Purity and Constraints in Legal Theory. Some Remarks on Paulson's Analysis of the Neo-Kantian Dimension of Kelsenian Theory of Law

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Abstract

Hans Kelsen rejects both natural law theories and fact-based positivism. Rather, following certain ideas inspired by the neo-Kantian philosophy, he attempts to preserve a clear separation between law and facts as well as between law and morality. As it is well-known, Kelsen's Neo-Kantian ideas are combined with other theses extracted from a positivistic vision of the law. However, as Stanley L. Paulson shows in his very fine paper about the limits of the kelsenian doctrine, Neo-Kantism and positivism cannot be easily articulated in a coherent picture. In particular, Paulson analyses two closely connected problems. On the one hand, the relation between legal interpretation and the 'irregular' creation of norms (i.e., *the problem of constraints*) and, on the other hand, the limits of purity (i.e., *the philosophical problem*). In this paper, I will briefly comment on both problems mentioned by Paulson. First, I deal with the philosophical problem and I focus on (i) the distinction between 'Is' and 'Ought' and (ii) the rejection of Natural Law Theories. Second, I analyse the problem of constraints and I pay attention to certain consequences that stem from the validity of *irregular* norms.

Keywords: Neo-Kantism. Legal positivism. Pure Theory of Law. Natural Law.

1. Introduction

Hans Kelsen rejects both natural law theories and fact-based positivism. Rather, following certain ideas inspired by the neo-Kantian philosophy, he favours a "pure" explanation of the law. As it is well-known, his *Pure Theory* attempts to preserve

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a clear separation between law and facts as well as between law and morality[1]. Kelsen's Neo-Kantian ideas are combined with other theses extracted from a positivistic vision of the law[2]. However, as Stanley L. Paulson shows in his very fine paper about the limits of the kelsenian Neo-Kantian legal theory[3], both traditions cannot be easily articulated in a coherent picture. In particular, Paulson analyses two closely connected problems that reveal an internal tension in Kelsen's theory. On the one hand, the relation between legal interpretation and the "irregular" creation of norms (i.e., *the problem of constraints*) and, on the other hand, the limits of the idea of purity (i.e., *the philosophical problem*). A dilemma arises because Kelsen's answers to the problem of constraints seem to be at odds with his solution to the philosophical problem. Finally, Paulson concludes that Kelsen fails in his neo-Kantian defence of the purity of legal theories.

In this paper, I will briefly comment on both problems mentioned by Paulson. First, I deal with the philosophical problem and I focus on (i) the distinction between "Is" and "Ought" and (ii) the rejection of Natural Law Theories. Second, I analyse the problem of constraint and I pay attention to certain consequences that stem from the validity of *irregular* norms like "unconstitutional" norms or *contra legem* judicial decisions[4].

Finally, I would like to stress that, in my opinion, Paulson offers an excellent reconstruction and I can imagine no better presentation of Kelsen's ideas. So, my complaints are not directed against the Paulson's paper, but rather they are mainly addressed to the *Pure Theory of Law* itself.

2. Legal Science and the Philosophical Problem

The *philosophical problem* analysed by Paulson is about the possibility of legal cognition and, by the same token, about the nature of legal science. To the extent that science and truth are intrinsically connected, an answer to the philosophical problem must shed some light on the meaning and truth-condition of scientific legal statements. According to Kelsen, a true legal statement is neither an empirical

[1] The main neo-Kantian ideas in the *Pure Theory* are the following ones:
1) Legal norms are ideal entities belonging to a specific dimension (the "ought to be" world),
2) Validity, understood as binding force, is the specific existence of a legal norm,
3) Legal science is normative and legal cognition has a constitutive character,
4) The unity of a legal system depends on a non-positive (or transcendental) norm, i.e. the Basic Norm.

[2] For example, (e.g., the rejection of natural law, a clear distinction between prescription and description, etc.).

[3] Paulson 2019.

[4] In my analysis, I will put aside many important issues raised by Paulson's paper, e.g., the distinction between two concepts of law in the *Pure Theory*. Although such issues deserve closer inspection, they cannot be examined here.

statement (i.e., it does not refer to sociological regularities, psychological dispositions, etc.) or a moral proposition (i.e., it does not refer to the moral status of certain actions). Indeed, a true legal statement like "It is legally obligatory that the President of Argentina resides in Buenos Aires" *means* something different from (a) As a matter of fact, the President of Argentina resides in Buenos Aires, and (b) It is morally required that the President of Argentina resides in Buenos Aires. Factual or moral statements like (a) or (b) can also be true, but they do explain neither the specific meaning or truth-conditions of legal statements.

Kelsen claims that only the Pure Theory provides a scientific approach to legal phenomena. His insistence on the "purity" of a legal theory can be understood as a corollary of a more fundamental idea: the distinction between "is" and "ought". However, there are two different versions of such a distinction and it is worth mentioning the role that they play in Kelsen's philosophy. As Bulygin says[5],

> On an ontological interpretation (that is predominant in Kelsen's early writings) the thesis of a sharp separation between is and ought is related to his distinction between two radically different realms or worlds: the world of ought and the world of is.

It seems to be clear that our "ordinary" world can be placed in an empirical dimension (i.e., the realm of "is" or a "physical world"). For this reason, classical positivism endorses "the facticity thesis": the law can be explained in terms of a concatenation of facts (like the will of the sovereign). However, as Paulson stresses, «in place of the legal positivist's facticity thesis, Kelsen introduces a normativity thesis, which calls for an explication of law […] altogether independently of fact»[6]. The problem is that Natural Law Theories also subscribes the normativity thesis and, therefore, the insistence on the distinction between two different worlds would be irrelevant for discarding the reduction of law to morality.

However, Kelsen believes that Natural Law Theories also violate the separation between "is" and "ought". For this reason, he stresses that this *Pure Theory* «attempts to answer the question of what and how the law *is*, not how it ought to be»[7]. From this perspective, the difference between legal and moral statements could be seen as a conceptual distinction between positive law (or the law as it is) and an *ideal* law (or the law as it ought to be from a particular moral perspective)[8].

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5 Bulygin 1990: 33.

6 Paulson 1996a: 797.

7 Kelsen 2005: 1. See also, Kelsen: 1992: 7.

8 This separation also seems to cover the distinction between explicit legal materials and their logical consequence. In this respect, logically entailed laws would not be valid if legal authorities had not prescribed them. Such entailed norms only show the law as it ought to be from a rational perspective, but they are not part of a legal system. (See, for example, Kelsen 1991: 46-49. See, also Marmor 2001: 69-70).

This new interpretation of the separation between "is" and "ought" is a semantic distinction. As Bulygin stresses, this semantic distinction «means that prescriptive propositions cannot be inferred from descriptive propositions alone and, conversely, that descriptive propositions do not follow logically from prescriptions alone»[9]. For example, Kelsen says[10]: «Nobody can deny that the statement: "something is" […] is fundamentally different from the statement: "something ought to be" […] Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa».

It would be tempting to ground the semantic distinction on the ontological interpretation of the division. This would be tantamount to say that legal statements mean something different from factual propositions *only because* there are two different worlds. According to the ontological interpretation, it seems that the difference between "is" and "ought" is somehow "outside" of our theories; it would be something that belongs to our complex "*social* nature". In this respect, both natural law theories and fact-based positivism would be defective because they do not pay attention to the double dimension (i.e., ontological and semantic) of the fundamental distinction between "is" and "ought". On the contrary, the *Pure Theory* would be the unique conceptual tool that properly explains such distinctions and can take into account the specific meaning of legal statements. This is a weak interpretation of the "purity" of the *Pure Theory*.

However, a stronger interpretation of the requirement of theoretical purity would conclude that the normative dimension of empirical phenomena is not something already given, but it is a division constructed (or epistemologically created) by our philosophical reconstructions. If, as Paulson reminds us, both legal and natural cognition is constitutive, it follows that the difference between "is" and "ought" is also constituted by our theories. Thus, criticisms of natural law or fact-based positivism cannot be articulated in terms of misrepresentation of a given social reality, because – strictly speaking – there is no such a reality outside of our theories. Moreover, if the semantic distinction between "is" and "ought" is entailed by the ontological division, from the rejection of this last category, it would also follow the abandonment of the semantic distinction.

3. The Philosophical Problem and the Rejection of Natural Law

How is it possible to grasp the specific legal meaning of certain acts? Where could that specific legal meaning arise once the connection between law and morality or the reduction of the law to empirical regularities is rejected? As Paulson's

[9] Bulygin 1990: 33.
[10] Kelsen 2005: 5-6.

shows, Kelsen answers these questions by means of a regressive version of a transcendental argument. However, Paulson (2019: 15-17) reminds us that the regressive version is based on a progressive version, and it is far from clear that pure legal cognition can assume such a progressive version. I cannot deal here with this philosophical puzzle, and I agree with Paulson on his general criticism of the limits of Kelsen's strategy.

As Paulson (2018: 18) remarks, Kelsen introduces a "middle way" in jurisprudence in order to deal with the separability between law and morals as well as the separability of law and facts[11]. According to Kelsen,

(a) Positive law is normative, but – contrary to Natural Law theories – the validity of positive norms is not drawn from morality, and

(b) Positive law is a social phenomenon, but – contrary to fact-based positivism – positive norms are not a kind of empirical generalizations nor legal statements are disguised factual propositions.

To the extent that such different versions of the separability refer to logically independent possibilities, there are four conceptual possibilities, but Kelsen only analyses three options, and makes no comments on, for example, the plausibility of a Natural Law Theory that accepts not only the conceptual union of law and morality but also the reduction of the normative dimension of social phenomena to plain factual regularities. Thus, strictly speaking, Kelsen's transcendental arguments are defective because his analysis of traditional legal theories is incomplete.

However, Paulson (2019: 18) also claims that Kelsen fails because his analysis overlooks a «basic requirement of all transcendental arguments, namely that every alternative explanation of the fact of science… be eliminated» According to Paulson, Kelsen's 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.

It is clear that Kelsen rejects traditional forms of natural law doctrines, but in the quotation introduced above, Paulson seems to suggest that such a rejection is not founded on a "cogent argument". On the contrary, in my opinion, Kelsen provides a detailed criticism of Natural Law Theories. From his rejection, we could draw two general conclusions

First, according to Kelsen, both legal and moral norms lack truth-values. So, moral norms are not inherently valid, and our reason cannot "discover" the *true* morality. Therefore, moral cognition – as well as legal cognition – needs another

[11] See also, Paulson 1992a: xxv-xxix, and Paulson 2000: 279-293.

starting point in order to attribute a normative dimension to our social world. Second, if moral norms are prescriptions, somebody (e.g., God) prescribes them, but in this case, such moral prescriptions would be valid norms only if a certain Basic Norm is presupposed. Thus, Natural Law Theories face a dilemma: on the one hand, they need to assume a Basic Norm that allows us to regard some individuals as authorities and their requirements as valid moral norms. On the other hand, they claim that some moral norms are inherently valid. In the first case, the transcendental argument is still alive, and, in the second case, the argument is self-defeating.

4. The Problem of Constraints

The *problem of constraints* analysed by Paulson (Paulson 2019: 18-20) arises from two different ideas: (a) the constitutive nature of legal cognition, and (b) the evidence that some norms are irregularly created (henceforth, irregular norms). For example, unconstitutional norms or *contra legem* judicial decisions are paradigmatic examples of irregular norms[12]. According to Kelsen, the task of legal scholars is constitutive and this means that the scope of alternative interpretations identified by legal science is equivalent to make explicit all possible norms that an authority can create in the process of applying the law. However, it is undeniable that legal authorities often choose an option that is not included in the interpretative frame of a general norm provided by legal science. As Kelsen claims that such irregular decisions are valid, it follows that "interpretative frames" are only a euphemism because the validity of a norm is not founded on the content of a higher norm. This view leads *Pure Theory* to the *problem of constraints*.

In general, I agree with Paulson about the internal tension in the *Pure Theory* and I would only add three ingredients to his original recipe (a) the interpretative frame, (b) legal disagreements, and (c) the tacit alternative clause[13].

(a) The interpretative frame: One of the most important tasks of legal scholars is to identify the general norms that judges have to apply in order to justify their solutions to particular cases. This task often requires the interpretation of certain texts (*norm-formulations*). Contrary to the traditional doctrines of interpretation, Kelsen rejects that only one single interpretation can be drawn from norm-formulations, and consequently he emphasizes that legal scholars have to provide *all* possible readings of a certain authoritative text.

[12] It must be pointed out that Paulson deals with the irregular creation of law and the tacit alternative clause in his classic Paulson 1980: 172-193. I cannot do justice here to the subtlety and complexity of his paper.

[13] On the internal tensions of the Pure Theory, see also Paulson 1996b: 49-62.

However, it is impossible to elaborate an exhaustive and definitive list of all imaginable meanings of ordinary linguistic sentences[14]. For example, if a certain authority, e.g., a judge, correlates the norm-formulation with the meaning M, this option must be included in our list because it is a *possible* meaning (as something different from *conventional*, *admissible* or *reasonable* interpretations of a certain text). Thus, taking seriously the idea of "all possible readings" of a certain norm-formulation, the problem of constraints disappears. Strictly speaking, no possible decision would be outside the frame of "all possible" interpretations.

In order to reject formalism in legal interpretation, Kelsen only needs to claim that there is always an interpretative frame that contains "more than one" interpretation of a certain norm-formulation. As a particular norm cannot be drawn from a disjunction of different general norms, the application of a general norm would always involve a creative element. In other words, «the relation of the legislation to the constitution and the relation of the judicial decision to the statue which is to be applied cannot have a merely logical character»[15], and conversely, the fact that, for example, a judicial decision is in conformity with the content of the statute to be applied «does not mean that the derivation of the lower from the higher norm is merely a logical operation»[16].

(b) Legal disagreements: the metaphor of "*the* interpretative frame" suggests that legal science always provides only *one* frame. However, interpretative disagreements in law seem to be pervasive. Thus, according to a certain frame, the list includes a particular interpretation *A*, but another frame B regards such an interpretation as something inadmissible. Insofar as legal cognition constitutes the frames, lawyers cannot be wrong about the scope of their own lists. So, we need a meta-legal science that incorporates in a new larger frame both opposites first-level interpretative frames.

(c) The tacit alternative: Kelsen believes that in the process of application of norms, every higher norm can be read as including a tacit alternative that validates irregular lower norms. This is the solution that Kelsen maintains throughout his work to the problem of the conflict between norms of different levels. In this respect, legal science must emphasize that every general norm, e.g. a constitutional norm and its alternative clause "form a unity". For this reason, the problem of constraints vanishes because legal cognition assumes (and reveals) a frame that contains not only the possible meanings of a norm-formulation but also the implicit alternative content of legal norms of a hierarchical normative system.

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14 See, Endicott 2000: 59-62.
15 Kelsen 1965: 1155.
16 Kelsen 1965: 1155.

5. Concluding Remarks

The internal tension in the *Pure Theory* would require a radical solution, for example, the elimination of one of the conflicting alternatives. Nevertheless, Paulson suggests that Kelsen should perhaps be read on two tracks: the "official theory" and the "default position". The first is somehow an ideal «which informs much of what Kelsen is doing during the lengthy classical period» (Paulson 2019: 20) and the second one is rather a realistic view on the legal phenomena[17].

However, it is unclear why "the official theory" is an "ideal"[18], and I do not understand why legal science should pursue an impossible ideal. Moreover, it seems to be that Kelsen himself progressively abandoned the Neo-Kantian thesis in favour of a more positivistic perspective. In this respect, it is clear that «the Pure Theory of Law is emaciated by Kelsen's abandonment of the Neo-Kantian foundation that had made the theory, in its classical form, well-nigh unique»[19].

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[17] Although Paulson seems to associate "the default position" to a form of legal "realism", it is not altogether clear that this would be the only interpretation of Kelsen's doctrines. See, for example, Kletzer 2005: 46-63.

[18] For example, Ronald Dworkin (1977: 149) claims: «It is perfectly understandable that lawyers dread contamination with moral philosophy, and particularly with those philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason. But better philosophy is now available than the lawyers may remember […] There is no need for lawyers to play a passive role in the development of a theory of right against the state, however, any more than they have been passive in the development of legal sociology and legal economics. They must recognize that law is no more independent from philosophy than it is from these other disciplines».

[19] Paulson 1992b: 273.

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