The Neo-Kantian Dimension of Kelsen's Legal Theory and its Limits

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Abstract

It is well known that Hans Kelsen, in the name of a purity thesis, purports to rule out all fact-based legal theories as well as those based on morality. Having done so, he requires a neo-Kantian argument as a means of grounding his legal theory. The argument does not, however, prove to be sound. That leaves us with the question: what status ought to be ascribed to Kelsen's neo-Kantianism? I argue that, despite the problems, it must be preserved as a part of the Pure Theory of Law. The alternative is distortion.

Keywords: Hans Kelsen. Neo-Kantianism. Purity Thesis. Legal Cognition. Legal Science.

1. Introduction. Two Problems

On legal interpretation, Hans Kelsen is an outlier, to wit: his views on legal interpretation have little in common with traditional views in the field. In place of traditional legal interpretation, Kelsen substitutes his doctrine of the *Stufenbau*.

> Given the dynamic character of the law, a norm is valid because and in so far as it was created in a certain way, that is, in the way determined by another norm; and this latter norm, then, represents the basis of the validity of the former norm. The relation between the norm determining the creation of another norm, and the norm created in accordance with this determination, can be visualized by picturing

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> a higher- and lower-level ordering of norms. The norm determining the creation is the higher-level norm, the norm created in accordance with this determination is the lower-level norm[1].

This statement depicts a relation between a higher- and a lower-level norm. What is more, the relation as depicted has been brought to completion, that is, the lower-level norm has been issued. How does the legal official arrive at the lower-level norm? The answer, from the standpoint of Kelsen's legal theory, has two parts. The legal scholar, in the name of legal science, "fills in the frame" of the general norm by providing what amounts to a list of its possible interpretations[2]. Then the legal official chooses an entry from the list, which is issued as the lower-level norm.

But this phenomenon gives rise straightaway to the problem of constraints, to wit: Let us suppose the legal official deliberately or unwittingly chooses something that does not appear on the list. What then? I return to this issue, what I am calling the problem of constraints, in section 4 below.

And there is a second problem, which has to be considered quite apart from the resolution of the problem of constraints. This problem, what I am calling the philosophical problem, takes as its point of departure Kelsen's purity thesis. The purity thesis precludes, in legal science, an appeal to the facts and, likewise, it precludes an appeal to values. What is left? Kelsen resorts to a neo-Kantian transcendental argument, and the stakes are high. That is, Kelsen's alternative to fact-based legal positivism[3] is workable only if his neo-Kantian argument is viable. Whether it is takes us to the philosophical problem, which I set out in section 5.

To set the stage for a closer look at these problems, I have worked up two sections of material on the background. Specifically, I begin, in section 2, with Kelsen's purity thesis and with two concepts of law that are prominent in his theory. Then, in section 3, I turn to Kelsen's neo-Kantian characterization of legal cognition; this amounts to an elaboration of the first of his two concepts of law.

Having set the stage in this way, I turn in sections 4 and 5 to the problem of constraints and to the philosophical problem respectively. In a brief concluding section, I take up the problem of Kelsen's "official theory", his neo-Kantian inspired theory. What remains of the "official theory" if neither of the problems I adumbrate is resolved?

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1 Kelsen 1992, §31(a): 63-64.

2 See Kelsen 1992, §36: 80-81; Kelsen 1960, §45(d): 348-349, Kelsen 1967a: 350-351.

3 I use "fact-based legal positivism" as a generic term, covering a number of different positivistic approaches to the law, e.g. "public law positivism" (*staatsrechtslicher Positivismus*) in the nineteenth century (Gerber, Laband), "statutory positivism" (*Gesetzespositivismus*) in fin-de-siècle circles, Hart's theory as the standard-bearer of legal positivism in the Anglophone world, and legal realism in both its American and Scandinavian forms. I distinguish all of these from Kelsen's Pure Theory of Law, which, as I argue, is conceptually distinct from fact-based legal positivism in its various forms.

2. The Purity Thesis and Two Concepts of Law

I want briefly to return to the quotation above, depicting Kelsen's *Stufenbau*. The question arises: why does Kelsen supplant the traditional theories of interpretation with this unorthodox approach? The problem is that the traditional theories are normative. In the tradition, Kelsen reports, those engaged in legal science focus their efforts, every time around, on providing the sole correct interpretation, the «*one* correct decision»[4]. This tack, as Kelsen sees it, is tantamount to endorsing a policy, an endorsement that is by definition value-laden. And his purity thesis (*Reinheitsthese*) – precluding every appeal to fact and to value – rules out such endorsements, and in so doing it also rules out the traditional theories of interpretation.

But – the next query – why purity? Kelsen believes that traditional views in legal theory distort our understanding of the law. To eliminate the distortions that arise from an appeal to the causal sciences on the one hand and that arise from an appeal to the value-laden fields, morality and politics, on the other, requires a purity thesis. Purity sets «the limits within which cognition must remain, and these limits, particularly for legal science, are very narrow»[5]. As Kelsen is already arguing in his early treatise, *Main Problems in the Theory of Public Law* (1911), the limits set by purity amount to a two-fold constraint. Purity precludes the purported explanations stemming from the reduction of legal norms to causal propositions in sociology and psychology, as well as the purported justifications stemming from morality and politics. Kelsen, as early as *Main Problems*, offers a statement on these approaches:

> [T]he question of the basis of the validity of the law, on both of [these] readings, is legally irrelevant. Either the question addresses the motive for lawful behaviour and is therefore a psychologico-sociological problem, or the question aims at moral justification and therefore has a place only in ethics[6].

To be sure, the first part of Kelsen's statement is imprecise in that he addresses not the norm but the motive for lawful behaviour. To offer an explanation of this or that motive for compliance with the law is not incompatible with the purity thesis, which is addressed to the norm itself, precluding the reduction of the norm to a factual proposition. The purity thesis thereby rules out – to take the most straightforward example – Karl Olivecrona's view in early work to the effect that legal norms are nothing other than «natural cause[s]»[7].

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4 Kelsen 1992, §36: 81; Kelsen 1960, §45(d): 349, Kelsen 1967a: 351. See also Kelsen 1950: xvi, quoted in the text at n. 20 below.

5 Kelsen 1920: v, in Kelsen 2014: 266.

6 Kelsen 1911: 353, in Kelsen 2008: 482.

7 See Olivecrona 1939: 16. For a modern statement of legal realism, in an idiom altogether diffee rent from Olivecrona's, see Leiter 2008.

Far from making claims based on the causal sciences, far from making recommendations drawn from ethics or politics, the legal scholar's task is limited to setting out the possible meanings of the general legal norm in question.

> The task of a scientific commentary is first of all to find, by a critical analysis, the possible meanings of the legal norm undergoing interpretation; and, then, to show their consequences, leaving it to the competent legal authorities to choose from among the various possible interpretations the one which they, for political reasons, consider to be preferable, and which they alone are entitled to select[8].

What is one to make of Kelsen's reference to political reasons? If the judge makes a choice of this or that interpretation for «political reasons», as Kelsen puts it, is this not an egregious violation of the purity thesis? Not at all. The judge is taking decisions *outside* the sphere of legal science.

Indeed, Kelsen renders the distinction – inside and outside the sphere of legal science – in well-nigh canonical terms.

> [T]he law *qua* ideal subject-matter (*als geistiger Sachgehalt*) is a system, and therefore an object of normative-legal cognition (*normative-juristische Erkenntnis*), while the law *qua* act – both motivated and motivating, both psychological and physical – is power, legal power, and as such an object of enquiry for social psychology or sociology[9].

Kelsen's distinction is to be understood in terms of two concepts of law. The first concept, which has as its focus legal science, is *the law qua object of legal cognition*. The second concept, which has as its focus the social sciences, is *the law qua acts of will* or, as I prefer to call it, *the law qua politics*. This latter concept of law also has a bona fide legal dimension, captured by empowerment.

At any number of points in Kelsen's writings, there are allusions to the distinction between two concepts of law as well as statements of one or the other of the concepts. Here is a brief sampler, beginning with the second concept of law:

> If legal science is not to merge into the natural sciences, the law must be contrasted with nature as sharply as possible. And this is especially difficult to do since at least part of the essence of the law (or what at first blush is usually referred to as law) appears to occupy the realm of nature, to have a thoroughly natural existence[10].

Law is to be contrasted with nature. At the same time, however, «part of the

[8] Kelsen 1950: xvi.
[9] Kelsen 1992, §48(e): 106.
[10] Kelsen 1992, §2: 8, see also Kelsen, 1960, §2: 2, Kelsen 1967a: 2.

essence of the law» is found in the natural world. Kelsen goes on to explain what he means. The «thoroughly natural existence» of the law is found in acts of will, the paradigmatic element of the second concept of law, the law qua politics.

At another point in his text, Kelsen invites attention to the first concept of law, the law qua object of legal cognition:

> To comprehend something legally can only be to comprehend it as law. The thesis that only legal norms can be the object of legal cognition is a tautology, for the law – the sole object of legal cognition – is norm, and norm is a category that has no application in the realm of nature[11].

Instead of speaking of two concepts of law, might one not render Kelsen's distinction more aptly by speaking of two points of view? This shift could be misleading. Kelsen's distinction between two concepts of law is a direct reflection of his general distinction between *Sein* and *Sollen*, between "is" and "ought". The distinction, in other words, represents a difference in kind[12], and this might well be missed if one were to speak simply of two points of view.

The distinction between two concepts of law, for all its interest, is not without problems. In particular, legal cognition – part and parcel of Kelsen's first concept of law – turns up as the wild card. Beginning very early in his work and reaching to the end of the classical or neo-Kantian period in 1960[13], Kelsen distinguishes between legal cognition and natural cognition, both of which, he argues, are constitutive. Thus, given that certain conditions obtain, cognition of a lawmaker's act of will *constitutes* the act as a legal norm.

I turn, in the next section, to a handful of textual details respecting Kelsen's idea of legal cognition.

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[11] Kelsen 1992, §5: 11.

[12] On first glance, one is tempted to say that the distinction in question is to be understood ontologically. But this view is problematic. Both kinds of object in Kelsen's theory – those found in the natural world and those found in what Kelsen identifies as the sphere of the "ought" – are found in Kant's *phenomenal* world. There is no suggestion in Kelsen's texts that he is flirting with an ideal sphere comparable, say, to Kant's noumenal world or to Frege's "third world". Indeed, the only textual support for an ontologically venturesome reading of ideality in Kelsen's work stems from his talk, in the opening pages of the *Hauptprobleme* (1911), of "two worlds". But this language simply reflects what Kelsen has drawn from Georg Simmel, and from Arnold Kitz, both of whom he is quoting here, see Kelsen 1911: 7-8, in Kelsen 2008: 86; Simmel 1892-1893, vol. 1: 8-9; Kitz 1864: 74. Both writers defend the fact-value distinction, but neither is making an ontological claim.

[13] I have worked up a periodization of Kelsen's development in terms of three phases: the early phase, critical constructivism, runs from 1911 up to circa 1920, then the classical or neo-Kantian phase from there up to 1960, and finally the late phase (*Spätlehre*) from 1960 up to 1971. See Paulson 1998; Paulson 1999; and Paulson 2017: 882-894. For a sceptical view on questions of a periodization vis-à-vis Kelsen's work, stimulating and artfully drawn, see Chiassoni 2013.

3. Neo-Kantian Legal Cognition

Legal cognition serves as the core of Kelsen's surrogate for traditional legal interpretation. In considering his development of the notion, I take up bold statements of Kelsen's on legal cognition. They stem from writings of Kelsen's in 1928, 1953, and 1960. My special interest in these statements turns on the function assigned by Kelsen to cognition. Kelsen would have us understand this function constitutively, and it purports to set limits on what can count as a valid legal norm.

Both legal cognition and natural cognition are constitutive, Kelsen contends, although he pays little attention to the details of the latter. In major texts of the classical period, he depicts the constitutive dimension of legal cognition in expressly neo-Kantian terms. Three statements, as noted above, are of special interest. They count as Kelsen's most outspoken statements of the first concept of law, the law qua object of legal cognition. And it is most clearly here that Kelsen appears to have replaced traditional legal interpretation with legal cognition understood constitutively.

In *Philosophical Foundations* (1928), the first of the texts in which the constitutive dimension of cognition figures centrally, Kelsen refers to what is, in his view, the greatest failure in the traditional theory of knowledge. He has in mind the notion of transcendent objects independent of cognition. This is the failure of the "copy theory of knowledge"[14]. Cognition, he writes,

> must play an *active*, *creative* role vis-à-vis objects of cognition. It is *cognition itself that, out of the material given to it by the senses, creates its objects according to its own immanent laws.* This nomological characteristic of cognition guarantees the *objective* validity of its results[15].

Here Kelsen emphasizes the affinity of the Pure Theory of Law to Kant's theory of knowledge. As Kelsen puts it, «in place of *metaphysics*, a *critical theory of knowledge*, in place of the *transcendent*, the *transcendental*»[16].

The second of the statements offering an outspoken neo-Kantian gloss on the law qua object of legal cognition is found in Kelsen's initial revision of the first edition of the *Pure Theory of Law*, a revision that appeared in French translation in 1953.

> We can thus state simultaneously that the propositions formulated by legal science are hypothetical judgments and that legal norms constitute the object of this

[14] The copy theory, whose name stems from the idea that our sensations are "copies" of independently existing objects, is familiar from British empiricism.

[15] Kelsen 1928, §34: 62 (Engl. trans.: 434).

[16] Kelsen 1928, §34: 62 (Engl. trans.: 435).

> science. Here there is no contradiction. Without question, one can regard the norms created and applied within the framework of a legal system as having the character of legal norms only if they are [cognized] by legal science. It is the role of this science to attribute to certain acts the objective meaning of legal norms, but this does not prevent us from stating that legal norms are the object of legal science or, what amounts to the same thing, that the law is a system of norms. This definition is in complete harmony with Kant's theory, according to which cognition creates its object, for we are speaking here of an epistemological creation and not a creation of man's handiwork in the sense that one speaks of the legislator creating a law. Similarly, natural phenomena, which are the object of the causal sciences, are created by the causal sciences in a purely epistemological sense[17].

Here «the propositions formulated by legal science» are propositions about legal norms, reflecting Kelsen's view as initially introduced in 1941[18]. For my present purposes, the more significant doctrine emerging from this text pertains to the role played by legal science in "creating" or "constituting" legal norms. What does it mean when Kelsen writes: «the norms created and applied within the framework of a legal system [have] the character of legal norms only if they are [cognized] by legal science»?

In a quotation drawn from the second edition of the *Pure Theory of Law* (1960), Kelsen expressly explicates cognition in terms of its constitutive dimension.

> It is […] correct that, in the sense of the Kantian theory of knowledge, legal science as cognition of the law, as with all cognition, has a constitutive character and therefore "creates" its object in comprehending it as a meaningful whole. Just as the chaos of sensory perception first becomes a cosmos through the ordering cognition of science, that is, becomes nature as a unified system, so it is that the wealth of general and individual legal norms issued by legal officials – that is, the material given to legal science – becomes a unified system free from contradiction, a legal system. This

[17] Kelsen 1953a: 53-54 (trans. here Anne Collins and Bonnie Litschewski Paulson); the monot graph represents Kelsen's own revision of the first edition of the *Reine Rechtslehre* (1934), a revision coming seven years ahead of his greatly expanded second edition. Kelsen's full statements of the neo-Kantian constraint include the text quoted at n. 19 below, which is drawn from the second edition of Kelsen's *Reine Rechtslehre*.

[18] Kelsen first introduces legal propositions (*Rechtssätze*) in the technical sense, his descriptive "ought"-propositions, in his 1941 paper, *The Pure Theory of Law and Analytical Jurisprudence* (Kelsen 1941), repr. (with omissions) in Kelsen 1967b: 266-287, 390 (notes), and they also receive attention in Kelsen 1945: 45 *et passim*, albeit in the guise of "rules of law", an unfortunate translation. Legal propositions emerge, appropriately labeled, in Kelsen 1953a, where, at 51, Kelsen distinguishes «*les norms juridiques* (*Rechtsnormen*), created by the legal system, from *les propositions* (*Rechtssätze*) that stem from legal science and that describe these norms» (the German-language insertions are there, in the French translation). See also Kelsen 1960, §16: 73-77, which contains his most complete statement on legal propositions during the classical period; the corresponding statement in Kelsen 1967a: 71-75, is marred by the rendition of *Rechtssatz*, just as in Kelsen 1945, as «rule of law».

> "creation", however, has a purely epistemological character. It is altogether different from the creation of objects by means of human labour or the creation of the law by means of the legal authority[19].

In all three statements, legal science appears to be constitutive, serving to create its object. The question arises as to whether Kelsen's claim is viable. As noted above, an argument here will have to be neo-Kantian in character, for Kelsen has ruled out every appeal to facts and to values. I return to this problem, the philosophical problem, in section 5 below. First, however, I want to take up what I have dubbed the problem of constraints. The problem can be stated quite simply: what happens if the legal official chooses and applies an interpretation of the general legal norm that is not found in the list worked up by the legal scholar in "filling in the frame"? To put the same question a bit differently: Does the legal scholar's list constrain the legal official?

4. The Problem of Constraints

The quintessential task of the legal scholar, according to Kelsen, is to cognize the general legal norm with an eye to drawing from it the possible individual legal norms contained, so to speak, therein. In the Foreword to his treatise on *The Law of the United Nations* (1950), Kelsen reiterates his view that the task of interpretation – the task of legal cognition – is to set out the various possible readings of the higher-level norm, that is, the possible individual legal norms that can be drawn from the general norm. Here Kelsen distinguishes between the task of legal science («the task of a scientific commentary») and the political role of the lawmaker («the competent legal authorities»). (The relevant text is quoted at fn. 8 above.)

Then, in the same paragraph of *The Law of the United Nations*, Kelsen ups the ante. He explains that it is the task of the legal scholar to provide *all* possible readings of the general norm.

> A scientific interpretation has to avoid giving countenance to the fiction that there is always but a single "correct" interpretation of the norms to be applied to concrete cases. This fiction, it is true, may have some political advantages. A party who sees his claim rejected by the legal authority may support this [rejection] more easily if he can be persuaded that another decision, another "correct" decision, was not possible. […] Besides, the scientific method of exhibiting on the basis of a critical analysis all possible interpretations of a legal norm, even those which are politically undesirable and those which permit the conjecture that they were not intended by the legislator, may have a practical effect which largely outweighs the advantage of

[19] Kelsen 1960, §16: 74-75, Kelsen 1967a: 72.

> the just mentioned fiction. Showing the legislator how far his product lags behind the goal of any law-making function, *i.e.* the unambiguous regulation of inter-individual or interstate relations, may induce him to improve his technique[20].

The puzzling reference to «all possible interpretations» aside[21], what does Kelsen mean by his reference to the legal scholar's «critical analysis» of the possible interpretations of a legal norm? There is no suggestion that the legal scholar is to employ the canons and strategies of traditional legal interpretation, although there is no reason to assume that Kelsen would object to their employment in this context. In his express rejection of the canons and strategies of traditional legal interpretation, he has in mind the legal scholar who is employing them with an eye to the «single "correct" interpretation». Legal scholars, as noted in section 2 above, are to confine themselves to a *descriptive* account in "filling in the frame". If the canons and strategies of traditional legal interpretation promote this enquiry, Kelsen has no objection.

Still, the constraints stemming from the purity thesis are real, ruling out for legal scholars any endorsement of values whatsoever – and thereby of policy. The material found in those statutes already enacted, those judicial decisions already handed down, and those administrative regulations already issued serves as the basis of the legal scholar's effort to set out the possible readings of the norm in question. Policy considerations and recommendations lie beyond the legal scholar's bailiwick.

This is Kelsen's position not only in the treatise on *The Law of the United Nations*, but also in both editions of the *Pure Theory of Law*, where we find his well-known view that the general legal norm is to be understood as a "frame":

> [T]he norm to be applied is simply a frame within which various possibilities for application are given, and every act that stays within this frame, in some possible sense filling it in, is in conformity with the norm[22].

Also in the *Pure Theory of Law*, Kelsen sets out the distinction between non-authentic interpretation, which is the legal scholar's interpretation, and authentic interpretation, which is represented in the legal official's act of will, the issuance of a legal norm.

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20 Kelsen 1950: xvi.

21 Dreier 1990: 149, at n. 342, writes that the idea of capturing all possible alternatives is illusory, and he quotes Merkl to the effect that science would be able to set out the conceivable interpretations «only as a list of examples, not as a taxonomic enumeration». See Merkl 1917: col. 395, in Klecatsky, Marcic, and Schambeck 1968: 1185-1191, at 1187, 2nd edn: 970-982, at 971, in Merkl 1993-2009, vol. I/1: 116-122, at 118.

22 Kelsen 1992, §36: 80; Kelsen 1960, §45(d): 348, Kelsen 1967a: 351.

> [T]he interpretation of the law by means of legal science, as non-authentic interpretation, must be unequivocally distinguished from [authentic] interpretation by means of legal officials. The former is a purely cognitive determination of the meaning of legal norms[23].

What if the legal official, following the dictates of authentic interpretation, issues a norm that is not found on the list? Kelsen's answer is spelled out clear as a bell in the second edition of the *Pure Theory of Law*:

> [I]n the course of authentic interpretation – that is, the interpretation of a norm by the legal organ who is to apply this norm – not only can one of the possibilities determined by the cognitive interpretation of the norm be realised, but also a norm can be created that is altogether outside the frame represented by the norm to be applied[24].

If this thesis of Kelsen's is his last word, it undermines not only the constitutive dimension of cognition but also raises questions about the viability of the legal scholar's enterprise. The issuance of a legal norm that falls outside the "frame" stems solely from the legal organ, a state of affairs that would not be possible if a constitutive dimension of legal science, drawn from neo-Kantianism, truly prevailed. And if the legal scholar's enterprise, as depicted by Kelsen in the "official theory", were viable, the legal organ could not override the list of interpretations represented by the work of legal scholarship.

The philosophical problem, to which I now turn, underscores the difficulties encountered here and adds still more difficulties.

5. The Philosophical Problem

Kelsen's Kantian-inspired argument is a transcendental argument[25], suitably modified to apply in the standing disciplines, here legal science[26]. In what follows, I divide the discussion on transcendental arguments and the philosophical problem that stems from them into eight sub-sections, namely: (a) transcendental arguments

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[23] Kelsen 1960, §47: 352, Kelsen 1967a: 355.

[24] Kelsen 1960, §46: 352, Kelsen 1967a: 354. This text of Kelsen's is by no means his only statement on the question. In a number of papers written during the 1950s, Kelsen gives expression to the same position. See e.g. Kelsen 1953b: 151, in Klecatsky, Marcic, and Schambeck 1968: 611-629, at 618-619, 2nd edn: 499-514, at 505.

[25] The expression "transcendental" was first employed in medieval philosophy; the transcendentals (*unum*, *bonum*, *verum*) were familiar as basic features of being that transcend classification into genera and species. Kant, departing radically from this tradition, uses "transcendental" to speak of cognition that is concerned «not so much with the objects of cognition as with how we cognize objects, in so far as this may be possible *a priori*» (Kant 1998, B 25).

[26] On the problems in applying the transcendental argument within one or another of the standing disciplines, see Paulson 2013: 53-57.

generally, (b) the transcendental question, (c) Kelsen's basic norm as shorthand for a transcendental argument, (d) Kant's progressive and regressive forms of argument, (e) the neo-Kantians' transcendental argument in its regressive form, (f) Kelsen's transcendental category, (g) the unfolding of the argument, and (h) an assessment of Kelsen's argument.

(a) Transcendental arguments generally. Transcendental arguments are not straightforward proofs in formal logic; rather, they unfold indirectly[27]. As Eckart Förster writes, they proceed – with an eye to conclusions about our conceptual scheme – «by showing that alternatives to these conclusions are incoherent»[28].

I might note, *en passant*, that there have been no fewer than three rounds of transcendental arguments in what is, broadly speaking, the Kantian tradition. First and foremost, there is Kant's own transcendental argument, the notoriously difficult and prolix "transcendental deduction" in the transcendental analytic of the first *Critique*. Second, there are various transcendental arguments collected under the rubric of the "transcendental method"[29] in the work of the fin-de-siècle neo-Kantians. While Kant's overriding concern with his transcendental argument was to make the idealist philosopher's case on behalf of the existence of the phenomenal world, the neo-Kantians, Kelsen among them, presuppose the phenomenal world and proceed by applying aspects of the transcendental philosophy in the standing disciplines (*Einzelwissenschaften*). And, in a third round, there are the initiatives of Peter F. Strawson, which have given rise to a cottage industry on transcendental arguments in analytic philosophy over the past half-century[30].

(b) The transcendental question. Kant begins with a reference to traditional metaphysics, which, he remarks, has been more a "combat zone" than a field «entering upon the secure path of a science»[31]. The puzzles of metaphysics give rise to Kant's transcendental question, which is, as always, about *possibility*. As he writes in the *Prolegomena*:

> My intention is to convince all of those who find it worthwhile to occupy themselves with metaphysics that it is unavoidably necessary to suspend their work for the present, to consider all that has happened until now as if it had not happened, and before all else to pose the question of "whether such a thing as metaphysics is even possible at all"[32].

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[27] Kant's transcendental "deduction" is not a proof in formal logic either. It proceeds, so Dieter Henrich, in a way akin to legal argument where the issue in question is traced back to its source. See Henrich 1989.

[28] Förster 1989: 10.

[29] A familiar statement on the "transcendental method" is Natorp 1912, repr. in Flach and Holzhey 1980: 197-225. The expression "transcendental method" does not occur in Kant's writings.

[30] See Strawson 1959a: 35-36; Strawson 1959b. Stern 1999 is a representative collection of papers and includes a lengthy bibliography.

[31] Kant 1998: B xiv-xv.

[32] Kant 1911: 255 (preface).

Properly understood, Kant writes, the purpose of metaphysics is «to extend our *a priori* knowledge»[33]. Thus, as a part of his programme, Kant recasts the transcendental question in terms of the very possibility of "synthetic *a priori* judgments", that is to say, the question of whether substantive judgments arrived at independently of experience «are possible»[34].

Kelsen poses his own transcendental question. In a philosophically rewarding, short monograph, *The Philosophical Foundations of Natural Law Theory and Legal Positivism* (1928), he writes: «How is positive law qua object of cognition, qua object of cognitive legal science, possible?»[35].

In the second edition of the *Pure Theory of Law* (1960), he poses the question anew.

> [H]ow, without appeal to a meta-legal authority like God or nature, is an interpretation of the subjective sense of certain material facts as a system of objectively valid legal norms that can be described in legal propositions (*Rechtssätze*) possible[36]?

(c) Kelsen's basic norm as shorthand for his transcendental argument. In answering the transcendental question, Kelsen once again employs the characteristically Kantian language of possibility.

> Provided that only the presupposition of the basic norm makes possible the interpretation of the subjective sense of [certain material facts] as their objective sense, that is, as objectively valid legal norms, the basic norm can be described in its characterization by legal science – applying by analogy a concept of Kant's theory of knowledge – as the logico-transcendental condition for this interpretation[37].

Kelsen is arguing that the presupposed basic norm designates the logico-transcendental condition that makes possible the objective validity of legal norms. His label, the "logico-transcendental condition", is an elliptical reference to a neo-Kantian transcendental argument that is addressed to legal science[38]. Why legal science? Kelsen argues that legal science, which attributes to «certain acts» the ob-

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[33] Kant 1998: B 18.

[34] Kant 1998: B 20-23.

[35] Kelsen 1928, §36: 66 (Engl. trans.: 437).

[36] Kelsen 1960, §34(d): 205, Kelsen 1967a: 202.

[37] Kelsen 1960, §34(d): 204-205, Kelsen 1967a: 202.

[38] For an unmistakable allusion to a neo-Kantian transcendental argument, see Kelsen 1992, §16: 34, a text of 1934. Earlier, Kelsen takes up aspects of Fritz Sander's wildly ambitious Kantian reconstruction of the law, worked up by Sander by appealing to the transcendental analytic of Kant's first *Critique*. See Kelsen 1922. Kelsen's paper, along with Sander's early papers to which Kelsen is replying, is reproduced in Sander and Kelsen 1988.

jective validity of legal norms[39], can accomplish this only if it has the right sort of support, which must take the form of a transcendental argument. It must take this form, Kelsen is arguing, because every other possibility is precluded by the purity postulate. Kelsen adduces his transcendental argument in what the literature calls the regressive form. I return to Kant for an explication.

(d) Kant's progressive and regressive forms of argument. Kant's transcendental argument is found in both progressive and regressive forms[40]. As he develops the argument in the first *Critique*, it reflects the progressive form, which begins with a strikingly weak premise, the data of consciousness, and moves ultimately to the existence of the phenomenal world. Where Kant's transcendental argument is understood as a response to the sceptic[41], the argument, if sound, shows that the sceptic cannot help but undermine his own position in the course of defending it. For he, too, must begin with the data of consciousness, and he is then drawn ineluctably along into the further reaches of the argument against him.

Contrariwise, the starting point of Kant's transcendental argument in its regressive form is a very strong premise, the fact of experience (*Erfahrung*) and so the existence of the phenomenal world. But there is a catch: the regressive form of Kant's transcendental argument presupposes the progressive form, and Kant simply offers it as a heuristic device. Otherwise, the very strong initial premise of the argument in its regressive form would be question-begging.

(e) The neo-Kantians' transcendental argument in its regressive form. Everything changes as soon as we turn to the neo-Kantians, including Kelsen. The transcendental argument that turns up in their work reflects something of the regressive form of Kant's argument, but *without* a progressive counterpart. The form of their argument looks like this.

1. *P* (given).
2. *P* is possible only if *Q* (transcendental premise).
3. Therefore, *Q* (transcendental conclusion).

In the first premise, "*P*" stands for the material that is given, and, in the second premise and the conclusion, "*Q*" stands for the presupposed category[42]. From what is given, we "regress" to the transcendental category without which what is given would not be possible.

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[39] See the text quoted at n. 37 above.

[40] Kant regards the regressive form of the argument as a summary statement of the progressive form. In Kant 1911: 277 (note), Kant alludes to the regressive form of the argument. On the distinction between the two forms of the argument, see Paulson 1992: 322-332.

[41] On Kant's transcendental argument as a reply to the sceptic, see e.g. Forster 2008.

[42] The argument is rendered formally valid by adding the trivial premise – call it premise *1a* – to the effect that if *P* is given, as in premise *1*, then *P* is possible.

A strong initial premise – the "fact of science", as the neo-Kantians put it[43] – is given. The task, then, is to make the case for the *very possibility* of *P* by showing that *P* implies *Q*, the transcendental category.

*(f) Kelsen's transcendental category***.** Kelsen writes that the legal "ought" designates «a transcendental category»[44], but he does not pursue the idea. Instead, his most effective expression of the idea of a transcendental category in legal science is imputation (*Zurechnung*)[45]. By appeal to imputation, he is in a position to set out, between material fact and legal consequence, a connection that runs parallel to the causal connection between facts.

> If the mode of linking material facts is causality in the one case, it is imputation in the other, and imputation is recognized in the Pure Theory of Law as the particular lawfulness, the autonomy, of the law. Just as an effect is traced back to its cause, so a legal consequence is traced back to its legal condition. The legal consequence, however, cannot be regarded as having been caused by the legal condition. Rather, the legal consequence (the consequence of an unlawful act) is linked by imputation to the legal condition[46].

Thus, imputation is to be understood by analogy to causation, and imputation serves as the presupposed juridical category, corresponding to "*Q*" in the second premise and the conclusion of Kelsen's transcendental argument.

(g) The unfolding of the argument. Some of the machinery of Kelsen's argument is now in place. How exactly, then, does the argument unfold? I begin with the state of affairs that would obtain if the argument were sound, taking Kelsen's purity thesis as the point of departure[47]. It precludes every appeal to fact-based legal positivism and to natural law theory, the traditional views on the character of the law. In other words, it precludes every appeal to facts and to values. The purity thesis,

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[43] «If […] I take cognition not as a form and manner of consciousness, but as a *fact* that has established itself in science and that continues to establish itself on given foundations, then the enquiry is no longer directed to a subjective fact; it is directed instead to a fact that, to whatever extent self-propagating, is nevertheless objectively given, a fact grounded in principles. In other words, the enquiry is directed not to the process and apparatus of cognition, but to its result, to science itself. Then the unequivocal question arises: from which presuppositions does this fact of science derive its certainty?» (Cohen 1883: 5). Compare, on the fact of science, Kelsen: «The possibility and the necessity of a normative theory of law is shown by the very fact of legal science over a millennium, which, in the guise of dogmatic jurisprudence, serves – so long as there is law at all – the intellectual requirements of those who concern themselves with the law» (Kelsen 1992, §16: 37).

[44] In Kelsen 1992, §11(b): 23, heading of the sub-section.

[45] Support is lent to the rendering of *Zurechnung* as "imputation" by Kelsen's own occasional use of the Latin *imputatio* in place of *Zurechnung*; see Kelsen 1911: 138, 194, 209, 503, in Kelsen 2008: 244, 306, 322, 650.

[46] Kelsen 1992, §11(b): 23-24.

[47] See Paulson 2013: 45-49.

according to some of Kelsen's critics, gives rise to a dilemma. They assume that the two traditional views, taken together from a suitably abstract standpoint[48], exhaust the field: *tertium non datur*. And, the critics continue, the purity thesis, in ruling out both traditional views, goes too far. Kelsen faces the dilemma of either abandoning the purity thesis or confronting nihilism, the result of mindlessly adhering to the purity thesis. Kelsen appeals to Kant and thereby escapes the dilemma. More precisely, he appeals to the category of imputation, which he draws from his neo-Kantian reconstruction. The category of imputation, evaluated from the standpoint of the purity thesis, withstands scrutiny. Or so Kelsen contends.

*(h) An assessment of Kelsen's argument***.** The sketch above is roughly the picture we would have if Kelsen's argument were sound. But it is not sound. It fails to comport with a basic requirement of all transcendental arguments, namely, that every alternative explanation of the fact of science, every explanation that would undermine the second premise in Kelsen's transcendental argument, be eliminated. Kelsen believes he has accomplished this, but he has not. Even if we were to recognize Kelsen's arguments against naturalism and psychologism as sufficient for the elimination of fact-based legal positivism, these arguments do not address natural law theory, which Kelsen all too often simply dismisses out of hand. At this juncture in Kelsen's work, cogent argument is conspicuous by its absence. Natural law theory – for purposes of the transcendental argument – remains a viable alternative to Kelsen's Pure Theory of Law. The presence of a viable alternative undermines the truth of the second premise in Kelsen's transcendental argument and, therefore, its soundness[49].

Another factor, completely overlooked by Kelsen, is the problem of *quartum non datur*. Kelsen introduces *two* complexes as a means of representing his version of legal positivism – first, his stance against naturalism, reflected in the neo-Kantians' fact-value distinction, and, second, his stance against morality and politics, reflected in the legal positivist's separability principle. These two complexes generate four distinct species of legal theory. Thus, even if Kelsen's dismissal of fact-based legal positivism and natural law theory were granted, he would not have, without further ado, an argument addressing the issue posed by *quartum non datur*.

In concluding this section, one might ask: how is it that Kelsen defends the trappings of a transcendental argument if the argument is clearly seen to be unsound? The deceptively simple answer is this. Kelsen *believes* that neither of the traditional theories, fact-based legal positivism and natural law theory, is defensible. He rejects fact-based legal positivism on the ground that legal norms yield, on the fact-based positivist's analysis, causal claims. Here the most obvious example, at any rate from

[48] I would have "suitably abstract standpoint" understood as saying, *inter alia*, that legal realism counts as a species of fact-based legal positivism, see n. 3 above.

[49] See Paulson 2012: 75-78.

Kelsen's standpoint, is Georg Jellinek's legal theory[50]. And Kelsen rejects natural law theory on the ground that it is nothing more than ideology. Thus, he reasons, there are no alternatives to his Pure Theory of Law.

6. The "Official Theory" and Other Concluding Remarks

Kelsen on legal interpretation – along with the related fields, legal cognition and legal science – proves to be a wide-ranging and multifaceted motif. The point of departure is straightforward: the doctrine of the *Stufenbau* supplants traditional legal interpretation. But then Kelsen is confronted on the various *Stufen* – the levels of the hierarchical construction – with questions familiar from traditional legal interpretation. To cope with them, he takes as his point of departure a distinction between two concepts of law, the law qua object of legal cognition and the law qua politics. Legal science captures the first concept, and lawmakers' acts of will are the focal point of the second. The lawmakers' acts of will are ostensibly constrained by legal science, whose operative notion, cognition, purportedly sets down necessary limits on what counts as a valid legal norm.

At this point, as we have seen, Kelsen faces serious problems. The putative constraint on lawmakers that stems from legal cognition falls short of the mark. It may serve as an ideal, but not as a bona fide constraint. Quite apart from any constraint set by legal science, all shades of acts of will do in fact turn up as legal norms, and Kelsen recognizes them as legal norms.

If Kelsen's notion of legal cognition – and with it the first concept of law – is neo-Kantian in origin, then what impact does its falling short of the mark have on the neo-Kantian dimension of Kelsen's Pure Theory of Law? Simply to excise the neo-Kantian dimension would, I believe, be a mistake, removing far too much that is characteristic of Kelsen's legal theory. An analogy illustrates the point. Even if no-one nowadays is prepared to defend Plato's doctrine of forms or exemplars on the merits[51], by the same token, no-one is suggesting that the doctrine be excised from the Platonic dialogues. The very idea is fanciful, eliminating in one fell swoop a great deal of what is rightly associated with Plato. Similarly, *mutatis mutandis*, for Kelsen.

Instead, Kelsen should perhaps be read on two tracks: in terms of both the neo-Kantian dimension, which informs much of what Kelsen is doing during the lengthy classical period, and a default position, which might be called the legal re-

[50] On Jellinek, see Paulson 2018: 286-294.

[51] See e.g. the interesting critique of Platonism, based on uninstantiated properties, kinds, and relations, in Loux 2006: 40-45 *et passim*.

alist dimension of Kelsen's theory[52]. The first track, what I have dubbed the "official theory", is an ideal, and from this neo-Kantian standpoint, it is entirely appropriate to speak of a necessary constraint set by legal science on legal validity. The second track, legal realism, is marked by contingency, and its stance on legal validity is drawn, not surprisingly, from acts of will qua legal norms.

It is of interest that something comparable takes place in the field of Kelsenian norm theory. On the one hand, he is bound and determined from the very beginning to reject the imperative and all that it portends. Indeed, in *Main Problems* (1911) he allows himself to set out utterly fanciful statements in response to Karl Binding's norm theory. Kelsen contends that when the literal use of an expression has no legal application, then its metaphorical use in the law is illegitimate. For example, "to transgress" (*übertreten*), understood literally, is directed to a limit, and to transgress the limit is to exceed it. This literal use has no legal application, and therefore its metaphorical use in legal contexts is illegitimate[53]. Ultimately, this audacious polemic against the imperative theory leads, in the 1930s, to Kelsen's empowerment theory of legal norms, which he pursues right up to and including the second edition of the *Pure Theory of Law*. Here *the very form* of the legal norm represents a departure from the imperative theory. And this is Kelsen's "official theory" in the field of norm theory. Alongside it, there is a great deal of language in Kelsen's writings that would suggest an endorsement of something like the old-fashioned imperative theory. Here, too, the official theory goes off in one direction, while the default position meanders off in another.

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[52] See Chiassoni 2013.

[53] See Kelsen 1911: 273, in Kelsen 2008: 293, drawing on Binding 1872-1919, vol. II/1, 2nd edn, §1: 7.

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