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KELSEN'S LEGAL POSITIVISM AND THE CHALLENGE OF NAZI LAW¹

Abstract

Kelsen's legal positivism has often been criticized for having supported the compliance of the German judiciary with Nazi law. Especially Kelsen's insistence on the separation of law and morality was considered as a crucial deficiency. I reject that criticism. My argument is that Kelsen's thesis that law and morality constitute two distinct normative spheres seems persuasive if one takes into account that the Nazi legal theorist's program of a 'unification of law and morality' served to extend the authority and power of the Nazi-regime. I criticize, however, Kelsen's relativist account of morality which made his position vulnerable to the post-war objections that legal positivism provided no safeguard against the Nazi perversion of law.

1. Introduction

In this paper I am going to examine Kelsen's legal positivism in the light of Nazi legal theory. My claim will be that Kelsen's thesis that law and morality constitute two distinct normative spheres is highly plausible, but that some of his metaethical assumptions are seriously flawed. Kelsen's insistence on the separation of law from morality seems much more persuasive if one takes into account the Nazi legal theorist's program of a 'unification of law and morality'. The critique that legal positivism was responsible for the compliance of the German judiciary with the Nazi's interpretation and use of law is not viable. I will, however, argue that Kelsen's relativist account of morality made his position vulnerable to the post-war objections that legal positivism provided no safeguard against the Nazi perversion of law.

The paper is structured in the following way: Section II explains briefly why Nazi law is thought to pose a special problem for legal positivism, Section III outlines the main assumptions of Kelsen's legal positivism and his relativist understanding of morality. In section IV, I depict the anti-positivist view of some prominent Nazi legal theorists. Section V reflects on the lessons we should draw from the arguments of the Nazi legal theorists. I conclude by arguing that the weak point of Kelsen's position is not the separation between law and morality, but his skepticism towards an intersubjectively valid morality.

2. The challenge for legal positivism

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Legal positivism is famous for denying any internal connection between law and morality. Positivists consider law and morality to be distinct normative spheres. That a legal system fails to meet standards of morality does not justify denying it legal validity: a bad legal system can still be law.

In the continental tradition of legal theory, Hans Kelsen certainly was the most prominent advocate of such a position. Kelsen's succinct statement reads: "(T)he validity of a positive legal order does not depend on its conformity with some moral system."² In the Anglo-American tradition legal positivism finds most vivid expression in Hart's *separability thesis*, which maintains that it "is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so".³

Natural law theorists, on the other hand, argue that legal systems which violate basic demands of morality and justice cannot qualify to be genuine law. They are, as John Finnis puts it, "peripheral" and "watered-down versions" of the central cases of law.⁴

Legal positivism has been repeatedly accused of failing to provide the resources for rejecting bad and evil law. The separability thesis, so the critique goes, rules out a substantial critical assessment and rejection of immoral legal orders. If we accept the framework of legal positivism, we are stuck with the judgment that wicked legal systems, notwithstanding their failure to meet basic moral standards, still amount to valid law.

A prominent reaction after World War II, when the crimes, atrocities and horrors of the NS-regime became apparent, was to blame the legal profession for submitting to the Nazi regime because of its blind acceptance of the principle 'law is law'. The responsibility for this failure was attributed to legal positivism and its dominating influence on German jurisprudence in the pre-Nazi area, which, so the critics say, continued to shape the jurists' attitude towards the Nazi-regime.

In his ground-breaking article *Gesetzliches Unrecht und übergesetzliches Recht*, published in 1946, Gustav Radbruch called for a revival of natural law thinking in post-war German jurisprudence, writing:

„Positivism, with its thesis that 'law is law', has indeed rendered the German judiciary defenseless against laws with arbitrary or criminal content."⁵

How should we assess this critique of legal positivism which was addressed specifically against Kelsen's legal theory? Let us turn to Kelsen's characterization of legal positivism.

3. Kelsen's legal positivism

² Hans Kelsen, *Pure Theory of Law*. Translation from the Second (Revised and Enlarged) German Edition by Max Knight, Berkeley and Los Angeles: University of California Press, 1967, p. 67.

³ H.L.A. Hart, *The Concept of Law*. With a Postscript edited by Penelope A. Bulloch and Joseph Raz (2nd edn Oxford: Oxford University Press, 1994), pp. 185, 186.

⁴ John Finnis, *Natural Law and Natural Rights*. Oxford: Oxford University Press, 2011, p. 11

⁵ See Gustav Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, in: *Süddeutsche Juristen-Zeitung* 1946; reprinted in: Radbruch: *Gesetzliches Unrecht und übergesetzliches Recht*. Baden-Baden: Nomos Verlagsgesellschaft, 2002, p. 10. (Translation H. Pauer-Studer. All German citations in this text are translated by H. P. St.)

Kelsen's aim in developing a 'pure theory of law' is to provide a descriptive-scientific account of law. A science of law should depict law as it is, not law as it ought to be from the point of view of legal politics or morality. "The aim of the pure theory of law", Kelsen writes, "is to explore what law is, not what it ought to be."⁶ Therefore law should be seen in its normative purity, free from all "alien elements" like statements of psychology, ethics, and politics.⁷

In conformity with his project of developing a pure theory of law, Kelsen states that the definition of legal validity must be internal to the law. Whether certain norms are legally valid or whether a certain order of norms amounts to a legally valid system cannot depend on external standards like criteria of political or moral correctness. Legal validity has to be defined and assessed on merely legal grounds.

Kelsen develops a procedural account of legal validity. A certain norm declaring certain acts to be obligatory or forbidden is a legally valid norm if the norm is part of a legal system. Crucial is the grounds on which the norm is considered to be part of a legal system: a particular norm belongs to a particular legal system and is legally valid, according to Kelsen, if and only if the norm has been generated exactly in the manner which the particular legal system defines as its norm-creating procedure. "The norms of a legal order", Kelsen writes, "must be created by a specific process."⁸

The procedure of norm-creation is defined by the constitution. But regress threatens if we consider the act by which the constitution has been created as itself an act which has to be authorized by a higher legal authority, and so on. The process of law-generation must have a beginning; but in a legal framework which is not based on a God-given natural order the human designers of the legal order have to set this beginning point. The constitution must be simply declared to be the source of law.

The creation of positive legal norms thus depends on the organs and institutions to which the constitution confers the norm-creating authority. The authority of the constitution itself, however, can only rest on the constitution ascribing to itself the normative power of establishing its own authority. In "the logical sense", this requires according to Kelsen, that the constitution be read as a theoretical presupposition, as a sort of transcendental condition of making possible the process of generating law. This theoretical presupposition Kelsen calls the "basic norm" (*Grundnorm*). Accordingly he writes: "The basic norm is the presupposed starting point of a procedure: the procedure of positive law creation."⁹

What Kelsen presents is a thoroughgoing legal constructivism: the norms of a legal system do not reflect a natural order, but are man-made. At the basis of a legal order is a decision about the constitution and the manner of generating legal norms via a settled procedure.

An accurate scientific account of law must, Kelsen maintains, depict the normative authority of law. Law requires that certain acts *ought* to be done and that the omission of acts which ought to be done and the performance of acts which *ought not to be done* will be sanctioned. If the law, for example, requires one to pay taxes, then omitting payment of taxes, especially by acting on a skilfully planned scheme of tax evasion, will have legal consequences in the

⁶ Kelsen, *The Pure Theory of Law*, *loc. cit.*, p.1.

⁷ *Ibid.*, p. 1.

⁸ *Ibid.*, p. 198.

⁹ *Ibid.*, p. 199.

form of punishment. Sanctions are for Kelsen a constitutive element of law. Legal orders - and this distinguishes law from morality - are backed by coercive power. As Kelsen notes:

“(T)he social orders designated as ‘law’ are coercive orders of human behavior. They command a certain human behavior by attaching a coercive act to the opposite behavior. This coercive act is directed against the individual who behaves in this way (or against individuals who are in some social relation to him).”¹⁰

How does Kelsen set law apart from notorious coercive schemes, such as the coercive system set up by a gang of robbers or mafia bosses? If coercion is a constitutive feature of law, what rules out coercive acts which we perceive to be mere threats or even crimes?

Kelsen concedes that the command of a robber – ‘your money or your life’ – addresses an ‘ought’ to another individual. However, we ascribe the objective meaning of a norm only to the commands of a legal organ, defined as such by the constitution. The command of the legal organ but not that of the robber amounts to an objectively valid norm. The request of the robber contains a merely subjective ‘ought’ reflecting an individual wish, not an objectively valid norm.¹¹ Kelsen maintains that the subjective meaning of the command of the gangster and the command of an income-tax official are the same. Both correspond to a wish that a certain action be performed. But the command of the tax-official has, in addition to the subjective meaning, the objective meaning of a valid norm. In Kelsen’s own words:

“Only the one order, not the other, is a norm-positing act, because the official’s act is authorized by a tax law, whereas the gangster’s act is not based on such an authorizing norm. The legislative act, which subjectively has the meaning of *ought*, also has the objective meaning – that is, the meaning of a valid norm – because the constitution has conferred this objective meaning upon the legislative act.”¹²

Note that ‘objective validity’ is here defined in terms of the internal legal validity of the legal order. The objective validity of a norm depends on what the higher legal norms and finally the constitution define to be law.

There is an alternative way to draw the line between the tax-official’s request and the gangster’s command. Many legal theorists consider the appeal to norms of justice essential for distinguishing between the valid commands of a legal organ and those of a robber gang. The command of the legal organ is considered to be a form of coercion aiming at justice; the command of the gangster amounts to coercion by a purely arbitrary will, acting outside all moral and legal restrictions.

Kelsen rejects this. Justice, he claims, cannot be the demarcation line between law and other coercive systems. Justice, Kelsen maintains, “cannot be made an element of law”.¹³ The reason is that Kelsen regards justice to be a relative value, understood and defined differently in different social communities.

The example on which Kelsen bases his argument is telling. He refers to St. Augustine’s claim in the *Civitas Dei* that there cannot be law if justice is not in place. Augustine’s conception of justice, Kelsen objects, is defined with reference to God. Acting justly means giving to God what is owed to him. Therefore any coercive order which is not based on the belief in the God of the Christian religion has for Augustine merely the status of a robber gang. Given that standpoint, Kelsen concludes, the Roman Law would not be law. Equally, he

¹⁰ *Ibid.*, p. 33.

¹¹ *Ibid.*, pp. 44, 45.

¹² *Ibid.*, p. 8.

¹³ *Ibid.*, p. 48.

continues, “the capitalistic coercive order of the West is not law from the point of view of the Communist ideal of justice, nor the Communist coercive order of the Soviet Union from the point of view of the capitalist ideal of justice.”¹⁴ The upshot is: Legal orders can be assessed to be just or unjust from the standpoint of a certain conception of justice. But standards of justice are community-relative and world-view-dependent. To judge a legal order to be unjust is therefore no reason to deny that it is a legal order.

It is crucial for an appropriate assessment of Kelsen’s legal positivism to keep in mind that Kelsen was a moral relativist. He recognizes only two forms of values: absolute values and relative values. Absolute values are based on the belief in God or in another form of trans-human authority. The notion of objective “good” accordingly only makes sense in the context of assuming that there is a normatively binding trans-human will or authority, foremost God. All values which rest on human foundations are merely relative values, worse, they are arbitrary. To quote Kelsen:

“Inasmuch as the norms that are the basis of the value judgments are enacted by human, not superhuman, will, the values constituted by them are arbitrary....Therefore the norms enacted by men and not by divine authority, can only constitute relative values.”¹⁵

Kelsen distinguishes between a subjective and an objective meaning of acts that address another person’s behavior by an ‘ought’. The subjective meaning of an ‘ought’ is just the individual’s personal and subjective wish that the person to whom the ‘ought’ is addressed comply with the norm. The objective meaning of an ‘ought’ is a valid norm binding upon the addressee of the ‘ought’-statement. Kelsen illustrates this with the following example: If X who is in need asks another man, Y, for help, the subjective meaning of this request is the wish of X that Y ought to help him. But in an objective sense Y ought to help, that is to say, he is morally obliged to help, only if a general norm – established, e. g., by the founder of a religion – is valid, such as the norm ‘love your neighbour’. And this latter norm is objectively valid only in case one ought to behave as the religious founder has commanded.¹⁶

In a nutshell, Kelsen’s relativism amounts to the following argument:

- a. To assess a norm and the value stated by the norm as objectively valid and therefore as good, the norm must emanate from a superhuman authority, i.e. from God or from a natural order created by God.
- b. The object of a scientific theory of value are only norms (and the values constituted by these norms) enacted by a human will.
- c. Therefore: It is not possible to assess the norms and values enacted by a human will to be objectively valid (if we operate in the framework of a scientific theory of value).

Kelsen, however, offers no argument for the first premise. The dichotomy – that values are absolute and based on the will of God or they are man-made, based on human willing and therefore relative - is just presupposed. Kelsen rules out by definition that there might be norms and values that are the result of human willing and construction and that can be justified by rational deliberation and argument as objectively, i.e., intersubjectively valid. Though Kelsen was an antagonist of natural law, especially religion-based natural law, he was obviously still in the grip of religious thinking when it came to explaining the objectivity of values.

¹⁴ *Ibid.*, p. 49.

¹⁵ *Ibid.*, p. 18. Kelsen’s relativism is also apparent in: Hans Kelsen, Foundations of Democracy, in: *Ethics* 66, 1955, pp. 1-102, esp. 16, 17 and pp. 42-48.

¹⁶ *Ibid.*, p. 8, 9.

Kelsen's relativism is thoroughgoing. We are of course familiar with conflicting value judgments: What A judges to be good, B can claim to be bad. A and B can also hold conflicting moral norms to be valid: A maintains that norm x is valid; B claims that norm not-x is valid. Kelsen's relativism, however, is not restricted to admitting that individuals might entertain different value judgments and moral norms, and that conflicts of value among individuals might therefore occur. Kelsen thinks it impossible to rationally resolve the question which of two conflicting norms is the correct one, as the following passage shows:

“For example, a norm could be valid that forbids to commit suicide or to lie under all circumstances, and another norm could be valid permitting or even commanding suicide or lies under certain circumstances, yet it would be impossible to prove rationally that only one of these two norms, but not the other, is the truly valid one.”¹⁷

The norm-conflict and the dispute between contradictory conceptions of what is valid could be decided only if one of the two conflicting norms could be proved to constitute an absolute value. This means that the norm must be backed by a superhuman authority, namely, God or a natural order created by God. But for Kelsen such assumptions remain outside a scientific theory of value, which can take into account only norms and values that are the result of human willing.

Kelsen's way of talking of a 'science of value' reminds one of course of the 'Scientific World Conception' propagated by the Vienna Circle.¹⁸ Most of the members of the Vienna Circle acknowledged only two categories of meaningful sentences, namely analytic or empirical sentences, thereby excluding normative sentences. The most radical version of non-cognitivism was advocated by Rudolf Carnap who denied that value judgments have any cognitive content and compared them with mere emotional exclamations expressing approval or disapproval.¹⁹

Kelsen, however, was not an emotivist. He did not share Carnap's views. One of the passages in the *Pure Theory of Law* reads like a direct response to Carnap:

“If somebody says that something is good or bad, but if this statement is merely the immediate expression of his emotional attitude toward a certain object, if it expresses that he wishes something or does not wish it but its contrary, then the statement is no value 'judgment', because it is no function of cognition, but a function of the emotional component of consciousness; and if this emotional reaction refers to the behavior of another individual, then it is the expression of an emotional approval or disapproval, akin to the exclamation 'bravo' or 'phooey'!”²⁰

Kelsen argues that expressions of one's emotional attitudes are not value judgments, but merely “a function of the emotional component of consciousness”; to be a value judgment, a judgment must be “a function of cognition”.²¹

¹⁷ *Ibid.*, p. 18.

¹⁸ In a personal letter from 1963 Hans Kelsen states that though he was not formally a member of the Vienna Circle, he had contact with several of its members like Moritz Schlick, Otto Neurath, Philipp Frank, and Viktor Kraft. Kelsen explains in that letter that it was the Vienna Circle's „antimetaphysical thrust“ which connected him to its philosophy. The letter is cited in Clemens Jabloner, Kelsen and his Circle: The Viennese Years, in: *European Journal of International Law* 9, 1998, pp. 368-385, here: 378, 379; cf. also Clemens Jabloner and Friedrich Stadler (Eds.), *Logischer Empirismus und Reine Rechtslehre. Beziehungen zwischen dem Wiener Kreis und der Hans Kelsen-Schule*, Wien: Springer 2001; cf. also Friedrich Stadler, *The Vienna Circle. Studies in the Origins, Development and Influence of Logical Empiricism*, Vienna-New York: Springer, 2001.

¹⁹ Carnap, R., 1937, *Philosophy and Logical Syntax*, London: Kegan Paul, Trench, Trubner & Co., pp. 23-29.

²⁰ Kelsen, *The Pure Theory of Law*, *loc. cit.*, p. 20.

²¹ *Ibid.*, p. 20.

Kelsen draws here a twofold distinction. One way to distinguish between value judgments is to take into account the value they state, namely whether they state a subjective or an objective value. Another way to look at the question is to ask whether an utterance is a function of emotion or of cognition.

With respect to the value they state, we can distinguish between subjective and objective value judgments, Kelsen maintains. A subjective value defines the relation of an object to the wishes of an individual. Subjective value judgments are judgments that refer to a subjective value, i.e. a value which consists in the relation of an object, in particular someone's behavior to the wish or will of an individual. A value judgment is merely subjective if the judgment that x is good means that x is wished by the individual who makes the judgment; the judgment that x is bad would then just mean that the individual wishes the opposite behavior of x. This way the values 'good' and 'bad', Kelsen claims, are relative to the individual who wishes x or non-x.²²

An objective value, according to Kelsen defines the relation of an object x, e.g. a certain behavior, to an objectively valid norm. An objective value judgment has no relation to the wishes of an individual; it merely states whether x (a certain behavior) corresponds to an objectively valid norm.

In regard to the emotional or cognitive function of an utterance things are different, Kelsen holds: the category of subjective value judgments drops out of the picture because a statement that would be merely a function of one's emotional attitudes, is, according to Kelsen, not a judgment in the strict sense.

The emotive/cognitive distinction thus determines what is a *judgment*: judgments cannot be expressions of emotion. The objective/subjective view thus depends on whether a judgment is about someone's wishes. There can be subjective judgments: they would be cognitive attitudes about someone's wishes.

As a function of cognition any judgment must be objective, in the sense that it must be given and hold independently of the wishes of the judging individual. So, in regard to the function of cognition all value judgments are objective.

Note, however, that Kelsen has a merely descriptive reading of 'objective value judgments'. To utter an objectively valid judgment means for him that one compares the behavior of x with the norms of an existing normative order and then assesses whether the behavior conforms to the norms of that order. This purely descriptive exercise can be done without any emotional involvement, without any way of approving or disapproving of the normative order or the particular norm at stake. One can, to cite Kelsen's own example, state that according to Christian morality it is appropriate and good to love one's enemies, but one can make that value judgment without taking any stance on whether one approves or disapproves of the norm that one ought to love one's enemy.²³ Or take the following explanation by Kelsen:

"The answer to the question whether according to a valid law the death penalty ought to be imposed upon a murderer and consequently whether – legally – the death penalty in case of murder is valuable, can and must be given without regard to whether the one who has to give the answer approves or disapproves of the death penalty. Only then is a value judgment objective."²⁴

²² *Ibid.*, p. 20.

²³ *Ibid.*, p. 21.

²⁴ *Ibid.*, p. 21.

Kelsen thereby rules out that it is meaningful to assess the validity of value judgments from a normative perspective. In Kelsen's framework, the question whether x is objectively valuable or not, or whether y ought to be done or not, is not decided on normative grounds. To decide whether x is objectively valid or whether y ought to be done depends solely on which norms are held to be valid by the normative system against which one makes the judgment, either a particular legal system or a particular group morality.

Kelsen simply does not take into account that we might interpret value judgments to make a normative claim which we are then going to assess on normative grounds, namely asking whether the normative claim amounts to a mere partial wish or interest of a particular individual or whether the claim is viable and can be normatively endorsed from the perspective of (all) others. For Kelsen issues of morality are not something which we can deliberate about from a universal perspective. There are in his normative world no universally valid principles of morality, i.e. a morality whose central principles could be shared normative ground across various religious, social, ethnic and political communities. This is so since Kelsen recognizes only two kinds of moral norms: all moral norms or principles either rest on the belief in God and depend therefore on the acceptance of a certain religious system, or they are the result of human willing and part of a particular moral system which, however, expresses merely the moral beliefs of a specific group or community of people. In the first case the moral norms are absolute, in the second case relative. Given this categorization of moral norms into absolute and religious-based ones on the one hand, and man-made and therefore relative on the other hand, for which Kelsen provides no reasons and justification, all non-religious moral principles or norms are by definition relative.

This radical form of relativism, not his separation of law and morality, is, I think, the weak point of Kelsen's position and his legal positivism. Before elucidating this point more clearly, let us take a look at the Nazi conception of law.

3. The Nazi legal philosophy: The unification of law and morality

The program of the Nazi lawyers was to call for the unification of law and morality (*Sittlichkeit*)²⁵. Leading Nazi legal theorists like Reinhard Höhn, Otto Kollreutter, Karl Larenz, Ernst Forsthoff, and the notorious Roland Freisler thought that eliminating the distinction between law and morality was crucial for achieving a National Socialist form of law.²⁶ The idea was that an appropriate conception of law should embrace not only positive legal norms but a 'higher law idea' (*höhere Rechtsidee*) reflecting 'the right and the just'. Ethical principles should be embedded in law.

Höhn demands that considerations of justice „find immediate expression in the legal norm“²⁷; they are not merely relevant in the case of discretionary decisions of the judge. “Justice”,

²⁵ The Nazi legal theorists usually use the term ‚Sittlichkeit‘ for ‘morality’ which was common at the time.

²⁶ Reinhard Höhn, Volk, Staat und Recht, in: Reinhard Höhn, Theodor Maunz und Ernst Swoboda, *Grundfragen der Rechtsauffassung*. München: Duncker & Humblot, 1938, pp. 1-27; Reinhard Höhn, *Rechtsgemeinschaft und Volksgemeinschaft*. Hamburg: Hanseatische Verlagsanstalt, 1935, pp. 49-83; Otto Koellreutter, *Deutsches Verfassungsrecht*. 3rd edn., Berlin: Junker und Dünnhaupt, 1938; Karl Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*. Tübingen: Mohr, 1934; Karl Larenz, *Rechts- und Staatsphilosophie der Gegenwart*, 2nd edn., Berlin: Junker und Dünnhaupt Verlag 1935; Ernst Forsthoff, *Der totale Staat*, Hamburg: Hanseatische Verlagsanstalt 1933.

²⁷ Höhn, Volk, Staat und Recht, *loc. cit.*, p. 13.

Höhn claims, “does not stand outside law”.²⁸ Whereas positivism implies that „the idea of justice cannot be incorporated into positive law“,²⁹ the dichotomy between the idea of justice and statutory law should be overcome in the National Socialist state, because “(l)aw is lived morality.”³⁰ Law amounts, in Höhn’s words, not merely to a simple technique for applying independent ethical principles; “law can only mean the lived ethics of a people”.³¹ Thereby “the sharp separation of law and morality loses its meaning”.³²

The *volks-community (Volksgemeinschaft)*, Höhn states, „is according to the new German conception of law not only a social fact, but also a principle of law (justice)“.³³ The ethical values which are mandatory for the National Socialist conception of community, such as honor, loyalty, and race, must be part of law.³⁴ Only from the perspective of an individualist system of law would such concepts seem to be „foreign in their essence and ‘non-juridical’” Höhn maintains.³⁵ Because of the reassessment of the *volks-community* as a legal notion, the principles of racial sameness and species sameness should also be constitutive of law, according to the National Socialist conception of a legal system.³⁶

Otto Koellreutter equally emphasizes the relatedness of ethics, law, and community. It is crucial that members of the *volks-community* recognize the paramount political and legal status of the *volks-community* as well as the personhood and honor of every other member.³⁷ This sense of community also enhances the capacity for moral and legal judgment:

„If the corporate feeling is awakened and nourished and sustained in each *volks-comrade (Volksgenosse)*, then there develops the ‘right’ legal feeling which matches the *volks-conception* of the right and just. The *volks-conception* of justice thus has the same roots as the *volks-conception* of the political.”³⁸

The standards of justice include, in Koellreutter’s words, those norms and principles that have the “task to protect and develop the national life order in its existence”.³⁹ The community sentiments of the people define what is just.

Höhn also ascribes to the members of the *aryan volks-community* the decisive epistemic competence in legal and evaluative questions: their judgment determines what counts as just and unjust. It becomes especially clear how misguided and ideologically entrenched this conception is when Höhn cites approvingly Alfred Rosenberg’s statement: “Law (*justice*) is that which *aryan persons* consider to be right, and injustice is what they dismiss.”⁴⁰

Though the standards of justice and correctness are according to that definition clearly dependent on the acceptance of the Nazi worldview, Koellreutter, for example, has no reservations about the presumptuous claim: “Therefore the National Socialist rule of law state is a just state as well as an order-based state.”⁴¹

²⁸ *Ibid.*, p. 13 (italics in original).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*, p. 9 (italics in original).

³⁴ *Ibid.*

³⁵ *Ibid.*, p. 9.

³⁶ *Ibid.*, p. 8.

³⁷ Koellreutter, *Deutsches Verfassungsrecht, loc. cit.*, p.12.

³⁸ *Ibid.*, p. 11.

³⁹ *Ibid.* According to Koellreutter the Nazi racial laws belong to the constitution of the Third Reich.

⁴⁰ Höhn, *Volk, Staat und Recht, loc. cit.*, p. 8 (Italics in the original).

⁴¹ *Ibid.*, p. 56.

Karl Larenz, too, endorses the unity of law and morality. Consider the following passage:

“Law is not a matter of arbitrary discretion, it is also not a matter of external expediency and utility, but a live order closely connected with the moral and religious life of the community, which confronts the individual with its own claim to validity and internally binds the individual.”⁴²

Larenz claims that law must be connected to a specific understanding of morality: morality must “not (be) a matter of the individual person, but a life form of the community, in Hegel’s words, ‘the true spirit of a family and a people’”.⁴³ The meaning and end of law is according to Larenz located in the „substance and promotion” of the volks-community which is of unconditional value. Positive legal norms must be in line with the “ethical consciousness, the mores of the volk”.⁴⁴ Larenz claims that the “common will”, not the particular will of the individual, must be the basis of the “spiritual”, but also “real validity” of the legal norms.⁴⁵

The Nazi program of a unification of law and morality entails that in National Socialism, as the Nazi jurist Walter Hamel writes, „a distinction between moral duty and legal duty ... cannot be made any more.”⁴⁶ The same requirement is voiced by Roland Freisler:

„There can be no gap between a legal imperative and an ethical imperative. This is so because imperatives of law are imperatives of decency; however, what is decent is determined by the conscience of the volk and the individual member of the volk.”⁴⁷

Because the moralization of law eliminates the distinction between legal and ethical obligations, honorable, decent and loyal behavior is legally required. Because law and morality form a unity, the law binds the members of the community also ethically.

The National Socialist reading of law as expressing the ethics of the volks-community extends the authority of the state and the Nazi regime. In a liberal framework, the fulfilment of ethical and moral duties is entrusted to the person’s own conscience. The Nazi legal theorists’ elimination of the distinction between legal and ethical requirements entails transforming ethical duties into legal duties, enforceable by state coercion.

Crucial for the new understanding of law is, as the criminal law theorist Georg Dahm expresses it, that “law, ethics, criminal law and the worldview of the volk grow together.”⁴⁸ The values of National Socialism and the legal and ethical convictions and sentiments of the volks-community form the new foundations of law.

In many respects the required moralization of law remains on the level of a programmatic rhetoric and reduces to mere vague invocations of the ethical values of the volks-community. Some Nazi legal theorists, however, look for more precise formulations, appealing thereby to

⁴² Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*, loc. cit., p. 5.

⁴³ *Ibid.*, p. 6.

⁴⁴ *Ibid.*, p. 9.

⁴⁵ *Ibid.*, p. 30.

⁴⁶ Walter Hamel, *Wesen und Rechtsgrundlagen der Polizei im nationalsozialistischen Staate*, in: Hans Frank (Ed.), *Deutsches Verwaltungsrecht*. München: Zentralverlag der NSDAP Eher, 1937, pp. 381-398, esp. p. 384. Koellreutter equally emphasizes the connection between ethics, law, and community. Koellreutter, *Deutsches Verfassungsrecht*, loc. cit., p. 12. Compare also Ulrich Scheuner, *Die Rechtstellung der Persönlichkeit in der Gemeinschaft*, in: Hans Frank (Ed.), *Deutsches Verwaltungsrecht*, loc. cit., pp. 82-98.

⁴⁷ Roland Freisler, *Nationalsozialistisches Recht und Rechtsdenken*, Schriften des Reichsverbandes Deutscher Verwaltungs-Akademien. (Ed.) Dr. H.H. Lammers unter Mitwirkung von D. Fritz Müßigbrodt, Heft 4, Berlin: Industrieverlag Spaeth & Linde 1938, p. 56.

⁴⁸ Georg Dahm, *Die Erneuerung der Ehrenstrafe*, in: *Deutsche Juristenzeitung*, 39. Jahrgang, Heft 13, pp. 822-832, here: p. 826.

virtue ethics. Wilhelm Sauer, for example, considers the „original German (gothic) duties“, which are part of the „German ethical and cultural history“, to form the content of the „volks-ethics“.⁴⁹ Central for Sauer are the four „gothic virtues“: truthfulness, reliability, goal-directedness and self-control, where goal-directedness finds expression in a community-sense and a spirit of sacrifice; the virtue of self-control includes „restrained self-assertion“. The opposite of those virtues are the following “typical criminal vices” which also count as the strongest violations of the “community ethos”: obliqueness, betrayal, ravenousness (egoism), and license and intemperance (envy).⁵⁰

The practical consequences of the Nazi moralization of law also have an effect on the function and official self-understanding of the judge. Since ethical norms are of crucial importance, the judge has to follow his conscience and display „duty-bound discretion“.⁵¹ The judge must also respect the „juridical basic law, the law of the well-being of the volk as the conscience of the nation“.⁵² It is crucial that the judge does not merely adjudicate in a formal mode, but that he also avenges the material wrong connected with an offense. The subject of adjudication is not merely the formal violation of law, but also the infringement of the higher trans-legal ethical order.

Identifying law with morality entails distinguishing it from statute. The separation between statute and law (between *Gesetz* and *Recht*) which is repeatedly emphasized by the Nazi legal theorists holds equally for criminal law. Freisler, for example, writes:

„(W)e believe that throughout criminal law a material conception of law and of legal wrong-doing must be decisive since we do not put on a par law and legal statute, but develop it out of the ethical order of the volk. From our point of view one should therefore not deduce criminal law solely from the legal statute; we rather should equally recognize an extra-legal source of recognition of the law.“⁵³

The material conception of lawfulness and of legal right and legal wrong should first and foremost be secured by the skilled sentence of the judge. This means that the judge must, besides matters of facts and the descriptive features of an offense, also take into account specific normative elements which make possible a value-based adjudication. The list of “genuine normative elements” cited by Freisler includes: well-being of the Reich; well-being of the volk; social evaluations like esteem, depreciation and exploitation; good mores (*Sitten*), a concept of decency, and sanitary *volks*-feelings. These „genuine normative elements“ are according to Freisler decisive for establishing a material conception of legal right and wrong as a second source of legal cognition besides and equal to the positive legal statute.⁵⁴

The fusion of law and morality serves the NS-jurists as a welcome means to extend the authority and power of the Nazi regime. Larenz’s writings are an illuminating example. On the one hand, Larenz claims to follow Kant’s philosophy of law, especially Kant’s way of defining the authority and dignity of law independently from considerations of utility. He argues, for example, that Kant “rightfully removes not only from the sphere of ethics, but also

⁴⁹ Wilhelm Sauer, Die Ethisierung des Strafrechts. Über die Prinzipien der Strafrechtserneuerung und ihre praktische Auswirkung, in: Roland Freisler (Hg.), *Deutsches Strafrecht. Strafrecht, Strafrechtspolitik, Strafprozeß*, Zeitschrift der Akademie für deutsches Recht, Neue Folge, 1. Band, Berlin: R.v. Decker’s Verlag, G. Schenck 1934, pp. 177-190, here: p.188.

⁵⁰ *Ibid.*, p. 188.

⁵¹ *Ibid.*, p. 184.

⁵² *Ibid.*, p.184.

⁵³ Freisler, *Nationalsozialistisches Recht und Rechtsdenken*, *loc. cit.*, p. 57.

⁵⁴ Freisler, Aufbau und Aufgabe des Besonderen Teils, Gestaltung seiner Tatbestände. Einbau des Schutzes der Bewegung in das Gesetz, in: Franz Gürtner (Hg.) *Das kommende deutsche Strafrecht. Besonderer Teil*. Bericht über die Arbeit der amtlichen Strafrechtskommission, p. 61.

from the philosophy of law” a “form of utilitarianism which claims that law exists for the interests of the individual human beings and is created by them”.⁵⁵ The volks-community as a value for its own sake rests on the interest-independent ethical self-obligation of its members.

On the other hand, Larenz clearly gives up the basic principle of Kant’s political philosophy, namely that the force of the state merely extends to regulations in the sphere of external freedom.⁵⁶ The state is, Kant argued, not permitted to interfere into the sphere of internal freedom. The authority and power of the state must not extend to the control of our personal convictions, including our ethical attitudes. In regard to law the consequences of this Kantian restriction are: The state is entitled to enforce the subjects’ compliance with legal norms. But the state is not authorized to require that compliance to rest on specific moral or ethical motives.⁵⁷ According to Larenz, however, the subjects’ internal ethical commitment to law and legal norms is crucial for the National Socialist conception of law.⁵⁸

The elimination of the separation between state, law, and morality blurs the line between the spheres of external and internal freedom. In a liberal-democratic framework the state and therefore law regulate the relations of external freedom. Ethics, on the other hand, is a standard of internal freedom whose recognition is due to the autonomy of the person. The Nazi state rescinds the neutrality of the state towards the citizens’ personal ethical convictions and world-view principles. The personal sphere of freedom is now subject to the state’s comprehensive normative control.

Dahm’s remarks clearly display that new orientation when he writes:

„We recognize today the independence and neutralisation of law, the separation and opposition of state and law, law and politics, law and world view, law and ethics to be the core of evil. Overcoming those oppositions and the realization of unity within law amounts to a renewal of our legal life.“⁵⁹

The elimination of the distinction between law and morality thus strengthens the dictatorial power of the Nazi regime. An attitude of inner loyalty and commitment towards law is much more conducive to the ends of the Nazi state than a mere compliance with orders and legal regulations due to brute state force. The ‘ethical recognition’ of Führer orders by officials and judges was, as historians have pointed out, crucial for the relatively high inner stability of the Nazi state in the pre-war years.⁶⁰ Morality thus turns into one of the most effective tools of the Nazi regime to realize its political goals.

4. Conclusions

⁵⁵ Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*, loc. cit., pp. 5, 6. By ‘utilitarianism’ Larenz means a self-interest-based theory of morality.

⁵⁶ Immanuel Kant, *Metaphysical First Principles of the Doctrine of Right*, in Kant, *The Metaphysics of Morals*. Ed. by Mary Gregor, Cambridge: Cambridge University Press, 1991, p. 31, 6:239.

⁵⁷ It is of ethical value if citizens recognize the norms of the state and feel committed to *ethical juridical duties*, but that is not something the state can require citizens to do. This of course does not mean that Kant excludes all intentional and internal elements of morality from the sphere of law. A good discussion of the point is Allen D. Rosen: *Kant’s Theory of Justice*. Ithaca and London: Cornell University Press, 1993, p. 85f.

⁵⁸ Larenz, *Rechts- und Staatsphilosophie der Gegenwart*, loc. cit., pp. 157, 158.

⁵⁹ Georg Dahm, *Die Erneuerung der Ehrenstrafe*, p. 826.

⁶⁰ See e.g. Hans Mommsen, *Beamtenum im Dritten Reich. Mit ausgewählten Quellen zur nationalsozialistischen Beamtenpolitik*, Stuttgart: Deutsche Verlagsanstalt, 1966.

What conclusions should we draw from the Nazi philosophy of law? What follows in regard to the assessment of Kelsen's legal positivism? Is the claim that legal positivism contributed to the jurists' compliance with the Nazi regime tenable?

The Nazi legal theorists aggressively attacked legal positivism. Ernst Forsthoff, for example, holds the strict separation of law and morality and the „formalistic conception of law“ defended by legal positivism to be responsible for „the ethical disorientation“ of Germany during the Weimar republic. Forsthoff claims that the liberal state is unable to distinguish between „true – false, just – unjust, good – bad, moral – immoral, since it lacks the substance which is the basis for drawing such distinctions.“⁶¹ The Weimar republic was for him nothing other than a mere „apparatus-state“ („*Apparaturstaat*“), guided by functional expediency and utility.⁶² Instead of the formalism of the Weimar constitution, the National Socialist State is according to Forsthoff in need of a material understanding of law, requiring the rejection of positivism and individualism.

These sharp objections are addressed specifically against Kelsen, who was the most prominent academic representative of legal positivism in the German-speaking world at the time. Karl Larenz, for example, describes Kelsen's *Pure Theory of Law* as „a phenomenon of intellectual foreign infiltration (“*eine Erscheinungsform der geistigen Überfremdung*“).⁶³ And Larenz emphasizes that it was the achievement of Carl Schmitt to bring again to life the „essence of the political“ and „the simple reality of political life against the artificial abstractions of the Vienna School (of legal thought).“⁶⁴ The special target of critique is Kelsen's demand to treat law and morality as two distinct normative spheres. Legal positivism, Larenz argues, strips law „of its natural connection with national mores and morality“.⁶⁵

Instead of endorsing legal positivism, the Nazi lawyers approve the unification of law and morality in a way which at least formally corresponds to a normative demand the post-war anti-positivists articulate as well.

The Nazi conception of morality is of course deeply distorted and permeated by ideology. Nevertheless, the moralization of law by Nazi legal thinkers should be a clear warning that the call for bringing law and morality together will not be the way to remedy the perversions in the Nazi legal system.

What follows in regard to our understanding of law? Law should be an instrument for solving moral problems. That means that law itself should not turn into a moral problem. Sometimes - and totalitarian regimes are a paradigmatic case - law itself becomes so deeply moralized that it cannot function any more as a reliable normative guideline.

In order for law to avoid getting stuck in ideological moralized territory and losing its capacity for being an impartial forum for resolving disputes, requires expressing the deepest insights of morality in normative requirements applying to legal systems. Requirements like publicity, reliability, predictability, prospectivity, consistency, understandability, avoidance of

⁶¹ Forsthoff, *Der totale Staat*, loc. cit., pp. 13, 14.

⁶² *Ibid.*, pp. 13, 34.

⁶³ Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*, loc. cit., p. 11.

⁶⁴ *Ibid.*, p.18.

⁶⁵ *Ibid.*, p.12 (italics in the original).

arbitrariness and retroactive legislation⁶⁶ support and work towards a legal system which resists deterioration. All these criteria the Nazi legal system was far from meeting. However, to claim that a legal system should fulfill those standards by no means amounts to demanding that morality and law should form a unity.

To sum up: The post-war critique that legal positivism is responsible for the submitting of the German judiciary to Nazi law is not viable. Yet there is a deep deficiency in Kelsen's theoretical position.

Kelsen defends the separation of law and morality as two distinct normative spheres with the following arguments:

- a. Law is a coercive order, sanctions are enacted by force. Morality is not a coercive order, the sanctions are milder.
- b. A justification of positive law through morality is only possible if there exists a contrast between moral and legal norms and between morally good and morally bad law.
- c. Law cannot form a unity with justice and morality; otherwise the demand *that law ought to be just* does not make sense. In Kelsen's own words: "(I)f law is identified with justice, and if that which *is* is identified with that which *ought* to be, then the concept of justice as well as the concept of the Good have lost their meanings."⁶⁷

The first assumption (a.) is certainly uncontroversial. The second and third argument (b. and c.), claiming that we need to draw a distinction between moral and legal norms in order to be able to criticize certain legal norms as morally bad, maybe even obnoxious, are equally plausible. They are especially so in the light of the Nazi program of a moralization of law.

However, in the second and third argument Kelsen talks as if there were principles of morality and justice which do have the resources to allow us to criticize bad and evil law. He talks as if there were principles of justice functioning as normative guidelines directing us in the process of deliberating what sort of law and legal norms *we ought to create*. In reminding us that we need to distinguish between law and morality in order to get a clear notion of what law *ought* to be, Kelsen seems to make use of 'ought' in a normative sense. Recall, however, that Kelsen considers moral values to be relative; morality is for him only a form of a partial personal or group morality.

Let us look briefly at what he had to say about the Nazi legal system even many years after the war. In the English edition of the *Pure Theory of Law* which appeared 1967 Kelsen writes:

"The legal order of totalitarian states authorizes their governments to confine in concentration camps persons whose opinions, religion, or race they do not like; to force them to perform any kind of labor; even to kill them. Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order of these states."⁶⁸

⁶⁶ The mentioned criteria are of course the principles which Lon Fuller considers to constitute the „inner morality of law“ and they formed the basis of his claim that law without a core of inner morality does not deserve to be called law any more. See Lon L. Fuller, *The Morality of Law*, revised edn., New Haven and London: Yale University, Press, 1969, pp. 39-41. But Fuller's assumption of an inner morality of law does not draw the line between law and morality in a clear way. It is, I think, too close to the problematic idea of uniting law and morality.

⁶⁷ Kelsen, *Pure Theory of Law*, p. 67.

⁶⁸ *Ibid.*, p. 40)

From a descriptive point of view Kelsen's statement which applies also to the Nazi legal system is accurate. But of course we would also like to know what he had to say about the Nazi legal system from *a normative point of view*. In this respect the passage tells us that one might "violently condemn" such a system on moral grounds.

But in terms of Kelsen's relativistic account of morality, such a moral condemnation would be relative to the personal moral standpoint of an individual or relative to a specific group-morality. Given Kelsen's background, personal history, and his deep engagement for democracy there is of course no question that he personally despised the Nazi regime.⁶⁹ Yet his theoretical views do not allow the condemnation of the Nazi regime from an agent-neutral and impartial point of view. The problem of Kelsen's position thus is not the separation between law and morality, but his relativism in regard to morality.

In regard to Kelsen's legal positivism we can state:

- Kelsen's insistence on the separation of law and morality is correct.
- Kelsen's moral relativism is implausible and his conception of morality needs to be revised.
- Kelsen's conception of the science of law as a mere descriptive analysis of law has to be corrected. Law remains a normative enterprise, the question what law *ought* to be is normatively crucial.

But given the dramatic political developments and circumstances facing Kelsen - namely a politically influential religious absolutism in Austria resulting eventually in an authoritarian Christian-catholic *Ständestaat* eliminating parliamentary democracy from 1934 to 1938 on the one hand, and the rise of Nazi power in Germany on the other hand - we can understand Kelsen's deep wish that at least law should be free from ideological and moralizing elements, though we might not share his moral relativism.

⁶⁹ Kelsen was one of the drafters of the Austrian constitution in 1919. He left Austria in 1930 to take up a professorship at the University of Cologne. In April 1933, due to the „Law for the Restoration of the Civil Service“ Kelsen was dismissed as a Jew from his position at the University of Cologne. After positions in Geneva and Prag he emigrated to the US in 1940. Cf. Oliver Lepsius, Hans Kelsen und der Nationalsozialismus, in: Robert Walter, Werner Ogris and Thomas Olechowski (Eds.), *Hans Kelsen: Leben – Werk – Wirksamkeit*, Wien: Manzsche Verlags- und Universitätsbuchhandlung 2009 (=Schriftenreihe des Hans Kelsen Instituts Vol. 32), 271-288.