

FICTION OF LAW (I)

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The Pure Theory of Law is not dead, it just smells funny.¹

That the legal scientific community is strongly inclined to preserve the theory of the Austrian legal scientist Hans Kelsen (1881–1973) as a fossil in the Kantian inventory is well-known. Perhaps it is most convenient to keep him in the Kantian and neo-Kantian archives, but I was no longer completely convinced of the accuracy of this classification when I took a closer look in the files. I was struck by the possibility of another classification of this relic, which led me to detect some similarities between Kelsen’s legal philosophy and, much to my amazement, the philosophy of Baruch Spinoza. The main concern became to explore the remarkable resemblances in their efforts to lay the foundation of a *philosophy of immanence and pantheism* in the fields of jurisprudence and political philosophy, respectively.

It was important to bring out these little known aspects of the Kelsenian legal theory in particular. I went further, however, and attempted to provide a different perspective to the history of legal philosophy in light of the opposed world-views of immanence and transcendence. As to that, a couple of palpable opponents were of course Spinoza and Hobbes in the 17th century philosophy; later, Kelsen and Carl Schmitt were in contrary camps during the political turmoil preceding the Second World War, especially on the question of democracy and sovereignty.² These themes were explored at some length in my essay ‘Immanence of Law’, and this two-part article is a development of a few thoughts originating in that text.³

* I would like to extend my thanks to Stephanie Hedrei Helmer for her help with the language and thereby considerably improving my text.

¹ When contemplating the contemporary necessity and desirability of fusion in the mid-seventies, Frank Zappa made a famous ironic statement, ‘*Jazz is not dead, it just smells funny*’ (Zappa/Mothers ‘Be-Bop Tango’ on the album *Roxy & Elsewhere*. Warner Bros, 1974).

² See David Dyzenhaus’ important work on the political tensions between Kelsen and Schmitt. Dyzenhaus 1997.

³ Gustafsson 1998. In the essay I made a close-reading of Kelsen’s use of the words ‘transcendence’, ‘dualism’ and ‘immanence’ in the *Reine Rechtslehre*, and through his ‘peripheral’ texts on religion I attempted to bring out the underlying political themes of his work, *the subterranean Reine Rechtslehre* so to speak. A shorter version, solely on Kelsen, appeared earlier in Swedish; Gustafsson 1995.

Departure

It may seem at odds with the (post)modern jurisprudential trends of today to engage oneself in the legal-positivist world-view and its specific problems, problems which of course partly emanate out of that world-view itself. But Kelsen is of considerable interest even today. He points to some very fundamental questions of legal theory on a variety of levels, such as origin, foundation, validity, 'ought'/'is,' morals, and politics, to name a few. He is also significant because of the peculiar way he poses these questions, not to mention the way he answers them (or doesn't). Kelsen's failure to solve these questions have left them unsolved even today – and they will, in some way or another, continue to be our concern.

Following some elements in the *Reine Rechtslehre* (*the pure theory of law*, hereafter), this essay will focus on the consequences for legal science that ensue from the choice to construct the legal system based upon an immanent or presupposed 'ultimate' norm, a *Grundnorm* (*the basic norm*, hereafter). What I convey here is not meant to be seen as definite theses that I support or strongly maintain. Rather this essay is an exploration of the vast (and ever expanding?) Kelsenian universe, this time with a particular focus on the examination of the basic norm as a specific device in the fields of legal epistemology or legal cognition. Using this strange and puzzling device, how did Kelsen himself look upon the legal system? What specific problems was the basic norm supposed to answer? And how did he envision the task of legal science?

I will proceed as follows: *Part I* gives a background scheme to the epistemological idea behind the pure theory of law, whereas *Part II* clarifies the underlying idea of the basic norm and tracks down its development over a time span of almost sixty years. *Part III* considers the consequences of a legal philosophy that assumes that legal concepts and frameworks are built on conscious fictions – that is, the consequences of legal fictionalism. Finally, *Part IV* rounds off with some themes on legal science in the light of the problematique of fictionalism and what socio-political rationale it may serve as an ideology that 'interpellates' its concrete subjects – that is, *us*. Or some of us...

PART ONE: A NEW METAPHYSICS

1. Norm is a norm is a norm is a norm...⁴

The well-known enterprise of Kelsen and the point of departure for his famous *pure theory of law* is to lay the foundation for a legal science that has to rely on its own objects – legal norms (*Rechtsnorme*) – without any reference to other norms or normative systems:

It attempts to answer the question of what the law is and how it is made, not the questions of what the law ought to be or how the law ought to be made. The Pure Theory of Law is a legal science, not legal policy. (Kelsen 1992 [1934], 7.)

Kelsen deploys quite a fascinating inquiry into the very limits of legal science *as* science, which must achieve its own particular scientific status. As sociology, ethics, politics and religion are outside its scope of explanation, it ‘aims to free legal science of all foreign elements’.

The theory posits a strict formal conception of the order of norms, where the contents of the individual norms (*Rechtsnormen*) are not relevant from a *scientific* point of view. The legal system is considered a chain of creation; the validity of a legal norm is not dependent on external grounds, but on its creation in accordance with a norm of higher dignity, which in turn is generated out of an even higher norm, which in turn is... and so forth. Consequently, the norms form a hierarchical structure of levels – a *Stufenbau*.

At some point no higher norms become available, and one must knit together the *Stufenbau*. Otherwise an infinite regress of validity would threaten the whole system, since the validity would not find an ultimate foundation to rest upon. The problem is solved with the aid of a basic norm, which states in all its simplicity that as a jurist one must take for granted that the legal system is valid. Given that the basic norm is regarded as valid, the legal system resting on it is also valid. Furthermore, the basic norm indicates the highest normative reference for the validity of the legal system – the Constitution. However, the infinite regress reappears even here, since one is of course theoretically obliged to ask for the validity of the constitution, and why one *should* obey it, and so forth. Ultimately

⁴ ‘Norm is norm!’ is Kelsen’s famous and irritated reply to Hart during a debate between the two at Berkeley in the autumn of 1961 and which sent Hart falling off his chair. See Lacey 2004, 251. Pardon my ‘steinian’ extension...

one is led back to assuming a ‘first’ constitution expressing an assumed ‘first’ act of will.⁵

The basic norm can not refer to any possible external conditions or transcendent foundations for its validity, since legal science would thereby be on its risky road, as Kelsen saw it, into other scientific fields. The basic norm cannot be a ‘factual’ or ‘real’ norm, but has to be *presupposed* (*vorausgesetzt*) and not posited (*gesetzt*) by the system that it validates. Kelsen’s own various descriptions and characterisations of this ‘presupposition’ are to follow in the subsequent text (part II, below). Three vital features of the basic norm are to be kept in mind:

1. The *Grundnorm* is an epistemological device serving a well-defined cognitive purpose;
2. The *Grundnorm* is internal (i.e. radically non-external) to the system and also immanent to it (i.e. radically non-transcendent);
3. The *Grundnorm* is presupposed, and not in any way actual or factual.

These features of the basic norm are to be illuminated in what follows. I will not try to show if they are untenable or not by performing a wearisome exegetical interpretation. Rather, I take them at face value as fundamental tenets of Kelsen’s system.

2. The very idea itself

In a sense, the basic norm is an evidently simple and a very appealing solution, as it puts an end to the otherwise infinite quest for an ultimate and, probably, unattainable origin of validity – the ‘tracing exercise’ must end here. Naturally the problem here is how such a presupposition can concurrently both *attain* auto-validity and *create* validity further down the legal system in a chain of creation – and this is exactly the other sense in which the answer is not so simple any longer,

⁵ The basic norm cannot furthermore be said to express a will (even though a legal proposition does), since that would first result in a vain search for the very original will (logical infinite regress, once again), and secondly, it implies that if the validity of the legal system relies on a will, it would in turn be based on a decision, which forces us to move in the direction of political decisionism as it was expressed and worked out by Kelsen’s opponent Carl Schmitt. Schmitt could not, partly by political reasons, embrace the concept of the normological purity. See his *Political Theology: Four Chapters on the Theory of Sovereignty*, 2005, and especially the famous chapter one, ‘Definition of Sovereignty’.

since the idea of a ‘presupposition’ somehow has to be embedded in an explanation of theoretical rigour.

It is well-known that Kelsen’s theoretical position is deep-rooted in Kantian and neo-Kantian epistemology.⁶ However because this essay is not particularly about that philosophy and his specific relation to it, providing a few sketches of it here will suffice.⁷ Anyone who is trying to come to grips with the neo-Kantianism of Kelsen will be confronted, according to Geert Edel, with a ‘great maze of problems’ (Edel 1998).

In short: Kelsen is trying to proceed by laying bare the *pure* formal fundamentals for the legal system, in the same way as Kant tried to lay the foundation for a *pure* theory of ethics, even though he rejected Kant’s ethics as such. That is, by establishing a ‘pure’ part, within the system, that aims to validate the ‘empirical’ (i.e. impure or non-pure) part. This influence on Kelsen’s ‘purity’ is clear from the very title of Kant’s work *Kritik der reinen Vernunft*. In other words, this method serves to make way for descriptions of the theoretical ‘ought’ expressed in legal propositions (*Rechtssätze*) that represent the prescriptions of the empirical ‘ought’ of individual legal norms (*Rechtsnormen*). So, even though the ‘ought’ belongs to the normative region of morals (or practical reason, according to Kant) it can nonetheless be described in a scientific way, as it also functions as an *a priori* category for the legal comprehension.⁸ Or put differently: Kelsen wants to give a ‘new metaphysical’ basis, though scientific, for a transcendental-logical condition (a pure ‘ought’) of practical judgments.⁹ The ‘transcendental question’ according to Kant is less concerned with the objects themselves (whatever they are), than with *how* we perceive and recognize them. How is such knowledge possible, and what kind of knowledge is produced?

For Kelsen the transcendental question becomes: what kind of knowledge is gained from a system of legal norms and how do we at all cognize such norms (i.e., formulate the *Rechtssätze*)? Only from some ‘pure’ (i.e. non-empirical)

⁶ The epistemological character of Kelsen’s theory is well beyond doubt, but see anyway Tur 1986; Stewart 1986, and Beyleveld & Brownsword 1998, 125f.

⁷ Besides seeing Kelsen’s strong impact from Kantianism, some authors detect such a resemblance that one might as well turn it around and distinguish clear Kelsenian elements already laid down in Kant. As regards to the former see Wilson 1986, and as for the latter view Steiner 1986.

⁸ Stewart 1980, 204. This double-nature of the ‘ought’ gives way to fundamental and long-lasting problems in Kelsen’s conception of the norm itself, see Hartney 1991.

⁹ The phrasing of Kelsen’s ‘new metaphysics’ is from Stewart 1980, 202f, and Stewart 1986, 125.

fundamentals or ‘presuppositions’ can we perceive them. One such fundamental is the distinction between ‘is’ and ‘ought’, another one is the (epistemological) unity of state and law, and a third is the ‘presupposed’ conception of the basic norm.¹⁰ The transcendental-logical theory thus provides a set of formal and constitutive conditions for being able to recognize objects (norms) that do not exist independently.¹¹ According to Kelsen, the disposition of cognition and recognition is only made possible by epistemology, or as Richard Tur rephrases it: ‘the pure theory of law is a thoroughgoing attempt to develop an epistemology for jurisprudence’ (Tur 1986, 157), and accordingly:

The Pure Theory of Law is not a book of knowledge but a book about knowledge. As a prolegomenon to all future jurisprudence which aspires to be scientific it must necessarily relate to the forms of knowledge and not provide knowledge itself. The *a priori* element of law is its form, not its content. (Tur 1986, 160.)

The transcendental-logical methodology of the pure theory of law is preoccupied with the *mode* of (legal scientific) knowledge, expressed in a number of *a priori* concepts or presuppositions. Here, Kelsen’s use of ‘transcendental-logical is analogous to Kant’s, but not identical’ (Stewart 1980, 213). It is interesting to note that Kelsen’s own conception of the bases of legal theory does not stem from Kant’s remarks on the ‘Metaphysical Bases of Legal Theory’ (*Metaphysische Anfangsgründe der Rechtslehre*) because it belonged to his ‘Metaphysics of Morals’ (*Metaphysik der Sitten*). Instead he took his scientific inspirations and requisites from Kant’s work ‘Metaphysical Bases of Natural Science’ (*Metaphysische Anfangsgründe der Naturwissenschaft*) and imported them to a normative high-risk zone, known as legal science.¹²

The basic norm is thus to be understood as a transcendental-logical presupposition – that is, non-empirical and expressing a pure ‘ought-norm’ – which makes it an epistemological device used for making legal re/cognition possible at all. Thereby also making a discussion of values (morals, ethics, justice, et cetera) feasible, which is desirable and indispensable for any legal theory. Hence, the *Reine Rechtslehre* is a ‘*Pure Theory of Law*’ and not a ‘*Theory of Pure Law*’ (‘*Lehre des reinen Rechts*’) as it has often been misconstrued.¹³ There can be no

¹⁰ See Paulson 1992, xxx ff.

¹¹ See Hammer 1998, 183.

¹² See Stewart 1980, 203. Also Hammer 1998, 181, and Luf 1998, 224.

¹³ Stewart 1986, 127. See also the mind-twisting Husserlian discussion on the different (infinite?) levels of ‘purity’ of the ‘pure theory’ by Minkinen 2005. Also, Raz 1998a.

such thing as a ‘pure norm’ in and of itself. Even less – which is a common misapprehension and an enduring bewilderment – can the empirical part make the ‘pure’ part invalid, but rather the basic norm and ‘its validity on the pure side cannot be questioned from the empirical side, since it is the condition of possibility, furnished by the pure side, for the empirical side’ (Stewart 1986, 132).

This transcendental-logical condition is not to be confused with a philosophy of *transcendence*, i.e. any philosophy claiming that a system (of thought, morals, law, etc.) gains its validity, meaning and truth by transcending itself. The *pure theory of law* is, or at least pretends to be, a philosophy of immanence that – confusingly perhaps – relies on a transcendental-logical epistemology in the Kantian or neo-Kantian manner.¹⁴

At this point it might be helpful to compare Kelsen with Hart. Whereas the Kelsenian basic norm is an epistemological device serving a cognitive function, Hart’s conception is the other way around. Namely, Hart’s ‘rule of recognition’ is a cognitive device serving a (potential) epistemological function. Where Kelsen is obsessed with the continental, or at least German, urge of finding a philosophically based epistemology of legal science, Hart is much more concerned with the factual validity of the legal system and its cognitive counterpart, thus following the more Anglo-Saxon empiricist tracks of Bentham and Austin. Hart without hesitation put forth, regarding the rule of recognition, that ‘its existence is a matter of fact.’¹⁵ Where Kelsen makes clear that ‘the doctrine of the basic norm is not a doctrine of recognition as is sometimes erroneously understood’ (Kelsen 1967 [1960], 218 note 83). Hart’s main interest is not ‘knowledge as such’ (in epistemological jargon), albeit a certain epistemology may very well appear from the cognitive standpoint – consequently it is not appropriate to charge him of lacking a theory of epistemology, since that was clearly not his major interest.

To illustrate: for Kelsen the basic norm is both epistemologically necessary and sufficient, whereas for Hart it is indeed cognitively necessary, but factually insufficient (as an epistemological presumption, that is).¹⁶ One is permitted to ask: does it really matter? The answer is at the same time undoubtedly affirmative and firmly negative. In the former case, Kelsen is out looking for knowledge provided by the legal system itself (and legal science), whereas Hart is content with the factual circumstances giving the legal system its validity, most notoriously in the

¹⁴ This is one of the main points made in Gustafsson 1998.

¹⁵ Hart 1981, 107. The rule of recognition is, furthermore, ‘an empirical, though complex, question of fact’, note 1 to chapter VI, p 245.

¹⁶ For a further discussion on necessary and sufficient conditions of epistemology/cognition, see Hammer 1998, 188, and Paulson 1998, xxxvi.

behaviour of his illustrious ‘officials’. In the latter case, it is of no practical significance whether we talk about legal science as epistemologically or cognitively founded, since the perspectives seem to clash together in the legal norm and its everyday application. All in all, it eventually comes down to a question of preferences regarding which juristic world-view one is opting for – one directed chiefly on knowledge, or one aiming at (re)cognition. Similarly, who’s approved to have a peek through the looking-glass: lawyers or the public? Insiders or outsiders?¹⁷

PART TWO: BASIC TROUBLES...

1. Transformations

As we now turn to the transformations of the basic norm, it should be kept in mind that the *pure theory of law* developed alongside and transformed simultaneously with the basic norm, and that the view offered above is a *general* description, from long periods of time, incorporating elements with transformations, tensions and inner contradictions of their own.¹⁸

In order to avoid confusion in what follows it is necessary to clarify the use of some concepts and abbreviations. Whenever *Reine Rechtslehre* or *RR* is used, it refers to the first edition of the pure theory of law from 1934. When *PTL* (‘The Pure Theory of Law’) appears, it is an abbreviation of the second, expanded and revised edition of the pure theory of law from 1960. Lastly, *Allgemeine Theorie der Normen* (the ‘General Theory of Norms’) or *ATN* denotes the so called third version of the *pure theory of law*, published posthumously in 1979. Wherever ‘pure theory of law’ is written it refers to the theory *as such* despite all its changes and not the relation to any specific version of it.¹⁹

Kelsen’s contraction of the basic norm and his stubborn insistence on its fundamental significance for legal science aroused vivid criticism. It is a truly contested concept, and it does not evaporate from the hallways of legal theory

¹⁷ For ‘cognitive’ reflections from the ‘personal point of view’ and the ‘scientific point of view’, see Raz 1998b, 62ff.

¹⁸ A comprehensive exposition of the evolution of the *pure theory of law* is offered by Hartney 1991, xx–liii.

¹⁹ Since the *pure theory of law* is not the main study of this essay, I have refrained from the standard abbreviations commonly used, i.e. *RR*¹ for the first edition, *RR*² for the second and *RR*³ for the final one .

despite all its turning points and alleged falsifications. An unmistakable scent lingers on even today – it sure smells funny. But Kelsen’s idea of the basic norm came to be a bothersome case, a contentious nuisance, even in his own mind. That said, let us to take a closer look at the various ways the basic norm has been expressed throughout his writings.

2. Metamorphoses

2.1 *Of things to come*

As early as 1914 – about ten years prior to the conceptual realization of the *pure theory of law* – Kelsen touched upon the reflection of an ultimate norm that established the unity of the legal system, which had the purpose of ‘juxtaposing the becoming (creation) of the norm with the being (existence) of the norm’ (Kelsen 1923, 13) in order to avoid drifting into an infinite regress of factual circumstances. Walter Jellinek had speculated in the previous year (1913) on an ‘ultimate norm that can be neither traced to a higher-level nor overturned’ and that it had to be regarded as some kind of *Denknotwendigkeit* (Paulson 1996, 223). Influenced mainly by Jellinek’s thoughts, Kelsen reflected, well, on his own – in *Reichsgesetz und Landesgesetz nach österreichischer Verfassung* (1914) – and came up with this:

One must always proceed from some sort of highest norm (or system of norms) that is itself presupposed as valid. Thus, the question of the validity of this ultimate norm, accepted qua presupposition of all legal cognition, lies beyond legal cognition. And the norm that is in the end presupposed as the highest norm is, then, the Archimedean point, so to speak, from which the world of legal cognition is set into motion.²⁰

But Kelsen is uneasy – no wonder, keeping in mind that he is only in his early thirties – about the accurate position of the basic norm:

The choice of this standpoint [namely, the choice of the highest, presupposed norm] is in principle not a legal question at all, but rather a political question. And the choice, therefore, must always appear arbitrary from the standpoint of legal cognition.²¹

²⁰ Translated by Paulson 1996, 223.

²¹ Translated by Paulson 1996, 224.

‘Political question’ in this setting implies, as far as I gather, *not* political ideology as such (right-wing or left-wing, liberal or what have you), but the constitutional or state-oriented conditions forming the very need for such a norm. Or, in the vein of Stanley Paulson’s interpretation, a reference to the *occasion* of the presupposition of the ultimate norm, i.e. to the new circumstances that a change, or even a rupture, sets about in the constitution.²² The criticism that can be – and was – directed at this definition is that it harbours the idea of a state-will contained in older positivist theories, from which Kelsen turned away from in due time.

Therefore, Kelsen was in fact by no means alone in his endeavour to find a crucial grounding basis for the legal system. Others, besides Jellinek, who ran on the same track in the midst of the First World War²³ were Alfred Verdross, who came up with the idea (in 1916) of the basic norm as a hypothesis referring to the material of the positive law, along with Leonidas Pitamic (in 1918) who threw out the suggestion of it being a presupposition of legal cognition, and lastly, Julius Merkl (in 1917) who tossed about the idea of the *Stufenbau* (Kelsen 1923, 13f). Kelsen eventually came to fuse these themes into his own theory, making it more consistent over the years.

2.2 An early draft

Some scant remarks on the basic norm were made by Kelsen over the years (in 1915, 1916 and 1920),²⁴ but it was not until some time later that we find it somewhat more well-defined. In one of the first drafts of what is to become the full-grown basic norm – in the *Foreword* to the second edition of his *Main Problems in the Theory of Public Law*, 1923 – Kelsen makes clear that:

The *basic norm*, as the highest rule of law creation, establishing the unity of the entire system, is indeed on hand for the issuance of other legal norms, but it must itself be assumed to be *presupposed* as a legal norm and not *issued* in accordance

²² Paulson 1996, 224. *Even though*, I would like to emphasize, the basic norm does have political implications in the Kelsenian scheme, namely as forming a legal philosophy of immanence that in its essence is democratic to its epistemological intent, i.e. if ‘democracy’ is a political ideology of course. For further elaborations on this theme, see Gustafsson 1998.

²³ Almost worth a study on its own: why the hunting of an ‘ultimate norm’ in the middle of a War? In addition, what was the common driving force behind five quite young researchers, Verdross and Merkl just about the age of twenty-five, Jellinek, Pitamic and Kelsen around thirty?

²⁴ For further information, see Paulson 1996, 225–230.

with other legal norms. Its creation must therefore be seen as a material fact outside the legal system. (Kelsen 1998 [1923], 13.)

This is what we are fairly accustomed to think the basic norm is about, even though some essential features of the classical definition to come (1934) are lacking in this early version. The idea of the basic norm as ‘presupposed’ has by now settled itself into the upcoming theory, but in this initial conceptualisation the basic norm still hangs on as to its creation to his earlier thought in that it is seen as a ‘material fact outside the legal system.’ The basic norm is still outside, not anymore as a purely ‘political question’ but as a ‘material fact,’ understood in a legal fashion, pointing to a more limited set of conditions that provide meaning to it.

The idea of the basic norm was not the only grounding principle in the *pure theory of law*. It also had to be connected to a more specific train of thought in an epistemological setting that swayed between several philosophers in that tradition. It is not a major concern here to unfold Kelsen’s inner development in relation to the tradition in question. Let me take a look at his explanation as to that anyway, because it can clarify his point of view:

It was by way of Hermann Cohen’s interpretation of Kant, in particular Cohen’s *Ethics of Pure Will*, that I arrived at the definitive epistemological point of view from which alone the correct employment of the concepts of law and of state was possible [...] I came to appreciate as the consequence of Cohen’s basic epistemological position – according to which the epistemic orientation determines its object, and the epistemic object is generated logically from an origin (*Ursprung*) – that the state, in so far as it is the object of legal cognition, can only be law, for to cognize something legally or to understand something juridically means nothing other than to understand it as law. (Kelsen 1998 [1923], 15f.)

In addition to being one of the strongest proponents of neo-Kantianism, Herman Cohen also had a strong and long-lasting influence on modern Judaism, which possibly gives a further clue to Kelsen’s interest in neo-Kantianism (and in Cohen). Even though I have earlier managed to trace unmistakable Jewish influences in Kelsen’s philosophy, the obvious importance of Cohen was, alas, not a specific theme in my previous essay.²⁵ These influences came especially from Spinoza’s

²⁵ On the Jewish neo-Kantianism of Hermann Cohen, see Rose 1993. Rose holds that Cohen ‘did not “read” Kant, he destroyed the Kantian philosophy. In its place, he founded a “neo-Kantianism” on the basis of a logic of origin, difference and repetition’ and his ‘logic is inseparable from his ethics and his philosophy of Judaism’ (Rose 1993, 112). A neglected path to be true, and perhaps Herman Cohen is the concealed ancestor of a distinctly ‘Jewish Legal

thoughts on immanence as opposed to Christian transcendence and *its* impact on natural law theories. In the next section Kelsen's relation to Cohen's neo-Kantianism will be considered in greater depth.

It is important to mention, at this stage, another impact on his early thoughts on the basic norm and *the pure theory of law*, since this impact will eventually take us into the part II of this essay:

Hans Vaihinger's analysis of personifying fictions (his 'philosophy of the *as if*') was also illuminating, inviting my attention to analogous situations in other fields of scientific enquiry. (Kelsen 1998 [1923], 16.)

Nevertheless, the *pure theory of law* is by now clearly set into motion and preoccupies Kelsen's mind throughout the twenties, where further details and philosophical tools are mended in his efforts of providing a consistent legal theory.²⁶

2.3 *The unpurloined letter*

Ten years later in a letter (1933) to Renato Treves, the Italian translator purifying *La dottrina pura del diritto* out of *Reine Rechtslehre*, Kelsen made some clarifications as to the 'spirit' of his theory:

Although it is altogether correct that the theory of the basic norm finds a certain support in Mach's principle of economy of thought and in Vaihinger's theory of fictions, nevertheless, owing to certain misunderstandings that have arisen from these references, I no longer wish to appeal to Mach and Vaihinger. What is essential is that the theory of the basic norm arises completely from the Method of *Hypothesis* developed by Cohen. The basic norm is the answer to the question: What is the presupposition underlying the very possibility of interpreting material facts that are qualified as legal acts, that is, those acts by means of which norms are issued or applied? This is a question posed in the truest spirit of transcendental logic. (Kelsen 1998 [1933], 173f.)

Positivism' that ignited the Jewish legal philosophers Georg and Walter Jellinek, and continued with their influence on the Austrian Jew Hans Kelsen, whose work was carried on by his 'disciple', the British Jew, HLA Hart that in turn have had a decisive impression on his American pupil Joseph Raz, the Jewish legal positivist of today.

²⁶ The term 'Pure Theory of Law' was first used as a subtitle in Kelsen's work from 1920, *Das Problem der Souveränität und die Theorie des Völkerrechtes: Beitrag zu einer reinen Rechtslehre*.

Ernst Mach's (positivist) philosophy and his principle of 'economy of thought' (*Denkonomie*), somewhat akin to Occam's razor, had a great impact on the scientific community at the beginning of the century, almost cutting off the roots of quantum physics.²⁷ Suffice it to say that it made Kelsen try to formulate a 'determining principle' for legal science, which however turned out to be difficult mainly because of its restricted logico-empiricist inclination.

Very little has been said about Hans Vaihinger thus far, and not very much was written on him by Kelsen in the twenties, even though Treves was accurate in his sensibility of tracking down these influences. Kelsen's own reflections at the time could have been nothing but a few remarks. I'll get back to this later on.

Leaving aside all the confusion as to what works and which specific aspects of Cohen's philosophical *œuvre* Kelsen is referring to,²⁸ it is nonetheless clear that an unambiguous reference is made to an overall influence by Cohen during these years. As Kelsen underscores heavily his intellectual debt to the Cohennian neo-Kantianism, he also points out, in his letter, that Cohen's 'legal philosophy is a theory of natural law, not a theory of positive law', and accordingly not apt to conform easily with Kelsen's own point of view. This is perhaps natural. Similarly Kant himself was bent towards natural law fashion, and neither he nor Cohen had the insights into modern (positivist) legal theory at the time.²⁹ In any case, Kelsen transformed the Cohennian methodology, making it fit into legal positivism by taking hold of the method of 'hypothesis' and importing it as a principle of legal science. This 'hypothesis' has nothing to do with a hypothesis in the manner of natural science that can be verified or falsified by empirical testing. On the contrary, it is not in the least beheld to experience but rather is the outline of the forms or conditions for thought itself – that is, necessary 'presuppositions' for epistemological considerations of thought and thinking itself. Experience and perception as such can not form the basis for scientific cognition, but must always

²⁷ See Lindley 2007.

²⁸ Edel 1998 claims that several ambiguities and confused contradictions are apparent in Kelsen's conception of Cohen. For example, in the afore mentioned 'Foreword' Kelsen refers in particular to Cohen's *Ethik des reinen Willens*, which to Edel seems utterly out of place, since that work is 'distinctly unkantian' and so on. For anyone with special interest in sorting out this question on Cohennian influences on Kelsen, see the introductory part of Edel 1998, 195–201.

²⁹ Kant's ethics in the word of Kelsen: 'utterly worthless' (as an appeal for the pure theory of law, that is), see Kelsen 1998 [1933], 173. Kelsen also accuses, which seems to me paradigmatic unfair, Cohen for 'lacking the courage' to overcome the Kantian transcendental philosophy and apply it to positive law. This was evidently not possible for Cohen to do, as it was for Kelsen to straighten this up.

fall back upon principles of thought (in order to make experience and perception comprehensible in the first place).

Cohen is opting for *pure cognition*, as is already clear from the title of his seminal work, *Logik der reinen Erkenntnis* (1902). Cohen's system first raises questions about the conditions for the possibility of science ('theorem of hypothesis'), and secondly traces the logical generation of the epistemic object from an origin or *Ursprung*³⁰ ('theorem of origin') – this is the 'transcendental method' of his epistemological point of view. Cohen is out to examine certain basic concepts and types of judgments that make up (a specific) science, which cannot in turn be based on other concepts that would lead to an *infinite regress*; they have to be *assumed* or *presupposed* as ultimate basic concepts and logical foundations, generated by means of thought (Edel 1998, 207). The *presupposition* of ultimate concepts is what is implied by the method of 'Hypothesis' and they serve, not as ultimate foundations (*Grundlagen*) themselves, but as the *laying of foundations* (*Grundlegungen*) (Edel 1998, 208f).

As is clear by now, this explains the influence on Kelsen and the aim of the pure theory of law. Legal theory is 'pure' if its explanation of validity is drawn exclusively from the positive law itself. In the same way that Cohen 'considers cognition exclusively in terms of cognition, Kelsen, in the *Reine Rechtslehre*, considers the law exclusively in terms of the law' (Edel 1998, 211). It is utterly important to make clear that the *immanence of cognition* and the *immanence of law* respectively, preclude any references to transcendent values. And in the systems of Cohen and Kelsen alike, 'Sollen' is not as much a transcendent value as a *transcendental category*.³¹ By extension we can also add that the basic norm *is a category*, not a value.

All in all, we can identify several decisive imprints on the pure theory of law that relate to Cohen's philosophy: first an epistemology of '*pure legal cognition*'; second a presupposition or '*hypothesis of a basic norm*'; third as a consequence of legal cognition, the '*unity of law and state*'; and fourth a '*theory of origin*'.

This will have to suffice in regards to tracing the general similitude of Cohen and Kelsen on the 'theorem of hypothesis'. Furthermore, I will postpone the discussion of the 'theorem of origin' until the very end of this article.

³⁰ See Edel 1998, 198.

³¹ Edel 1998, 206, points here to the *immanence of cognition* in Cohen's system, which resembles my own rendering of the *immanence of law* in Kelsen (and Spinoza). Gustafsson 1998.

2.4 *The classic formula*

In the *Reine Rechtslehre* of 1934 Kelsen's struggle with the basic norm and the transcendental-logical philosophy finally came to an end. It is here we find the classical formulation of the basic norm:

The Pure Theory of Law works with this basic norm as hypothetical foundation. Given the presupposition that the basic norm is valid, the legal system resting on it is also valid [...] The empirical data given to legal interpretation can be interpreted as law, that is, as a system of legal norms only if a basic norm is presupposed [...] It is valid not as a positive legal norm – since it is not created in a legal process, not issued or set – but as a presupposed condition of all lawmaking, indeed, of every process of the positive law [...]. With the doctrine of the basic norm, the Pure Theory analyses the actual process of the long-standing method of cognizing positive law, in an attempt simply to reveal the transcendental logical conditions of that method. (Kelsen 1998 [1934], 58.)

The basic norm has now settled as a 'hypothetical foundation' in the Cohennian spirit. It is 'presupposed' as previously conceived, and it supports the pure theory of law in its 'transcendental-logical' method. Throughout almost a quarter of a century this definition was at rest.

2.5 *A commencing deviation*

In the extended second edition of the *Pure Theory of Law* (1960), Kelsen emphasized further the basic norm as a 'transcendental-logical condition of normative interpretation'. Also the headline of one of its subsections is *The Basic Norm as Transcendental-logical Presupposition*:

Insofar as only the presupposition of the basic norm makes it possible to interpret the subjective meaning of the constitution-creating act (and of the acts established according to the constitution) as their objective meaning, that is, as objectively valid norms, the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of this interpretation, if it is permissible to use by analogy a concept of Kant's epistemology. Kant asks: 'How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?' In the same way, the Pure Theory of Law asks: 'How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?' The epistemological answer of the Pure Theory of Law is: 'By presupposing the basic norm that one ought to behave as the constitution

prescribes, that is, one ought to behave in accordance with the subjective meaning of the constitution-creating act of will – according to the prescriptions of the authority creating the constitution.’ (Kelsen 1967 [1960], 202.)

At first glance nothing seems to have changed, and the quote does not reveal anything peculiar. We still have the basic norm as a ‘presupposition’ as before, firmly sunk into the ‘transcendental-logical’ condition with its roots buried in the soil of neo-Kantianism. Yet something is in fact missing. Now, the concept of the basic norm as a clear-cut ‘hypothetical foundation’ in the vintage of 1934 is on its way out – in fact it is not even mentioned in the lengthy subsection 34 probing the basic norm. It is deliberately absent. However, more is to come in a few years.

Before we move on, the particular way the basic norm refers to the order it validates should be noted, as Beyleveld and Brownsword have pointed out. The basic norm relates to the order it validates in two ways, *presuppositionally* and *definitionally*. We have dealt with the *presuppositional relation* at some length already, but it too can be comprehended in two ways, as a ‘hypothetical’ relation or a ‘dialectical’ relation. Concerning the hypothetical, according to Beyleveld and Brownsword, ‘we can only say, “*Only if* the basic norm is accepted can we characterize the validated order as objectively valid.” We cannot say “*Because* the basic norm [etcetera]”.’ When the presuppositional relation is understood as a dialectical one, ‘we can only say, “*Only if* the basic norm *is accepted (regarded as if true)* can we *characterize (regard)* the validated order as objectively valid”.’ Meanwhile, the *definitional relation* of the basic norm’s function is to validate a specific legal order, rather than another legal order, in that ‘norms are unified as norms of the same order by sharing the same basic norm and [regards] a basic norm as, in a logical sense, the constitution of the order that it validates.’³² Understanding norms as ‘unified norms’ does not seem to provide the room for distinction between, for example, primary and secondary rules as given by Hart, and no more for an application of anything resembling a secondary ‘rule of recognition’ to the basic norm.

2.6 Transitory becomings

In *The Function of a Constitution (Die Funktion der Verfassung)* from 1964 the new direction is set out by Kelsen. First of all, Kelsen still retains the opinion that:

³² Quotations from Beyleveld and Brownsword 1998, 123f.

The basic norm as presented in legal science may be characterized [...] as the transcendental-logical condition of the judgements with which legal science describes law as objectively valid order. (Kelsen 1986 [1964], 116.)

Clearly nothing new here. However, on second consideration he takes a step into another direction:

Along with the basic norm, presupposed in thought, one must also think of an imaginary authority whose (figmentary) act of will has the basic norm as its meaning. With this fiction, the assumption that the constitution, whose validity is grounded by the basic norm, is the meaning of an act of will of a supreme authority, over which there can be no higher authority. Thus the basic norm becomes a genuine fiction in the sense of Vaihinger's philosophy of 'as if'. A fiction in this sense is characterized by its not only contradicting reality but also containing contradiction within itself. (Kelsen 1986 [1964], 117.)

At an age past eighty, and after a detour of about forty-five years, Kelsen reintroduces the concept of *fiction* as it once influenced him in his early thinking. This short piece of work is of tremendous importance since it truly is a transitory work. It exposes all the tensions that are distinctive of such a text undergoing a shift of thought. It shows his hesitation to leave behind an old idea, but also his confidence to employ a new concept in his theory, a standpoint he was forced to take. Forced by no one else but himself, though.

His text still hangs on to the earlier version of the basic norm as a transcendental-logical presupposition, but it also tries to introduce a new way to extract the essence of the basic norm. We can *in the text itself* observe the visual transformation of the New Basic Norm, its textual birth so to speak, in the performative act of introducing the word '*becomes*' – 'the basic norm *becomes* a genuine fiction'.

In the remaining decade of his life Kelsen devoted himself to deciphering the inherent and regressive enigmas of his pure theory of law.

2.7 A Posthumous Riddle

In the posthumous work of 1979 entitled *Allgemeine Theorie der Normen*, an additional amplification of his unease is expressed (in the quote proceeding), but also a strong uncompromising attitude towards his last position. Appearing close to the end of Chapter 59 on 'Logical Problems about Grounding the Validity of Norms' we come across an immensely opaque passage – 'D. The Basic Norm Is a Fictitious Norm:'

As is obvious from the foregoing, the Basic Norm of a positive moral or legal system is not a positive norm, but a merely thought norm (i.e. a fictitious norm), the meaning of a merely fictitious, and not a real, act of will. As such, it is a genuine or 'proper' fiction (in the sense of Vaihinger's philosophy of As-if) whose characteristic is that it is not only contrary to reality, but self-contradictory. For the assumption of a Basic Norm – for instance, the Basic Norm of a religious moral order 'Everyone is to obey God's commands', or the Basic Norm of a legal order 'Everyone is to behave as the historically first constitution specifies' – not only contradicts reality, since there exists no such norm as the meaning of an actual act of will, but is also self-contradictory, since it represents the empowering of an ultimate moral or legal authority and so emanates from an authority – admittedly, a fictitious authority – even higher than this one. According to Vaihinger, a fiction is a cognitive device used when one is unable to attain one's cognitive goal with the material at hand. The cognitive goal of the Basic Norm is to ground the validity of the norms forming a positive moral or legal order, that is, to interpret the subjective meaning of the norm-positing acts as their objective meaning (i.e. as valid norms) and to interpret the relevant acts as norm-positing acts. This goal can be attained only by means of a fiction. It should be noted that the Basic Norm is not a hypothesis in the sense of Vaihinger's philosophy of As-If – as I myself sometimes have characterized it – but a fiction. A fiction differs from a hypothesis in that it is accompanied – or thought to be accompanied – by the awareness that reality does not agree with it. (Kelsen 1991 [1979], 256.)

From the first explanation of the basic norm as a Neo-Kantian concept highly dependent on Cohen's *theorem of Hypothesis*, through its bold assessment as a Kantian *transcendental-logical presupposition*, it finally ends up in the very last decade as a *genuine fiction*. Kelsen himself was over ninety years old when he undertook this change of thought in his system.

The quote needs some demystification. The main problem is that Kelsen in his later thinking reintroduced the problematique of an 'act of will' or 'will-theory', thereby injecting the fuel of subjectivity or 'subjective idealism' into the machinery of the pure theory of law.³³ By consequence *two* regressive systems emerged. On the one hand, the same old 'Stufenbau' problem that led him to the basic norm. On the other hand, there is a regressive system of wills faced with exactly the same problem. Iain Stewart points out this discrepancy:

If 'norm,' including 'basic norm,' is defined as the meaning of an act of will and also as 'objective' in Kelsen's sense, the will concerned must also be 'objective'

³³ See for example Paulson 1998 and Hartney 1991.

in that sense. That is: it must be a supra-individual will. And it is not enough for that will to be merely 'imaginary' or 'fancied': it must be presupposed as an actual will, if the presupposed 'objectivity' of legal norms is to be actual and jurisprudence to be possible as descriptive science. [...]. The concept of the 'basic norm,' which was to have allowed legal science to dispense with the allegation of an absolute subject, itself makes that allegation. (Stewart 1980, 207.)

Now the only way to overcome the tensions and to save the entire system of the pure theory of law is to reintroduce the concept of fiction.

First of all the word 'becomes' from the text of 1964 has disappeared in the *Allgemeine Theorie der Normen* since the concept of 'fiction' is now already born into the pure theory of law. But as the work was posthumous, and as the *Reine Rechtslehre* finally changed its title, the basic norm in its new shape was, to put it frankly, *the dead-born child of Kelsen*. Yet we should not refrain from an autopsy.

Secondly, his strong emphasis on the basic norm as a Kantian transcendental-logical presupposition has at last been abandoned in favour of a 'proper fiction' in the sense that Vaihinger described.

Thirdly, he altogether rejects the basic norm as a hypothesis. While at this final stage, it seems that Kelsen is imprecise and highly ambiguous in his use of the concept 'hypothesis'. His earlier conception was clearly influenced by Cohen's understanding of 'hypothesis' in its logico-methodological sense. It was meant to be a presupposed *Grundlegung*. Yet in his refutation of the 'hypothesis' in his late conception it appears that it was indeed understood ('as I myself sometimes characterized it') in Vaihinger's definition of it (as a 'semi-fiction', see below). That is, it was exactly a 'hypothesis' in the natural scientific way, set up for verification or falsification.

So, one might ask, what definition of 'hypothesis' is being refuted? *Either* he maintains a rigorous version of it, but then it is a mystery why he rejected Cohen in 1979, since it should be in agreement with Vaihinger's philosophy. *Or* he must in fact have interpreted it as a Vaihingerian hypothesis all along. However, why did he then reject Vaihinger in 1933?

In order to answer these questions, we have to travel back once again to the young Kelsen and to the years when the *pure theory of law* started to take shape. As should be evident by now, the German philosopher Hans Vaihinger definitely bothered Kelsen throughout his career. Already in 1919 Kelsen wrote a review-essay on Vaihinger's major work, *The Philosophy of 'As-if'*³⁴. But before we take a closer look at his review, we must turn *as if* to the man himself.

³⁴ Kelsen 1968 [1919].

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