A NEW THEORY OF POSITIVE LAW

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It may be useful to begin with an analysis of the title. The first thing to do is to deny that this theory is completely new. My own ideas about it are by now about fifteen years old and are essentially a contribution to the so called "Austrian" or "Viennese School" of a "Pure Theory of Law" which originated with H. Kelsen, now teaching at the University of California.

The next step is to limit the concept of law. This word may be used in the most general sense to denote any kind of relationship. This usage we can find in the world of being as in chemical or sociological, in mathematical or logical laws, the first two examples dealing with real, the last two with ideal objects. Some relationships in this sphere are objectively correct (as we hope), others are not, and again others were perhaps never meant to be so.

There is another group of relationships referring not to what is, the being, but to what ought to be, the "oughtness". Again laws of this kind may be objectively correct, as by definition ethical or natural laws are, or they may express only certain demands as proposals in social politics, proposed bills or for that matter mores, customary laws or statutory laws. And finally this form may be used just in a playful or joking way. To distinguish this type from the first we speak of "norms."

There is a fundamental difference between the two kinds of laws. Being may be a reality, oughtness never is. Our real behavior may of course conform to it as when we comply with a norm, but this behavior itself is not the oughtness. The latter continues to exist even if we constantly violate the norm. The norm, therefore, cannot be checked with reality, it can, however, be compared with the objectively correct ethical norm. If it conforms to it we call this particular normative law "just", otherwise "unjust". The word "theory" in the title means that this discussion will not follow the axiological line of evaluating laws according to what they ought to be but will only deal with the logical question what law is. And we shall be concerned only with normative laws from now on.

In fact we shall narrow the scope of our investigation once more to what may be called "juridical laws". Suppose we read a treatise on the sociology of property, what this institution is and what its effects are; or we may read the seventh commandment and a proposal telling us that the institution of property should be preserved, or may be that it should be abolished; finally we may read that part of Ancient Roman criminal law which deals with theft, a bill on this subject discussed in Congress, and the existing law on theft in the present day French criminal code.

We shall soon be able to distinguish between these various cases. The first case (sociology of property) deals only with what is, all the others refer to norms, the seventh commandment to an ethical norm, the proposal of a writer on social politics to the personal opinion of its author as to what ought to be. Both make demands on

human behavior but are noncommital as to what reaction should take place if the commanding norm is not complied with. It is precisely the presence of such a sanctioning norm which distinguishes the last three cases from the preceding ones. All the examples may possibly deal with the same content. It is, therefore, not the content but the formal element of combination of a commanding norm with a sanctioning norm that is characteristic of juridical law. The most general form of it would be: "A demands B, and if B does not take place and C happens D is demanded". Whatever I may substitute for the variables A, B, C, D, e.g. in order to give examples, the result will always be an element of juridical law. It may seem surprising that I can "manufacture" it that way at will. And I can actually do so but I am not yet a "law maker" because I cannot so simply "manufacture" positive law.

For not every juridical law is positive law. In the examples given before we can be rather sure that the existing French law will be called so and that the example I write down will not. There might be some dispute about the two others and probably more inclination to call the law of Ancient Rome positive than the unfinished bill in Congress. Why?

We may say that the present day French law on theft is being actualized, that is prevailingly obeyed. That does not mean that theft does not occur. It may even be very frequent so that we could not speak of a prevailing fulfillment of the commanding norm. The law, however, does not cease to be positive even in this case so long as at least the sanctioning norm is prevailingly fulfilled, that is by court action against the violation of the commanding norm.

There seems, however, to be one more requirement for positivity beside actualization (prevailing fulfillment). If I write down jokingly or just for demonstration's sake a hypothetical juridical law, it could happen that this particular demand is (by chance) fulfilled. This will probably be the case if the commanding norm demands a behavior which is usually being observed anyway, for instance certain habits and fashions as wearing straw hats from a certain date on etc. Nevertheless we would not speak of positive law because it was never meant to be taken seriously. Thus we have to add for positivity another element to actualization. Positive law must also be "given," i.e. somebody must demand it seriously. That may happen in a family if father or the older brother says: "Do it or else....." Such demand has the form of a double-norm of juridical law and if meant seriously and obeyed makes for an atmosphere of "legalism". It may be the case when a monarch or dictator or for that mateer a legislative assembly, issues laws. It is surprising but unavoidable that positivity, therefore, rests in part on a psychological element, the serious intention of the law giver. Only because in most cases there is no doubt about it, it is as a rule not mentioned explicitly. But it may play a quite important part in problems of interpretation.

This investigation has been carried on so far with respect to a single juridical norm. Very often it is not worded so plainly but its elements must be assembled from various parts of a law system, unsanctioned norms must be eliminated as merely moral appeals without juridical relevance etc. . . Now

just what is the element of coherence between the norms of a law system. They may be interdependent through "logical implication" so that the content of the lower norm B may be logically derived from the content of a higher norm A. Or the higher norm A may only point to another act of norm giving and declare what is demanded by that norm B ought to be done. This merely " functional implication" is the case of "delegation of norms". This happens for instance if father declares what mother says should be done; or if the constitution defines how ordinary laws can be made or how administrative regulations can be derived from ordinary laws; or if international law defines the conditions for the recognition of a state (and its law system) as an entity of international law.

The result is a scale of strata of laws: "Laws" agreed upon by contracting people, by-laws of associations, laws of municipalities, counties, states, federal states, the family of nations, each of them governing the legal relations, "downwards", free in its own sphere and subjected to regulations from higher strata. The result is a "pyramid" of strata of law and groups of people subjected to them. The "state" is only one group among them, theoretically not distinguished in essence from the others and not endowed originally with any quasi-mystical competence, called sovereignty. As long as it remains in the framework of international law it has only as much competence as the international law gives to its members. It is only a logical consequence that absolute sovereignty can exist only on the highest level of international law or (if there is such a thing) in groups outside of it. As far as the international law is in operation, a "world government" is already in operation. We may try to enlarge its scope but we do not have to create it. On the other hand we do not need to destroy the sovereignty of states because it is not existent, we can destroy only the erroneous belief in it.

In this way the pure theory of law may help to pave theoretically the way to the one world for which mankind is headed if it is not going to be lost.