuine legal system, Kelsen claims, provides a comprehensive regulation of the use of force among its subjects, thus securing social peace.

15 Though legal norms are not directly addressed to the subjects of the law, they entail legal duties that typically fall on potential delinquents (and not on those who apply the law): Subjects of the law are under a legal duty to avoid the behaviour which the law has made the normative condition of the application of a sanction. What it means to say that I have a legal duty to do x or to forbear from x is that the law determines that if I do not do x or do not forbear from x a sanction ought to be applied. Given the claim that every legal order must provide a comprehensive regulation of the use of force, we arrive at an implication that Kelsen was particularly interested in: Wherever there is a legal system, all human beings who are subject to that system have a legal duty to abstain from all uses of force that have not been legally authorized.

16 Kelsen's view of the structure of legal norms implies that, strictly speaking, there are no laws that mandate performance of legal duty. If we wanted to say that the law mandates performance of legal duty, Kelsen claims, we would have to picture the structure of legal norms in a different way. We would have to separate the one Kelsenian norm into two, one which mandated performance of duty, and another which imposed a sanction in the case of non-performance of duty. Kelsen admits that such separation may be practically useful since the "the representation of law is greatly facilitated."[20] But he holds that it is nothing more than a pragmatic device. From the point of view of legal science, "law is the primary norm, which stipulates the sanction" and it is "only the sanction [that] 'ought' to be executed."[21]

17 Let us now turn to Kelsen's criticism of Austin's conception of legal duty. At first glance, Austin's conception would appear to be rather similar to Kelsen's. After all, Austin claims that "being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it."[22] But the appearance of similarity, Kelsen is at pains to point out, is misleading. Austin's view that laws are commands clearly understands laws as commands addressed to the subjects of the law, that is, as laws that mandate performance of legal duty. Hence, Austin is committed to the view, according to Kelsen, that the norm that mandates performance of legal duty is really the primary or fundamental form of a law. A law is a command issued by a superior to an inferior to behave or not to behave in a certain way. But this view, Kelsen argues, is inconsistent with the idea that to have a legal duty is to be liable to sanction:

> If, as Austin presumes, the legal duty is a consequence of the sanction, then the behaviour which it is our legal duty to observe cannot be identical with the behaviour which the legal norm commands. What is commanded can only be the sanction. The legal norm does not stipulate the behaviour which forms the legal duty. [...] It is because the legal norm attaches a certain sanction to a certain behaviour that the opposite behaviour becomes a legal duty. Austin, however, presents the matter as if the legal norm, by him called 'command', prescribed the behaviour which forms the legal duty. Thereby, he contradicts his own definition of legal duty. In Austin's command there is no room for the sanction. And yet it is only by means of the sanction that the command is obligating.[23]

Kelsen's argument here seems to rely on the assumption that if to have a legal duty is to be liable to a sanction, then the law that gives rise to the duty must be a norm that determines the conditions under which the sanction ought to be applied. But in this case, the law must take the form of the Kelsenian legal norm. It cannot take the form of a command to perform the legal duty, addressed to the subject of the law. It therefore follows that the theory that legal norms are commands addressed to the subjects of the law is incompatible with the view that to violate a duty is to be subject to sanction. If one wants to hold onto Kelsen's assumption of what it means to have a legal duty, one must reject the command theory and individuate laws in Kelsen's way.

18 An Austinian might well ask why it should be thought impossible for a sovereign command to be phrased as a conditional of the form 'Do x, or I'll sanction you.' It would be odd to deny a conditional of this sort the status of a

command and to thereby claim that there is no room for a sanction in Austin's command.[24] This reconstruction seems to be needed, in any case, to explain why the duty is a consequence of the sanction. If the announcement that one will be sanctioned if one does not do x is credible and the threatened sanction sufficiently severe, one has a conclusive reason to do x, which would account for the motivating force of legal duty. And why would one want to claim that to have a duty is to be obnoxious to a sanction unless one were interested in accounting for the bindingness of legal duty in this way? If Kelsen agrees that the legal duty is a consequence of the sanction, how can Kelsen's view of the nature of legal norms possibly differ from Austin's?

19 The claim that Austin's theory of legal duty is incoherent for the reason that Austinian commands cannot make reference to a sanction would appear to fail. However, it is not too difficult to see what Kelsen is driving at. For Kelsen, the reason why I have a legal duty to do x is that the law determines that a sanction ought to be applied if I do not do x. In other words, that I have a legal duty to do x means that the application of a sanction will be legally justified if I do not do x. For Austin, the reason I have a duty to do x is that there is a high probability that I will be harmed by the sovereign if I do not do x. The question whether the sovereign is justified in harming me simply doesn't arise. The Kelsenian norm that determines that a sanction ought to be applied if I do not do x is not itself a command, like the Austinian conditional 'do x, or I'll sanction you.' It is a permission to organs of state to apply a sanction in reaction to a delict.[25] As such, it is not valid because it was issued by a person with the de facto power to compel the obedience of those who are to execute it. Rather, it is valid because it was in enacted in accordance with legislative procedures themselves validated by a basic norm.

20 The real problem for Kelsen with Austin's conception of legal duty is not that it is incompatible with the view that laws are sanction-backed commands. The real problem is that Austin's conception is incompatible with the view that wherever there is law all legitimate use of force must be legally authorized. Kelsen's claim that legal norms, in their primary form, determine the conditions under which sanctions ought to be applied is rooted in the view that what the law does, first and foremost, is to authorize the use of force in a society, in the form of sanctions that react to prior delicts, and to de-legitimize or criminalize all use of force not so authorized. This conception of legal order is the polar opposite of the Austinian view that the law is the expression of a de facto power that is not itself authorized by the law to produce law and that, one presumes, may consequently exercise force with impunity even where it is not legally authorized to do so. According to Kelsen, by contrast, legal authorization is required to turn any use of force into an exercise of public power in the first place.[26]

21 This fundamental difference between Austin and Kelsen seems to have been lost on Hart. Hart refers to Kelsen's claim that "law is the primary norm, which stipulates the sanction" and that it is "only the sanction [that] 'ought' to be executed"[27] as though it were an attempt to salvage the Austinian view that all laws are coercive orders. Hart agrees with Kelsen that it is possible to present a legal system as a system of norms that determine the conditions for the application of a sanction. But he denies that there could be any good reason to do so once one acknowledges the inadequacy of the view that all laws are coercive orders to the subjects of the law. Kelsen's conception of the structure of legal norms, Hart concludes, lacks an adequate jurisprudential motivation: It expresses a misguided urge for the greatest possible degree of theoretical uniformity and simplicity, an urge that distorts and unduly simplifies our perception of legal phenomena.[28]

22 At the very least, this assessment is uncharitable. It overlooks that Kelsen's conception of legal norms as conditionals that authorize the use of force supports Hart's point that one cannot assimilate legal governance to the gunman situation writ large. To be sure, Kelsen, in contrast to Hart, attempts to reduce all legal norms to one and the same form, by interpreting power-conferring secondary norms as parts of complete norms that provide the conditions for the application of a sanction. But this move is not tied to the questionable assumption that law must be backed up by an un-commanded commander superior in de facto power to the subjects of the law. Hart emphasizes that law empowers individuals to shape their normative situation, instead of merely subjecting them to the will of a political superior. Kelsen's conception of the structure of legal norms clearly has room to accommodate this. There is no reason, from Kelsen's point of view, why the law should not empower its individual subjects to participate in determining the conditions under which sanctions ought to be applied.

23 Kelsen argues that legal norms are conditionals that provide for the application of sanctions, and that legal duties are duties not to perform acts that, according to the law, ought to trigger a sanction. However, Kelsen rejects the idea that the fear of being sanctioned is the typical motive for compliance with a legal duty. According to Kelsen, people conform to the law for all kinds of reasons, including moral beliefs, patriotic attitudes, or theological convictions. While a legal system can only exist if it passes a threshold of efficacy, the fear of sanction usually only plays a minor role in securing that threshold. Kelsen's interest in sanctions, then, is not based on the assumption that the psychological fear of punishment is needed to explain the bindingness of law.[29] It is based, rather, on the view that the fundamental point of legal order is to comprehensively determine the conditions of the legitimacy of the use of force in a society.

24 It should be admitted, however, that the defence of the Pure Theory's conception of the structure of legal norms just offered might not suffice to put a Hartian positivist's worries about Kelsen's conception of the structure of legal norms fully to rest. Even if it is acknowledged that Kelsen's picture of legal order differs as radically from the idea that law is the gunman situation writ large as Hart's own, one might still argue that the claim that all complete legal norms provide conditions for the application of sanctions lacks an adequate motivation. The pluralist approach to the individuation of legal norms we find in Hart, after all, is equally free of the shortcomings of the command theory, and it is arguably capable of greater descriptive nuance.

25 As we have seen, Kelsen does have a reply to this charge. His conception of the structure of legal norms is based on the claim that any true legal system must provide a comprehensive regulation of the legitimate use of force in a society. The key question in the dispute between Kelsen and Hart, then, is whether we should accept this claim as a true claim about the nature of law or legal system. Although both Kelsen and Hart reject the Austinian model of sovereignty, Kelsen's approach, as we will see, leads to more far-reaching conclusions in the field of the theory of the state than Hart's. Kelsen's ambition is ultimately a normative ambition, and it puts pressure on the claim that the Pure Theory is the only legal theory that meets the methodological requirements of legal positivism.

4. Austin, Kelsen, and the Illimitability of Sovereign Power

26 The second major strand of Kelsen's criticism takes issue with two famous implications of Austin's theory of sovereignty: the view that a legally illimitable sovereign is essential to the existence of a legal system and the denial of international law. In both cases, the command theory turns out to be too constraining to allow for a descriptively adequate account of legal phenomena.

27 Austin's claim that sovereign power is legally illimitable is a straightforward implication of the command theory.[30] If what it means to be subject to law is to pay habitual obedience to the sanction-backed command of a sovereign who does not pay obedience to anyone else, a sovereign cannot possibly be subject to legal limitation. Since there must be a sovereign power wherever there is law, every legal order necessarily presupposes a legally illimitable sovereign. Kelsen, in response, rather brusquely observes:

> This concept of the sovereign is sociological or political, but not juristic ... . This is difficult to reconcile with the theoretic method of analytical **jurisprudence,** which derives its concepts only from an analysis of positive law. In the norms of positive law no such thing as a 'sovereign,' a person or group 'incapable of legal limitation,' can be found. The central difficulty is that the **jurisprudence** of Austin, while it deals with the concept of the sovereign which is not the state but only an organ of the state, does not concern itself at all with the problem of the state itself.[31]

Kelsen gives little further explanation, in his discussion of Austin, of what it means for a concept of sovereignty to be sociological or political and not juristic.[32] It seems clear, however, that he would accept the following as at least a partial description of his claim: The existence, in a society, of a person or group of persons who are habitually obeyed but who do not pay habitual obedience to anyone else is nothing more than a social fact. And the social fact that some person or group of persons is habitually obeyed without paying obedience to anyone else simply does not entail that that person or group of persons is authorized to enact legal norms. Austin's concept of sovereignty is therefore

jurisprudentially irrelevant, as it misrepresents the nature and sources of legal authority.

28 This much would presumably find the support of other positivist critics of the command theory. However, Kelsen does not just claim that we cannot identify someone's having legal authority with his receiving de facto obedience. This mistaken identification, Kelsen suggests, is the result of a general methodological error, namely of the tendency to confuse legal and sociological categories. Kelsen holds that legal norms exist in the mode of validity. They do not determine that something will happen given such and such conditions, but rather that something ought to be done, given such and such conditions.[33] Since it is impossible to derive an 'ought' from an 'is', the validity of a legal norm, Kelsen argues, can only be grounded in another legal norm that authorized its creation. Ultimately, all norms must draw their validity from a basic norm that directly or indirectly authorizes the creation of all other legal norms, and that basic norm must be presupposed by the legal theorist to possess validity.[34] Kelsen elsewhere concludes from this line of argument that any attempt to ground the existence of law in any kind of social fact must fail.[35]

29 I do not intend to offer a discussion of the merits of Kelsen's theory of the basic norm in this paper. But I think we can make the following observation: The failure of the view that to have legal authority is to receive de facto obedience does not itself suffice to show that any legal theory which attempts to ground the existence of law in social fact must fail. If it is possible to develop, as Hart has clearly shown, a theory of law that grounds the existence of law in social fact and that is at the same time free of the command theory then Kelsen has not established that Austin's attempt to ground the existence of law in social fact is the cause of the clear descriptive inadequacy of his view. And if this has not been established, the failure of Austin's view provides no reason for rejecting all theories that try to explain the existence of law in terms of social fact.

30 Similar problems afflict Kelsen's claim that Austin's conception of sovereignty violates the "theoretical method of analytical **jurisprudence,**" which Kelsen takes to consist in deriving legal-theoretical concepts from an analysis of the positive law, and the positive law only. That Austin violates this methodological prescription follows from the fact that we find no such thing as a sovereign with legally illimitable powers "in the norms of the positive law."[36] An office or institution will be in the norms of positive law, presumably, only if the norms of positive law explicitly provide for that office or institution, by endowing it with a certain legislative authority. Needless to say, that an illimitable sovereignty is not in the norms of positive law would not have surprised or embarrassed Austin. Austin's claim that there must be a sovereign wherever there is law is surely not to be understood as a claim about the content of the positive law. It is a claim about the essential features of law as a social institution.[37] To go on to argue that we must, for methodological reasons, reject any theory of the nature of law that makes reference to something which is not in the content of the norms of the positive law, takes us back to the impasse we already encountered. We have not been shown that Austin's theory fails for the methodological reason that it makes reference to a social fact that is not in the content of the law.

31 Can Kelsen's argument be strengthened if we focus on the substantive claim that Austin's legal theory "does not concern itself at all with the problem of the state"?[38] Kelsen's development of this claim is rather brief and somewhat difficult to follow.[39] But his line of thought seems to be this: A sovereign can at best be an organ of the state. A sovereign, after all, acts in the name of the state or as a representative of the state. An organ of state, however, can wield authority in the name of the state only on the basis of some legal authorization. The idea of authorization, in turn, implies limitation, or at least limitability, since it entails that the organ that stands under authorization lacks the legal power to do what it has not been legally authorized to do. Since the state, as a legal person, can act only through its organs, the state's authority is identical to the legal authority of its organs. Neither the powers of the state itself nor those of any of its representatives can be essentially illimitable.[40]

32 Austin's **jurisprudence,** according to Kelsen, lacks the resources to arrive at this insight since it did not develop a legal concept of the state. To be sure, Austin uses the concept of an 'independent political society,'[41] but this concept is itself analyzed in terms of the brute fact of habitual obedience to sovereign power. Austin cannot, therefore, conceive of the sovereign as an organ of state or of the state as a legal person that must act through its authorized representatives.[42]

33 Our assessment of this criticism will have to depend on what exactly Kelsen takes himself to have shown here. One

way to read Kelsen's argument is to take it to focus on the alleged role of the sovereign in the constitution of a legal system. On this reading, Kelsen is doing no more than advocating the principle that someone's decisions can only have legislative effects if there is already a legal rule that connects those effects with his decisions. This principle denies that a legal norm could be the product of a legally unauthorized and illimitable sovereign and thus suffices to reject Austin's conception of the role of sovereignty in the constitution of law. The problem with this interpretation, it seems, is that it can be endorsed by the Hartian theorist who wants to base the validity of laws on the existence of a rule of recognition, (which is a matter of social fact).[43] Kelsen, then, still has not shown that the failure of Austin's theory of sovereignty establishes that the Pure Theory is its only feasible alternative.

34 However, Kelsen is clearly after something more than just the claim that Austin's theory of sovereignty fails as a theory of legal system when he states that the central difficulty of Austin's **jurisprudence** is that it does not concern itself with the problem of the state. Kelsen does not just argue that an act of state must have legal authorization in order to have legislative effects or that all the state's legal powers depend on the law. He makes the far stronger claim that it is inconceivable for the state to act in legally unauthorized ways since the state and its legal order are identical.[44] In Kelsen's view, no purported act of state is really an act of state if the organ in question, in performing that act, exceeds the bounds of its legally determined authority. And if a purported act of state that lacks proper authorization involves a use of force or coercion it will inevitably constitute a criminal act that is itself subject to a legally determined sanction, for the reason that any legal order, in Kelsen's view, must outlaw all unauthorized use of force.[45]

35 This conception of the relation of law and state has consequences that seem to set it apart from the Hartian rejection of the theory of sovereignty. One way to bring out the difference is to consider Locke's conception of powers of prerogative. Locke defines the power of prerogative as the power "to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it."[46] In Locke's view, a state (or its executive) can legitimately claim this power regardless of whether the positive law makes reference to it or not. Since the state is an association formed to pursue and protect the public good, the state must have the power to pursue and protect the public good without legal authorization and in violation of existing legal norms, should this turn out be necessary.[47]

36 It would appear that one can support the Hartian rejection of Austin's theory of sovereignty as a theory of legal system while acknowledging the existence and perhaps the legitimacy of a state's power of prerogative. A power of prerogative, in the Lockean view, is not a legislative power, a power to enact legal duties or to confer legal rights. Rather, it is a power to engage in the de facto action that is judged necessary to avert some imminent threat to the public good. Such action may involve the use of coercive force on the part of the state against certain individual persons, but not as legal punishment or sanction. It should therefore be possible for a Lockean to agree with the claim that the state's decisions can never have legislative effect unless they are legally authorized (and thus to reject the idea that the legal system is constituted by a legally unauthorized sovereign power) and yet to refuse to restrict the state's legitimate power to the making and the execution of law.

37 Kelsen, by contrast, is committed to denying that there can be such a thing as a power of prerogative (though he will admit, of course, that it is possible to make legal provision for situations of emergency or for the preventative use of force). According to the theorist of prerogative, an exercise of the power of prerogative is an official use of force that does not take the form of a sanction in reaction to a prior delict authorized by an already existing legal norm. But Kelsen insists, as we have seen, that wherever there is a legal order, all uses of force must either fall into the category of legally authorized sanction or into the category of sanctionable delict. The view that this alternative applies only to the acts of individual subjects of the law but not (or not necessarily) to acts of state is precisely the kind of authoritarian fiction to which Kelsen -- arguing against the likes of Carl Schmitt[48] -- wanted to provide the jurisprudential antidote.[49]

38 Kelsen's willingness to concern himself with the problem of the state, then, sets his view apart from Hart's. Kelsen is as anxious to show that we cannot coherently conceive of the state in terms of social fact as he is to show that we cannot coherently conceive of law in terms of social fact. If it were possible to conceive of the state in terms of social fact, we would, presumably, have to let go of the view that legally unauthorized uses of force can never be attributed to the state and must always constitute punishable delicts. Kelsen's claim that the state is identical to its legal order and that organs

of state cannot use force without legal authorization would fail. Hence Kelsen's refusal to limit his criticism of Austin to the claim that Austin invoked the wrong kind of social fact to explain the existence of law.

39 The Hartian positivist is likely to object that it is unclear why a positivist and purely descriptive theory of legal system must at the same time be or directly imply a full theory of the state. Surely, this demand is not forced upon us as a result of the failure of Austin's theory of sovereignty as an account of legal system. One might suspect that it results from a moral valuation of the rule of law, on Kelsen's part, which will put pressure on the value of the Pure Theory as a purely descriptive legal science.[50]

5. Austin, Kelsen, and the Status of International Law

40 Austin's model of sovereignty carries the implication that international law is not proper law. If all laws are commands issued by sovereigns to subjects, and if it is essential to sovereignty that a sovereign does not himself stand under someone else's command, there can be no 'proper' law that regulates relationships between sovereigns.[51] Kelsen argues that this view of the nature of international law is plainly inadequate. No **jurisprudence** that aims for descriptive adequacy should deny legal quality to international law on purely definitional grounds.[52]

41 The Pure Theory holds that the existence of genuine international law is not ruled out by the nature of law. The rules of international law exhibit the standard structure of legal norms in that they provide the conditions under which sanctions (war, reprisal) ought to be applied against a delinquent state. There is no reason to think that the norms of international law could not come to form a genuine legal system. For that to happen, Kelsen argues, the norms of international law must come to provide a comprehensive regulation of the legitimate use of force among states. All use of force among states must come to fall into either the category of international delict or the category of international sanction. If such a development is possible, and possible without the establishment of a highly centralized global political authority that does away with the independence of states, there is no reason to think that there could never be true international law.[53]

42 Kelsen admits that it is questionable whether international law can be said to have reached this stage of development. Some states still claim the right to use force at their own discretion, and not just in reaction to a prior delict, but to protect what they see as their vital interests. If one does not recognize international law as providing a comprehensive regulation of the use of force between states, one must conceive of international legal norms as having validity only within national legal systems. Under such a view, international law cannot be said to exist as a legal order in its own right. Both approaches are, for the time being, jurisprudentially feasible. International law is presently in a transitional stage of development. It has clearly already developed into something more than mere international morality, but it arguably has not yet taken on all the characteristic features of a fully developed legal order. The legal theorist thus has to choose whether to adopt the national or the international perspective in describing international law.[54]

43 Kelsen does not deny that a jurist's choice of perspective is likely to be conditioned by judgments of value, by his sympathy, or lack of sympathy, for the ideal of a cosmopolitan legal order that has supremacy over national legal orders. The Pure Theory as a legal science cannot make such judgments of value. Therefore, the Pure Theory cannot claim that only one of the two perspectives, but not the other, is scientifically legitimate.[55] However, Kelsen is anxious to deny scientific respectability to the view that an international lawyer, in describing international law, does not have to choose between the cosmopolitan and the national perspective. Some legal theorists want to hold both that international law forms a genuine legal system, and also that international law does not have to possess or to claim supremacy over national law. They argue instead "that national law and international law are two completely distinct and mutually independent systems of norms, like positive law and morality."[56]

44 Kelsen is opposed to such a view in part because he sympathizes with legal cosmopolitanism and thinks that it would be detrimental to the cause if international lawyers were to convince themselves that the choice between national or international supremacy could somehow be avoided.[57] But this normative concern, in Kelsen's view, does not

provide a scientifically respectable reason for thinking that the supremacy question is jurisprudentially unavoidable. Kelsen therefore presents what he takes to be a scientifically unassailable reason for thinking the supremacy question is forced upon us:

> The Pure Theory of Law shows that such a dualistic concept of the relation between national and international law is logically impossible [...]. If one assumes that two systems of norms are considered as valid simultaneously from the same point of view, one must also assume a normative relation between them; one must assume the existence of a norm or order that regulates their mutual relations. Otherwise insoluble contradictions between the norms of each system are unavoidable, and the logical principle that excludes contradictions holds for the cognition of norms as much as for the cognition of natural reality. [...] But once it is conceded that national and international law are both positive law, it is obvious that both must be considered as valid simultaneously from the same juristic point of view. For this reason, they must belong to the same system of norms, they must in some way supplement each other.[58]

Either national legal systems must form subordinate parts of one global legal system which determines their competence and provides their ground of validity, or international law must be conceived as part of the national legal system whose perspective the legal theorist has chosen to adopt. This is Kelsen's famous legal monism. Regardless of which point of view we adopt, all valid law must turn out to belong to one and the same legal system. Hence, one must either accept that international law has supremacy over national law or one must deny its existence as a legal order in its own right.[59]

45 The reason why we must acknowledge international law's supremacy if we want to affirm its existence, Kelsen argues, is purely scientific. It is logically impossible for a legal theorist who is true to the method of legal positivism to conceive of the existence of several independent legal systems. It should not occasion surprise that this radical claim has not found universal favour with later legal theorists.[60] Kelsen's argument for legal monism appears to rest on two independent claims. The first is that it is impossible for a legal system to contain norms that make contradictory demands on the behaviour of the subjects of the law. The second is that all valid (or, what amounts to the same thing, all existing) law must be described from the same point of view and thus form part of the same legal system.

46 The first of these two claims is more plausible than the second. While it may not be clear why the occurrence of contradictory norms within the same system must be logically impossible, a legal system containing contradictory norms is clearly a bad legal system insofar as it fails to provide behavioural guidance. Existing legal systems invariably contain rules of precedence for the solution of such conflicts.

47 Be this as it may, Kelsen's second claim is so problematic as to make his argument indefensible. It is hard to understand how it follows from the fact that national and international law are both positive law that they must both be considered valid from the same point of view. Put more generally, how does it follow from the fact that two norms a and b are norms of positive law that they must belong to the same legal system?

48 Kelsen's own explanations of the point are based on the view that legal norms exist in the mode of validity. What it means for a legal norm to exist is for that norm to specify a delict to which a sanction ought to be applied.[61] But it cannot be true that, according to the law, a sanction ought to be both applied to some behaviour and not applied to that behaviour. Hence, if there are two legal norms that make conflicting demands, the law must contain provisions to solve the conflict. These provisions will ensure that both norms are normatively related and thus form part of the same system.[62] This reasoning assumes what is to be shown, that both norms are part of the same legal system. That there must be a normative relation between two norms which are valid from the same point of view does not show that all legal norms must be valid from the same point of view.

49 A Kelsenian might reply that positive legal theory provides a description of what people ought to do, according to the law, and does not record the social facts that underpin the existence of legal systems. To perform this task, the legal theorist must inevitably choose to take the perspective of a particular legal system and tell us what ought to be done

according to that perspective. But from any such perspective there will only ever be one legal system, since all the laws that bear on what one ought to do, from the chosen perspective, must stand in some normative relation to it.

50 Even if we grant this point, it will not follow that Kelsen's normative theory is the only legitimate jurisprudential endeavour. Why should legal theorists refuse to adopt an external perspective of social fact, in addition to analyzing the normative content of the law from the internal perspective of one or another legal system? The counter that positivist legal theory ought to refrain from ever adopting an external perspective of social fact to preserve its scientific purity is unconvincing, as that restriction would rob legal theory of the ability to speak about a number of important features of law: It will not be able to make sense of the apparent plurality of legal systems, and it will fail to explain what distinguishes one from the other. These would surely be grave deficiencies in a theory of law that aims for descriptive adequacy and generality.

51 However, a substantive assumption about the function of legal order provides an alternative motivation for the monist approach. If it is true, as Kelsen argues, that any legal system must claim a monopoly of force, then international law must claim a global monopoly of force. This claim creates a conflict with any claim of a national legal order to provide a supreme and self-sufficient regulation of the use of coercive force. This conflict would not be merely theoretical. It would be a conflict that would have to be resolved on a practical level. Since a legal system, according to Kelsen, can only exist if it meets a threshold of effectiveness,[63] the existence of international law will require a sufficiently successful factual suppression of uses of force that challenge international law's monopoly of force. Hence, the question of supremacy of national or international law is unavoidable. Not for logical reasons, but for the reason that two competing claims to a monopoly of force in the same territory cannot both be successful.

52 The Hartian positivist is likely to respond that the question of supremacy becomes unavoidable, then, only because Kelsen's conception of legal system is laden with excess baggage that has no place in a purely descriptive theory of law. Kelsen's argument imports some traditional attributes of the sovereign state, such as the claim to a monopoly of coercive force in a specific territory and the function of securing peace, into the concept of law.[64] The resulting legal monism supports the hope for a supreme global legal order, the absence of which Kelsen perceives both as a political tragedy and as a defect of legality. The law, for Kelsen, necessarily aims to overcome anarchy, conceived as legally uncontrolled violence, and the complete attainment of that goal requires a supreme global legal order. Clearly, the conception of the purpose and the value of legality that is in play here cannot be defended on logical or methodological grounds alone. It expresses the view that the legal control of violence is of overriding moral importance.

6. Conclusion

53 The problematic nature of legal monism is well-encapsulated in Kelsen's final verdict on Austinian **jurisprudence:**

> As it is the task of natural science to describe its object -- reality -- in one system of laws of nature, so it is the task of **jurisprudence** to comprehend all human law in one system of rules of law. This task Austin's **jurisprudence** did not see; the Pure Theory of Law, imperfect and inaccurate though it may be in detail, has gone a measurable distance toward this accomplishment.[65]

We are confronted here with a description of the task of legal theory that appears to go well beyond the methodological demands -- double purity and generality -- that Kelsen put forward at the beginning. The requirement of descriptive generality, or the aim to give a general theory of the nature of law, applicable to all legal phenomena, has now turned into the demand to interpret all law as part of one legal system.

54 Austin was certainly not the only positivist who, while being interested in developing a general theory of law, did not consider it a necessary task of legal theory to comprehend all human law in one legal system. And some of those who have sided with Austin have been able to develop legal theories that avoid the obvious descriptive shortcomings of Austin's model of sovereignty. The Pure Theory, I conclude, will be the only possible theory of positive law only if the

methodological requirements of positivism are interpreted in ways that non-Kelsenian positivists can reasonably reject.

55 Kelsen's encounter with Austin is nevertheless an important episode in the development of positivism. Hart's attack on Austin in The Concept of Law visibly adapts Kelsen's line of attack on the command theory. In doing so, Hart tried to dissociate Kelsen's attack from the theoretical context of the Pure Theory of Law, and to integrate Kelsen's criticisms of Austin into a theory that, like Austin's, treats the existence of a legal system as a social fact and that refuses to concern itself explicitly with the problem of the state. The result of this Hartian reconstitution of the Austinian approach is a legal theory more strongly separated from political theory than Kelsen's Pure Theory which, after all, was supposed to be a theory of law and state. Those who take the aim of legal theory to be to develop a purely descriptive account of the general features of law will welcome this result.

56 But this is not to say that Kelsen's work is now jurisprudentially irrelevant. We undoubtedly need a theory of the state that concerns itself with the relationship of state and law, and with the role that legality plays in the constitution of legitimate political power. Hartian legal theory tends to assume that whether the power of the state is exercised under constraints of legality or not is only of limited importance, since what primarily counts, from a moral point of view, is the moral quality of the purposes for which political power is employed.[66] Those who find this perspective problematic have good reason to turn back to Kelsen's theory of law and state, as it contains fascinating material for thinking through the problem of the rule of law. But they may find themselves forced to let go of the view that what the Pure Theory has to teach us about the value of the rule of law can be defended on purely methodological and value-neutral grounds.[67]

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Notes

1 Kelsen's Pure Theory of Law did not develop under the influence of Austin's work, and Kelsen only began to write about Austin after his emigration to the US. The key texts for Kelsen's criticism of Austin are: Hans Kelsen, "The Pure Theory of Law and Analytical **Jurisprudence**" in Hans Kelsen, What is Justice? Justice, Law, and Politics in the Mirror of Science. Collected Essays by Hans Kelsen (Berkeley: University of California Press, 1957) 266 [Kelsen, "The Pure Theory"]; Hans Kelsen, General Theory of Law and State, translated by Anders Wedberg (Cambridge, MA: Harvard University Press, 1945) at 30-37, 62-64, 71-74, 77-83 [Kelsen, General Theory].

2 See HLA Hart, The Concept of Law, 2d ed by Penelope A Bulloch & Joseph Raz (Oxford: Oxford University Press, 1994) at 35-42.

3 See Stanley Paulson, "Introduction" in Hans Kelsen, Introduction to the Problems of Legal Theory: A translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law, ed by and translated by Bonnie Litschewski Paulson & Stanley L Paulson (Oxford: Clarendon Press, 1992) xvii at xlii.

4 Kelsen, "The Pure Theory", supra note 1 at 271.

5 See Kelsen, supra note 3 at 7-19.

6 Kelsen, "The Pure Theory", supra note 1 at 266.

7 John Austin, The Province of **Jurisprudence** Determined, ed by Wilfrid E Rumble (Cambridge: Cambridge University Press, 1995) at 38.

8 See ibid at 157-63.

9 See Hart, supra note 2 at 26-78.

10 See Kelsen, "The Pure Theory", supra note 1 at 272-74; Kelsen, General Theory, supra note 1 at 30-32.

11 See Austin, supra note 7 at 22.

12 Hart, supra note 2 at 80-83.

13 Kelsen, General Theory, supra note 1 at 31-32.

14 Ibid at 32.

15 See ibid at 32.

16 See ibid at 32-34.

17 See ibid at 34-37.

18 See Kelsen, supra note 3 at 26-32; Kelsen, General Theory, supra note 1 at 30-58.

19 See, for example, ibid at 21-23; Hans Kelsen, Peace Through Law (Chapel Hill, NC: University of North Carolina Press, 1944) at 3; Hans Kelsen, Principles of International Law (New York: Rinehart & Company, 1952) at 13-15, 17-18 [Kelsen, Principles of International Law].

20 Kelsen, General Theory, supra note 1 at 61.

21 Ibid at 60.

22 Austin, supra note 7 at 22.

23 Kelsen, General Theory, supra note 1 at 62.

24 Austin, supra note 7 at 21 defines command as follows: "If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command."

25 See Kelsen, "The Pure Theory", supra note 1 at 275-76.

26 Kelsen, General Theory, supra note 1 at 36: "That is the authority of the law, above the individual persons who are commanded and who command. This idea that the binding force [of the law] emanates, not from any commanding human being, but from the impersonal anonymous 'command' as such, is expressed in the famous words non sub homine, sed sub lege."

27 Ibid at 61 and 60.

28 See Hart, supra note 2 at 35-42.

29 See Kelsen, "The Pure Theory", supra note 1 at 274-76.

30 See Austin, supra note 7 at 212.

31 Kelsen, "The Pure Theory", supra note 1 at 281.

32 See ibid at 269-71. Kelsen offers an exhaustive discussion of the relation of the Pure Theory to the sociology of law and state in Hans Kelsen, Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhaltnisses von Staat und Recht (Tübingen, FRG: J.C.B. Mohr/Paul Siebeck, 1928).

33 See Kelsen, "The Pure Theory", supra note 1 at 267-78; Kelsen, General Theory, supra note 1 at 30.

34 See Kelsen, General Theory, supra note 1 at 110-11; Kelsen, supra note 3 at 59-62.

35 See the discussion of Max Weber's legal theory in Kelsen, supra note 32 at 156-70. For a (qualified) defence of Kelsen's rejection of sociological **jurisprudence** see Joseph Raz, "The Purity of the Pure Theory" in Joseph Raz, The Authority of Law. Essays on Law and Morality, 2d ed (Oxford: Oxford University Press, 2009) 293.

36 Kelsen, "The Pure Theory", supra note 1 at 281.

37 See Austin, supra note 7 at 164-83, 211-23.

38 Kelsen, "The Pure Theory", supra note 1 at 281.

39 See ibid at 278-83.

40 For a more detailed development of these themes see Kelsen, General Theory, supra note 1 at 181-207; Kelsen, supra note 32 at 114-204.

41 See Austin, supra note 7 at 165-83.

42 See Kelsen, "The Pure Theory", supra note 1 at 280-81.

43 But see Hart, supra note 2 at 144-50.

44 Kelsen, "The Pure Theory", supra note 1 at 281: "One of the distinctive results of the Pure Theory of Law is its recognition that the coercive order which constitutes the political community we call 'state,' is a legal order. What is usually called 'the legal order of the state,' or 'the legal order set up by the state' is the state itself." See also Kelsen, supra note 3 at 97-106.

45 See p 477 above.

46 John Locke, Two Treatises of Government, ed by Peter Laslett (Cambridge: Cambridge University Press, 1988) at 375.

47 See ibid at 374-80.

48 Schmitt identified the view that all public authority must rest on legal authorization as the core tenet of liberal constitutionalism and emphatically rejected it. See Carl Schmitt, Constitutional Theory, ed by and translated by Jeffrey Seitzer (Durham, NC: Duke University Press, 2008) at 62-66, 169-80.

49 It may be objected that the contrast I am trying to draw here is undermined by Kelsen's view that the law formally authorizes even acts of state that constitute material violations of the law. See Stanley L Paulson, "Material and Formal Authorization in Kelsen's Pure Theory" (1980) 39 Cambridge LJ 172. For a reply see Lars Vinx, Hans Kelsen's Pure Theory of Law. Legality and Legitimacy (Oxford: Oxford University Press, 2007) at 78-100.

50 See Joseph Raz, "The Identity of Legal Systems" in Raz, The Authority of Law, supra note 35, 78 at 97-102. Raz argues that Kelsen's thesis of the identity of law and state makes it impossible to offer a satisfactory account of the identity of legal systems.

51 See Austin, supra note 7 at 123-25, 171.

52 See Kelsen, "The Pure Theory", supra note 1 at 283-87.

53 Kelsen, Principles of International Law, supra note 19 at 17: "International law is law in the same sense as national law, provided that it is, in principle, possible to interpret the employment of force directed by one state against another either as sanction or as delict." See also Kelsen, General Theory, supra note 1 at 328-41.

54 See Kelsen, General Theory, supra note 1 at 376-88; Kelsen, supra note 3 at 111-25.

55 See Kelsen, General Theory, supra note 1 at 388.

56 Kelsen, "The Pure Theory", supra note 1 at 284.

57 See Hans Kelsen, Das Problem der Souveranitat und die Theorie des Volkerrechts. Beitrag zu einer Reinen Rechtslehre (Tübingen, FRG: JCB Mohr/Paul Siebeck, 1920) at 314-20.

58 Kelsen, "The Pure Theory", supra note 1 at 284.

59 See ibid at 284-85.

60 See the following: HLA Hart, "Kelsen's Doctrine of the Unity of Law" in HLA Hart, Essays in **Jurisprudence** and Philosophy (Oxford: Clarendon Press, 1983) 309; Joseph Raz, The Concept of Legal System. An Introduction to the Theory of Legal System (Oxford: Oxford University Press, 1970) at 95-109.

61 See Kelsen, "The Pure Theory", supra note 1 at 267-68.

62 See Kelsen, supra note 3 at 111-12.

63 See ibid at 59-63.

64 This point is made explicit in Kelsen, supra note 57 at 85-101.

65 Kelsen, "The Pure Theory", supra note 1 at 287.

66 See Joseph Raz, "The Rule of Law and its Virtue" in Raz, The Authority of Law, supra note 35, 210; Hart, supra note 2 at 203-07.

67 See Hersh Lauterpacht, "Kelsen's Pure Science of Law" in W. Ivor Jennings, ed, Modern Theories of Law (London: Oxford University Press, 1933) 105; Vinx, supra note 49.