The function of judge or the postmodernist challenge in contemporary legal philosophy

Kelsen – Hart – Dworkin

Jelica Šumič-Riha

One of the main challenges of contemporary philosophy of law is to solve the problem of form, that is to say, of consistency, of completeness, of »wholeness« of law. From the point of view of predominantly positivist legal theory, the problem of wholeness of law could be: how to achieve a unified legal system, and in what way is it to be guaranteed? Leaving aside the question why the law is supposed to be whole at all, why is it necessary to conceive the law as a unified system, we should, nevertheless, point out that this presupposition has never been put into question by contemporary legal philosophy. A full account of this problem is yet to be given, though not in the present paper, since it could not be integrated within its general framework. In this context, we could suggest only the general idea of the possible answer to this question, that the universally accepted presupposition of wholeness of law is a part of the problem, not the method of its solution.

The aim of this paper is to suggest why the interpretation of law, by taking as its basis the very presupposition of the wholeness of law, also could be understood as a rejection of the challenge of postmodernism. For our present purpose, postmodernist enterprise in theory and practice could be characterized as an attempt to demonstrate how truth, consensus, unity and sameness are produced by marginalization, exclusion and suppression of differences. In the case of the institution of law as a practice of social regulation, the postmodernist project is preoccupied, generally speaking, with the denouncement of the totalitarian feature of the universalizing pretensions of legal discourse and, more specifically, with the paradoxical relation between finding the truth or, rather, the »right« interpretation, and the exercise of power.

For our present purpose, it is not necessary to analyse in detail how each of the three legal philosophers mentioned in the title tackled this problem. What is important, however, is to show in what way the answers given to this question by Kelsen, Hart and Dworkin focus on the role of the judge in exercising legal power. Our starting hypothesis is that the judge or, rather, the exercising of judicial power, may well be understood as the point at which the whole interpretation of law as a unified system breaks down.

*

The solution proposed by Kelsen in his first major work, *Reine Rechtslehre*, is a hierarchical system of legal norms with a fundamental norm *(Grundnorm)* as

its basis. But in his later work, a legal system is conceived as a set of individual judicial decisions, »linked together,« as B. S. Jackson puts it, »only by the fact that they belong to a common system of authorisation.«[1] Regardless of important differences between *Pure Theory of Law* and Kelsen's later doctrine of norms, for Kelsen, the wholeness of law is not at issue. According to Kelsen, a system of norms belongs to the legal universe if and only if the condition of normative consistency is fulfilled. In other words, a legal system is experienced as unified and taken for granted as such from the very start.

For Hart, the law is to be conceived as the union of primary and secondary rules, where primary rules are rules to guide the behaviour of individuals, while secondary rules are rules about primary rules, of how they are to be created and recognized. The rule of recognition is a means by which an appropriate authority provides an »identity card« indicating that a rule in question belongs to a legal system and has, therefore, legal validity. In short, the law is that which is declared as such by the »rule of recognition.« This fundamental rule, which in many ways functions analogously to Kelsen's *Grundnorm,* is based on universal acceptance by a given community or, at least, by officials exercising judicial power.

For Kelsen as well as for Hart, declaring themselves legal positivists, the law is a system of rules unified by an exceptional rule. Because of its exceptional position, this rule – *Grundnorm* for Kelsen or the rule of recognition for Hart – could be called a master rule. It is nothing but a pure signifier, giving unity and identity to an assemblage of unrelated rules or, rather, totalizing a field of dispersed rules into a discrete, hierarchical legal system.

From the point of view of legal positivism, every legal system has an ultimate norm or rule, a rule of recognition, or the *Grundnorm,* which is the basis of all legal norms/rules. This fundamental rule/norm defines the ultimate criteria of validity for all rules/norms of the system. At the same time, it defines those practical considerations and principles that are relevant and legally binding grounds for judicial decision-making. This fundamental rule/norm, being ultimate, cannot itself be valid, at least not in the sense in which other legal rules are valid, because it does not rest on some further standard of validity (a more fundamental rule/norm), but simply on its universal acceptance. It is the sole rule in a legal system of rules whose validity or, rather, binding force depends upon its acceptance. It is noteworthy that accepting a positivist conception of law leads almost automatically to the conclusion, drawn also by Kelsen and Hart, that what could not be subsumed under a hierarchical system of rules falls out of law or, strictly speaking, is not law.

For legal positivists as Kelsen and Hart, the legal system is distinguished from other normative systems by the fact that the validity of legal norms/rules is

1. B.S. Jackson, *Semiotics and Legal Theory*, Routledge & Kegan Paul, London and New York 1985, p. 234.

determined by their recognition by certain authoritative institutions, namely the courts, which are charged with interpretation and application of the norms/rules of the system. On the other hand, legal norms are conceived not only as standards guiding human behaviour, but also as standards and criteria defining judicial duties and guiding judicial decisions. For every legal system to function, at least from the point of view of legal positivism, there must be a shared context of interpretation of rules in which legislator (law-maker), judge (law-applier), and ordinary law-follower participate.

To establish this shared context of interpretation of rules or norms, we must distinguish, according to Kelsen, two forms of meaning: subjective and objective. Subjective meaning is the meaning given to an act by the subject or law-follower himself. Objective meaning, on the contrary, is the meaning of an act resulting from its interpretation in light of a legal norm. The general idea of Kelsen's conception of legal interpretation is that not only law-maker and law-applier, but law-follower as well, is in a position to know whether his/her act is legal. Any reasonable individual is, therefore, capable of judging his/her own behaviour objectively. Objective knowledge is in *Pure Theory of Law*, at least in principle, available to all:

»If the 'ought' is also the objective meaning of the act, the behaviour at which the act is directed is regarded as something that ought to be not only from the point of view the individual who has performed the act, but also from the point of view of the individual at whose behaviour the act is directed, and of the third individual not involved in the relation between the two ... then the 'ought' as the objective meaning of an act, is a valid norm binding upon the addressee, that is, the individual at whom it is directed. The ought which is the subjective meaning of an act of will is also the objective meaning of this act, if this act has been invested with this meaning, if it has been authorized by a norm, which therefore has the character of a 'higher' norm.«[2]

Kelsen's conception of the norm is ambiguous, even controversial – the evidence is this very passage – because the norm is presented as a »schema of interpretation« of an act and, at the same time, as the meaning of an act of will. The only reasonable solution would be – since the norm cannot be both a schema of interpretation and its object – to disregard one of the two alternatives. It is not always clear which alternative was chosen by Kelsen himself. One of the reasons for this embarrassing situation is that the universally available objectivity of meaning is compatible only with the conception of norm as a schema of interpretation. But it is difficult to reconcile the universalisation of objective meaning with the conception of the norm as the »meaning of an act of will.«

This tension between two conceptions becomes even more obvious in Kelsen's position on conflicting norms. The answer to this problem, as presented in his

2. H. Kelsen, *Pure Theory of Law*, 1967, p. 7f.

first conception of norm, could be formulated as follows: If a legal system contains incompatible prescriptions obliging the law-follower to behave in a certain manner and, at the same time, not to behave in this way, then no objectively valid legal norm is present. The second conception is a rejection of this view. Two rules within the same legal system may be in conflict and, therefore, may place a rule-follower in a dilemma: to follow one or the other? But this conflict of norms is by later Kelsen no longer regarded as relevant to the meaning of the act as legal, because each rule, each prescription within a legal system is to be understood as a separate act of will. What is required, however, is that those acts of will should be issued by a competent authority. The same could be said of the objective or legal meaning of an act. The official, that is, legal quality of an act is determined only by the decision of a legal authority:

»Objective meaning is a form of institutional meaning, but it is conferred not in accordance with the views of the participants but according to objective criteria, even though these objective criteria appear, in the later Kelsen at least, as no more then the fact of decision by a competent legal organ. The act of a footballer in kicking the ball into the net may have the subjective meaning of a 'goal,' in that the player understands his act as having that significance under the rules of the game of football. If the referee so rules, the act also has the objective meaning of a goal; if he whistles for off-side, the subjective meaning of the act does not correspond to its objective meaning.«[3]

In the application of legal rule by a judge, the interpretation of the rule in question rests on an act of will by which the judge as law-applier chooses between the possible interpretations of rule. It is, therefore, possible that a judge may choose the wrong alternative and make the wrong decision. But even if such a decision is considered a mistake, it is not null or invalid. Until this decision is annulled by a higher legal authority, it is legally valid, since it was made by a competent legal organ. Notwithstanding the fact that Kelsen regards legal errata or wrong legal decisions as legally valid as correct legal decisions, this does not mean that judicial decision-making is arbitrary. As Kelsen puts it:

»In Plato's ideal state, in which judges may decide all cases entirely at their discretion, unhampered by any general norms issued by a legislator, every decision is, nevertheless, an application of the general norm that determines under what conditions an individual is authorized to act as a judge.«[4]

In theory, every interpretation of a statute, every application of law, is, according to Kelsen, legal insofar as it remains within the frame constituted by the statute itself. But this frame, as shown, does not preclude possible mistakes. Kelsen, of course, being a legal positivist, cannot concede in advance that a

3. B.S. Jackson, *Op. cit.*, p. 238.
4. H. Kelsen, *Op. cit.*, p. 235.

mistaken judicial interpretation is possible. Even more, for a legal positivist like Kelsen it is impossible to reconcile the idea that the statute itself renders the wrong decision possible.

The solution offerd by Kelsen is the following: Inasmuch as a decision is made by a competent legal organ whose competence was conferrerd to it by a higher legal authority, it should be regarded as legally valid. Even a wrong decision counts as valid until annulled by a higher instance as erroneous. What confers to a decision its validity is, therefore, not its »correctness,« but, rather, the fact that it was made by an official charged with the task to issue authoritative decisions. A mistake counts as a mistake if and only if it was declared as such by a competent (higher) authority. In other words, the legal meaning of judicial decision, whether »right« or »wrong« in itself, is determined, necessarily, retroactively.

We might say that in spite of Kelsen's own intention to preserve the wholeness of law, a legal system as unified, his later conception of norm undermines his initial project. It is true that a higher norm determines a lower norm, that »the act by which the individual norm of judicial decision is created is usually predetermined ... by general norms of formal and material law,«[5] but Kelsen, nevertheless, rejects any logical relationship of inference between a general norm and an individual norm. It is a mistake, according to the later Kelsen, to believe that the two most important logical principles, the law of non-contradiction and the rule of inference, are applicable to the relations between norms of positive law. A general or »higher« norm is not to be regarded as a premise having an individual norm as its conclusion. To illustrate Kelsen's position, we might use his own exemple:

So far as the applicability of the logical rule of inference to legal norms is concerned, the question is whether, from the validity of a general norm such as »All thieves should be punished,« the validity of an individual norm such as »Smith the thief should be punished« follows logically in just the same way as it follows from the truth of the general statement »All men are mortal« that the individual statement »Socrates is mortal« is true. But there is no similar normative syllogism: even if the general norm holds, that »All thieves should be sent to prison,« it is still possible for the individual norm to hold, that »Smith the thief should not be sent to prison.« If a norm is conceived as a meaning of the act of will, then no individual norm could be implicit in the general norm because, as Kelsen puts it, the judge is a different man from the legislator and his act of will cannot be implicit in the act of will of another man. Whether the judge decides that Smith the thief should be sent to prison or not, his decision is based only on his act of will, not on the relationship of inference between higher and lower norm. Even if the decision made by the judge is in accordance with the rule of inference, this is only because the judge

5. *Op. cit.*, p. 242.

wanted to make it so. But Kelsen goes even further and states that, whatever motives the judge might have in making his decision, these motives are irrelevant to the legal status of his decision.

Notwithstanding the fact that this view of the later Kelsen concerning norms is hardly acceptable even to his followers, it is a logical consequence of his positivist position. But there still remains to be explained how to preserve the objective validity of judicial decisions. In the absence of the normative syllogism, which means that the legal validity of judicial decisions can not be guaranteed in advance by any logical relationship between norms, the only answer seems to be that legal validity is presupposed. In this sense we could say that whatever a judge decides, it should be regarded as legally valid because the decision was issued by a competent legal organ. What guarantees the legal validity of the legal application is only the authoritative status of the law-applier.

* *

For Hart, to solve the problem of judicial interpretation is to find the middle way between »formalism« and the »skepticism« or »realism.« The stability and order, necessary for legal interpretation are guaranteed by the »core of the settled meaning« of general expressions. On the other hand, »penumbra of uncertainty« saves the legal interpretation from the dangers of formalism. But Hart's distinction between central clarity (a core of the fixed meaning) and peripheral shadow (a margin of uncertain meaning that is yet to be determined) implies more than a conventional theory of language. As to the question of why is it necessary to presuppose a »core of settled meaning« at all, Hart's position is clear and firm:

»If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist«[6].

And even more explicitly:

»If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that certain type of behaviour be regulated by rules, then the general words we use... must have some standard instance in which no doubts are felt about their application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in in which words are neither obviously applicable nor obviously ruled out.«[7]

We could summarize Hart's answer to this question as follows: the presupposition of a »core of settled meaning« is necessary because the

6. H.L.A. Hart, *The Concept of Law*, Oxford 1961, p. 121.
7. *Ibid.*

existence of law as an institution of social regulation depends upon it. But even though his theory of judicial interpretation is based on distinction between paradigm-cases or clear-cases and difficult cases, Hart is nevertheless forced to admit that there is no answer or, at least, no unproblematic answer to the question »what makes a 'clear case' clear or makes a general rule obviously and uniquely applicable to a particular case.«

In *The Concept of Law*, Hart presents the question of legal interpretation not as a question of »what is the meaning of expression X« but, rather, as a question of »does/ought expression X apply to situation Y?« And it is in the context of this reformulation that we must situate Hart's distinction between »plain cases constantly recurring in similar contexts to which general expressions are clearly applicable«[8] and difficult cases, possesing only some of the features of plain cases but lacking others. Hart describes these debatable cases as follows:

»There are reasons both for and against our use of a general term, and no firm convention or general agreement dictates its use, or, on the other hand, its rejection by the person concerned to classify. If in such cases doubts are to be resolved, something in the nature of a choice between open alternatives must be made by whoever is to resolve them.«[9]

The significance of this reformulation of the question of legal interpretation is not only that we do not know in advance whether concept X applies to situation Y, but also that it is the interpretation itself that decides whether concept X should or should not apply to situation Y.

The gist of this distinction between clear and penumbral cases is not that the clear cases are unproblematic and need no interpretation because they are characterized by a »core of undisputed meaning« but, rather, that they are recognized as unproblematic because the meaning of the general expressions applied in them has not been disputed. The same could be said of the applicability of legal rules to concrete cases. As Hart puts it:

»Legal rules may have a central core of undisputed meaning, and in some cases it may be difficult to imagine a dispute as to the meaning of a rule breaking out. ... Yet all rules have a penumbra of uncertainty where the judge must choose between alternatives. Even the meaning of the innocent-seeming provision of the Wills Act that the testator must sign the will may prove doubtful in certain circumstances.«[10]

We could say that, according to Hart, for all rules some unforseen circumstances may arise that could render their application questionable. In other words, though the distinction between easy cases and hard cases is useful and perhaps even necessary for judicial interpretation, it is impossible to decide in advance which case is easy and which is difficult.

8. *Op. cit.*, p. 123.
9. *Ibid.*
10. *Op. cit.*, p. 12.

But how, then, is the judge in the position to know if a certain general rule applies to particular cases in the absence of a positive standard or criterion for his/her interpretation? Hart's answer to this question is phrased almost in Wittgensteinian manner: Even if canons of interpretation existed, they could not eliminate the uncertainty of interpretation since they would be themselves rules and would, therefore, require their own interpretation.

In fact, the discretion left to the judge by language itself is very wide. Whenever the judge applies the rule to a particular case, notwithstanding the fact that his/her application may be correct, wrong or even arbitrary, his/her interpretation of the rule in question is a result of a decision, of a choice among possible alternatives. The reason that makes such choice necessary is that which Hart labeled »open texture« of all rules and standards. At some point of legal practice, all legal rules prove to be ultimately indeterminate and their application uncertain because they use expressions of a natural language which is, by hypothesis, irreducibly open textured.

Judicial discretion is, then, founded in the nature of the interpretation itself, in its ultimate uncertainty. Of course, it would be inacceptable, at least for Hart, to imply that judicial interpretation is in essence arbitrary. On the contrary, rather than arbitrariness, open texture of legal rules implies judicial responsibility. It is clear that the ordinary meaning of general terms could not be taken for granted, since the ordinary meaning as warranted by everyday usage is often burdened with ideological implications. But on the other hand, if the judge decides to take the ordinary meaning for granted, he is nevertheless responsible for that decision. We could say that, despite the fact that our everyday legal experience may present different evidence, there is, in principle, no »automatic« application of legal rules to particular cases and, therefore, no alibi for judicial decisions.

* * *

Amongst contemporary legal philosophers, R. Dworkin has dealt most explicitly with the questions relating to the function of judge and, consequently, developed in detail a theory of adjudication, a theory conceived to be both a description of how a judge in fact interprets a given legal doctrine and how s/he should interpret it if his/her interpretation is to be valid or – to put it in terms of Dworkin's philosophy – the right one and if the »rightness« of his/hers interpretation is to be guaranteed.

One of the slogans of Dworkin's theory of adjudication is that there is always a right answer to a question of law and, therefore, always a right, unique solution to all cases, even the most difficult. It is clear that this position is in conflict with the positivist conception of law. Dworkin criticizes two tenets of positivist theory: the positivist doctrine conceiving the law as a system consisting only of rules, and the doctrine of judicial discretion saying that in the absence of a clear rule judges have discretionary power to create a new rule.

Dworkin rejects the positivist approach and its methodological principles, above all, the separation of law and morals. Dworkin argues that the ultimate foundation of law is not a rule of recognition or a Kelsenian basic rule, but a set of legal principles. Legal rules can be morally unjust – this is especially evident in the case of Nazi law – but they are, nevertheless, in their essence, based on moral principles. This does not mean that legal principles are »morally correct principles« or that law is always morally right. Legal principles are not fashioned in accordance with a given positive morality. They may be morally disputable, but with regard to their form they are necessarily moral.

If a positivist picture of law is a hierarchical system of rules, Dworkin offers a pluralistic picture of dispersed principles, linked together in a loose web rather than in structure. It would, therefore, be absurd to seek to discover their origin, to locate their utterer:

»We make a case for a principle, for its weight, by appealing to an amalgam of practices and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings'.[11]

Contrary to hierarchically organized legal rules or legal norms, »a principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit and substantive rules of the jurisdiction in question.«[12]

As a consequence of this modern, though not modernist, picture of law, Dworkin refuses to establish a typically positivist distinction between legal theory and legal practice. For him, legal theory is in its essence (interpretative) practice, on the other hand, legal practice is already in itself a theory of interpretation. Dworkin describes a judge as a Hercules who is capable of finding a solution for every case by being a philosopher and a practitioner at the same time. As a philosopher he builds a theory as a means to justify his decisions as judge, as a law-applier he verifies a theory that he himself has developed before. The weakness of this theory of adjudication is clearly in its circularity:

»If jurisprudence is to form principles capable of justifying practices and rules, what are the practices and rules that have to be justified?«[13]

What is needed to identify principles as foundation of legal practice and theory is a construction, a creative interpretation rather than a discovery. We might say that in theory it goes smoothly, but in practice Dworkin faces again the circularity:

»Since there are no permanent criteria enabling the scholar to identify them, he is forced to look among the principles elaborated from the rules for the

11. R. Dworkin, *Taking Rights Seriously*, London 1977, p. 18.
12. *Op. cit.*, p. 36.
13. M. Troper, »Judges Taken to Seriously: Professor Dworkin's views on Jurisprudence,« *Ratio Juris*, Vol. 1, No. 2, July 1988, p. 168.

criteria that will serve to select those rules, which will in turn serve to elaborate the principles, etc.«[14]

Despite the fact that Dworkin describes practicing law and theorizing about it as a creative activity, he nevertheless criticizes positivists for stating – as shown on Kelsen's and Hart's example – that judges actually create new rules, in short, that judges make law. In Dworkin's theory of judicial decision-making, the judge can never make law, he is never in the position of legislator, autonomous in relation to legal discourse. If for positivists, especially for Kelsen, unity of law is not given in advance but, rather, constituted only retroactively by an act of will of legal authority, for Dworkin the legal universe is always already coherent, consistent, whole. The position of the judge changes radically:

»Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own.«[15]

Creativity of interpretation is not in itself an end but it serves a higher end that is to »advance the enterprise hand,« as Dworkin puts it. The very essence of Dworkin's interpretative activity is to preserve the continuity of the enterprise. Even more, judicial interpretation can never be really innovative, creative since beliefs of a judge – as a precondition of his interpretation – are already shaped by the legal enterprise itself. Judicial interpretations may differ, they may even be controversial but this controversy does not testify against the unity of law, since all interpretation must be regarded as links of the same chain, as elements of the same narrative tradition.

Where legal positivists, especially Kelsen and Hart, insist on judicial responsibility in the process of decision-making, the obligation of Dworkin's judge is only to follow instructions arising from the legal enterprise itself. He is not responsible for his interpretation, since his interpretation is already predetermined by legal tradition. In so far we may agree with M. Troper,[16] who claims that Dworkin's theory of adjudication provides an ideological justification for ideological judicial practice. Dworkin, by merely denying the existence of the judicial discretion, only repeats what judges themselves say that they are merely applying the legislator's intentions or, as in Dworkin's case, fundamental principles embedded in the legal enterprise.

14. *Ibid.*
15. R. Dworkin, *A Matter of Principle*, London 1985, p.159.
16. M. Troper, *Op. cit.*, p. 174.