A Path that Forks.
Legal Science between Is and Ought

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Abstract

Distinguishing between law and legal science –between legal norms and the juristic description of norms– is a crucial point for the pure theory. Nonetheless, Kelsen seems unable to give a consistent and satisfactory account of both the wording and the logical form of legal statements (or propositions of law), that is, the sentences by which legal scholars are supposed to describe the law. In particular, he cannot decide whether legal statements are empirical (is-) or normative (ought-) sentences. This is especially clear in his posthumous *General Theory of Norms*.

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1. Distinguishing between Law and Legal Science

One of the main concerns of Kelsen's (his all life through, indeed) was distinguishing sharply between law and legal science.

«La science du droit ne peut ni ne doit –ni directement ni indirectement– créer le droit; elle doit se limiter à connaître le droit que créent les législateurs, les administrateurs et les juges. Cette renonciation, incontestablement douloureuse pour le jurisconsulte, parce que contraire à l'intérêt compréhensible de son état, est un postulat essentiel du positivisme juridique, qui, en opposition consciente avec toute doctrine de droit naturel, avouée ou secrète, rejette résolument le dogme que la doctrine soit une source de droit»[1].

In particular, in the *General Theory of Norms*[2], Kelsen harshly criticizes «the

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1 Kelsen 1928: 7.

2 Kelsen 1979.

tendency to identify the science of ethics with its object –morality– and legal science with its object –law– and so to speak of them as 'normative' sciences in the sense of sciences which posit norms or issue prescriptions, instead of merely describing the norms presented to them as their object»[3]. He blames «those representatives of legal science who consider it their task not so much to know positive law and describe it objectively, as to justify or question its validity on moral or political grounds and so engage in a highly subjective *evaluation* of law under the banner of objective legal cognition»[4]. Kelsen had both moral and political (or constitutional) reasons to hold firmly the distinction between law and legal science.

First, he endorsed the "inner morality" of science (as we may call it). «The fundamental principle of science [is] Truth»[5]. Law is a set of norms, and norms are the result of acts of will, that is «arbitrary»[6] political decisions –they have no truth-values and their contents are conditional upon the moral values of law-making authorities. Legal science, on the contrary, as any other science whatsoever, is a merely cognitive enterprise, a set of value-free, descriptive, truth-apt, sentences. «*La doctrine* cannot perform any law-forming acts, since law-forming acts are acts of will, while legal science or *la doctrine* is a function of cognition rather than will»[7]. «The interpretation of legal norms is legal *cognition* and legal cognition cannot repeal the validity of legal norms any more that it can create legal norms (i.e. make them valid), interpretation cannot resolve conflicts of norms»[8].

Second, he had a political attitude of respect towards those positive, materially constitutional, rules that regulate law-making. Law-creation is the exclusive task of those competent organs that are empowered by legal rules[9]. Legal scientists have no legal authority[10], they are not enabled to create new law, they have no legal competence to legislate. «Since the law regulates its own creation and application, […] only individuals on whom the legal order confers this power can create or apply legal norms»[11]. «*La doctrine* can only state that a certain legal norm is valid, it can only describe the relations between legal norms, and between legal and other norms, and not make legal norms valid or deprive them of validity. Only a legal *authority*, such as the legislator or the judge, can do that»[12]. Legal science «cannot posit norms or prescribe anything»[13]; it «is no more competent to resolve –e.g., by interpretation–

[3] Kelsen 1979: 1.
[4] Kelsen 1979: 117.
[5] Kelsen 1945: xvi.
[6] Kelsen 1979: 4.
[7] Kelsen 1979: 118.
[8] Kelsen 1979: 225.
[9] Kelsen 1979: 27.
[10] Kelsen 1979: 155.
[11] Kelsen 1979: 102.
[12] Kelsen 1979: 118.
[13] Kelsen 1979: 153.

existing conflicts of norms (i.e., to repeal the validity of posited norms) than it is to posit them in the first place»[14].

So, distinguishing between law and legal science –between legal norms and the juristic description of norms– is a crucial point for the pure theory. Nonetheless, Kelsen seems unable to give a consistent and satisfactory account of both the wording and the logical form of legal statements (or propositions of law), that is, the sentences by which legal scholars are supposed to describe the law. In particular, he cannot decide whether legal statements are empirical (is-) or normative (ought-) sentences. This is especially clear in his posthumous *General Theory of Norms*.

2. Legal Statements as Factual Statements

Propositions of law (*Rechtssätze*) –Kelsen insists– are not norms (of course, they are not) but statements *about* norms.

Now, one can state a lot of different properties of a given norm: for example, that such a norm was actually issued, that it is (or is not) effective, that is (or is not) valid, and so forth.

However, the only statements Kelsen has in mind are statements about the *validity* of norms («the statement about a norm, that is, the statement that a norm is valid […]»[15]), which are supposed to "describe" the norms they refer to[16].

Besides, «in order to exist –i.e., to be valid– a norm must be posited by an act of will. No norm without a norm-positing act of will […]: No imperative without an imperator, no command without a commander»[17]. Therefore, the validity, the very existence, of a positive norm –its presence in the world (although, admittedly, an «immaterial» presence[18])– seems to be a matter of fact (admittedly, a special kind of fact, since only empowered individuals can posit valid, that is, binding norms[19]). The validity of a norm is conditional upon its actual issuance, the «real existence» of a fact[20]. So, the statements about the validity of norms should be *factual* statements, that «can be verified by ascertaining that the norm was posited»[21]. «The validity of a norm is not analogous to the truth of a statement, but the existence of a fact»[22].

And, as a matter of fact, Kelsen does treat legal statements as factual statements

14 Kelsen 1979: 127.
15 Kelsen 1979: 181.
16 Kelsen 1979: 188.
17 Kelsen 1979: 3.
18 Kelsen 1979: 171.
19 Kelsen 1979: 27.
20 Kelsen 1979: 204.
21 Kelsen 1979: 181.
22 Kelsen 1979: 216.

–namely, existential statements– especially when he argues against the applicability of logical principles to (positive) norms. If two conflicting norms –say *Op* and *O*¬*p*– were actually posited, they are both valid, they exist[23]. In such a way that, notwithstanding the *apparent* inconsistency between such norms, there is no contradiction at all between the statements "*Op* is valid (exists)"and "*O*¬*p* is valid (exists)" – they are both true. This thesis supposes (otherwise it would make no sense) that such statements are *empirical* sentences about the actual issuance of the norms they refer to.

Moreover, according to Kelsen, a norm is valid *if and only if* it was actually posited (by a competent authority): therefore, the issuing of a norm is a condition both necessary and sufficient for its validity[24]. That amounts to say that stating the validity of a norm and stating that such a norm was actually posited are logically equivalent sentences.

Besides, «the application of logical principles to the sentences of legal and moral science is beyond question; but not so the application of logical principles to the object of these sciences, i.e. norms»; «the application of logical principles to natural science does not entail that these principles are applicable to the object of this science, i.e. the facts of natural reality»[25]. So, norms are analogous to «the facts of natural reality», and legal science looks analogous to natural sciences. No need to say that the sentences of natural sciences are empirical, not normative (deontic).

3. Legal Statements as Ought-Sentences

Thus, propositions of law seem to be factual statements. Nonetheless, according to Kelsen, this is not the case, since the norm-positing act is to be sharply distinguished from its meaning-content, that is, the norm itself[26]. «A sentence which asserts the validity or existence of a norm *must* be an ought-sentence and not an is-sentence, that is, cannot be a sentence which *asserts* the existence of a fact»[27]. «The norm of the legal authority and the statement of legal science about this norm can [in fact: they *must*] have the same wording»[28]. A legal statement is the answer to the question "What ought I to do?"; therefore, it can only be an ought-sentence[29].

So, in some simple cases the statement about (the validity of) a norm will be but *an echo* of the norm itself. «A father says to his son: 'Karl, shut the door'. The son […] appears not to hear his father. So, his mother says to him: 'Karl, you ought

[23] Kelsen 1979: 213, 218, 224.
[24] Kelsen 1979: 18, 223.
[25] Kelsen 1979: 155.
[26] Kelsen 1979: 153.
[27] Kelsen 1979: 150.
[28] Kelsen 1979: 153.
[29] Kelsen 1979: 182.

to shut the door'. It is the father who commands, and not the mother. The sentence spoken by the mother is not a command, but the statement about the father's command»[30].

Is mother's sentence really a statement? What is it supposed to *state*? Contrary to Kelsen, mother's sentence looks like the *iteration* of the quoted command, hence the command itself, although somehow weakened. To be sure, formulating a norm and quoting it in brackets, respectively, are two different matters. «When the norm is placed within quotation marks (i.e. is *quoted*), its prescriptive signification is, so to speak, put in brackets, and excluded as the signification of the statement-sentence in which it occurs»[31]. In such cases, the (quoted) "ought" is not «genuine», but «inauthentic»; it has a descriptive, not a prescriptive meaning[32].

Nonetheless, Kelsen seems not to distinguish clearly between repeating a command ("Shut the door") and quoting a command ("Father said: 'Shut the door'") within quotation marks. Otherwise, legal statements would not admit a deontic formulation. Kelsen complains about the confusion between norms and statements about norms, and consequently between law and legal science[33]. But he himself encourages such a confusion.

Moreover, in most cases, namely where legal science is concerned, the statement describing a norm will be not the plain iteration, a simple echo, of a legal provision, but the result of the juristic *reconstruction* of the norm at stake, by interpreting and handling the relevant legal provisions. For instance (a very basic example, indeed), the legislator, by means of two different sentences, first defines the notion of murder ("Murder is the intentional causing of the death of another"), then commands the relative sanction ("Murder is punished by putting the murderer to death"). A legal scholar describes the reconstructed norm stating that "If a person by his behaviour intentionally causes the death of another, punishment by death ought to be inflicted to him"[34].

Unfortunately, a juristic sentence like this does not look as a statement *about* the norm, whose formulation simply «differs from that of the legal norm»[35]. Rather, it looks like *the norm itself*. The norm is not "described" or mentioned –it is reconstructed and formulated for the first time by legal science. And this formulation, Kelsen says, «is of the greatest theoretical significance […] since it is only in this formulation as a hypothetical judgment that the principle of *imputation* fundamental to the normative sciences is expressed»[36].

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30 Kelsen 1979: 151 f.
31 Kelsen 1979: 187.
32 Kelsen 1979: 155.
33 Kelsen 1979: 155.
34 Kelsen 1979: 188. Some more complicated examples at Kelsen 1979: 53, 130.
35 Kelsen 1979: 188.
36 Kelsen 1979: 188.

So, after all, according to Kelsen, propositions of law are ought-sentences, just like the norms they claim to describe. In this way, however, the distinction between law and legal science is completely blurred.

4. Validity between Is and Ought

This disappointing conclusion depends on Kelsen's concept of validity. For Kelsen holds that validity amounts, at the same time, to both existence (that is, apparently, a plain matter fact) and binding force (which certainly is *not* a matter of fact).

In his view, however, neither existence nor binding force are properties of norms. Existence is no property of norms, since existence is no predicate[37]. Binding force, in turn, is no property of norms, since bindingness is a part of the very *definiens* of "norm" –any norm (valid, otherwise it would not exist) is binding by definition. «The *validity* of a norm –i.e., its specific *existence*– consists in that the norm *ought* to be observed»[38]. «"To be valid" in its specific –objective– meaning signifies "ought-to-be-observed"»[39]. «An empowered command is a *norm* binding on the addressee, obligating him to act in the prescribed way»[40]. «The validity of a norm consists in the fact that it ought to be observed»[41].

So, a valid norm is just *a norm* and nothing else –«"A valid norm" is a redundant expression»[42]. And a non-valid norm is *no norm* at all– «"An invalid norm" is a contradiction in terms»[43].

As a consequence, saying "The norm *Op* is not valid" amounts to say that *Op* does not "exist"[44] –hence it is not binding, no obligation to *p* exists.

On the contrary, the sentence "The norm *Op* is valid" says nothing at all regarding the norm at stake. "*Op* is valid" is equivalent to repeating "*Op*"[45], and *Op*, being a norm, is binding.

This is why statements of validity either formulate or simply repeat the norms themselves.

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37 Kelsen 1979: 171, 225, 233, 383.
38 Kelsen 1979: 3.
39 Kelsen 1979: 28.
40 Kelsen 1979: 27.
41 Kelsen 1979: 221.
42 Kelsen 1979: 171.
43 Kelsen 1979: 171.
44 Kelsen 1979: 174.
45 Kelsen 1979: 155, 164.

5. Confusion between the Logic of Norms and the Logic of Legal Statements

Kelsen's difficulty to distinguish clearly between legal norms and legal statements emerges also in his discussion of the topic "law and logic".

As I mentioned before, in such a context, he treats juristic descriptions of norms as factual statements about the actual issuance of the norms at stake. «Just as there are no logical contradictions in natural reality, and as the existence of one fact of reality does not follow logically from the existence of another, so there are no logical contradictions between norms, and the validity of one norm does not follow logically from the validity of another»[46].

For example, Kelsen assumes (quite correctly) that no sentence stating the validity (that is, the actual issuance) of a norm –"Norm N1 is valid"– can entail any sentence stating the validity of another norm –"Norm N2 is valid". For the validity, the existence, of this second norm depends not on a logical inference, but on the actual issuance of the norm concerned[47]. Norms are «valid positive norms only if they are meaning-contents of real, actually occurring, acts of will»[48].

However, while N1 and N2 are norms, the sentences "Norm N1 is valid" and "Norm N2 is valid" are, supposedly, not norms –they are *juristic statements* concerning the validity of two different norms. In other words, Kelsen's reasoning counts as an argument against the applicability of the rules of inference (and logical rules in general) *not* to norms, *but* to the validity of norms, that is, to *legal statements* about validity[49].

Unfortunately, Kelsen is not aware of this crucial point. He believes he argued against the applicability of the rules of inference to *norms* –but, in fact, he did not. Thus, once more, the distinction between legal norms and legal statements about norms fades away.

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[46] Kelsen 1979: 192; see also 233.
[47] Kelsen 1979: 232, 243.
[48] Kelsen 1979: 251.
[49] Kelsen 1979: 240.