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Recht en vrede bij Hans Kelsen : een herwaardering van Kelsens rechtsfilosofie : juridisch pacifisme als stilzwijgende betekenis van zijn Zuivere Rechtsleer

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6. Rechtsgeldigheid en vrede

Social peace as *conditio tacita* for the validity of the positive legal order*

6.1. Introduction: Is and Ought

Kelsen's well-known dualism of Is and Ought – and with that the dichotomy of fact and norm and of reality and value – is one of the cornerstones of his Pure Theory of Law,¹ yet appears to be paradoxical. On the one hand, Kelsen makes a very strict and fundamental distinction between the 'basic categories' of Is and Ought,² and argues that from the fact that something *is* no-one can ever deduce the norm that something *ought* to be, and vice versa.³ Kelsen's value-relativism, which is the second cornerstone of his pure theory,⁴ holds that one can never value positive law as *absolutely just*, and thus even suggests that the dualism of Is and Ought leads to an 'unbridgeable', 'value-ridden' gap between Is and Ought. But, on the other hand, Kelsen places the necessary conditions for the validity of the legal norms and of the legal order as a whole (Ought) in the order of social facts (Is).⁵ In order to be valid, a legal norm must have been *posited* by a human act of will, which (f)act takes place in social reality. Only a positive legal norm, created by a norm-positing authority, is valid. In addition, a legal norm must be *effective*. Its effectiveness is formed by the fact that in social reality people act in accordance with the norm and by the fact that a sanction is applied when the norm is violated. Consequently, there actually exists a certain relation between the validity of the legal order (Ought) and the positivity and effectiveness of that order (Is).

This article investigates the paradoxical nature of the dualism in Kelsen's Pure Theory of Law. Why does Kelsen defend a strict distinction between

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1 Olechowski 2009, pp. 48-49. See also: Wróblewski 1981, p. 509 and Brugmans 1997, p. 463.

2 According to Kelsen both categories are primary and indefinable. In Kelsen 1967, p. 5 he declares: "The difference between Is and Ought cannot be explained further. We are immediately aware of the difference"; and in idem 1991, p. 2 he states: "Ought is a 'basic category' just like Is; and we can no more give a definition of Ought than we can describe what Being is".

3 With this view Kelsen ultimately goes back to 'Hume's law', stating that it is logically impossible to derive an Ought from an Is, see: Hume 2007, book III, part 1, section 1.

4 Kelsen 1967, pp. 63-65; cf. idem 1968a, p. 621. See also: Olechowski 2009, pp. 50-51.

5 Kelsen 1967, p. 10; cf. idem 1991, p. 3.

Is and Ought on the one hand, and a necessary relation on the other hand? Is the gap between positive law and social reality really unbridgeable, according to Kelsen, or does he provide some stones that enable us to build a narrow, yet valuable bridge between the two? Is his relativistic concept of normativity no more than a “pallid normativity”,⁶ perhaps even a “value-nihilism”,⁷ or does it have formal but important and worthy value implications? Are there – besides the ‘basic norm’ – merely *real* conditions for the validity of the positive legal order or does the pure theory tacitly presuppose, in the conditions for legal validity, a basic *value* and underlying condition, namely, that of ‘social peace’?⁸ In order to answer these questions, I will first sketch why Kelsen actually differentiates Is and Ought and conceives of a relation between both basic categories (§2). Then I will examine if and in what way the *conditio tacita* of social peace⁹ is implied in the conditions (basic norm and effectiveness) for legal validity¹⁰ (§3, §4 and §5). The concluding section will suggest what this implication possibly means for the (re)valuation of the Pure Theory of Law¹¹ and of its normative concept of the positive legal order (§6).

6 Harris 1996, p. 103.

7 Brugmans 1997, pp. 478-480.

8 In my search for the basic value and underlying condition of ‘social peace’ in Kelsen’s Pure Theory of Law, I find support in a recently published book, which shows that the presupposition of the basic norm, can only be justified if it is reasonable to assume the existence of internal values of legality independent of substantive justice (namely: democracy, constitutionalism and *legal peace*), see: Vinx 2007, pp. 1-28.

9 To be clear at the outset, for Kelsen the peace of the law is not an ‘anarchical’ order of absolute absence of force, nor a ‘utopian’ state completely free from violence or conflict between individuals or groups; the legal order is rather a socially approved (be it ‘democratically’ or ‘autocratically’) state of compromise, in which the use of force is monopolized just to prevent, reduce and counteract individual violence and social conflict.

10 As we shall see, for Kelsen the term ‘legal validity’ simply means the specific (normative) ‘existence’ of legal norms. But even this simple sense is ambiguous, because he uses the term ‘legal validity’ both as ‘membership’ (a legal norm is valid/exists if it belongs to a legal order) and as ‘bindingness’ (a legal norm is valid/exists if it is legally binding). Being aware of this ambiguity, I shall use the term ‘validity’ in the plain sense of ‘existence’.

11 In the following sections, I shall refer to both the first and the second edition of the Pure Theory of Law, as well as to other works of Kelsen, especially the General Theory of Law and State and the General Theory of Norms. Though I am aware of the fact that Kelsen modified his views considerably and that there is not *one* Pure Theory of Law but *several* (four) phases of development in his pure theory (see: Paulson 1998, pp. 153-166), the aforementioned works of Kelsen can all the same be considered as ‘periodical’ overviews of his *work in progress* called the ‘Pure Theory of Law’ (see: Herrera 2004, p. 1).

6.2. Difference and relation between Is and Ought

By drawing a sharp ontological and epistemological line between the natural order (Is) and the normative order (Ought), Kelsen tries to 'purify' legal theory from its naturalistic fallacies.¹² The natural law doctrine assumes that norms are present in nature. Nature in general or nature of man as a rational being is seen as a norm-positing authority. By investigating nature carefully, man can discover the norms that prescribe good behavior to him. The theory that norms are immanent in nature in general, is, however, untenable. "Nature as a system of facts, connected with one another according to the law of causality, has no will and hence cannot prescribe a definite behavior of man."¹³ From what is or actually occurs in nature, it is impossible to deduce how we ought to behave. The idea that norms can be found in human reason rests on a similar fallacy. As reason is only capable of understanding and *describing* something and not capable of *prescribing* something, norms can only be produced by human will. "To detect norms of human behavior in human reason is the same illusion as to deduce them from nature",¹⁴ according to Kelsen.

The difference between Is and Ought finds further expression in the methodological distinction between the natural science principle of causality and the normative science principle of imputation.¹⁵ Natural science describes in laws of nature the connection between cause and effect. This relation is a causal necessity; it is a *must*: if A is, then B must be. Normative science, such as legal science, on the other hand, studies the connection between certain illegal behavior as a condition and a sanction as an 'effect' thereof. This relation is governed by the principle of imputation. In a norm this principle is expressed by an *ought*: if A is, then B ought to happen. A norm (and the imputation) only comes into existence by an act of human will, whereas a natural law exists independently from a will.¹⁶ The Pure Theory of Law acknowledges an analogy between causality and imputation, but emphasizes that the two connections have essentially different meanings. A sanction is not the effect of illegal behavior, but is the reaction

12 In his 'purification' of legal theory Kelsen uses the argument of naturalistic fallacies not only against the natural law doctrine, but also against sociological jurisprudence, see: Wróblewski 1981, p. 516.

13 Kelsen 1971, p. 20.

14 *Ibid.*, p. 21.

15 Kelsen 1968a, pp. 614-615. See also: Herrera 2004, pp. 17-18.

16 Kelsen 1967, pp. 75-91; cf. idem 1991, pp. 22-25.

that ought to be imputed to the illegal behavior.¹⁷ This insight leads Kelsen to conclude that legal orders are “im wesentlichen Zwangsordnungen, d.h. Ordnungen, die ein bestimmtes menschliches Verhalten dadurch herbeizuführen suchen, daß sie für den Fall des gegenteiligen Verhaltens, das dadurch als Unrecht qualifiziert wird, einen Zwangsakt als Unrechtsfolge d.i. als Sanktion vorschreiben.”¹⁸

The ontological difference between the categories of Is and Ought becomes even more apparent when Kelsen describes the specific mode of existence of the latter. He defines the validity of the norm as the specific existence of the norm.¹⁹ The validity of a norm means that it ought to be observed. This validity of the norm is its characteristic, *ideal* existence. A norm becomes valid because it is posited, and the fact that the norm is valid means that it exists. An invalid norm is no norm, because it does not exist.²⁰ The fact that only valid norms exist, indicates that we are talking about a completely different mode of existence than that of natural facts. Facts have a *real* existence. They exist as they are in reality. A fact is a fact if it actually is. A norm, however, only exists if it is valid.

On the basis of this demonstration of a fundamental difference between Is and Ought, Kelsen concludes that the difference constitutes an irreducible dualism. He states that:

an Ought cannot be reduced to an Is, or an Is to an Ought; and so an Is cannot be inferred from an Ought, or an Ought from an Is. Ought and Is are two wholly different meanings, or (...) two wholly different meaning-contents.²¹

In sum: from an Is there logically follows no Ought, and, the other way round, from an Ought there never follows an Is. Logic thus requires us to make an essential distinction between the order of norms and the order of facts; norms do have an entirely different meaning and mode of existence than facts. In addition, the two worlds are governed by the analogous, yet very different principles of imputation (Ought) and causality (Is).

Now the interesting question is whether Kelsen's Pure Theory of Law nonetheless makes room for a link between these two worlds, because if

17 On the principle of imputation and the criterion of sanction, see: Calsamiglia 2000, pp. 206-208.

18 Kelsen 1968a, p. 612.

19 Idem 2002, p. 12; cf. idem 1967, p. 10.

20 Idem 1991, p. 28.

21 *Ibid.*, p. 58.

not, it “seems that in his approach the anchorage of positive law in empirical reality disappears.”²² Is there an unbridgeable gap, or is the normative side in some way connected with the factual side? Can the Ought exist completely independent from the Is, or is there actually a certain dependence? Is the validity of legal norms (in)dependent on reality? As I said in the introduction, according to Kelsen there exists a necessary, empirical relation between the two worlds. This seems evident, since every legal norm (Ought) presupposes at least two human beings (Is): the norm-positor and the norm-addressee.²³ The law must in some sense be related to reality.

As has been said, the validity of a norm is its specific existence. This *ideal* mode of existence is made possible by two *real* conditions. These two necessary conditions for the validity of the normative order thus lie on the other side of the bridge, in the actual order of facts. The first condition for the validity of a norm is the *positivity* of that norm, which means that a legal norm, in order to be valid, must be posited by a real act of will. The positing of a norm is simply a human act that takes place in reality. The validity (existence) of a norm is then dependent on the fact whether it is posited or not by an authority. Kelsen formulates this necessary condition as a general principle: “no norm without a norm-positing authority.”²⁴

By positing a norm, the norm-positing authority wants to bring about certain behavior of the norm-addressees. The addressees ought to behave in accordance with the posited norm; and if they do not comply, then their contrary behavior ought to be sanctioned in the way prescribed by the norm. Herein lies exactly the validity of the norm. The degree in which the norm actually is observed and/or applied, that is, its actual *effectiveness*, forms the second necessary condition for the validity of the norm. Essential to a legal system then, is the apparatus of sanctions: this guarantees the effectiveness of the normative order. The assumption is that people are motivated to do the right thing, that is, to act according to the norm, because they all wish to avoid the bad reaction (the sanction, the punishment).²⁵ In Kelsen’s view, therefore, the validity is dependent on the effectiveness: “a single norm and a whole normative order lose their validity – cease to be valid – if they lose their effectiveness or the possibility of effectiveness.”²⁶

22 Soeteman 1990, p. 137 (my translation from Dutch).

23 Kelsen 1991, p. 28.

24 *Ibid.*, p. 29.

25 *Idem* 2002, pp. 28-29. The subjective motives (be they moral, religious, social or psychological) for obeying the law can be very different indeed, yet from a *legal* point of view they are not relevant, according to Kelsen.

26 *Idem* 1991, pp. 138-139.

The effectiveness of the norm does not, however, require that actual behavior is always and completely in accordance with it. A norm is already effective, when it is respected by and large. There must even be a certain antagonism between the Ought of norms and the Is of facts.²⁷ If the actual behavior of people were in absolute accordance with the normative order, that order would be superfluous. It makes no sense to prescribe behavior, if that behavior consists in what everybody already necessarily does. In that case people ought to behave as they behave in reality, and then the normative order would be pointless. Equally pointless is an order of norms that nobody can possibly comply with: here, people ought to do something that they are literally unable to do. So an area of tension between norms and factual behavior is required in order for the Ought to exercise its power (effectiveness) on the Is, with complete agreement and impossible conformity as its borderlines.²⁸ Now it is clear why in the quote of the previous paragraph Kelsen refers to the 'possibility' of effectiveness as a condition for normative validity. In order to be valid, a norm must be able to be effective. A norm that prescribes impossible or necessary behavior can never be valid, because it cannot be effective at all.

So there exists an essential relation between the validity of the norm and its actual effectiveness, yet Kelsen emphasizes that the first concept certainly must not be identified with the latter. The two concepts must be distinguished in the same way as the Ought from the Is.²⁹ When the validity of a legal order (Ought) is equated with any matter of fact whatsoever (Is), then the particular meaning and effect of that order and the specific relation it has with reality is annulled.

Only if law and natural reality, the system of legal norms and the actual behavior of men, the Ought and the Is, are two different realms, may reality conform with or contradict law, can human behavior be characterized as legal or illegal.

The effectiveness of the law, Kelsen continues, is an actual phenomenon, that can be understood as the 'power' or 'might' of the law. And grasped in that way, this leads to:

27 On the inherent tension between norm and behavior, Is and Ought, see: Ebenstein 1971, pp. 641-642.

28 Kelsen 2002, pp. 59-60; cf. idem 2006, p. 120.

29 Idem 1991, p. 139.

the old truth that though law cannot exist without power, still law and power, right and might, are not the same. Law is, according to the theory here presented, a specific order or organization of power.³⁰

But what exactly is the ‘specific’ aspect of the legal order? For Kelsen’s theory of law it is just its *normativity*.³¹ His positivistic theory, of course, cannot deny that there exists a link between the legal order and reality; between its validity and effectiveness. As we have noted, the law can impossibly be valid, when it can no longer be effective. At the same time the positivistic theory must not put validity on the same level with effectiveness, or identify Ought with Is, because then the legal order would lose its specific, *normative* meaning. In other words:

To consider a legal order as a valid system of norms means that one thinks in normative, that is not reducible to factual, terms. On the other hand there is necessarily a factual substrate. But when one restricts oneself to the latter, one gets a legal point of view, in which the crucial normative aspect of the law disappears.³²

So, the relation between Is and Ought consists in two real requirements for the validity of legal norms, namely, effectiveness and positivity, and without these necessary conditions legal norms cannot be valid; that is to say, they cannot exist. Legal validity is therefore dependent on actual conditions, which are anchored in reality. In view of this anchorage of legal validity in reality, I suggested, in a previous article,³³ the question whether Kelsen considers social peace as *conditio tacita* – as the implicit or obvious condition – for the validity of the positive legal order. Here I shall offer an answer to this question. The question is triggered by the fact that Kelsen in his search for the formal³⁴ foundation of legal validity characterizes the basic norm as *conditio per quam* – as sufficient condition – and effectiveness and positivity as *conditio sine qua non* – as necessary conditions – whereas in other instances he seems to mention social peace as the implicit or underlying condition for the validity of the positive legal order. In the following three sections these conditions shall therefore be discussed. I will argue

30 Idem 2006, p. 121; cf. idem 2002, p. 61 and idem 1967, p. 214.

31 Calsamiglia 2000, p. 205.

32 Soeteman 1990, p. 138 (my translation from Dutch).

33 Notermans 2008, p. 67 (this thesis, chapter 3, p. 72).

34 As an alternative to a *material*, natural law-foundation, which is according to Kelsen scientifically untenable, see: Brugmans 1997, p. 465.

that, while Kelsen already alludes to social peace in his formulation of the basic norm (§3), it is only in his conception of the effectiveness of law (§4) that these allusions become so clear that social peace must be taken to constitute a different condition, to wit the 'tacit condition', for legal validity in its own right (§5).

6.3. Basic norm as *conditio per quam*

Kelsen begins his search for the formal reason of validity of law with the question why a certain coercive act, for example the execution of a sentence to imprisonment, can be judged as a *lawful* act.³⁵ More specifically, why can we – as jurists – interpret the deprivation of freedom in the one case as a *legal* act (sanction) and in another case as an *illegal* act (delict)? Kelsen replies that our interpretation depends on the preceding existence, that is, validity, of a legal norm as a 'scheme of interpretation'.³⁶ If the deprivation of freedom is prescribed by a valid individual legal norm, for example the judicial sentence imposing imprisonment, then we can interpret that act as not-illegal and thus as *lawful*; if not, for example in case of a hostage, then that act can be judged as illegal and thus as *unlawful*. When we search for the basis of validity of a certain individual legal norm, such as a judicial sentence, that basis can be found in a, figuratively speaking, 'higher', or more general legal norm. The individual norm against taking of hostages, applied by the judge in his sentence, is valid if it can be traced back to a more general norm, namely, the statutory regulation determining the sanction of imprisonment against the delict of taking of hostages. When we ask further why a certain general legal norm, the criminal statute, is valid and why a judge is authorized to punish, the answers can be given by referring to the highest, most general legal norm: the constitution.

The constitution prescribes in what manner the legislative power must enact (criminal) statutes and authorizes the judiciary to adjudicate (criminal) acts. When we ask next for the foundation of validity of the highest positive legal norm, the constitution, we can look to the historically first constitution,³⁷ but we cannot find the final foundation, according to Kelsen,

35 Kelsen 2006, p. 115; cf. idem 2002, p. 57 and idem 1967, p. 199.

36 Idem 2002, p. 10; cf. idem 1967, pp. 3-4.

37 Or at most from the highest, most general legal norm of *international* law, depending on the question whether one recognizes the primacy of the *national* or the *international* legal order: for the most extensive explanation thereof, see: Kelsen 1952, pp. 401-447.

in a positive legal norm but only in a hypothetical, non-positive 'basic norm'. The supreme basic norm of positive law, which is essentially a normative coercive order, must then schematically be formulated as follows: "Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.)"³⁸

In his quest for the basis of legal validity Kelsen opposes, amongst other doctrines like that of natural law, Schmittian decisionism,³⁹ which holds that the decisive reason of validity of a legal norm is the fact that it is decided by a certain human (or divine) authority or sovereign, as in the claim: "This sentence is valid, because it is passed by the judge." If we, however, strictly observe the Is-Ought dichotomy and do not commit the naturalistic fallacy⁴⁰, we cannot look for the reason of validity of that sentence in the bare *fact* that it *is* passed by a judicial authority, but we can only find it in the higher *norm* – giving authority to the judge – that determines that we *ought* to behave as the judgment prescribes. Applied to the highest posited legal norm, the constitution, this means that the basis of validity thereof does not lie in the *fact* that it *is* established by a legislative sovereign, but in the presupposed *basic norm* – lending sovereignty to that legislator – that stipulates that we *ought* to behave as the constitution prescribes.

In the so-called 'normative syllogism' this reasoning runs as follows: The major premise: "One *ought* to behave as the constitution prescribes"; the minor premise: "The constitution *is* established by the sovereign legislator"; and the conclusion: "According to the constitution the judge *ought* to adjudicate (criminal) acts." As Kelsen admits, the minor premise (the fact of norm-positing) forms a necessary link between the major premise (the basic norm) and the conclusion (the constitutional norm), for both premises are conditions for the validity of the conclusion. But, as Kelsen states further:

only the major premise, which is an *ought*-statement, is the *conditio per quam* in relation to the conclusion, which is also an *ought*-statement; that is, the norm whose validity is stated in the major premise is the reason for the validity of the norm whose validity is stated in the conclusion. The *is*-statement functioning as minor premise is only the *conditio sine qua*

38 Idem 1967, p. 201; cf. idem 1991, p. 255.

39 Schmitt's well-known decisionism and definition of the sovereign as "he who decides on the state of exception" conceptually and logically negates Kelsen's ultimate foundation of legal validity on a norm, see: Schmitt 2005, chapter 1, p. 5. See also: Dyzenhaus 1997, pp. 42-51 and Piret 1996, pp. 6-10.

40 On the subject of the Is-Ought dichotomy and naturalistic fallacy, see: Wróblewski 1981.

non in relation to the conclusion; this means: the fact whose existence is asserted in the minor premise is not the reason for the validity of the norm whose validity is asserted in the conclusion.⁴¹

In the foregoing quote Kelsen refers to the basic norm as *conditio per quam* for the validity of the highest positive legal norm, the constitution, and thereby of the positive legal order as a whole. Kelsen explains that the basic norm has several functions; the most important ones are the following.⁴² Firstly, the hypothetical basic norm – if assumed – provides for a “cut-off point in the quest for validation”,⁴³ it brings the endless quest for the grounding of validity of the positive legal order to a final closing. At the same time, the formal-dynamic basic norm provides the positive legal order with a “starting point of the process of creating law”,⁴⁴ which grants a norm-positing authority and prescribes under which conditions and in what manner it ought to create valid legal norms. Moreover, the presupposed, non-positive basic norm functions as a Kantian ‘transcendental-logical condition’ for normative scientific knowledge, which makes the ‘juridical interpretation’ of subjective coercive acts as objective legal acts possible.⁴⁵ Furthermore, the covering and coordinating basic norm establishes, in the multitude of norms, a ‘logical, non-contradictory unity’ in which the validity of all norms is reducible to one common source.⁴⁶ As such it logically guarantees both that all conflicts between norms are solvable because of their ‘annullability’ provided for by the legal order⁴⁷, and that all disputes between people are decidable on a legal basis because of the ‘completeness’

41 Kelsen 1967, p. 194. See also: Fränkel 1965, p. 26.

42 For a first impression of the number of functions the basic norm fulfills, see the Index of Subjects under ‘basic norm’ in: Paulson & Bonnie Litschewski-Paulson (ed.) 1998. See also: Paulson 1993, pp. 53-74 and Van Roermund 2000, pp. 209-213.

43 Ebenstein 1971, p. 638. In contrast to the natural order in which the search for the cause of an effect leads to a *regressum ad infinitum* and in which there is no place for a *prima causa*, see: Kelsen 1967, pp. 194-195.

44 Ebenstein 1971, p. 643. In contrast with the material-static basic norm of natural law which lays down beforehand the moral content of all norms on which content their validity is fully dependent, see: Kelsen 1967, pp. 195-201.

45 By analogy with Kant’s ‘transcendental-logical conditions’ (like causality) for natural scientific knowledge in: Kant 2005, chapter 3, A79|B105. See: Kelsen 1967, pp. 201-205.

46 On the logical systematicity and unity of the theory of law and of the law itself, see: Cal-samiglia 2000, pp. 208-211.

47 Kelsen 1967, pp. 205-208, 267-278. According to Kelsen the term ‘unconstitutional law’ is a *contradictio in adjecto* because such a ‘law’ is not a valid constitutional law and therefore on the basis of the constitution – ultimately the basic norm – ‘annullable’; in fact such a law is considered constitutional until it is annulled either by an opposite later one (under the general

of the legal order.⁴⁸ Finally, in his skeptical or voluntaristic phase⁴⁹, Kelsen loses faith in the applicability of logical principles to norms and in the possibility of grounding their validity, as meaning of acts of will, on a hypothetical thought-norm. Now he presents the basic norm as a mere fiction of cognition in the pragmatic sense of Vaihinger's philosophy of 'As-if'.⁵⁰ Yet its aim remains the same; the basic norm serves "to ground the validity of norms forming a positive (...) legal order, that is, to interpret the subjective meaning of the norm-positing acts as their objective meaning (...) and to interpret the relevant acts as norm positing-acts."⁵¹

Thus far I have represented the usual formulation of (the respective functions of) the basic norm, as Kelsen explicitly conveys it in his Pure Theory of Law. As yet, we have not heard much about the basic value of positive law, namely, social peace, which would be – as I announced – tacitly implied in the conditions for legal validity, like the basic norm. This is no wonder, since the pure theory defends the position, first, that the basic norm can found the *objective* validity of *any* positive legal order, so long as it is by and large effective, and, second, that the moral-political content of such a coercive order is completely independent of its basic norm. This position makes the pure theory essentially different than the natural law doctrine.⁵² Certainly, Kelsen admits that his legal positivism depends on a non-positive basic norm in order to found the validity of the legal order, just like the natural law doctrine makes use of a supra-positive value-standard of valid law. But Kelsen emphasizes that this relative difference is "large enough to exclude the view (...) that the positivistic theory of a basic norm (...) is a theory of natural law."⁵³ He wastes no more words on this very problem – at least, not in his Pure Theory of Law.

legal rule: *lex posterior derogat priori*) or by a special procedure provided for by the constitution (under a legal system with "judicial review"), see: Fränkel 1965, pp. 35-36.

48 Kelsen 1967, pp. 245-250. According to Kelsen the idea of 'gaps in the law' is an ideological fiction because logically there are no genuine 'gaps'; all actions are on the basis of a statute – ultimately the basic norm – either explicitly prohibited or on the silence of the law permissible, *tertium non datur*, see: Vinx 2007, pp. 42-43.

49 On the (four) phases in Kelsen's legal theory, see: Paulson 1998, pp. 153-166.

50 Herrera 2004, p. 25 and Olechowski 2009, p. 58. Contrary to a hypothesis, of which the truth can be verified by its correspondence with reality, a fiction – of which we are aware that it is false because it contradicts reality and is self-contradictory – can only be justified by its utility in reality, see: Vaihinger 2000, part 1, chapter 21.

51 Kelsen 1991, p. 256.

52 Idem 1967, p. 217; cf. idem 2002, p. 56.

53 Idem 1967, p. 219. See also: Ebenstein 1971, pp. 639-640.

Nevertheless, in an early and small, yet not less important study, entitled *Natural Law Doctrine and Legal Positivism*, Kelsen does say more (than he perhaps cared for) about this problem and refers to the basic value of positive law. He argues that the function of the basic norm consists not only in the interpretation of a “historical-political reality” as an objectively valid order, in which sense the basic norm “means the transformation of power into law”, but also in the conversion of this empirical material to a “meaningful, that is, non-contradictory order”, with which postulate “juridical science oversteps the boundary of pure positivism.”⁵⁴ And although Kelsen emphasizes again that it is not the proper task of legal positivism – unlike natural law doctrine – to give an “answer to humanity’s eternal quest for justice”, he yields to the temptation to ‘confess’ that legal positivism,

which need not be more papal than the pope, may claim that it, too, has grasped the essence of justice in its basic norm which constitutes the positive law as a non-contradictory order, especially if it comprehends the positive law, by means of this basic norm, as an order of peace.⁵⁵

That this hint of Kelsen at “the positive law as an order of peace” is not a slip of his tongue – as Carrino already observed⁵⁶ – and that he neither will stick to this sole ‘confession’ shall be shown hereinafter (§5). At the end of this section I confine myself to the tentative conclusion that the formulation of the basic norm, as *conditio per quam* for the validity of the positive legal order, is *in itself* the formulation of a basic legal value. While the basic norm – not able to answer rationally the quest for justice because of the emotional problem of interests or value conflicts⁵⁷ – excludes *all* irrational and material values of justice, it does imply *one* logical-formal value that forms the basis of the existence of the positive law as a rational order. For if the positive legal order ‘*ought to be*’ rational (a meaningful unity), it *can only be* rational (non-contradictory) if the society that is subject to the law, is pacified. Formulated in this sense, the basic norm means the transformation of the ethical ideal of justice into a logical ideal of peace.⁵⁸

54 Kelsen 2006a, p. 437.

55 *Ibid.*, p. 440.

56 Carrino 1991, p. 82.

57 For Kelsen’s understanding of justice as a problem of solving emotional interests or value conflicts, see: Kelsen 1971.

58 Carrino 1991, p. 83. Subsection IV.B.e. of Kelsen 2006a, in which Kelsen makes the above said ‘confession’, has the revealing title: “The ideal of justice becomes a logical pattern”. On this ‘transformation’ of the idea(l) of justice, see: Kelsen 1947, pp. 390-418; cf. *idem* 2006, pp. 13-14.

Also, in its non-logical meaning of a mere “fiction of finiteness in the legal order”, the basic norm contains this pacifying value, as it pragmatically secures against an important source of “alienation” – as Van Roermund calls it – namely, “the infinite debate of conflicting parties, which ignores the urgency of bringing conflicts to an end.”⁵⁹ By means of the ‘fiction’ of the basic norm we lend legal-institutional form to the practical idea that there is some ‘lawful’ solution for our ethical problems.

6.4. Effectiveness as *conditio sine qua non*

Before I shall present a few other clear allusions to social peace (this time in relation with effectiveness) and argue that social peace must be regarded as a different condition for legal validity, to wit as the *conditio tacita* (§5), I will discuss Kelsen’s conception of effectiveness of law as *conditio sine qua non*.

“Just as Kelsen is willing to admit that the concept of the basic norm contains a minimal element of natural law”, in the limited degree that we have described above, “he also concedes that the basic norm, to be meaningful, must take into account a minimum of social facts, or social reality.”⁶⁰ In this precise sense, as Ebenstein in my view correctly states its ‘bridging role’, even the presupposed basic norm forms a narrow bridge between the normative side of Ought and the factual side of Is. According to Kelsen, the non-positive basic norm is not a *necessary* but only a *possible*,⁶¹ yet not *arbitrary*⁶² presupposition of the validity of the positive legal order. Indeed, in order to be meaningful, the basic norm must *directly* relate to an actually established constitution, which is by and large effective, and *indirectly* to an under that same constitution settled coercive order, which then is effective in the same degree. Only when the basic norm is related to a socially effective order, can it provide that specific order with

See also: Bernstorff 2010, pp. 188-190 and Notermans 2011b, pp. 87-105 (this thesis, chapter 2, pp. 29-51).

59 Paulson & Van Roermund 2000, p. 127 and Van Roermund 2000, pp. 211-212.

60 Ebenstein 1971, p. 642.

61 Kelsen 2002, p. 34; cf. idem 1991, pp. 255-256. One can interpret human relations also as sheer power relations, see: Brugmans 1997, p. 470.

62 Herrera 2004, p. 25. According to Brugmans the basic norm is a completely arbitrary justification of normative statements because – contrary to the correspondence theory of truth – as a standard of normativity it is with respect to content objectively indeterminate, see: Brugmans 1997, p. 470.

an objective meaning, in the sense that one can speak of an existing, that is, an objectively valid, legal order.⁶³

Kelsen admits that the two real conditions of legal validity, namely, positivity and effectiveness, are in some (circular) sense taken into account in the basic norm,⁶⁴ as becomes apparent in the variation on the aforementioned syllogism (§3), which brought us back to the foundation of validity of the legal order, as follows:

the major premise is the ought-sentence which states the basic norm: 'One ought to behave according to the actually established and effective constitution'; the minor premise is the is-sentence which states the facts: 'The constitution is actually established and effective'; and the conclusion is the ought-sentence: 'One ought to behave according to the legal order, that is, the legal order is valid'.

Here Kelsen confirms again the *conditio per quam*-nature of the basic norm and the *conditio sine qua non*-character of the effectiveness, for he continues:

The norms of a positive legal order are valid because the fundamental rule regulating their creation, that is, the basic norm, is presupposed to be valid, not because they are effective; but they are valid only as long as this legal order is effective. As soon as the constitution loses its effectiveness, that is, as soon as the legal order as a whole based on the constitution loses its effectiveness, the legal order and every single norm lose their validity.⁶⁵

Thus the validity of the positive legal order cannot be reduced to and/or justified by its actual effectiveness – in other words: from an Is one cannot deduce an Ought – but this does not mean – as we already saw in §2 – that there is no relation at all between the ideal sphere of Ought (normative order) and the real sphere of Is (social facts). As a realist, Kelsen acknowledges that the validity of the legal order is indeed to a certain, even *necessary*, extent dependent on its effectiveness. Or put in other words, this acknowledgment comes down to the truism – also mentioned in §2 – that

63 Kelsen 1967, p. 201.

64 Vinx 2007, n. 86 p. 60, pp. 105-106. See also: Harris 1996, p. 108 and Van Roermund 2000, p. 214.

65 Kelsen 1967, p. 212; cf. idem 2006, pp. 41-42, 119.

while right is not the same as might, yet law cannot do without power.⁶⁶ So legal validity is not identical with effectiveness, but effectiveness is a necessary, *sine qua non*-condition for legal validity. This does, of course, not mean that a whole legal order loses its validity as soon as one single legal norm lacks effectiveness. As we know, a legal order is considered to be valid so long as its norms remain by and large effective, that is, so long as its norms are applied and obeyed in general. But when this is no longer the case, the legal order as a whole will finally lose its validity.

A clear case of a positive legal order being disputed, is when it is threatened to be replaced in a violent or revolutionary way by a whole new order, as for instance during a revolution or (civil) war.⁶⁷ It is remarkable that, of all questions, Kelsen formulates this particular question concerning a non-legal regime change not so much in terms of 'legality', but rather in terms of 'legitimacy'.⁶⁸ Specifically: why can we – as jurists – interpret the acts of rebels in the one case as *legitimate* (as creating a new constitution) and in another case as *illegitimate* (as committing (high) treason)? Far clearer than in the search for the basis of validity of a stable and undisputed legal order, where our juridical interpretation of acts can, without much contention, proceed through *previously* existing legal norms to the presupposed basic norm (§3), the case of a regime change shows us to what extent we take into account the effectiveness of the norms created by a new regime in our possible presupposition of the basic norm of that regime. And we can in fact ascertain this effectiveness of the regime in question only *subsequently*, that is, after the whether or not successful outcome of the rebellion against the old regime.⁶⁹ But how exactly, according to Kelsen, does this interpretation proceed in case of (an attempt to) a revolutionary change?

Imagine that in an autocratic regime rebels rise up in arms attempting to overthrow the lawful government and to substitute the autocracy by a

66 Herrera 2004, pp. 36-39.

67 Though Kelsen only treats cases of revolution or *coup d'état*, I suppose that his theory of non-legal regime changes is also applicable to a regime change in case of (civil) war.

68 Kelsen 1967, pp. 208-2011; cf. *idem* 2006, pp. 117-119. At first sight the terms 'legality' and 'legitimacy' seem to mean for Kelsen essentially the same 'purely legal' thing, yet on further consideration one can understand Kelsen's Pure Theory of Law as a theory of political legitimacy, once it is read in the light of Kelsen's political theory; that is at least the claim in: Vinx 2007, pp. 58-67.

69 If one recognizes the primacy of the international legal order by presupposing an international basic norm (see n. 37 above), then the principal of effectiveness becomes a positive norm, which regulates the *ex post* recognition of states and governments by the ascertainment of effective control by a government of a population on a state territory, see: Kelsen 1952, pp. 258-288. See also: Harris 1996, p. 107 and Khan 1987, p. 15.

democracy. If they are successful, the old regime will become ineffective and the new regime effective, through the fact that in reality the people will no longer behave in conformity with the old regime, but generally with the new regime. As soon as we can actually ascertain the effectiveness of the new government, it is possible for us to regard the democratic regime as the valid legal order,⁷⁰ and we can interpret certain acts as lawful and other acts as unlawful, according to its norms. This also means that we presuppose a new basic norm: we claim no longer that one ought to behave as the autocratic constitution prescribes, but that, from now on, one ought to behave as the democratic constitution prescribes. In this way we judge *ex post* the rebellion as *legitimate*. If the rebels are unsuccessful, because actually the new regime that they attempt to settle remains ineffective, we judge the rebellion as *illegitimate*, consequently not as the creation of a new constitution but as (high) treason. For in the latter case we can interpret the behavior of people still according to the autocratic regime, of which we presuppose the validity by virtue of the old basic norm. In sum, if a rebellion is effective, the old government loses its authority and the new government is lawful so long as it remains effective.

One could depict Kelsen's "strict juristic interpretation", with his conception of the effectiveness of law, as "moral neutrality (...) [sliding] into moral emptiness"⁷¹, since he seems to legitimize any mere successful regime change. As a result, we – as jurists – seem unable to distinguish meaningfully between the law as a coercive order in process of (trans)formation and 'an armed rebel situation writ large'.⁷² Well now, I admit that Kelsen's pure juridical interpretation can validate – and thereby 'legitimize' – morally just as well as unjust revolutions and subsequently changed regimes, because of the anti-ideological and relativistic stance of the Pure Theory of Law.⁷³ But in my view it is not quite correct to infer that his conception of effectiveness "would legitimize a revolution even if it is socially disapproved", and – as Khan also suggests – I think it is definitely wrong to conclude

70 Again from the perspective of international law, this means that "even a government that comes to power by revolutionary means or a coup d'état is to be regarded, in terms of international law, as a legitimate government if it is capable of securing continuous obedience to the norms it issues", see: Kelsen 2002, pp. 61, 120.

71 Khan 1987, pp. 16-17. Harris paints Kelsen's "juristic interpretation" as "nothing but normative topdressing" and states that the term 'legitimacy' is thus reduced to or resolves into "pallid normativity", see: Harris 1996, pp. 109-110.

72 As a variation on Hart's comparison of Austin's command theory of law with a "gunman situation writ large", in: Hart 1997, pp. 18-25.

73 Kelsen 2002, pp. 15-19. For Kelsen's relativistic theory of justice, see: idem 1971.

that “a revolutionary government can create a valid (...) legal order on the sole basis of effective coercion.”⁷⁴ As I have shown above: validity is not reducible to effectiveness; and as I will show below: effectiveness involves more than bare coercion.

6.5. Social peace as *conditio tacita*

For Kelsen the term ‘effectiveness of law’, as *conditio sine qua non* for the validity of the positive legal order, does not only have an explicitly recognized *socio*-logical overtone, but also an implicitly confessed *socio-ethical* undertone, for which we can hardly close our ears if we wish to comprehend his theory of law better. In his *General Theory of Law and State* Kelsen writes that the “only connotation” which may be attached to the term effectiveness, is the actual conformity of human behavior with the legal order.⁷⁵ And if we listen carefully to his already mentioned study *Natural Law Doctrine and Legal Positivism*, we can clearly hear this *socio*-logical overtone: Kelsen speaks about effectiveness as conformity and argues that human behavior must not be in complete contradiction⁷⁶ with the legal order if that order wants to regulate the behavior in a meaningful way. This statement, Kelsen goes on, can in addition be expressed in terms of the basic norm: “the basic norm can only establish a law-making authority whose norms are, by and large, observed, so that social life broadly conforms to the legal order based on the hypothetical norm.”⁷⁷

If we take these statements seriously, we see – or at least this is what I suggest – that the basic norm, as *conditio per quam* for the validity of the positive legal order, cannot assume *any* (arbitrary) effective transformation of naked power into valid law, but *only* under the implicit condition that in general no major conflict exists, neither in the ordered society itself (between its members) nor between the legal order and social life (human behavior). Taking into consideration Kelsen’s reference to peace in relation to the basic norm (§3) and his conception of the effectiveness of law (§4), it is – I believe – just in his aforesaid connotation of effectiveness as ‘conformity of social life with the legal order’ that the *socio-ethical* condition

74 Khan 1987, pp. 17-18. Khan concludes, “Kelsen’s theory of efficacy is morally neutral and legitimizes every successful change, but in so doing confuses legal order with mere coercion”, see: idem 1987, pp. 27-28.

75 Kelsen 2006, p. 40.

76 For that matter neither in absolute accordance, see n. 27 above and Khan 1987, p. 13.

77 Kelsen 2006a, p. 437.

of social peace is tacitly presupposed. This implies that the Is-sentence, functioning as minor premise in the ‘normative syllogism’,⁷⁸ stating the fact of effectiveness as the necessary condition for the validity of the legal order, presupposes social peace as the underlying condition for legal validity. I shall clarify my suggestion by providing some more allusions of Kelsen to social peace, and argue that social peace needs therefore to be considered as a different condition, namely, a ‘tacit condition’, in its own right.

In *General Theory of Law and State*, when he compares the irrational ideal of absolute justice with that of peace, Kelsen writes that:

regarded from the point of view of rational cognition, there are only interests, and hence conflicts of interest. Their solution can be brought about by an order that either satisfies one interest at the expense of the other, or seeks to achieve a compromise between opposing interests. That only one of these two orders is ‘just’ cannot be established by rational cognition.⁷⁹

The Pure Theory of Law – as a rational science of law, not an ideological politics of law – can know no more than the objectively determinable law, which is in reality the positive legal order. In Kelsen’s view the pure theory can only inquire into the real and the possible, not into the morally ‘just’ law; therefore, it must, under all circumstances, refuse to evaluate a legal order as an absolutely just or unjust solution to the problem of conflicting interests.

But what this anti-ideological and relativistic theory can do – realistic as it is too⁸⁰ – is to determine under what objective circumstances a legal order can keep its claim to validity and obedience, so that it continues to be socially effective. According to Kelsen, experience can teach us that:

only a legal order which does not satisfy the interests of one at the expense of another, but which brings about such a compromise between the opposing interests as to minimize the possible frictions, has expectation of relatively enduring existence. Only such an order will be in a position to secure social peace to its subjects on a relatively permanent basis.⁸¹

78 See § 3 and § 4 above.

79 Kelsen 2006, p. 13.

80 Herrera 2004, pp. 22-23 and Fränkel 1965, pp. 55-56.

81 Kelsen 2006, pp. 13-14. See also: Bernstorff 2010, p. 188.

This means, contrariwise, that one can expect a legal order which is unable to guarantee the social peace between its subjects in this way, to have a relatively short existence; it will gradually lose its effectiveness, and by that, eventually, its validity.

In *Natural Law Doctrine and Legal Positivism* Kelsen formulates the same socio-realistic insight in other words. There he states that, although the question as to what moral-political factors have caused the content of a positive legal order is beyond rational cognition of legal positivism, since it must restrict itself to a given order of legal norms in its 'Ought'-quality, it nonetheless can offer the following answer:

every legal order which has the degree of effectiveness necessary to make it positive is more or less of a compromise between conflicting interest-groups in their struggle for power, in their antagonistic tendencies to determine the content of the social order.(...) The result of this struggle determines the temporary content of the legal order.

And a little bit further Kelsen continues the answer to the aforesaid question as follows:

The content of the positive legal order is no more than the compromise of conflicting interests, which leaves none of them wholly satisfied or dissatisfied. It is the expression of a social equilibrium manifested in the very effectiveness of the legal order, in that it is obeyed in general and encounters no serious resistance.

In this sense then, as Kelsen 'confesses' once again, legal positivism "recognizes every positive legal order as an order of peace."⁸²

With this recognition, Kelsen clearly draws a sharp distinction between the natural law doctrine and his own project of legal positivism. Whereas the former accepts only the validity of a legal order when it meets all the unconditional and material requirements of the ideal of absolute justice, unilaterally determined by one of the interest-groups in their struggle for power; the latter, on the contrary, recognizes any legal order as valid under the relative and formal condition of a socially effective balancing point, that is, a state of peace which is, more or less, approved of by the conflicting

82 Kelsen 2006a, pp. 438-439.

interest-groups as their general conformity with the realized order shows.⁸³ And while the natural law theory prioritizes, in the making of the moral-political content of the legal order, a definite and absolute (yet rationally disputable) value of ‘the good life’ or ‘the right order’, and places it as the uncompromising end of the positive law, legal positivism holds on to its moral-political skepticism and value-relativism. Legal positivism is totally indifferent to the, arguably various, good and bad judgments on what the content of the positive law ought to be; here, the essential function of the legal order is only to serve as a rational frame for reaching compromises that makes human life and social order at least possible.⁸⁴ Here we find the precise socio-*ethical*, yet ‘moral-political indifferent’⁸⁵ sense in which, as I believe, Kelsen considers social peace to be the *conditio tacita*, the underlying condition for the validity of the positive legal order.

I am supported in this interpretation by what Kelsen writes, again in his *General Theory of Law and State*, about the monopolization of the use of force and the related relation between law and peace. He accepts without reservations that the law, as an organization of force, is “an ordering for the promotion of peace, in that it forbids the use of force in relations among the members of the community” and that the law, precisely by the monopolization of the use of force, “pacifies the community.”⁸⁶ He relates this situation of monopoly of force to the expected enduring existence (validity) of a legal community, when he says that a “community, in the long run, is possible only if each individual respects certain interests – life, health, freedom, and property of everyone else, that is to say, if each refrains from forcibly interfering in these spheres of interests of the others.”⁸⁷ He points out that it is precisely the positive legal order, by using a specific ‘social technique’ – the law – and by having control of the force monopoly, that can bring one individual to refrain from a violent interference in the sphere of interests

83 Van Roermund speaks of “a certain form of factual by and large compliance with certain directives or, what boils down to the same thing, a certain crystallization of political oppositions”, see: Van Roermund 2000, p. 214.

84 Carrino 1991, p. 85 and Vinx 2007, pp. 68-69. Because of this pacifying function of the legal order, I do not – unlike Brugmans 1997, p. 480 – believe that in its skepticism and relativism Kelsen’s legal positivism indicates a fundamental arbitrariness and genuine indifference to actual and human-practical reality.

85 Subsection IV.B.d. of Kelsen 2006a, in which Kelsen makes the above said ‘recognition’, has the concealing title: “The political indifference of legal positivism”, because it is an ‘indifference’ to the just content of the law, not to the pacifying function of the legal order. See also: Bernstorff 2010, p. 189.

86 Kelsen 2006, p. 21.

87 *Ibid.*, p. 22.

of another, and by that, make a permanent and pacified community possible. The law is namely a coercive order under which the use of force in general is prohibited as a delict, but in exceptional cases – under specific circumstances and for specific organs – allowed as a sanction. In the rare case of a violent interference (delict) a so ordered community intervenes itself and reacts with a comparably forceful, yet *legal* interference (sanction) in the sphere of interests of the individual who was responsible for the *illegal* act. By this reaction the sphere of interests of the disturbed individual is re-established, and the social peace in the community is restored. But when, contrariwise, a disintegrating community becomes incapable of using this specific ‘social technique’ and loses control of the force monopoly – as for instance during a revolution or (civil) war – the spheres of interests of the individuals can no longer be protected effectively. In which case, according to Kelsen, there is no more “state of law, which, in the sense developed here, is essentially a state of peace.”⁸⁸

The fact that in Kelsen’s work social peace not only appears as a *condition* for legal validity – ‘law through peace’ – but also as a *consequence* of the legal order – ‘peace through law’⁸⁹ – does not detract from my argument that social peace is the *conditio tacita*. It just proves the very fact that law (including its force) and peace are the two sides of the same coin of the positive legal order. That specific *normative* coin can only begin to roll (become positive/valid) when there is a minimal level of peace already present in society (condition), and it can keep on rolling (remain positive/valid) and even increase that peace-level by further reducing violence and conflict, just because the law is an ordering for the continuation and promotion of peace (consequence). I am aware of the fact that in the second edition of the *Pure Theory of Law* Kelsen modified his view on the relation between law and peace. There he substituted for the concept of ‘social peace’ that of ‘collective security’, still aimed at peace though, and assumed:

that a pacification of the legal community takes place only on that level of legal development in which self-help is prohibited, at least in principle, and collective security in the narrower sense of the word [i.e. centralization of the monopoly of force] prevails.⁹⁰

88 *Ibid.*, pp. 22-23.

89 The phrase “peace through law” refers to Kelsen’s well-known work on international peace through compulsory adjudication, see: Kelsen 1944. See also: idem 1942 and Notermans 2011a pp. 38-47 (this thesis, chapter 4, pp. 73-103).

90 Kelsen 1967, p. 38.

According to this later Kelsen, the law in its primitive stage, when the monopoly of force is decentralized and self-help still exists,⁹¹ cannot secure peace, but guarantees only collective security in the broader sense of the term, by prescribing under which conditions and in what manner force ought to be used. Despite of the fact that, as he even now maintains, “the development of the law runs in this direction [i.e. of peace]”, Kelsen drops his earlier view “that the state of law is necessarily a state of peace and that the securing of peace is an essential function of the law”, and concludes that “the securing of peace, the pacification of the legal community, cannot be considered as an essential moral value common to all legal orders; it is not the ‘moral minimum’ common to all law.”⁹² Because of this significant modification of Kelsen’s view, I consider my argument especially applicable to the positive law in its advanced stage,⁹³ when the monopoly of force is more or less centralized, with the modern state as the representative of the most pacified legal order.

For this pacification of the community it is, however, not required that the ordered society and its members are always and completely in a ‘state of peace’, in the sense of a situation in which there is no use of force at all. The positive legal order can only provide relative, not absolute, peace; not only in that it deprives its subjects of the right to use force and reserves the force-employment entirely for itself (with the exception of self-defense in which case every individual still has the right to use force itself⁹⁴), but also in that it cannot totally avoid that some of its subjects actually will sometimes use violence towards others and thereby still commit delicts.⁹⁵ Because of this relativity of the legal peace, there exists a certain antagonism between the ideal of social peace and the reality of human conflicts, comparable to the antagonism, mentioned in §2, between the Ought of norms and the Is of facts. We have seen that Kelsen points at the area of tension in which the Ought can exercise its power on the Is, with on the one hand complete agreement and on the other hand impossible conformity as its

91 One can think of primitive legal communities, but also of the international legal order in its present form.

92 *Ibid.*, p. 38.

93 This does not exclude the applicability of my argument to the law in its *primitive* stage, yet I admit that on that low level of legal development the implicit value of ‘social peace’ is less discernible as a tacit condition for legal validity in its own right, perhaps because in its reduced sense of ‘collective security’ it is more uniform – but not identical – with the explicit principle of effectiveness, which at that stage is still the prevalent condition.

94 “Even in the modern state, in which centralization has reached the highest degree, a minimum of self-help remains: self-defense”, see: idem 1967, p. 39.

95 Olechowski 2009, p. 50 and Fränkel 1965, p. 21.

boundaries. The contrast between the normative order and social reality may not sink below a certain minimum, but cannot go beyond a certain maximum either.⁹⁶ My suggestion is that Kelsen would point out that, in a similar way, there is a field of tension in which the ideal of social peace can exert its effectiveness on the reality of human conflicts, with its extremities as: on the one hand absolute absence of force, a ‘state of anarchy’ in which law would not be needed, and on the other hand full presence of violence, a ‘state of war’ in which law would not be viable.

Only within these two extremities of the impossible ‘state of anarchy’ and the intolerable ‘state of war’, the positive legal order can span a more or less narrow, but stable and valuable bridge connecting ideality with reality. Of course, Kelsen would add that within this bandwidth the positive law can realize the ideal of social peace in various moral-political degrees and through different good or bad forms of government, ranging from autocracies to democracies,⁹⁷ which nonetheless are all to be considered as legally valid. On the one side of the range one can find – probably already fulfilled in an autocratic order – a restricted form of ‘negative peace’, that is a state of relative absence of individual violence in which at least the most vital spheres of human interests are secured, as well as a limited frame of ‘positive peace’, meaning that at least the most powerful interest-groups have approved of this state of social compromise (otherwise they would have revolted against it). And on the other side of the breadth (making the bridge somewhat broader) one will discover – perhaps only achieved in a democratic order – besides an enlarged form of negative peace, respecting more than only the most vital spheres of human interests, also a wider frame of positive peace, that is, a state of social compromise of which most of the opposing individuals have approved.

6.6. Conclusion: legal validity and social peace

As for the conclusion of my argument: Kelsen’s Pure Theory of Law *tacitly* presupposes in *all* conditions (including the basic norm), but clearly in the *necessary* conditions (especially effectiveness) for the validity of the (more or less centralized) positive legal order, an implicit and underlying condition of social peace, which I therefore have called the *conditio tacita*. Social peace appears to be not only the ‘tacit condition’ for legal validity,

⁹⁶ Kelsen 2006a, pp. 436-437.

⁹⁷ On these different forms of government, see: idem 2006, pp. 283-303.

but – unlike effectiveness and positivity, which are to be sure necessary yet merely *real* conditions – it also seems to be a basic socio-ethical *value* inherent in positive law. This would imply that in our – Kelsenian – normative concept of the legal order and in our juridical interpretation, we – as jurists – presuppose hypothetically and normatively social peace as a basic value,⁹⁸ notwithstanding the conclusion that even the least contradictory legal order may represent a state of supreme material injustice⁹⁹ and notwithstanding the conclusion that even the fullest monopolization of the use of force constitutes only relative, not absolute, peace. It is true that “such relative implementation of ordered peace” – as Harris calls it – “does not, for Kelsen, entail ranking on a scale of objective political virtue”, yet, at the end of my investigation I’m not so certain that it is, for Kelsen, merely “a matter of legal-institutional sociology, not justice.”¹⁰⁰ Despite its formal and relative limitations, the implementation of social peace in the legal order (for instance in the institute of adjudication), is anyhow an implicitly conditioned worthy or ‘just’ value in its own right, not in that it can help – us jurists (or judges) – to find the ideal answer to humanity’s never-ending quest for absolute justice (for example the absolute just decision in a legal dispute), but in that it enables us to make a peaceful end to human conflicts that are ever-present in reality.¹⁰¹

One could object that Kelsen’s concepts of validity and normativity of the positive legal order come down to – as Piret names it – a “sterile tautology of normality, that means a state of relative internal calm and peace: as long as it lasts the valid law applies”, and that Kelsen thereby actually confirms “the Schmittian position that the normativity of the law lives on the normality of the political state and presupposes a minimum of social stability.”¹⁰² Indeed, due to this tautology it becomes difficult or almost impossible¹⁰³ for Kelsen to say something juridically meaningful about the abnormal and therefore non-legal ‘state of exception’; whereas for Schmitt this very state is just the proof of the primacy of the political and therefore

98 As the “value-philosophical foundation” of the Pure Theory of Law, cf. Verdross 1968, pp. 1306-1307.

99 “Peace need not mean justice, not even in the sense of a solidarity of interests”, see: Kelsen 2006a, p. 441.

100 Harris 1996, p. 108.

101 Carrino 1991, p. 86 and Herrera 2004, p. 28.

102 Piret 1996, pp. 11, 13 (my translation from Dutch).

103 Not *totally* impossible as Piret claims, see § 4 above on Kelsen’s interpretation of non-legal regime changes.

the beginning of a fruitful discussion on this polemic concept.¹⁰⁴ Yet, in this same tautology Kelsen would – I think – find a (re)confirmation of the old truth and thereby of his own, Kelsenian position,¹⁰⁵ saying that ‘though law cannot exist without power (or politics), right and might are not identical’. Law is namely, according to Kelsen’s Pure Theory of Law, a specific, to wit, *normative* order or organization of power, and we may now tacitly imply a *pacifying* order of power. Because of this implication considering the tacit ‘social peace’-condition I suggest that, in contrast with Schmitt’s decisionist ‘politics of law’ which is explicitly and highly polemical in view of his notorious ‘friend-enemy’-distinction, Kelsen’s normative ‘science of law’¹⁰⁶ may be (re)valuated as essentially pacifistic. Where, according to Schmitt, the political can only survive with a discernible enemy and an eventual ‘state of war’,¹⁰⁷ the law on the contrary, according to Kelsen, cannot exist without a minimal ‘state of peace’, but once this condition is met, law is just the continuation and promotion of peace with other (coercive/forceful) means.¹⁰⁸

104 For Schmitt’s concepts of the ‘state of exception’ and of ‘politics’ or ‘the political’, see: Schmitt 2005, chapter 1 and Schmitt 2007.

105 Which is essentially a middle position between the polemical view of ‘might makes right’ and the anarchical view of ‘law without power’, see: Ebenstein 1971, p. 627.

106 These characterizations are borrowed from: Dyzenhaus 1997, pp. 38-160.

107 Schmitt 2007, chapters 1-2.

108 As a variation on Clausewitz’s famous definition of war as “merely the continuation of policy by other means”, in: Clausewitz 2007, book I, chapter 1, section 24.

