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INTERPRETATION OF LAW AND THE KELSENIAN INTERPRETATIVE FRAMEWORK

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ABSTRACT

The article explores Kelsen's theory of legal interpretation as outlined in Hans Kelsen's Pure Theory of Law (1881-1973), with emphasis on the 1934 and 1960 editions. Initially, it is highlighted that the interpretation of law, according to Kelsen, is a mental process that occurs in the application and creation of law, distinguishing itself into "authentic interpretation" and "non-authentic". The first is binding and carried out by state agencies, while the second is merely descriptive, made by private individuals and legal scholars. The work emphasizes the metaphor of the "legal framework", which illustrates the margin of discretion existing in the act of applying the law, in addition to discussing the criticisms of the possible decisionist tendency of Kelsen's theory. Finally, the institutional thesis is considered as a perspective that attenuates the criticism of decisionism, by suggesting that decisions are influenced by a complex normative and procedural structure.

Keywords: Pure Theory of Law. Legal Interpretation. Hans Kelsen. Discretion. Normative Framework.

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Revista ARACÊ
ISSN: 2358-2472

INTRODUCTION

The Kelsenian theory of the interpretation of law, the subject of this work, especially as embodied in a succinct specific chapter in the 1st and 2nd editions of the Pure Theory of Law, entitled in both editions as "Interpretation", is dedicated to the interpretative phenomenon in all levels of law, that is, in all the passages of steps that involve the application of law, Kelsen's theoretical proposal is not limited to the interpretation of judicial decisions.

It is worth emphasizing that, for Kelsen himself, as he notes in the first paragraph of the 2nd edition of the Pure Theory of Law, his theory of law "[...] provides a theory of interpretation" (KELSEN, [1960]/2009, p. 1), that is, it is possible to identify a theory of interpretation in the pure theory of law, including the theme being treated in other publications by Kelsen, in addition to the 1st and 2nd edition of the pure theory of law.

The present work was developed from a bibliographic review in specialized academic publications on the subject, in addition to obviously consulting Kelsen's publications, consulted in their translations into Portuguese, being a study of critical-reflective analysis.

DEVELOPMENT

It is the interpretation of law, according to the pure theory of law, a "mental process/operation" that occurs "when the law is applied/created" by a state organ to "fix/determine the meaning of the norms". In the 1st edition of the Pure Theory of Law, in a section entitled "Reason and object of interpretation", Kelsen summarizes that

> Interpretation is a mental process that accompanies the process of creating law, in its course from the higher level to the lower level, which is determined by the higher level (Kelsen, [1934]/2021, p. 82).

In the same sense, in the 2nd edition of the Pure Theory of Law, in a section now entitled "The essence of interpretation. Authentic and non-authentic interpretation", Kelsen summarizes that

> Interpretation is [...] a mental operation that accompanies the process of applying the Law in its progress from a higher to a lower level (Kelsen, [1960]/2009, p. 387).

In the 1st edition of the Pure Theory of Law, in the specific chapter on interpretation, Kelsen did not deal with the interpretative phenomenon taking into account private

Revista ARACÊ
ISSN: 2358-2472

individuals and legal scientists (authors, scholars, academics and legal professionals without decision-making power, such as lawyers). In the 2nd edition of the Pure Theory of Law, Kelsen adds an interesting new element to his theory of interpretation by distinguishing "authentic interpretation" from non-authentic interpretation. According to the didactically exposed in the 2nd edition:

> [...] there are two types of interpretation that must be clearly distinguished from each other: the [authentic] interpretation of the law by the body that applies it, and the [non-authentic] interpretation of the law that is not carried out by a legal body but by a private person and, especially, by legal science (Kelsen, [1960]/2009, p. 388).

This distinction between authentic and non-authentic interpretation is extremely relevant to differentiate the interpretation with the power to truly create law, carried out by state organs, from the simple interpretation for the observance and description of the law, carried out, respectively, by individuals and legal scientists. Thus, by classifying the type of interpretation of individuals, scientists and state agencies in the interpretation of law, Kelsen clearly explains the vulnerability of individuals in the legal sphere in general.

In The Constitutional Jurisdiction, in this passage Kelsen clearly explains the vulnerability of the individual when dealing with the annulment and nullity of unconstitutional acts emanating from state organs:

> From the point of view of positive law, the situation of the one to whom a [state] act is addressed with the pretense of being obeyed is, without exception, the following: if he considers the act null, he may refuse to obey it, but always acting at his own risk, that is, he runs the risk that, prosecuted for disobedience, the authority before which it appears does not consider the act null or declares the minimum conditions established by positive law for its validity fulfilled, subject to its subsequent annulment (Kelsen, [1928]/2013, p. 143).

It is plausible to speculate that Kelsen has identified this specific point of the pure theory of law (distinction between authentic and non-authentic interpretation) as one of the most relevant in the general context of his theoretical proposal. It is probably no coincidence that in the preface to the 2nd edition of the Pure Theory of Law, Kelsen emphasizes the protagonism of the judicial organs, the only one endowed with authentic interpretation, alongside the defense that there is no single correct answer (Kelsen, [1960]/2009, p. XVII-XVIII). It is also probably no coincidence that at the end of the 2nd edition of the Pure Theory of Law, Kelsen returns to this issue (Kelsen, [1960]/2009, p. 387-388, 395-396). Thus, Kelsen begins and closes the 2nd edition by arguing about the inferior role of individuals and scientists in the application of law.

Revista ARACÊ
ISSN: 2358-2472

In fact, the pure theory of law is concerned with the interpretation of the most diverse norms (laws, constitutions, decrees, international treaties, norms of general customary international law, judicial sentences, administrative orders, legal transactions, etc.), however, warning that it is up to individuals and scientists to interpret without binding force. In Kelsen's own words,

> In the hypothesis that is generally thought of when one speaks of interpretation, in the hypothesis of the interpretation of the law, the answer must be given to the question of what content is to be given to the individual norm of a judicial sentence or an administrative resolution, a norm to be deduced from the general norm of the law in its application to a specific case. But there is also an interpretation of the Constitution, insofar as it is also a matter of applying it - in the legislative process, when issuing decrees or other constitutionally immediate acts - to a lower level; and an interpretation of international treaties or the norms of general customary international law, when these and those have to be applied, in a specific case, by a government or by a court or administrative body, international or national. And there is also an interpretation of individual norms, judicial sentences, administrative orders, legal transactions, etc., in short, of all legal norms, insofar as they are to be applied. But also individuals, who must not apply but observe the law, observing or practising the conduct that avoids the penalty, need to understand and therefore determine the meaning of the legal norms which they are to observe. And, finally, legal science, when describing positive law, also has to interpret its norms (Kelsen, [1960]/2009, p. 387-388).

As already discussed in this work, Kelsen's theory of law presupposes a legal system that is structured in a relationship of supra-infra-ordination, that is, there is a relationship of determination or linkage, as to form and content, between the said levels of the legal order, such as the relationship between constitution and law. But the theory of interpretation of the Kelsenian theory of law argues that there is a relative indeterminacy in the act of applying the law, so that in the passage from the upper to the lower echelon,

> [...] Determination is never, however, complete. The norm of the higher echelon cannot bind in all directions (in all aspects) the act through which it is applied. There must always be a margin, sometimes greater or smaller, of free appreciation, in such a way that the norm of the higher echelon always has, in relation to the act of normative production or implementation that applies it, the character of a framework or frame to be filled by this act. Even an order that is as detailed as possible must leave to the one who fulfills or executes it a plurality of determinations to make (Kelsen, [1960]/2009, p. 388).

Hence, when it comes to the interpretation of law, according to the perspective of the pure theory of law, there is no single correct answer as a result of interpretation, there are only possible answers, implying the famous metaphor of the legal/normative framework or legal/normative framework. In fact,

Revista ARACÊ
ISSN: 2358-2472

> If by "interpretation" is meant the fixation by cognitive means of the meaning of the object to be interpreted, the result of a legal interpretation can only be the fixation of the framework that represents the Law to be interpreted and, consequently, the knowledge of the various possibilities that exist within this framework. Therefore, the interpretation of a law should not necessarily lead to a single solution as being the only correct one, but possibly to several solutions that - insofar as they are only measured by the law to be applied - have equal value, although only one of them becomes positive law in the act of the body applying the law - in the act of the court, especially. To say that a judicial sentence is based on the law, does not mean, in fact, but that it is contained within the framework or framework that the law represents - it does not mean that it is the individual norm, but only that it is one of the individual norms that can be produced within the framework of the general norm (Kelsen, [1960]/2009, p. 390-391).

There is, therefore, in the law, a space of structural indeterminacy under which "[...] judges exercise significant margins of discretion when they are called upon to decide [...]" (Leal, 2022, p. 504).

In the first interpretative stage, which corresponds to the act of cognizance, the judge must carry out a prior cognition, an intellectual exercise that requires the observance of the normative set existing in the staggered structure of the legal order. The authentic interpreter must thus take into account the norms already established, hierarchically superior and of a general nature (Almeida, 2024, p. 109).

Reflecting in detail on this aspect of the pure law theory, in a study especially focused on the phenomenon of indeterminacy in law, Caio Farah Rodriguez didactically summarizes Kelsen's proposal as follows:

> [...] the structure of Kelsen's argument on interpretation is fundamentally as follows: legal interpretation encompasses two moments: one cognitive, the other volitional; in the cognitive moment, the "legal framework" of the possible solutions to a given legal controversy is determined; in the volitional moment, one chooses, among the alternatives, which should be binding; the first moment is common to the scientist of law, the citizen and the judge; the second moment distinguishes the judge (whom he calls an authentic interpreter, since he creates the lower norm from the superior norm applicable to the case) from the other two. We have developed the basic scheme above below, including for the value of its simplicity and its intuitive character. Interpretation is defined, in Kelsen, as the "fixation of meaning" of legal norms, with a view to application (by the judge or court, when creating individual norms, by legislative or administrative bodies, which must produce other norms, by people who agree on legal transactions and, to a lesser extent, by enforcement bodies, which must materialize the effects of validly created norms), observance (by the citizen) or description (by the scientist) of the law. The fixation of meaning is the result of a "mental process" that accompanies the passage of the norms of positive law from the general to the particular or individual, from the abstract to the concrete, from its upper to its lower echelon. The relationship between the higher, abstract and general norms and the lower, concrete and individual norms is one of determination, both of the process of their production and of their content. This determination is, however, incomplete and leaves the applicator a "margin of free appreciation", of varying extent, either in terms of verifying the occurrence of the hypothesis ("if A"), or in terms of the scope of the statute ("then [it must be] B") of the norm (Rodriguez, 2011, p. 41-42).

Revista ARACÊ
ISSN: 2358-2472

The inevitable indeterminacy verified in the interpretation of the law, dealt with here, is due, according to Kelsen himself, to a (current) insufficiency of the so-called methods of interpretation. And he defends his thesis very explicitly by stating that

> [...] from a positive law-oriented point of view, there is no criterion on the basis of which one of the possibilities inscribed in the framework of the law to be applied can be preferred to the other. There is absolutely no method - capable of being classified as positive law - according to which, of the various verbal meanings of a norm, only one can be singled out as "correct" - provided, of course, that it is a question of several possible meanings: possible in comparison with all the other norms of the law or of the legal order. Despite all the efforts of traditional jurisprudence, it has not been possible to decide the conflict between will and expression in favor of one or the other, in an objectively valid way. All the methods of interpretation elaborated up to the present always lead to a result that is only possible, never to a result that is the only correct one. To fixate on the presumed will of the legislator, disregarding the verbal content, or to strictly observe the verbal content, without caring about the will - almost always problematic - of the legislator has - from the point of view of positive law - absolutely equal value. If it is the case that two norms of the same law contradict each other, then the logical possibilities of legal application already mentioned are, from the point of view of positive law, on one and the same level. It is a futile effort to try to "legally" substantiate one, to the exclusion of the other (Kelsen, [1960]/2009, p. 391-392).

This defense of the insufficiency of the so-called methods of interpreting the law led Kelsen to the controversial assertion that legal interpretation is an act of will to be performed by the legal authority in charge of applying the law, which, however, deserves some important observations.

Although not in a very detailed way, the 2nd edition of the Pure Theory of Law proposes a two-phase method of interpretation in law, insofar as

> [...] in the application of the Law by a legal body, the cognitive interpretation (obtained by an operation of knowledge) of the Law to be applied is combined with an act of will in which the body applying the Law makes a choice between the possibilities revealed through that same cognitive interpretation (Kelsen, [1960]/2009, p. 394).

In other words, there is a first (cognitive) phase in the process of applying the law aimed at defining which possible norms fit into the legal framework; and a second phase (volitional) aimed at choosing the norm to be applied, creating the right or properly applying the law by means of an executive act.

Also in this context, the fact that Kelsen's decision theory is part of the Kelsenian decision theory is the possibility of decisions outside the frame. In Kelsen's writings, such a prediction is verified, for example, in the 2nd edition of the Pure Theory of Law, specifically

Revista ARACÊ
ISSN: 2358-2472

when dealing with interpretation as an act of knowledge or as an act of will, where Kelsen notes that

> [...] By means of authentic interpretation, that is to say, the interpretation of a norm by the legal body that has to apply it, not only is one of the possibilities revealed by the cognitive interpretation of the same norm realized, but it is also possible to produce a norm that is completely outside the framework that the norm to be applied represents. By means of an authentic interpretation of this kind, law can be created, not only in the case where the interpretation is of a general nature, in which there is therefore an authentic interpretation in the usual sense of the word, but also in the case where an individual rule of law is produced by an organ which applies the law, provided that the act of this organ can no longer be annulled. provided that it has become final. It is a well-known fact that, by means of an authentic interpretation of this type, new law is often created - especially by the courts of last instance (Kelsen, [1960]/2009, p. 394).

The very existence of a normative provision for the possibility of challenging decisions, alongside the institute of res judicata, presupposes the possibility of norms that go beyond the normative framework, that is, norms that are valid even if they do not comply with the limitations of the cognitive phase of the interpretation of the law.

This problem involving legal interpretation is topographically better addressed in the 2nd edition of the Pure Theory of Law, not in the chapter "Interpretation", but in the chapter "Legal dynamics", more specifically when Kelsen deals with the illegal judicial decision and the unconstitutional law:

> Since the legal order presents a staggered construction of norms that are supra- and infra-ordinate to each other, and since a norm belongs to a given legal order only because and to the extent that it harmonizes with the higher norm that defines its creation, the problem arises of a possible conflict between a norm of a higher rank and a norm of a lower rank, That is, the question: quid juris, if a norm is not in harmony with the norm that determines its production, especially if it does not correspond to the norm that pre-establishes its content? [...]. To say that a judicial decision or an administrative resolution is contrary to the law can only mean that the process in which the individual rule was produced, or its content, does not correspond to the general rule created by legislative or customary means, which determines that process or establishes this content [...]. But if the process in which a judicial decision can be challenged has an end, if there is a court of last instance whose decision can no longer be challenged, if there is a decision with the force of res judicata, then the "legality" (legality) of this decision can no longer be called into question. What does it mean, however, that the legal system confers the force of res judicata to the decision of last instance? It means that, even if a general rule is in force which must be applied by the court and which predetermines the content of an individual rule to be produced by the judicial decision, an individual rule created by the court of last instance whose content does not correspond to that general rule may enter into force ... In fact, the question of whether the decision is "illegal" will not be decided by the parties to the proceedings but by the court of appeal, and, in any event, the decision of last instance becomes final. If it makes any sense to speak of a judicial decision "in itself" in accordance with or contrary to the law (legal or illegal), it must be admitted that a decision in accordance with the law can also be annulled by a decision with the force of res judicata (Kelsen, [1960]/2009, p. 295-300).

Revista ARACÊ
ISSN: 2358-2472

It is not, therefore, an exaggeration to say that from the perspective of the pure theory of law, the determining element to know whether or not a specific prescription has the quality of a (valid) legal norm is the criterion of competence of the authority that applies the norm (which makes the Kelsenian theory of decision, at least in a simplistic/intuitive logic, a strong candidate for reception by the state legal authorities, especially by the courts, insofar as it gives them a great role in the application of the law).

The interpretation outside the frame, which, it is worth explaining, creates a valid norm in the light of the pure theory of law, is explained, according to Matheus Pelegrino da Silva, by the theory of the "alternative attribution of power (alternative Ermächtigung)" identifiable as part of the pure theory of law:

> In this context, it is not simply a question of the possibility of authorities exceeding the limits of the attribution of power conferred on them, since the main fact is that the acts of these authorities, despite exceeding the limits conferred, still have (often only provisionally) legal validity. This means that the authorities have an attribution of power that derives from the valid legal norms that make up the normative framework relating to each specific issue, but they also receive another kind of attribution of power, the alternative attribution of power (alternative Ermächtigung), "alternative" in relation to the attribution resulting from the norms present in the legal system that constitute the normative framework relevant to the case in question. The central idea underlying this theory consists in offering an explanation of how a norm can have legal existence, how it can be valid, despite the fact that such a norm was created through the exercise of a limited power that exceeded the limits of this power [...]. [It is possible that] [...] the individual norm created by the authority corresponds to what was established in the pertinent general norm, that is, it may be the case that the authority is exercising the type of attribution of power that was conferred on it by the general norm. However, it is also possible that the individual norm elaborated by the authority does not correspond to the pertinent general norm, it is possible that such an individual norm is outside the normative framework in question, and even so it may be valid, it may exist legally. This occurs, so Kelsen argues, because in this case the authority not only received the power to create individual norms observing the available general norms, but it also received the power to create individual norms that do not observe what is determined by the valid and pertinent general norms to the question. In most cases, these norms have provisional validity, that is, they can be challenged in another instance, they may cease to be valid, but in any case, it should be noted that regardless of whether their validity is provisional or definitive, they exist legally, they are part of the set of objects of study of the science of law (Silva, 2019, p. 12-13).

Also according to Matheus Pelegrino da Silva, "The theory of alternative attribution of power consists of the way Kelsen received and reformulated Adolf Julius Merkl's theory of failure prediction (Fehlerkalkül)" (Silva, 2019, p. 12).

And in fact, the theoretical development of the question can be found in a text published by Adolf Julius Merkl, in 1925, therefore, since before the 1st edition of the Pure Theory of Law, where the following passage is verified:

Revista ARACÊ
ISSN: 2358-2472

> [...] A flawed sentence is preferable to no sentence at all: it is better to clearly recognize the judicial error than the eternally unanswered question: is there a judicial act or not? Leaving this legitimate question open is close to a denial of the right and greatly affects legal certainty. The legal means by which the law satisfies the above-mentioned demand for legal policy [consists] in what I call the "prediction of failures" [Fehlerkalkül]. By prediction of flaws, I indicate a provision of positive law that makes it possible to legally impute to the State acts that do not satisfy the sum of the legal requirements positively placed for their emergence, and, therefore, for their validity, which allows such acts, despite their deficiencies, to be known as law. The positive juridical form of such predictions of failures is enormously multiple – common to these is the function of correcting contradictions between the modes of manifestation of the law in the various steps, namely, between the law of the laws and those acts that arise from the claim of application of the law. [...] If the law itself presupposes that the enforcer of the law, the body responsible for the application of the law, has in certain cases, within a certain latitude, failed with respect to the law, has made a mistake, and, under certain circumstances, confers on that act some legal significance, in certain cases it even has legal validity, in the same way as it does with respect to the act free from fault, then the act "[riddled with] failure" is legally remedied, [becomes] free of failures, consequently [existing] as a legal act, and the "body" that failed must be recognized as a state agency (Merkl, 2018, p. 213-214).

An important issue to be highlighted is that this point of the pure theory of law, which recognizes the validity of decisions outside the frame, generates criticism of a supposed "decisionist" (or "skeptical") character of the theory, a criticism recalled here by Caio Farah Rodriguez:

> If the frame can be disregarded, what remains of Kelsen's description of the process of interpretation? Regardless of this consideration, the distinction between frame and decision is already problematic in itself. If one can only know which rule is applicable after all the phases of interpretation have passed, one cannot segregate, in such a marked way, the process of identifying the applicable norm and the decision-making process based on the identified norm (Rodriguez, 2011, p. 45-46).

Caio Farah Rodriguez himself, however, points out a certain inadequacy to the criticism that qualifies Kelsen's theoretical proposal as simply decisionist:

> The decisionist hypothesis seems to us to presuppose excessively restricted notions of norms and of the relationship of determination between norms (in Kelsen's case, superior and inferior). [It is necessary] [...] emphasize another aspect of Kelsenian thought, which we call "institutional" and which we oppose to decisionism (Rodriguez, 2011, p. 49-50).

A certain attribution of decisionism to the theory of interpretation of the pure theory of law exacerbates the "voluntarist" or "subjectivist" elements associated with the idea of authority, ignoring the existence of a historically locatable set, therefore subject to variation, of practices or institutions, structured by rules. This institutional set attributes complexity to the decision-making process, so that decisions are not made in a vacuum, as seems to

Revista ARACÊ
ISSN: 2358-2472

suggest a certain criticism of the decisionist character of decision theory of pure legal theory (Rodriguez, 2011, p. 49-50).

In this context, it should be noted that the notion of judicial precedent as a legal rule of mandatory observance, as strongly established by the Brazilian Code of Civil Procedure of 2015, is not incompatible with Kelsen's theory, which admits the absence of a single correct answer in the interpretation of the law. Kelsen recognizes that precedents create new law and standardize the interpretation of concrete cases that could have multiple solutions. In this sense, within a hierarchical legal order, the general rules established by the courts are positioned above the individual rules of judicial sentences, acquiring a binding character for future decisions in similar cases (Almeida, 2024, p. 119).

FINAL CONSIDERATIONS

It seems really pertinent to consider here the institutional thesis, by Caio Farah Rodriguez, for a more adequate reading of the theory of interpretation of the pure theory of law to the extent that, in fact, a certain decisionist character attributed to the pure theory of law deserves the counterpoint that it is necessary to consider the existence of a complex procedural normative structure that involves the decisions of public authorities (in the Western world in the twentieth century, under the guidance of positive law), especially the judicial authorities, who have the final word. But knowing the details of this institutional apparatus, which is historically constructed by each legal system, escapes the proposal of a general theory of pure theory of law.

Without going into detail about how positive legal systems are or should be structured, which is in line with the proposal of a merely descriptive and general theory of the pure theory of law, it seems that a theory of interpretation can really be identified in the pure theory of law, but to be thought of in the light of each legal system, for example, In the Brazilian case, it is necessary to consider the existence of a historically constructed complex institutional level that involves state decisions, imposing a series of provisions that restrict decisions outside the framework, that is, limiting the decision-making power of state authorities, such as the requirement, at least in theory, that the final word in the judicial context be given by collegiate bodies in a participatory manner with the various procedural actors, including the possibility of participation of organized civil society via amicus curiae, as well as provisions for the accountability of authorities in different spheres (administrative, disciplinary, civil, criminal and administrative probity).

Revista ARACÊ
ISSN: 2358-2472

But all this does not imply denying that, for Kelsen, after all, in systems guided by positive law, there is considerable discretion for public authorities in the decision-making process.

Revista ARACÊ
ISSN: 2358-2472

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