

HANS Kelsen's THEORY AND THE KEY TO HIS NORMATIVIST DIMENSION

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I INTRODUCTION

Writers have both praised and criticised Hans Kelsen's work, however all would agree that he is 'a theorist to be reckoned with.'¹ The focus of this research paper is to critically examine whether the key to the normative dimension of Kelsen's 'Pure Theory of Law', first published in his book of the same name in 1934, is a neo-Kantian or regressive version of Kant's transcendental argument. This paper will begin by outlining Kelsen's theory and discuss the 'middle-way' approach he adopts between the traditional theories of natural law and legal positivism.² This paper will then outline Kant's transcendental argument and apply the dimensions of Kelsen's neo-Kantian or regressive version to this argument. This paper will demonstrate how Kelsen's system of basic norms apply to Kant's transcendental argument and conclude with a statement as to the problems inherent in Kelsen's application of the neo-Kantian or regressive version of Kant's theory.

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¹ Stanley Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' (1992) 12 *Oxford Journal of Legal Studies* 311, 312.

² Ibid.

II KELSEN'S PURE THEORY OF LAW

Paulson states that 'Kelsen would have his Pure Theory of Law understood as a theory of legal cognition, of legal knowledge' and that 'the sole aim of the Pure Theory is cognition or knowledge of its object, precisely specified as the law itself.'³ Kelsen believed that utilising 'alien' disciplines such as ethics, theology, psychology and biology to answer legal questions have led legal theorists astray and hence his 'pure' theory of law must be sharply distinguished.⁴ Kelsen wished to create a 'science of law' which ought to be 'distinguished from the philosophy of justice on the one hand and from sociology, or the cognition of social reality, on the other.'⁵ Thus Kelsen's pure theory 'provides the basic forms under which meanings can be known scientifically as legal norms.'⁶ These legal norms form a 'normative system' which requires that individuals conform to the modes of behaviour stated in each of these norms, ie an 'ought' proposition.⁷ This normative system is expressed in a hierarchical structure where the validity of a legal norm is inferred from a higher order norm, whose validity is thus derived from an even higher order norm and so on until it reaches the highest order norm, through a direct appeal to the Constitution, which is the source of the validity of all the derivative norms, ie the *Grundnorm* or 'origin-norm.'⁸ The premise on which Kelsen bases this validity has been the subject of much

³ Ibid 313.

⁴ Ibid.

⁵ Hans Kelsen, *What is Justice?* (California University Press, 1957) 266 quoted in Augusto Zimmermann, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 72.

⁶ Michael Freeman, *Introduction to Jurisprudence* (Sweet & Maxwell, 8th ed, 2008) 307 quoted in Zimmermann, above n 5, 73.

⁷ Peter Langford and Ian Bryan, 'Hans Kelsen's Concept of Normative Imputation' (2013) 26 *Ratio Juris* 85.

⁸ Andreas Kalyvas, 'The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory' (2006) 32 *Philosophy & Social Criticism* 573, 577.

discussion and criticism, particularly by his main intellectual opponent, Carl Schmitt, who mockingly comments that a legal norm is ‘valid if it is valid and because it is valid.’⁹ Kelsen’s validity theory and its transcendental application will be discussed further below.

Kelsen distinguishes his pure theory of law from both traditional natural law theory and traditional legal positivism, and instead identifies his theory as a ‘middle-way’ between the two traditional theories.¹⁰ Historically, natural law theory is subject to moral constraints while empirico-positivist theory is seen as part of the world of fact.¹¹ Kelsen rejects both theories, stating that neither are defensible and thus produces his alternative theory of pure law, one which is free from the ‘foreign elements’ of either theory, ie matters of morality and matters of fact.¹² *Pure Theory of Law* is Kelsen’s attempt to combine the separability of law and morality (or ‘separation thesis’) with the separability of law and fact (or ‘normativity thesis’).¹³ The separation thesis is the usual domain of legal positivism and the normativity thesis reflects a classical part of natural law theory, hence the combination of both theses effectively adopts a Kantian or neo-Kantian middle-way or, as Kelsen put it *mittelweg*, between the two theories.¹⁴ Kelsen’s alternative theory, however, is not a reflection of Kant’s moral or legal philosophy as, in fact, Kelsen saw himself as a champion of legal positivism, but rather

⁹ Carl Schmitt, *Die Verfassungslehre* (Duncker and Humblot, 1928) 9 quoted in William Scheuerman, ‘Carl Schmitt’s Critique of Liberal Constitutionalism’ (1996) 58 *Review of Politics* 299, 303.

¹⁰ Paulson, ‘The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law’, above n 1, 312.

¹¹ Ibid 314.

¹² Ibid 314–15.

¹³ Stanley Paulson, ‘On the Puzzle Surrounding Hans Kelsen’s Basic Norm’ (2000) 13 *Ratio Juris* 279, 282.

¹⁴ Ibid 281–2.

Kant's ability to develop a 'middle-way' in his transcendental argument,¹⁵ to which this paper will now turn.

III KANT'S TRANSCENDENTAL ARGUMENT

Kant is known for retaining some of the terminology of the medieval transcendentals, while rejecting the general features of the classification,¹⁶ such as his disregard for God-given natural law in his formulaic development of the 'categorical imperative.'¹⁷ Instead, Kant uses 'transcendental' to identify the conditions of possible cognition.¹⁸ In *Critique of Pure Reason*, Kant writes that he is using the term to speak of cognition or knowledge that is concerned 'not so much with the objects of cognition as with how we cognise objects, insofar as this may be possible *a priori*.'¹⁹ Kant refers to the study of *a priori* knowledge as transcendental metaphysics.²⁰ Thus Kant's transcendental argument asks how such knowledge or cognition is possible.²¹ Similarly, Kelsen retains something of the terminology of fundamental norms, through his basic norm (*Grundnorm*), but rejects the import of the norms as they are

¹⁵ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 320–3.

¹⁶ Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 283.

¹⁷ Zimmermann, above n 5, 36. For a discussion of Kant's formula of universal law and moral duty (ie the 'categorical imperative' or 'ought' proposition) see Patricia Kitcher, 'Kant's Argument for the Categorical Imperative' (2004) 38 *NOÛS* 555.

¹⁸ Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 283.

¹⁹ Immanuel Kant, *Critique of Pure Reason* (Norman Kemp Smith trans, Macmillan, 1929) [trans of: *Critic der Reinen Bernunft* (first published 1781)] B25 quoted in Paulson, above n 1, 323; Paulson, above n 13, 283.

²⁰ Anthony Kenny (ed), *The Oxford Illustrated History of Western Philosophy* (Oxford University Press, 1994) 168.

²¹ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 323.

understood in the traditional sense, ie from a moral standpoint.²² Thus, Kelsen utilises Kant's metaphysical, or abstract, transcendental argument of legal cognition on which to base his theory of the fundamental, or basic norm. It is important to note here, as Paulson does,²³ that Kelsen makes it clear that his theory does not follow the progressive version of Kant's transcendental argument, but rather the regressive or neo-Kantian version. The following is an explanation of this premise.

IV NEO-KANTIAN OR REGRESSIVE DIMENSIONS OF KELSEN'S THEORY

In *Pure Theory of Law* Kelsen clearly dissociates his theory with a progressive version of Kant's transcendental argument by stating that '... the Pure Theory is well aware that one cannot prove the existence of the law as one proves the existence of natural material facts and the natural laws governing them ...'²⁴ Instead, Kelsen relies on the neo-Kantian or regressive version which takes, as its starting point, the assumption that one *already has* the knowledge or cognition of legal propositions.²⁵ In his later works, Kelsen explains this concept by stating that

[o]ne can distinguish between lawful and unlawful command acts and objectively interpret interpersonal relations as legal relations,

²² Ibid.

²³ See *ibid*; Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 283, 287.

²⁴ Hans Kelsen, *Pure Theory of Law* (California University Press, 1967) 16 [trans of: *Reine Rechtslehre* (first published 1934)] quoted in Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 328; Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 283.

²⁵ Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 284.

specifically, as legal duties, rights, and powers, *only if* one presupposes the basic norm ...²⁶

As an illustration of this point, Paulson outlines Kelsen's regressive version of the transcendental argument in three phases; starting with a person's cognition of legal norms (which is given), then ensuring that the cognition of legal norms is possible only if the category of normative imputation is presupposed (ie the transcendental premise) and thus concluding, therefore, that the category of normative imputation is presupposed (ie the transcendental conclusion).²⁷ Kelsen compares the category of imputation with causation, stating that the '...laws of nature link a certain material fact as cause with another as effect [ie causation], so [do] positive laws link legal condition with legal consequence [ie imputation] ...'²⁸ Thus, Kelsen interprets Kant's transcendental argument in the same way as the neo-Kantians, that is in a backward or regressive sense – from a theory that is already cognised (given) to the presupposed category or principle.²⁹

V KELSEN'S BASIC NORM AND THE NEO-KANTIAN OR REGRESSIVE TRANSCENDENTAL ARGUMENT

According to Scheuerman, 'Kelsen's theory represented the most important mid-twentieth-century effort to construct an identifiably neo-

²⁶ Hans Kelsen, 'On the Basis of Legal Validity' (1981) 26 *American Journal of Jurisprudence* 178 quoted in Paulson, above n 1, 328; Paulson, above n 13, 287.

²⁷ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 326; Paulson, 'On the Puzzle Surrounding Hans Kelsen's Basic Norm', above n 13, 288.

²⁸ Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley Paulson trans, Clarendon Press, 1992) s11b [trans of: *Reine Rechtslehre* (first published 1934)] quoted in Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 326.

²⁹ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 330.

Kantian legal theory.’³⁰ Kelsen’s characteristically neo-Kantian delineation of *Sein* (is) from *Sollen* (ought) formed the basis of his middle-way approach (discussed above) whilst, at the same time, distinguished his system of norms from any discussions of morality, ethics and questions of substantive justice.³¹ This distinction between ‘is’ and ‘ought’ helped establish, inter alia, the validity of Kelsen’s legal norms.³² As has been addressed above, Kelsen’s system of norms formed a hierarchical structure whereby the validity of the basic norm is simply *assumed*, which is unsatisfactory as it does not answer the question as to *why* the norm is valid. Kelsen, himself, does not provide any clarification within his work, but could argue that Kant’s universal ‘categorical imperative’ to obey authority is justification enough of the validity of the basic norm.³³ Paulson states that to understand the validity of Kelsen’s basic norm, the neo-Kantian or regressive version of Kant’s transcendental argument must be implicit in the basic norm.³⁴ Hence, where Kelsen introduces his notion of normative imputation as his fundamental category, he implicitly introduces a transcendental argument to demonstrate this fundamental category as a presupposition.³⁵ Kelsen describes the basic norm as a ‘transcendental-logical presupposition’

³⁰ William Scheuerman, ‘Realism and the Kantian Tradition: A Revisionist Account’ (2012) 26 *Industrial Relations* 453, 458.

³¹ Ibid.

³² Paulson, ‘The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law’, above n 1, 324.

³³ Zimmermann, above n 5, 74. See Alida Wilson, ‘The Imperative Fallacy in Kelsen’s Theory’ (1981) 44 *Modern Law Review* 270 for a discussion on the irreconcilability of the origin and validity of Kelsen’s system of norms.

³⁴ Paulson, ‘The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law’, above n 1, 325.

³⁵ Ibid 325–6.

which enables the scientific study of the objective validity of his legal system of norms.³⁶

Therefore, in general, the issuance of legal norms, compliance with them, and their application of sanctions for non-compliance is possible only if the fundamental legal category of imputation is presupposed.³⁷ Paulson holds that no matter how Kelsen's neo-Kantian argument on behalf of the fundamental legal category is formulated or constructed, it still remains problematic.³⁸ The main problem being that the second premise of the three-phase argument outlined above claims too much in that the only way to support a normativist legal theory were by way of the category of imputation.³⁹ Kantians would argue though that ruling out all possible alternatives to Kelsen's category of normative imputation is tantamount to the *progressive* version of the transcendental argument; an argument which Kelsen did not have in mind when developing his theory.⁴⁰ Therein lies the problem because it appears that, as Kelsen had no intention of using the progressive version, he is using the regressive version independently of the progressive version which robs it of its transcendental force.⁴¹ Where the transcendental element is lost, the regressive version thus reverts to a scheme of analysis or, more simply, as a *legal point of view*.⁴² These problems aside, Paulson still maintains that

³⁶ Kalyvas, above n 8, 575.

³⁷ Stanley Paulson, 'Hans Kelsen's Earliest Legal Theory: Critical Constructivism' (1996) 59 *Modern Law Review* 797, 811.

³⁸ Ibid 811–12. See Stanley Paulson, 'Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory' (1999) 19 *Oxford Journal of Legal Studies* 351 for an account of the period between 1960–2 where Kelsen identified the problems associated with his theory and abandoned neo-Kantianism precepts in his transcendental approach.

³⁹ Paulson, 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law', above n 1, 331.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid 332.

Kelsen's neo-Kantian foundation of his legal theory is work that counts as one of the most provocative efforts of our time in coming to terms with the perennial problems of legal philosophy.⁴³

VI CONCLUSION

Kelsen based his pure theory of law, not on sociological considerations, but on the strict science of law itself. His pure theory reflects Kant's transcendental argument on legal cognition without adopting Kant's moral or legal philosophy. In applying the transcendental argument, Kelsen adopts a neo-Kantian or regressive version of Kant's theory which assumes that one already has knowledge or cognition of legal propositions. This assumption forms the basis of the validity of Kelsen's system of norms, supported by the presupposition of the category of normative imputation, ie the link between legal condition and legal consequence. As his critics point out, Kelsen does not provide clarification as to why these norms are valid, but relies instead on his 'ought' proposition (acting as a categorical imperative to obey authority) to justify the validity of the basic or ultimate norm. Although Kelsen's theory is viewed by some as problematic, it is still considered among many as important work in the field of legal philosophy.

⁴³ Paulson, 'Hans Kelsen's Earliest Legal Theory: Critical Constructivism', above n 37, 812.