

# THE FACTUAL ELEMENTS IN THE DETERMINATION OF POSITIVE LAW

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## 1. *Introduction.*

In a critical study on Kant's theory of the Moral Law, I suggested that the aim of philosophy is the formulation of a theory the purpose of which is the elucidation of certain facts, that to each discipline a basic fact must be co-ordinated to clarify which is its primary object, and that for the lawyer this basic fact is the making and determination of law<sup>1</sup>. The present essay aims at taking this idea further. If the suggestion is tenable, then a theory of positive law must start from those facts by which positive law is constituted and must try to determine its object from that angle. Similarly, a theory of Natural Law —especially if it is assumed that, because it is dealing with "Law" it has basically the same object as a theory of positive law— must also refer to certain basic facts which, presumably, should in principle be the same. Should this be not the case, then the conclusion might be justified, that positive law and natural law share only the term "law" as part of the linguistic expression by which they are named, but are in fact

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<sup>1</sup> O. BONDY, «The Moral Law Theory» in *Australian Studies in Legal Philosophy* (1963) I. Tammelo, A. R. Blackshield and E. Campbell (eds.) 141.

two entirely different entities which might or might not have certain properties in common<sup>2</sup>.

The treatment of the problem of the relation of natural and positive law and especially of opposing the one to the other indicates that the real issue has been blurred by prejudice<sup>3</sup>. For this reason it might be considered advantageous to try and examine the problem what the object of a theory of positive law is separately and independently of the problem of what the object of a theory of natural law could be. Indeed, the failure to differentiate clearly between positive and natural law and the endeavour to work with a concept embracing both seems to be one of the reasons for the difficulty to define "law". This is demonstrated by the observations of Julius Stone when discussing the element of coercion as a characteristic of law<sup>4</sup> and by Anthony Blackshield's reference to different types of persons to whom different definitions of law might appear acceptable<sup>5</sup>. Arthur Kaufmann<sup>6</sup> agrees with Marcic<sup>7</sup> that "Law" and "Natural Law" are the same, and this might be to many as objectionable as my earlier<sup>8</sup> statement that there is no law unless it is positive law<sup>9</sup>.

<sup>2</sup> Alf Ross seems to hold that there is disparity in principle between positive law and natural law because he relegates the conflict between positive law and natural law to the general field of ethics and considers natural law to be the object of moral philosophy and not of legal philosophy. See his «Validity and the Conflict between Legal Positivism and Natural Law» («El Concepto de Validez y el Conflicto entre el Positivismo Jurídico y el Derecho Natural»), *Revista Jurídica de Buenos Aires* (1961), 60.

<sup>3</sup> This is also stressed by J. HALL «From Legal Theory to Integrative Jurisprudence» 33 *Cin. L. Rev.* (1964), 174, who speaks of «deeply rooted preferences». Still he wants to see both aspects united in a «comprehensive vision» 191 sq.

<sup>4</sup> J. STONE, «Meaning and Role of Definition of Law» in Tammelo et. al. (eds.) op. cit. supra n.1 at 28.

<sup>5</sup> A. R. BLACKSHIELD, «Some Approaches and Barriers to the Definition of Law», Tammelo et al. (eds.) op. cit. supra n.1 at 39.

<sup>6</sup> A. KAUFMANN, «Gesetz und Recht» in *Existenz und Ordnung, Festschrift für Erih Wolf zum 60. Geburtstag* (1962) 383: «Recht und Naturrecht sind dasselbe».

<sup>7</sup> As quoted by A. KAUFMANN, op. cit. supra n.6 at 383, MARCIC, *Vom Gesetzstaat zum Richterstaat*, 125 sq., 135 sq.: «Statt 'Naturrecht' sollte man einfach 'Recht' sagen».

<sup>8</sup> O. BONDY, «Logical and Epistemological Problems in Legal Philosophy» (1951) 29 *The Australian Journal of Philosophy* 90.

<sup>9</sup> It would be interesting to examine whether the natural law argument could only

This seems to justify the restriction of our attention to positive law in the first place, though, to judge from the literature of the years following the end of the second World War, this might hardly be possible: to those who consider natural law and positive law to be of one essence, such restriction must appear impossible. However, those who have advocated an essential unity of natural law and positive law do not seem to have done more than stating one of the dogmas which make up their metaphysical *Weltanschauung*. It would therefore be better to preserve an open mind concerning this fundamental problem and to clearly differentiate between the two rather than to assume their unity as a foregone conclusion. Indeed, the proper proof of their identity seems to lie in a procedure which would show that both have the same characteristics, the same features, and are for that reason, the same. This procedure presupposes that both natural law and positive law are examined independently, and only if the two independent investigations arrive at the same result, the proof of their unity would be complete.

The recognition of the necessity to preserve an open mind towards the problems here to be discussed induces me to join in the plea made by Anthony Blackshield<sup>10</sup> who regrets the tendencies which "Press the expounder of existentialism into the false position of appearing to espouse what he expounds". Though the scope of this article does not permit me to enter into a discussion of the methodological foundations of both existentialism and its predecessor phenomenology, I shall have to make some references to both. The same applies to the problem of metaphysics<sup>11</sup>. Though profoundly sceptical of what it is able to convey, I shall try to avoid taking sides either for or

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be pursued in the context of metaphysical speculation, and to what extent natural law is meaningful outside metaphysics. This, however, goes beyond the scope of the present article. See also Section 5, note 41.

<sup>10</sup> A. R. BLACKSHIELD, «The Importance of Being: Some Reflections on Existentialism in Relation to Law» (1965) 10, *Natural Law Forum*, 70.

<sup>11</sup> See KAUFMANN, «The Ontological Structure of Law» (1963) 8 *Natural Law Forum* 79: «To those who have no taste for metaphysics, or believe it to be a discipline consisting in the otiose shuffling of words, this appeal to its tools must appear a compounding of confusion».

against it. With this in mind, I have endeavoured to find my way through the maze of opposing philosophies in an effort to clarify the facts relevant to positive law and their proper interpretation.

## 2. *The Selection of the Relevant Facts.*

The basic problem which arises when determining the factual elements of positive law is that of finding the facts which are relevant<sup>12</sup>). This raises the question to what extent reliance might be placed on the method of selecting the relevant facts. To what extent would any pre-conceived ideas about the essence of law adversely influence such selection?

Mediaeval controversy about universals found its counterpart in the modern dichotomy of essence and existence. Taking into account the philosophical basis of present day existentialism and its predecessor phenomenology, it does not appear to be necessary to take this problem too seriously. Facts are always a matter of experience and therefore the existentialist slogan of "Existence is prior to essence"<sup>13</sup>) could be invoked. The point would be only whether some kind of pre-conceived idea of the essence of law which cannot be found or presumed to be inherent in the facts given to experience would or could influence us in the selection of what we may state to be the relevant facts.

If it is assumed that essence is deduced from the facts given the experience ("existence"), then there should not be much danger of being adversely influenced if we concentrate on facts only. Anyhow, the method which is advocated here is to find the relevant facts in the same way as learn them in everyday life, a procedure which is not yet influenced by second thoughts occurring when reflecting on the nature of those facts. This appears to be the idea underlying Husserl's Act Analysis<sup>14</sup>). The main

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<sup>12</sup> See O. BONDY, «Zum Problem der Rechtssatzformulierung» (1930) 9 Ztschr f. öff.Recht, 427 n.1 where Kelsen's Theory of the Basic Norm is referred to as pointing towards an analysis of the Legal Act in terms of Husserl's Phenomenology, and O. BONDY, article cited supra n.8 at 97 where the facts relevant to the phenomenological analysis of the Legal Act are referred to in detail.

<sup>13</sup> See BLACKSHIELD article cited above n.10 at 76 n.28.

<sup>14</sup> E. HUSSERL, 2 (1) Logische Untersuchungen (1922) 9 sq.

point is not to be sidetracked by the distinction between the facts and the meaning they might convey, that means to concentrate on the (relevant) facts as far as they constitute expressions as distinct from their meaning in the terms of Husserl's well known terminology<sup>15</sup>).

Arthur Kaufmann's<sup>16</sup>) reference to the old controversy about universals seems have a bearing on this matter. If it is true, as Kaufmann's suggests, that there is a middle solution between nominalism and realism, then the universal is neither "ante rem" nor "post rem" but is "in re". That is to say that it could not be projected into the facts by way of pre-judgement as long as we strictly adhere to being concerned with facts only, namely with such facts as bear a normative meaning in a special way considered to be legal according to the general usage of everyday life.

This might suffice for the purposes of the present task in order to be sure of our epistemological foundations. What we have said might indicate that no valid objection against the procedure here to be adopted, might be expected either from the existentialist or the phenomenological point of view. As will be seen later, the realisation that it is necessary to concentrate on the facts which bear the specific meanings of positive legal norms is also the clue for the proper interpretation of Kelsen's so controversial Basic Norm Theory.

### 3. *The Determination of the Relevant Facts.*

What result could we expect when asking any man in the street the question "What is Law?"? What would his probable answer be?<sup>17</sup>) In the same way we could wonder, of course, what a mother's answer would be when confronted with her child's question "What is Law?". All this amounts to the problem of how we arrive at our experience about law.

A proper reaction to these questions seems to be that the

<sup>15</sup> HUSSERL, op. cit. supra n.14 at 23 sqs.

<sup>16</sup> KAUFMANN, «Analogie und Natur der Sache (1956), 43 sqs.

<sup>17</sup> See BONDY, article cited supra n.8 at 89.

enquirer is referred to law courts and government authorities for further advice. These officials would then refer to certain Acts of Parliament, law court precedents and other "legal material", referring eventually back to the Constitution to which the norms embodied in such legal material would have to comply. The regress would end at some historical point such as the promulgation of a Constitution by an absolute monarch or by some revolutionary assembly.

The important point of this regress is that we have to refer to facts all the time, admittedly to facts bearing a certain specified meaning, but facts just the same. What we call legal norms is nothing more or less than the meaning carried by those facts.

This seems to lie at the root of Kantorowicz's<sup>18</sup>) suggestion to make "justiciable" the *differentia specifica* of the law. By this, he appears to refer to the fact that law is only something which is capable of entering the process of government administration and the administration of justice. The assential point, however, is that law, at least as far as positive law is concerned, is not only a norm *capable* of being administered, but that it is a norm actually referred to in the administration of justice and/or government; that what we call a legal norm is the actual meaning of an act realised in the course of such administration.

Prima facie this only defers the final answer; now we might ask how to determine those facts which are referred to in administration. The answer to this is nothing else than the reference to experience; also any change in law cannot be ascertained in any other way.

What is clearly needed is a completely unsophisticated approach to the task of determining "positive law". There is no doubt that law can be studied and taught without any reference to jurisprudence or philosophy of law. It would be a rather odd practical lawyer who would indulge in jurisprudential disputations with his client when asked to state what the law is. Indeed, no-one seems to experience any difficulty in this direction. It is only when we try to reflect on the law that we sud-

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<sup>18</sup> KANTOROWICZ, *The Definition of Law*. (A. H. Campbell ed.) (1958) 73.

denly seem to be confronted with unsurmountable difficulties and are unable to express ourselves satisfactorily. Is it really so, as H. L. A. Hart<sup>19</sup>) suggests, that we are here confronted with the same predicament as was St. Augustine when asked to explain the notion of time?<sup>20</sup>). Indeed, there is an essential difference which deprives the comparison of its usefulness. While time, as such, cannot be related to any facts which can be perceived and determined, positive law can always be identified by reference to those facts which constitute acts of law creation.

Arthur Kaufmann makes here an interesting point.<sup>21</sup>) He thinks that there could be legal norms which are positive law without having been "posited" (gesetzt). As an example of this, he points to customary law. However, also customary law is in the same sense "posited" as the law created by Acts of Parliament (Gesetzesrecht). Only such customs which are expressed in certain actions performed by members of the community bearing the meaning that they should have certain legal consequences can be regarded as the factual material that constitutes customary law. This applies also to those parts of the continental legal systems which recognise the legal quality of customary law.<sup>22</sup>) Where certain customs observed in commerce are considered to be (customary) law, such customs must of necessity find their expressions in acts (factual data) which can be identified and which bear the normative meaning by which the legal quality of those acts, as creating customary law, are conveyed. This is quite clear if we consider the large body of customary law which is embodied in the Common Law of the English legal tradition. It is perhaps the idea stemming from the continental tradition of enacted law (Gesetzesrecht) which seems to blur the issue.

It is certainly not a discovery of the free law movement

<sup>19</sup> H. L. A. HART, *The Concept of Law* (1961) 13.

<sup>20</sup> St. AUGUSTINE, *Confessiones* XIV.17: «What then is time? If no-one asks me, I know: if I wish to explain to one that asks, I know not».

<sup>21</sup> A. KAUFMANN, article cited supra n.6 at 385.

<sup>22</sup> Section 10 of the Austrian Civil Code expressly denies any validity to what is termed customary law, while Article 1 of the Austrian (and German) Code of Commercial Law admits it as far as law customary in commerce is concerned.

(*Freirechtsbewegung*) that judicial precedents create law. The law which is embodied in judicial decisions and is rightly considered to be positive law is just as enacted in the judgements delivered, as are Acts of Parliament, in the resolutions passed by the Houses of Parliament, and reduced to writing in the official publications of the Government.

It is now quite easy to see that there is no difficulty in determining those facts which convey positive law. They are all those facts which lead to the enactment of law by the organs instituted by the Constitution, they are those facts which convey judicial decisions, any facts which imply the creation of contracts, indeed any facts which convey the creation of norms which are actually being applied by some organs established in a community for the purpose of regulating the mutual relations between the members of such community.

#### 4. *Law without State.*

The selection of the relevant facts along the lines stated above, might lead to bringing under the concept of positive law certain norms created by certain bodies which are not directly connected with the legal order of a state defined by its territory. It is customary to refer to Canon Law as Law also where it is applied outside the territory of the Vatican. The same applies to Rabbinical Law which was developed only at a time after the Jews had lost their statehood and had ceased to be a nation settled in a special territory.<sup>23)</sup>

The problem is, however, not confined to these two instances which are generally referred to when discussing the question whether it would be essential to the Law to be bound up with some territory. St. Augustine's famous dictum:<sup>24)</sup> "What are States without justice but robber-bands enlarged" might indicate that he would be prepared to ascribe legal quality also to the rules by which robber-bands are governed if he

<sup>23</sup> See O. BONDY, «Law without State» (1965) 13 *B. B. Bulletin* (Official Publication of B'Nai B'Rith in Australia and New Zealand) 12 & 13.

<sup>24</sup> *Confessiones* IV.

could be assumed to subscribe to Bergbohm's positivism. Such an assumption might, after all, appear less ludicrous if one considers the contempt in which man-made positive law might well have been held by a fervent believer in the sanctity of God's own Divine Law<sup>25</sup>.

It is, however, not only the robber-bands with which we are concerned here and to whose rules we might feel like denying the quality of law for emotional reasons. There are quite a number of associations in every community, the legal quality of whose rules might be problematical. "Secret" organisations need not necessarily be prohibited organisations under the positive law of the country in which they operate, and need not have any aims inimical or detrimental to the welfare of that country. An association of harmless cranks of an esoteric fraternity who practise inoffensive rites which they want to keep secret from the uninitiated, and who are governed by very strict rules "binding" its members, are an example in point. The secrecy with which they surround themselves seems to indicate an intended disconnection with the positive law of their country. Though legal quality might well be attributed to those rules, their relation to the positive law would be an interesting question to investigate. This question, whose solution depends on the relevant provisions of the positive law, cannot be answered by reference to some general jurisprudential principles.

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<sup>25</sup> A. KAUFFMANN, *Das Schuldprinzip* (1961) 42-43, 49, thinks that Karl Bergohm's opinion that we would have to recognise the legal character of even the vilest statute provided it was legislated in the correct form, could, after the experiences of Nazism, no longer be considered practicable. As much as we disapprove of the legal monstrosities of Hitler's Germany, the question whether the individual should comply with those laws is a moral and not a legal problem, and there is nothing gained by denying legal character to those statutes which, much as we might dislike and abhor them, were very much legal reality applied by courts and the Nazi state executive on all its levels. St. Augustine had, in his lifetime, similar experiences to the ones we had in connection with the legal atrocities of Nazism, and it seems attractive to suggest that his attitude toward the legality of self-imposed rules of robber-bands might have been induced by these experiences. Convinced of the essential disparity of divine and positive law, he might not have felt the necessity to save the dignity of positive law by the application of metaphysical arguments.

5. *Kelsen's Basic Norm Theory and the Relevant Facts for the Determination of Positive Law.*

The concentration on the facts which bear the specific meanings of positive legal norms advocated here, gives also, it is submitted, the clue for the proper interpretation of Kelsen's Basic Norm Theory. To Kelsen's way of arriving at the basic norm, we referred before as the analysis of the Legal Act in terms of Husserl's Phenomenology. It is now appropriate to enlarge on this point further.

Since the basic norm theory was developed at the end of the second decade of the second decade of the present century, jurisprudential literature has been recurringly concerned with it. This theory has since been extended by its opponents far beyond its original limitations: originally intended as a theory dealing with the problem of validity of positive law, it has been drawn into such controversies as whether legal science and metaphysics, positivism and ius-naturalism can co-exist or must exclude each other in jurisprudential thought<sup>26</sup>. Here we are only concerned with the bearing the basic norm theory has on the problem of ascertaining the relevant facts essential for the determination of positive law. In fact, the basic norm theory was never intended as anything else than as a theory of positive law.

In the context of the present essay it will seem only natural to have the accent placed on the facts which constitute those expressions that convey the meaning of positive legal norms. However, it is suggested that, had more attention been given to these facts, some difficulties generally associated with that theory might possibly more easily have been overcome.

The trouble seems to stem from the traditional Aristotelian endeavour to define law as a norm by way of *genus proximum*, looking for the *differentia specifica* which would distinguish the legal norm from other norms.

The analysis of the relevant facts essential for the determination of positive law given above follows closely the steps

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<sup>26</sup> See, for instance, A. KAUFMANN, *op. cit. supra* n.25 at 49 sqs., esp. at 50.

taken by Kelsen in describing what he calls legal dynamics. However, we cut short this procedure as soon as the stage of the Constitution was reached. This was done because the act of promulgating the Constitution is the last fact given in the chain of events to which the legal validity regress can proceed<sup>27</sup>.

It is appropriate to refer in this context again to Husserl's distinction between meaning and expression<sup>28</sup>. If it is true that we cannot experience meaning without expression, and further, if it is true by norm we convey only the meaning of a given expression, then there cannot be any legal norm independent of the fact which constitutes the relevant expression.

This logical distinction becomes here most decisive. Husserl pointed out that the fact that we can concentrate in our minds on, and can therefore discuss meanings apart from the expressions by which they are conveyed, should not induce us to think that there is some kind of special "existence" of the meanings independent of the expression that carries it. This should be especially clear in the case of positive law where we have definite facts to refer to, which constitute the expressions that bear the meaning of a legal norm. If that is so, then positive law cannot "exist" unless there are the relevant facts referred to above, to which we can point.

From this another point follows necessarily. The expression which bears the normative meaning of an item of positive law must be part of a factual occurrence. Such occurrence must relate to some person who "creates" the legal norm and to some persons whose behaviour is referred to in the norm so expressed. Promulgating authority from which an item of positive law originates and group to whom the norm is addressed thus becomes as essential to the concept of norm as are father and child to the concept of paternity<sup>29</sup>.

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<sup>27</sup> It does not seem to be any longer necessary to quote any specified works of Kelsen's when referring to his Basic Norm Theory. However, we would like to name two places in his writings which are typical, namely his *Allgemeine Staatslehre* (1925) 229 sqs., and the second edition of his *Reine Rechtslehre* (1960) 198 sqs.

<sup>28</sup> HUSSERL, *op. cit.* supra n.15 at 23 sqs.

<sup>29</sup> See O. BONDY, article cited supra n.8 at 91.

It might be easy to see that this applies to positive law with which we are concerned here. It is, however, submitted that the same applies to any norm, especially also to those norms of which we often speak without being conscious of the "authority" from whom the norm issues and the group of people to whose behaviour such norm is intended to apply. It is probably the main point of contention of the traditional natural law theory in legal as well as in moral philosophy<sup>30</sup> in substantiating the claim for the existence of absolute values.

It should be well understood that the argument used here is not capable of contributing anything to the problem whether absolute (and eternal) values exist. What it means to convey, however, is the idea that nothing can "exist" unless it is factual. Where "existence" is predicated of absolute values, this should include a reference to certain facts by which such values are considered to have been established<sup>31</sup>.

It would be hazardous to go any further into the matter of objective values in the present context, because the whole matter of axiology is too complex to be treated in passing. All that is intended here is to emphasise again the necessity to establish a factual basis for any discussion about law. It also explains the reluctance to admit to the present exposition any argument taken from metaphysics, as long as it cannot be shown that such argument has the factual foundation which must be considered to be essential for any philosophy of law.

By the same token, it is felt that no interpretation of the basic norm theory can be successful if the traditional metaphysical argument is introduced, because the basic norm theory is essentially a theory concerned with those facts by which positive law is constituted.

It is at the point where the basic norm theory proceeds from

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<sup>30</sup> See IRIS MUDDOCH'S, «Metaphysics and Ethics» in D. F. SPEARS (ed.), *The Nature of Metaphysics* (1960) who, at page 115 uses the expression «natural law view» of ethics as opposed to the «liberal view».

<sup>31</sup> As an example, we might point to the values established by divine orders such as the revelation of the Ten Commandments on Mt. Sinai, or the revelation of God's will to a saint. In these cases the reference is to the occurrence (fact) of the revelation and the historical report of the relevant facts must be accepted by the faithful as correct. (See re this also *infra* n.41).

the constitution to the basic norm in the exposition of legal dynamics that the metaphysical argument generally enters. It may be felt regrettable that Kelsen himself, obviously harrassed by his opponents, was induced to admit that there is a metaphysical element in his theory at that point. In fact, there is no reason for such admission<sup>32</sup>.

The inclination to refer to metaphysical argument seems to be due to the fact that the attention of the jurispudent is too much focused on the norm, so much so that the factual basis, which is given by the way in which the norm is expressed, tends to be overlooked. If we strictly adhere to the necessary connection between the facts by which a legal norm is brought into existence and the normative meaning of those facts, then it is impossible suddenly to separate this normative meaning of those facts, then it is impossible suddenly to separate this normative meaning from the facts themselves. This, however, seems to be exactly what is being done when we suddenly speak of a norm which is deprived of any factual background whatsoever.

It is essential to stress that we are referring here again to the basic relation between meaning and expression, and that we must be aware of the epistemological situation that in spite of the fact that we can discuss meanings as distinct from the supporting expressions, we cannot admit any independence of the meaning from the expression; this can be regarded as the lasting result of Husserl's investigations. It is therefore not merely a terminological question that we insist<sup>33</sup> as Felix Kaufmann<sup>34</sup> has done before, that the basic norm cannot be a norm in the same sense as the norms of positive law. It is for the purpose of avoiding equivocations in philosophical parlance that we insist on a different terminology in order to impress that even if the basic norm were to be called a norm, the

<sup>32</sup> H. KELSEN, *Die philosophischen Grundlagen der Naturrechtslehre und des Positivismus* (1928) 20, 66. It appears from the second edition of the *Reine Rechtslehre* (1960) 209, that Kelsen has now overcome earlier difficulties.

<sup>33</sup> In my essays cited supra n.8 at 91 sq.

<sup>34</sup> F. KAUFMANN, «Juristischer und Soziologischer Rechtsbegriff» in ALFRED VERDROSS, (ed.) *Gesellschaft, Staat und Recht* (1931) 30 sq.

fundamental difference between that "norm" and the "norms" *qua* meaning of the law-constituting expressions, must be strictly maintained. To establish the true nature of Kelsen's Basic Norm thus becomes of vital importance for the present problem.

Felix Kaufmann<sup>35</sup> described the basic norm as a definition of positive law in the terms of a specific legal order. He adds that this would be acceptable if the Aristotelian concept of definition which is bound up with the concepts of *genus proximum* and *differentia specifica* is not adhered to. By this, Felix Kaufmann obviously did not wish enter the controversy about the nature of definitions. It is therefore unnecessary to compare his terminology with the nomenclature found for example in Robinson's<sup>36</sup> standard work on Definition. The basic norm, according to Felix Kaufmann, becomes the sum total of the criteria by reference to which a legal norm is conceived of as part of a positive legal order. In order to obviate any objection from the terminological point of view, it would be preferable to refer to the basic norm is the supreme principle of legality with respect to a given legal order. It is essential to realise that the basic norm theory is primarily a theory concerned with the problem of validity of law, and that the problem of validity is acute and the same on every level of legal dynamics. What is termed here "principle of legality" is nothing else than the expressed or implied reference of each legal norm to the fact that it was created in a certain manner which endows it with legal validity. At the level of the "historically first" constitution, such principle is, as a rule, not expressed but implied; the Resolution of the Constituent National Assembly for German-Austria dated 30th October 1918 "*über die grundlegenden Einrichtungen der Staatsgewalt*" which is such an "historically first" constitution, has clearly the purpose of establishing the supreme principle of legality for the newly created Austrian Republic.

We cannot, within the limits of this essay, go further into the problem of the validity of law which is only to a limited extent relevant here. Especially, the interesting controversy

<sup>35</sup> *ibid.* 31.

<sup>36</sup> R. ROBINSON «*Definition*» (1950) 7.

between Hart<sup>37</sup> and Ross<sup>38</sup>, of the special meaning of validity, Ross' distinction between "*giltig*" and "*geltend*" cannot be followed up here. What is interesting in the present context to note is that the controversy obviously centres around the importance of those facts which constitute expressions of positive law. The validity of the law obviously is connected with the mutual inter-relations of those facts which carry the expressions of positive law. It is therefore suggested that also the treatment of this problem would gain by the proper appreciation of the role which the correct attention to the relevant facts is likely to play in its solution.

Because the view taken here seems to come near to the position of existentialism, it is of interest to refer in this context to an objection raised recently from the existentialist point of view by Anthony Blackshield<sup>39</sup>. Blackshield claims that "the Kelsenite jurisprudential system... with its "dynamic" hierarchization of the creation of legal norms, must crumble absolutely under an existentialist view of legal philosophy. Its formal, intellectual patterning of the law is a world removed from the contingent, discontinuous, organic reality of law as it is in life; and the attempt to build the dynamics of law creation into the pattern succeeds only in destroying such intrinsic validity on its own level as the system might otherwise have had". Blackshield seems to overlook that what the basic norm theory and the theory of legal dynamics are intended to do is not the creation of a "system" as comparable, for instance, to the "system" created by the classifications of plants given by Linné, but rather is to comprehend and unite those facts which are essential for the determination of positive law. They are part of all those facts to which existentialists refer as "existence" or "life". Indeed, it would appear that it was precisely the merits of the theory of legal dynamics to include all legally relevant facts in the orbit of jurisprudential consideration.

Kelsen expressly admits the applicability of the basic norm

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<sup>37</sup> HART, *op. cit.* supra n.19 at 22, 28-31, 68, 70-71, 100, 152, 182, 195.

<sup>38</sup> ROSS, article cited supra n.2 at 86.

<sup>39</sup> BLACKSHIELD, article cited supra n.10 at 102.

theory to a theory of natural law<sup>40</sup>. This could be done only by neglecting to consider those facts which constitute the supporting expressions in relation to, and in connection with the norms of positive law. Francesco Puy Muñoz<sup>41</sup> suggests that natural law consists in a series of principles resting directly upon the nature of things and upon the nature of man as a social creature. He therefore finds its basis in experience, namely on an empirical-normative ground and on an empirical-sociological one (both these experiences being external to the individual) and on an empirical-axiological ground (this experience being internal to the individual). Puy suggests that also here there must be relevant facts capable of being co-ordinated to those experiences. This indicates an endeavour to base the theory of natural law on a factual basis. The present essay, just through confining itself to positive law, tries to clear the way for a theory based on Puy's ideas. If it proves to be possible to determine the factual basis of natural law, then it would indeed be possible to prove that natural law and positive law are the same in essence, and not two entirely different things which only share a common name<sup>42</sup>. This might well prove a major break-through in the age-old argument about the nature of natural law.

#### 6. *The Problem of the Definition of Positive Law.*

Kant<sup>43</sup> said that the definition of a subject should rather be put at the end of a discourse on the subject to be defined, than at the beginning. In adopting this procedure, we would like to indicate that, as must have become clear by what has been said so far, a definition of law could only be attempted by reference to the facts by which the law is expressed. Blackshield's idea that there could be different definitions appealing to dif-

<sup>40</sup> *Reine Rechtslehre* (2nd. ed. 1960) 226 sqs.

<sup>41</sup> In a letter to the present writer.

<sup>42</sup> See *supra* section 1.

<sup>43</sup> KANT *Critique of Pure Reason* (Karl Vorländer's ed. 1899) 605 (pp. 758/59, second original edition of 1787).

ferent people<sup>44</sup>, apparently implying that different definitions of law could be equally valid, is hardly acceptable because a difference in definition would indicate a difference in the objects defined. It has to be admitted that Blackshield's idea is the direct result of the traditional endeavour of combining natural and positive law as law as such in one definition. It must be open to doubt whether this is at all possible, and Blackshield's thesis might well be quoted in support of such doubt. Again, the restriction to positive law in the present essay is likely to narrow down the problem involved. Without prejudice to the result which might be the outcome of a similar investigation in respect to natural law, it must be maintained that at least positive law as a factual social datum must be capable of being defined, if by defining we do not aim at anything more than a description of the object to be defined, a definition generally referred to as descriptive definition.

Two kinds of facts constitute the factual elements of positive law according to what we have said above. The first kind is made up by those facts connected with the creation of the norms of positive law, the second kind by those facts which constitute an application of the positive law previously created. The actual application, or at least the applicability of its norms seems to be an essential feature of positive law. A resolution passed by a law-making body, for instance a parliament, which is not capable of being applied as a legal norm, such as a telegram of congratulation is certainly not positive law. Lawyers have also been reluctant to describe as law a legal enactment which is no longer being applied, even if it was never formally repealed. They are even speaking of a change of law in a case of this kind, though a change of law should only be brought about by new enactments in which previous conflicting enactments are either explicitly repealed or are repealed by implication. Of course, the problem of validity, and especially the controversy about the rule *lex posterior derogat legi priori*, comes into it here. However, it appears that the question of norm application must have a bearing on the problem of defining positive law. The solution seems to lie in the fact that norm

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<sup>44</sup> See *supra* at n.5.

creation, apart from that original act of law giving, be it the proclamation of a monarch or the resolution of a revolutionary assembly, must always also be an application of positive law, namely the application of that positive legal norm by which the authority of the norm giving organ is constituted.

It is just at this point where the epistemological importance of the basic norm theory becomes relevant, because it shows how the supreme principle of legality is ascertained by which the legality of any norm of positive law can be determined<sup>45</sup>. The supreme principle of legality is inherent in that "first" and "original" act of law making, and is included in the special meaning of that act. Whenever such "first" or "original" act of law giving historically occurred, it is the essential meaning of such act that in future only those norms which conform to it and therefore present themselves as an application of the norm inherent in it, should be regarded as Law. If this is accepted, the characteristic of norm application could well be included in a definition of positive law, irrespective of whether norms purporting to be legal norms are actually being applied by law courts or government authorities, provided they have been created in a way which represents an application of the norm inherent in the meaning of the "original" act of law making.

The trouble with definitions of law has always been that they were presented with a claim to finality. However, if the Kantian principle is accepted, then any definition offered by way of summing up the results of an exposition on the subject to be defined can never be expected to assume more finality than such results would be able to claim for themselves. It is therefore with only such restricted claim that the definition of positive law presented here by way of summing up, is offered.

Considering that the two factors which make up the factual essence of positive law are norm creation and norm application,

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<sup>45</sup> JULIUS STONE'S suggestion in «Mystery and Mystique in the Basic Norm» (1963) 26, *The Modern Law Review* 44, and «Legal System and Lawyers' Reasoning» (1964) 123 sq. to re-name the «basic norm» «apex norm»' is open to the same objection made above against the terminology of norm to be applied to the supreme principle of legality of a legal order.

we would like to venture a definition of positive law which should include the following elements:

Positive Law is a system of rules for human behaviour created in circumstances evidenced by facts immediately given to human experience, whose specific meaning it is to be applied to the behaviour of a specified group of persons<sup>46</sup>, <sup>47</sup>.

This formulation takes into account only those elements which, according to what has been said before, are considered to be characteristic and typical of positive law. It is designed in the first place, to cover all those rules which are being created within the framework of a State by what may be called legislative, executive, or judicial organs of such State. It is not confined to any requirement of advanced social technique, and would therefore appear to be applicable to the rules of any organisation on any level of social development. It is further designed to cover any rules in whatever way the circle of persons to whose behaviour they are to be applied, may be deter-

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<sup>46</sup> In my article «Law without State» (cited supra n.23) I ventured the definition of law as a system of rules for human behaviour which are being applied by some specified bodies whose function it is to make decisions on the application of those rules considered binding on (not necessarily by) the persons to whose behaviour they are being applied. The different formulation given above intends to place the decisive accent on the facts expressing the legal norms, and also intends to avoid the query whether positive law can be abrogated by *dissuetudo*; in other words, whether a norm of positive law, properly created in the terms legal machinery, ceases to be valid positive law if its application is consistently by-passed by courts or government authorities. This case is different to the one, sometimes also regarded as a change of law, where the interpretation of a law changes in its application. Where, under an existing law, it was previously considered obscene to use bathing trunks, so that bathers in trunks were prosecuted under that law, the same law is now considered inapplicable because it is no longer felt that bathing in trunks is obscene.

<sup>47</sup> This definition is contrasted with the famous definition of RUDOLF STAMMLER (*Theorie der Rechtswissenschaft* (1911), 109, (2 ed. (1923) 69)) «*Recht ist das unverletzbar selbstherrlich verbindende Wollen*», and the latest definition (?) by A. KAUFMANN in a similar vein, *op. cit. supra* n.16 at 14: «*Recht ist die Entsprechung von Sollen und Sein*». These definitions do not seem to serve their purpose because they would not enable anybody to identify law when confronted with it. This, however, should be the aim of all definitions, especially of descriptive definitions.

mined. Such determination may be effected by pointing to the territory in which such persons live, have residence, or might stay or by any personal criteria such as colour, creed, ancestry, or vocational qualification. It therefore also includes as positive law, those highly developed rules of Canon or Rabbinical law or any rules by which professional bodies are governed, which are not characterised by any reference to territory, but by reference to personal qualification such as being born into or belonging to a certain religion, or by belonging to a certain profession or trade.

This formulation is offered as a suggestion only. The suggestion is based on the assumption that the legal norms can be identified by the facts in which they are expressed; expressions must, after all, be some factual occurrences they might be words expressed in actually occurring utterances, or in writing. The suggestion is further based on the assumption that wherever facts are concerned, those facts must be capable of being described. It is, lastly, based on the assumption that a descriptive definition is the kind of definition which is expected to be offered when we are striving for a definition of law.