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Hans Kelsen's Basic Norm: Transition from the Transcendental-Logical Condition to a Fiction

Hans Kelsen's legal philosophy plays a significant role in shaping modern legal thinking. The defining, primary concept of his legal theory is the basic norm, which was represented as a transcendental-logical condition until 1960, and then, in the last years of his work, as a fiction. The article is dedicated to the study of the mentioned change, in particular, to the discovery of the influences of Cohen's and Vaihinger's philosophical doctrines in the formation of the contents of the basic norm and their criticism. The paper will also discuss the possibility of solving the problem that we come against when separating the pure theory of law from natural law and legal positivist traditions.

Keywords: *Kelsen, the basic norm, the jurisprudential antinomy, the transcendental method, fictionalism.*

1. Introduction

Hans Kelsen is considered as one of the most important legal theorists of the 20th century. In 1934 Roscoe Pound wrote that Kelsen was the leading jurist of the time,¹ and H.L.A. Hart called him the most stimulating author on analytical jurisprudence.² He was an advisor to the last Emperor of Austria-Hungary, a founding father of the 1920 Austrian Constitution, and held the position of a member of the Austrian Constitutional Court, which he had to leave for political reasons. In his article published in 2003, "Hans Kelsen and the Logic of Legal Systems", Michael Green points to a non-exhaustive survey he has conducted, according to which the non-English literature written on Kelsen in the last 20 years includes at least 75 books, but in some geographical areas of the world, such as Latin America and Italy, his influence is so significant that legal philosophy is considered as the "dialogue with Kelsen". As for the English-speaking world, after decades of neglect, interest in his works has reached the highest level.³

Kelsen proceeded steadily and deliberately to develop and perfect the Pure Theory of Law that he had begun in the early 1910s. In the last years of his career, in the 1960s, he made two radical changes with reference to the theory. First, he rejected the idea, which he insisted on throughout his whole life, that contradictory norms could not be simultaneously valid.⁴ Second, he changed his attitude towards the founding concept, the basic norm, which in his Kantian or neo-Kantian phase

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¹ *Pound R.*, Law and the Science of Law in Recent Theories, The Yale Law Journal, Vol. 43, № 4, 1934, 532.

² *Hart H.L.A.*, Kelsen Visited, in: Essays in Jurisprudence and Philosophy, Oxford, 1983, 308.

³ *Green M.S.*, Hans Kelsen and the Logic of Legal Systems, Alabama Law Review, Vol. 54, № 2, 2003, 365.

⁴ See: *Kelsen H.*, General Theory of Norms, *Hartney M.* (trans.), Oxford, 1991, 213-214.

considered a transcendental category to explain law's normativity and its systematic-hierarchical unity, and since the 1960s, after the second edition of the "Pure Theory of Law", he is no longer satisfied with the definition of the basic norm as the result of an act of thinking rather than the act of will, and displays it as a fiction.⁵

This article will try to find out what was the reason for the formation of the concept which lasted for half a century and its subsequent change. However, before moving on to the discussion of the aforesaid, it is necessary to analyse the Pure Theory of Law as a systematic activity different from positive-law and natural-law theories. Although, according to the "general view", Kelsen is considered as a legal positivist, as Stanley Paulson, a prominent Kelsen scholar points out in his 1992 article, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," the theory's normativist dimension is what distinguishes it from reductive or naturalistic aspirations that are typical for scholars considered in the legal positivist camp.⁶

The main part of the article includes three directions. First off, as the jurisprudential antinomy will be overcome, the characteristics of separation of the Pure Theory of Law from the prevailing classical theories will be established. In the second part will be discussed Kelsen's neo-Kantian, in particular, Herman Cohen's influence, which determines the establishment of the ideas and categories necessary for the existence of legal science, in which the basic norm will appear as a presupposed condition of lawmaking. And the main topic of discussion of the third part is Kelsen's "changed heart", during which the basic norm will be vested with the content of Hans Vaihinger's fiction.

2. Antinomy in Jurisprudence: Departure from the Traditional Theories

On the first page of the second edition of the "Pure Theory of Law" Kelsen tries to clearly define the methodological basis of the theory he developed, to establish it as a general theory of law and not as an interpretation of specific national or international legal norms, with the main goal to free the science of law from alien parts and to reject and criticise the historical experience which caused the bonding of "foreign" elements in it:

"Yet, a glance upon the traditional science of law as it developed during the nineteenth and twentieth centuries clearly shows how far removed it is from the postulate of purity; uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law. The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism)

⁵ See: *Duxbury N.*, Kelsen's Endgame, *The Cambridge Law Journal*, Vol. 67, № 1, 2008, 51-61.

⁶ *Paulson S.L.*, The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, *Oxford Journal of Legal Studies*, Vol. 12, № 3, 1992, 312. Kelsen overcomes the "jurisprudential antinomy" by distancing himself from the traditional legal theories, which is Paulson's interpretation and not explicitly expressed by Kelsen himself, although we will see later that this interpretation is convincing.

which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter.”⁷

Kelsen thought that the “purity” of the theory should be secured in two directions. First, it had to be separated from the sociological point of view, which used methods established in the sciences operating on the principle of causality to evaluate law and represented it as a part of nature. Second, it had to be separated from the natural-law theory, which took legal theory out of the space of positive legal norms and brought it into an ethico-political dimension.⁸

Against the natural-law doctrine (its objectivity), Kelsen criticises Plato and declares his concept of justice as irrational. The answer to the question, what is justice, must presuppose “the good”, which is intuitively given and formed as inner knowledge that is only to the chosen ones and, insomuch, is an inexpressible (inconceivable in rational concepts) secret. Therefore, it is an expression of mysticism.⁹ In law the absolute value designated by the word “ought” only means that “you ought to do what you ought to do” and not that “you ought to do good and avoid evil.” Justice, as an absolute value, lies as much outside of positive law as Plato's world of ideas lies outside of natural reality or the transcendent thing-in-itself lies outside of its actual manifestation. The metaphysical dualism between law and justice is similar to the mentioned ontological dualisms. Just as it is impossible to understand rationally based on experience the Platonic idea or the thing-in-itself, so it is impossible to say what justice is.¹⁰ Herewith, the Pure Theory of Law takes an anti-ideological position as it deals with cognition, while the basis of ideology is the will.¹¹

Kelsen also criticises the reduction of law to the fact, noting that “The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: the norm is an *ought*, but the act of will is an *is*.”¹²

The initiation of the jurisprudential antinomy pertains to the fact that there are two legal traditions (respectively, the “morality thesis” and the “separability thesis” – the name of the latter is derived from and even reminds us of Hart's famous essay “Positivism and the Separation of Law and Morals”¹³), which excludes the third, and furthermore, both traditions cannot withstand criticism separately.¹⁴ It is an “echo” of Kant's mathematical antinomies which the German philosopher talks about in “Critique of Pure Reason”; Kant introduces mutually conflicting arguments, in the form of

⁷ Kelsen H., *Pure Theory of Law*, Knight M. (trans.), Berkley and Los Angeles, 1967, 1.

⁸ Paulson S.L., *The Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, *Oxford Journal of Legal Studies*, Vol. 12, № 3, 1992, 313. See: Kelsen, *Hauptprobleme*.

⁹ Kelsen H., *Platonic Justice*, *International Journal of Ethics*, Vol. 48, № 3, 1938, 396-400.

¹⁰ Kelsen H., *Introduction to the Problems of Legal Theory*, Paulson B.L. & S.L. (trans.), Oxford, 1992, 16-17. Kelsen links the “rise” of natural law theory to the period of the police state of absolute monarchies, and positive law to the 19th century, when the liberal bourgeoisie agenda swept Europe, accompanied by the progress in the empirical natural sciences and the breakdown of the metaphysical understanding of religious ideologies and philosophy. See: *ibid*, 21.

¹¹ *Ibid*, 19.

¹² Kelsen H., *Pure Theory of Law*, Knight M. (trans.), Berkley and Los Angeles, 1967, 5.

¹³ Hart H.L.A., *Positivism and the Separation of Law and Morals*, *Harvard Law Review*, Vol. 71, № 4, 1958, 593-629.

¹⁴ Paulson S.L., *The Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, *Oxford Journal of Legal Studies*, Vol. 12, № 3, 1992, 313-314, 318-319.

thesis and antithesis, for example, the temporal beginning and spatial closure of the world is opposed by the antithesis of spatio-temporal infinity, and their synthesis, the concept of totality, cannot be given/apprehended. Kant calls the unifying thought of theses dogmatism, and antitheses – empiricism, and sees the only way to remove the contradiction in the revelation of falsity of both. Dogmatic rationalism and skeptical empiricism can be overcome in the form of transcendental idealism, which states that the objects of experience are never given in themselves. For instance, both propositions that the world is infinite in magnitude and that the world is finite in magnitude, present the world as the thing-in-itself, that must be dismissed because the world can only be represented in relation to the consciousness. It is a mistake to assume absolutely unconditioned empirically. The world is not a whole existing in itself; It is an appearance and appearances do not exist without our representations.¹⁵

Despite that the traditional theories consider the approach between law and morality as the primary difference and turn this issue into theses, Kelsen realised that there is another perspective that represents the relation between law and fact, so there are not two but four theses. Positive law emphasizes on the inseparability of fact and law, which is a reductive thesis, while natural law highlights the separation of fact and law, and therefore, it represents an antithesis.¹⁶

As we received four theses, it is possible to “pair” them in this way. The morality thesis (inseparability of morality and law) and the normativity thesis (separation of law and fact) are constituents of natural law, and the separability thesis (separation of morality and law) and reductive thesis (inseparability of law and fact) are constituents of empirical-positive law. The contradiction can be overcome if from each tradition non-contradictory theses are selected. Kelsen should still be considered as a legal positivist, because he defends the main idea of separation of law and morality, although he “teams up” with it not the reductive approach of reducing law to facts, but the normative thesis.

As social science differs from natural science, it must have a principle other than causality. Natural sciences describe phenomena in terms of cause and effect, for instance, metal expands when heated, while heating is the cause and expansion is the effect. Society, as an object of science, represents a normative order of human behavior and it must be based on some principle (in Kelsen's opinion, this principle does not as yet have its own name in science), which Kelsen calls the principle of “normative imputation”, which just as causality connects a cause to an effect, also provides the possibility of connecting two elements, that sounds as: “If x, then the coercive act y ought to be executed” (it shares the feature of “causality” as of a Kantian category). The legal norm becomes the legal proposition, which expresses the initial, basic form of positive laws. The legislator establishes a connection between two material facts, for instance, between crime and punishment, “imputates”, or if you would like, “ascribes” them to each other. It differs from the causal relation since the unity formed by this normative connection and its demand may not be fulfilled. It should be noted that a person will be “charged”, “imputed” legal responsibility only if we combine the principle of “imputation” with

¹⁵ Kant I., Critique of Pure Reason, *Papuashvili Sh. (trans.), Tevzadze G. (ed.)*, Tbilisi, 1979, A426-438/B454-466, A462-567/B490-595 (in Georgian).

¹⁶ Paulson S.L., The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, *Oxford Journal of Legal Studies*, Vol. 12, № 3, 1992, 319.

the concept of “responsibility”, because, for instance, a person who cannot realise the actual nature of his actions due to his mental illness, cannot be punished, so towards him a legal condition cannot be attached to a legal consequence.¹⁷

Let's discuss a specific example: if a person does not pay his debt, a civil execution ought to be directed into his possessions. There is a legal condition (non-payment of the debt, which is a material fact) and a legal consequence (implementation of a civil execution); civil delict and civil execution. Unlike a causal relation that says: “When A is, *is* (will be) B”, a legal proposition (which describes a legal norm) says: “When A is, B *ought* to be”.

Accordingly, in order to distinguish his theory from the ideas of the empirical-positivist philosophical school, Kelsen contemplates the legal norm as a scheme of interpretation of acts of will. The external fact, whose objective meaning can be a legal or illegal act, represents natural phenomenon determined by causality that occurs in time and space and is perceived by the senses, although it, as a part of nature, is not an object of legal cognition: “What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation.”¹⁸ And contrary to the philosophy of natural law, the legal norm is a social technique, which, based on the principle of responsibility, connects the legal condition to the legal consequence in the legal proposition, and as the legal consequence determines the sanction citizens want to avoid. Legal *ought* represents a relative (and unlike morality, not an imperative) a priori category for understanding empirical legal data.

3. Cohen, Kelsen and the Transcendental Method

The legal system consists of norms and higher norms determine the possibility of creating lower norms, granting authority to the state organs (which also includes specific people) to enact the rules regulating behavior. Why does the subjective meaning of the command of a gangster, the act of his will to turn over to him a certain amount of money, unlike the same kind of command of an income tax official, not become a norm interpreted as an objectively valid? The answer is simple, because in the second case the act is authorized by the valid norm. So, the legal system is hierarchical. A search for the chain of authorization leads to the historically first constitution, which stands at the top, and just as God has no “higher” authority, so its “higher” founding document can't be found. The question arises, why or how should we accept the objective meaning of the Constitution as a legally valid document? It is impossible to refer to a “super-constitution”, because it simply does not exist, but we can presuppose some ought statement which commands obedience to the historically first constitution. However, won't it be an endless chain? As William Buckland, professor at the University of Cambridge observed, does not the supposition of a super-norm require the supposition of another still superior norm, and so on *ad infinitum*? Just as the earth was believed supported by elephants and tortoises.¹⁹

¹⁷ Kelsen H., *Pure Theory of Law*, Knight M. (trans.), Berkley and Los Angeles, 1967, 75-81.

¹⁸ *Ibid*, 3-4.

¹⁹ *Buckland W.W.*, *Some Reflections on Jurisprudence*, Cambridge, 1945, 21.

For the basis of the theory Kelsen develops the concept of the basic norm, which in principle remains unchanged during the quarter of a century, that is the time between the first and the second editions of the “Pure Theory of Law”. In the 1934 edition, he states that the basic norm is simply the expression of the necessary assumption for the positivistic understanding of legal data, and it is valid not as a legal norm, but as a presupposed condition of lawmaking.²⁰ In the 1960 edition, he states that since historically legal authority higher than the creator of the first constitution, and consequently, an act of his will don't exist, the basic norm cannot be posited norm, but only the norm presupposed by the juristic mind, that is the meaning of an act of thinking, not an act of will. It is a precondition for an effective coercive order to be interpreted as a system of objectively valid legal norms.²¹ The question of the validity of the basic norm cannot be raised, because it is a condition of system's validity. To illustrate this, Kelsen provides following example:

“A father orders his child to go to school. The child answers: Why? The reply may be: Because the father so ordered and the child ought to obey the father. If the child continues to ask: Why ought I to obey my father, the answer may be: Because God has commanded “Obey Your Parents”, and one ought to obey the commands of God. If the child now asks why one ought to obey the commands of God, that is, if the child questions the validity of this norm, then the answer is that this question cannot be asked, that the norm cannot be questioned – the reason for the validity of the norm must not be sought: the norm has to be presupposed.”²²

Kelsen establishes the epistemological basis for the theory of law developed by him on the transcendental method used by neo-Kantian Herman Cohen, a method which is focused on the discovery of non-empirical necessary conditions for the cognition of any knowledge. It is true that Kant did not use the term “transcendental method”, although he uses the term “transcendental deduction”, which is a method of discovering the universal conditions of objective empirical knowledge.²³

In “Critique of Pure Reason” Kant speaks about the representation through which the object can be known. The relation between the object and the representation can be of two kinds: when the object alone makes the representation possible or conversely, when the representation alone makes the object possible. The first relation is only empirical, and the second is divided into two forms, the first is intuition, through which an object is given to us in the form of an appearance, and the second is concept, through which an object is thought. What makes possible objects to be intuited lies in the mind as a formal condition of sensibility,²⁴ and “concepts of objects in general lie at the ground of all experiential cognition as *a priori* conditions”.²⁵

²⁰ Kelsen H., Introduction to the Problems of Legal Theory, Paulson B.L. & S.L. (trans.), Oxford, 1992, 58.

²¹ Kelsen H., Pure Theory of Law, Knight M. (trans.), Berkley and Los Angeles, 1967, 204.

²² Ibid, 196-197.

²³ Heidemann C., Hans Kelsen and the Transcendental Method, The Northern Ireland Legal Quarterly, Vol. 55, № 4, 2004, 358. See: Kant I., Critique of Pure Reason, Papuashvili Sh. (trans.), Tevzadze G. (ed.), Tbilisi, 1979, §13-27 (in Georgian).

²⁴ Kant I., Critique of Pure Reason, Papuashvili Sh. (trans.), Tevzadze G. (ed.), Tbilisi, 1979, B125/A93 (in Georgian).

²⁵ Ibid, B126.

Kant puts an accent on the “comprehension of the manifold of representations”, which can be given in an intuition, that is merely sensible, yet the combination of the manifold can never come to us through the senses. Since the person who says “I think” is capable of combining manifold of representations in one consciousness, “this self-consciousness”, one could argue, is not derived from experience, but is a condition of that experience. Kant calls it the “transcendental unity of self-consciousness”, or in order to distinguish it from the empirical one – “pure apperception”.²⁶ He calls categories those concepts that “prescribe laws *a priori* to appearances, thus to the nature as the sum total of all appearances”.²⁷

Speaking about the basic norm as a “transcendental-logical” concept, Kelsen mentions Kant, who asks : how is it possible without a metaphysical hypotheses to interpret the facts perceived by the senses, in the laws of nature given by the natural sciences? The Pure Theory of Law asks the same kind of question: how is it possible without a meta-legal “authority”, such as God or nature, to interpret the subjective meaning of certain facts as objectively valid (describable as legal propositions) legal norms? The epistemological answer of The Pure Theory of Law is the basic norm, which interprets the subjective meaning of the acts of human beings, here an act of will of the founders of the constitution, as their objective, i.e. legal meaning.²⁸ The science of law, i.e. cognition of the law, like every cognition, creates its object to the degree that it comprehends the object as a meaningful whole. Just as the chaos of sensual perceptions turns into an ordered unified system, i.e. “nature”, as a result of its cognition by the natural science, so the multitude of general and individual legal norms “becomes” a legal order by the science of law.²⁹

However, as mentioned above, Kelsen does not use Kant's “transcendental deduction”, but the neo-Kantian Cohen's “transcendental method”.³⁰ Cohen begins with the science in which the object is given, and not with the transcendental unity of self-awareness that “I think” must accompany all our ideas, and probes the question: which presuppositions are responsible for the certainty of the scientific fact.³¹

In the second edition of the “Main Problems in the Theory of Public Law”, published in 1923, Kelsen denotes that the neo-Kantian theory first caught his attention in 1912, when he discovered

²⁶ Ibid, B130-B135.

²⁷ Ibid, B164.

²⁸ *Kelsen H.*, Pure Theory of Law, *Knight M. (trans.)*, Berkley and Los Angeles, 1967, 202. The legal proposition (*Rechts-Satz*) differs from the legal norm (*Rechts-Norm*). The first is a component of the science of law, it is a statement about an object of cognition, that is law-describing, true or false, and the legal norm is either valid or not. The “ought” used in the former is descriptive and in the latter – prescriptive. See: Ibid, 71-72.

²⁹ Ibid, 72.

³⁰ It is worth mentioning that Kant himself was aware of the difference between these two methods. In the “Prolegomena” he distinguishes between synthetic (progressive) and analytic (regressive) methods. See: *Kant I.*, Prolegomena to any Future Metaphysics with Selections from the Critique of Pure Reason, *Hatfield G. (trans.)*, Cambridge, 2004, 4:275.

³¹ *Heidemann C.*, Hans Kelsen and the Transcendental Method, *The Northern Ireland Legal Quarterly*, Vol. 55, № 4, 2004, 359. See Citation: *Cohen H.*, Das Prinzip der Infinitesimal-Methode und seine Geschichte, *Flach W. (ed.)*, Frankfurt/M., 1980, 47-48.

certain similarities between his and Cohen's works.³² Kelsen accepts the “factum of legal science”, defines the pure science of law as a theory that must discover the conditions which make this “factum” possible. He indicates that, although it is impossible to prove the existence of the law as one proves the existence of natural material facts and the natural laws, however, the possibility or the necessity of a normative theory of law is proven by the existence of legal science, which is known as dogmatic jurisprudence. If there is a religion, there must be dogmatic theology, which cannot be replaced by the sociology of religion, and similarly, if there is a law, there must be a normative legal theory.³³

For Cohen, the theories of mathematical natural science are paradigms of experience, and the fundamental concepts and laws established in them are a priori laws that enable experience's possibility. Philosophy takes this knowledge, that is, the fact of mathematical natural science, as its starting-point. It is true that theories, i.e. facts can change over time, but the philosopher must take the “best” theory of the day and apply to it a transcendental, namely purely logical (a priori) method of cognition. For instance, in the construction of the object of mathematics, Cohen uses the *Infinitesimal Method*, which precedes any sensibly given object and allows the determination of entity; Mathematical reality is the infinitesimal and is the necessary precondition of every experiment or entity.³⁴

For Kelsen, the science of law is a fact, that includes several theses: 1. The Pure Science is a theory of institutionalized legal science. 2. It is necessary to separate “is” from “ought”. It is not possible to deduce a normative sentence from an empirical sentence 3. A norm is an ought 4. The validity of a norm means its objectivity 5. The object of legal cognition is only positive norms 6. There is no necessary connection between the validity of a norm and its content 7. The legal system forms a hierarchical structure of norms. The validity of lower norms is determined by higher norms. 8. At the top of the hierarchy of norms is the basic norm presupposed in our thinking, which is the basis for the validity of the highest positive norms of the by and large effective coercive order.³⁵

Cohen's style of transcendental method is conveyed in this way: (1) Sentences that are accepted as true according to the application of (best) methods established in sciences are true (2) the truth of these sentences entails a (3) therefore, necessarily a. And Kelsenian style is as follows: (1) those normative legal propositions that are considered true according to the use of established methods in institutionalized legal science, are true (2) the possibility of their truth includes the principle of normative imputation (or the hierarchical structure of validity of norms, or the uniqueness of legal system, or the general effectiveness...) (3) Therefore, they are presupposed. It is certain that we did not mention the basic norm and legal ought as the most important preconditions, although component (2) is their denotation by “other” expression. For example, the principle of normative imputation stands in the place of legal ought, and the basic norm implies the validity of norms, hierarchy, effectiveness and

³² Ibid, 361. See Citation: Hans Kelsen, *Hauptprobleme der Staatsrechtslehre* (2nd ed., Tubingen 1923), YVII.

³³ *Kelsen H.*, *Introduction to the Problems of Legal Theory*, Paulson B.L. & S.L. (trans.), Oxford, 1992, 34-35.

³⁴ See: *Tevzadze G.*, *The Cognition Theory of German Neo-Kantianism*, Tbilisi, 1963, 65, 69, 122-123 (in Georgian).

³⁵ *Heidemann C.*, *Hans Kelsen and the Transcendental Method*, *The Northern Ireland Legal Quarterly*, Vol. 55, № 4, 2004, 361-362.

autonomy of legal system. With the same success we could have said that ... includes the presupposition of the basic norm that citizens ought to obey the prescriptions of the historically first constitution.³⁶

For example, if we take the sentences “legally theft ought to be punished” or “if someone steals, he ought to be imprisoned” and accept their truth value, then the next step in reasoning should be to discover the conditions that establish the objectivity of these sentences. Is theft connected to imprisonment as heating is connected to expansion? Obviously not. Therefore, the principle of normative imputation is needed. Why should we accept the subjective meaning of the norm that theft ought to be punished as its objective meaning? We can respond that it must be valid by a higher norm, so, it is necessary to accept the hierarchical structure of validity of norms as a precondition, therefore, it is necessary to consider the basic norm as well.

Again, the question arises as to what answer can be given to the sceptic who denies the existence of a science of law? The existence of a legal norm cannot be proven as chemical substance's, but the science of law is an age-old fact. However, as Heidemann mentions citing Kelsen, in any society law and legal procedures are part of an existing social practice (and this is a fact). And the factual procedures that can be classified as “legal” can thus be defined only if one shares the perspective of the science of law, that is, if one accepts the meaning-contents of the utterances whose purpose is to determine the law as valid norms. If the sceptic denies the existence of legal norms and, for instance, the truth value of the proposition that “legally theft ought to be punished”, he must also deny law as a social fact, which is a challenging job.³⁷

4. Later Kelsen: the Basic Norm as a Fiction

In the second edition of the “Pure Theory of Law”, i.e. after 1960, Kelsen changes his attitude towards the basic norm as a transcendental-logical condition through which the science of law describes law as an objectively valid order and designates it as a fiction. It is interesting, what could have caused such a radical change? Should we see it as a collapse, and should we agree with John Finnis, who says that Kelsen correctly recognized the failure of his legal philosophy, could not explain, or even coherently describe law's validity, because he excluded from the theory law's purposefulness and the requirements of practical reasonableness.³⁸

In 1964, Kelsen publishes a short essay on the function of a constitution, and although, at the beginning he repeats the attitude of the previous years towards the basic norm, at one point he notes that it is correct to validly object the meaning of an act of thinking as a norm, as there is an essential correlation between “ought” and “willing”, and this objection can only be overcome, if along with the basic norm presupposed in our thinking, there is also assumed an “imaginary authority” whose

³⁶ Ibid, 368-370, 373-376. See: *Paulson S.L.*, The Neo-Kantian Dimension of Kelsen's Pure Theory of Law, *Oxford Journal of Legal Studies*, Vol. 12, № 3, 1992, 324-330.

³⁷ *Heidemann C.*, Hans Kelsen and the Transcendental Method, *The Northern Ireland Legal Quarterly*, Vol. 55, № 4, 2004, 370-371.

³⁸ *Finnis J.*, The Priority of Persons, *Oxford Essays in Jurisprudence*, 4th Series, *Horden J. (ed.)*, Oxford, 2000, 6.

(fictional) act of will has the basic norm as its meaning. Therefore, it must be a genuine fiction (and not a semi-fiction), which not only contradicts reality, but also containing contradiction within itself. It is contrary to reality, insofar as such a norm as the meaning of an actual act of will does not exist, and it is self-contradictory, since it represents the authorisation of a supreme moral or legal authority, so it has to issue from an authority that is superior to it, and the “higher than the supreme” authority is simply a product of imagination.³⁹

How can “highest” be derived from “still higher”? And for this “still higher” will it be necessary to bring in “higher than it”? As Robert Alexy points out, in this case, the “highest authority” is not the “highest authority”. To such an extent, a further basic norm would have to be invented to empower the “fictitious authority” to create the basic norm, and so endlessly.⁴⁰

Kelsen's “change of heart” should have sparked from an interest in Hans Vaihinger's fictionalism, according to which fictions – false concepts and ideas are used as if they were true, with the help of which right results are obtained. Vaihinger says that what is commonly called reality, which surrounds human in its diversity, is the world of our own imaginative representations. He distinguishes between fiction and hypothesis⁴¹ and as the goal of the latter names the reflection of reality, while fiction looks sceptically at the discovery of reality and its laws independent of thinking and aims at inventing useful methods. We know in advance that fiction not only does not exist, but also that its logical consideration is contradictory. For instance, assuming an atom or infinitely small. Language expresses this with the word “as if” (*Als ob*). Therefore, the basis of the assumption, which we know in advance to be contrary to logic, is only its expediency, that is, the practical result it ensures. Thinking utilizes fiction only because it makes adaptation to environment easier. For example, the Romans developed legal fictions and the word fiction (*fictio*) first appears with them.⁴²

³⁹ Kelsen H., *The Function of a Constitution*, Stewart I. (trans.), Tur R., Twining W. (eds.), *Essays on Kelsen*, Oxford, 1986, 116-117.

⁴⁰ Alexy R., *The Argument from Injustice : A Reply to Legal Positivism*, Paulson B.L. & S.L. (trans.), Oxford, 2002, 111.

⁴¹ Kelsen in the work “General Theory of Norms”, published posthumously in an unfinished manner, notes that the basic norm is not a hypothesis, but a fiction. See: Kelsen H., *General Theory of Norms*, Hartney M. (trans.), Oxford, 1991, 256. In 1933, Kelsen mentions Mach's principle of economy of thought and Vaihinger's fictionalism, although he rejects both and focuses on Cohen's Method of Hypothesis. See: Kelsen H., *The Pure Theory of Law. “Labandism” and Neo-Kantianism. A Letter to Renato Traves.*, Paulson S.L., Litschewski B. (trans.), Paulson S.L., Litschewski B. (eds.), *Normativity and Norms. Critical Perspectives on Kelsenian Topics*, Oxford, 1998, 173.

⁴² Speaking of juridic fictions, Kelsen criticises Vaihinger and points out that nearly all the examples he uses are false. Of the three possible activities – legislative, judicial and scientific, only the latter, the legal science can produce a fiction. A legislative act cannot contradict reality; Positing a norm is the result of an act of will, not a process of thought aimed at cognition. And the application of law, when in the absence of law it is assumed “as if” it were covered by a statute, lacks the element of expediency, insofar as correct conclusion is not reached (“correctness” means legality, not utility). An example of a fiction used by legal science is the concept of the legal subject or the legal person, which is a way of personification or hypostatisation applied by legal theory to the complex of norms, that simplifies the understanding of norms. See: Kelsen H., *On the Theory of Juridic Fictions. With Special Consideration of Vaihinger's Philosophy of the As-If*, Kletzer C. (trans.), Del Mar M., Twining W. (eds.), *Legal Fictions in Theory and Practice*,

The method of using fiction is as follows: when thinking tries to cognize the reality, it means that the subject is not satisfied with the given situation and wants to change it, although the given reality does not show a tendency to change. Therefore, thinking goes the other way, consciously allowing something that cannot exist in reality and thereby introducing dissonance (since traditional logical forms only give relations in constancy), that is, thinking is given a contradictory reality that it must overcome.⁴³

Fiction forms four main characteristics, which are: deviation from the reality, removal of fiction in the research result, the awareness of the fictivity and the expediency, however, according to Vaihinger, for juridic fictions, because law is a human artifact and legal fictions do not describe natural phenomena or natural laws, the criterion for canceling, “correcting” the fiction in the research result is unnecessary, which Kelsen does not agree in relation to the legal science.⁴⁴

The critical opinion, often expressed in literature, that the basic norm is inapplicable as a fiction because it implies an endless chain of legitimation, should not be shared for the simple reason that the assumption of this logical contradiction, what is thus conceived, gives it a fictional character. It is a preliminarily cognized internal contradiction and not a “correct” construction corresponding to the legal reality which completes the hierarchy of legitimation at the level of the constitution.

According to Kelsen, reality should not be diminished only in the form of “natural or empirical” reality, and it should also include, in general, the object of knowledge, which in relation to the legal science, since its object of knowledge is law, means legal reality. Accordingly, deviating from reality means deviating from legal reality, i.e. contradiction with the legal order: “The juridic fiction can only involve a fictitious *legal* claim, and not a fictitious *actual* claim.”⁴⁵

Vaihinger distinguishes between theoretical and practical value and recognizes only the possibility of practical application of thinking. Kelsen, since he considers as fictions only the fictions of the science of law, for the legal science should consider expedient precisely a result which is having a “practical value” for the theory, not for the practice, as a mean of “explaining” law’s normativity and validity. If his aim were to “explain” the practice of law (the vision from the viewpoint of the sociology of law), then Hart's remark regarding the basic norm, if a constitution specifies sources of law that are part of “living reality” in the sense that the courts and state bodies “identify” the law based on it, then the constitution is accepted and actually exists, therefore, consideration of a further norm (basic norm) is an needless reduplication, is legitimate.⁴⁶

The question arises, is the basic norm as a fiction, used by Kelsen more for theoretical rather than practical utility? The legal science describes the law whose validity must be explained, however,

Switzerland, 2015, 3-22. See: *Vaihinger H.*, The Philosophy of “As if”, 2nd ed., *Ogden C.K. (trans.)*, London, 1935, 33-35.

⁴³ See: *Vaihinger H.*, The Philosophy of “As if”, 2nd ed., *Ogden C.K. (trans.)*, London, 1935, 85-100. See also: *Tevezadze G.*, The Cognition Theory of German Neo-Kantianism, Tbilisi, 1963, 287-310 (in Georgian).

⁴⁴ *Kelsen H.*, On the Theory of Juridic Fictions. With Special Consideration of Vaihinger’s Philosophy of the As-If, *Kletzer C. (trans.)*, *Del Mar M.*, *Twining W. (eds.)*, Legal Fictions in Theory and Practice, Switzerland, 2015, 6. See citation: Vaihinger, H. *Die Philosophie des Als-ob.* 2nd ed., Berlin : Reuther & reichard. 197.

⁴⁵ *Ibid*, 13.

⁴⁶ *Hart H.L.A.*, The Concept of Law, 2nd ed., Oxford, 1994, 293.

the question of why this or that norm is valid, first of all, must consider lawyer's "practical" perspective, who will not really point up the basic norm as a fictitious member.

5. Conclusion

Transcendental-logical condition or fiction? In principle, in both cases the content of the basic norm is the same, that citizens ought to behave as determined by the historically first constitution. It is true that in both the basic norm is an epistemological mean for the science of law to cognize its object, but if the first denotes a true condition for obtaining a true result, the second is a false condition that leads to a practical result.

Representing the legal science as a "pure science" obviously leads to the need for the Humean radical separation of is and ought or to the need to lock the normative reality into itself. Therefore, Kelsen's criticism should, first of all, be derived from the law itself, i.e. should be determined not the insufficiencies of the philosophical theories that he uses to explain the validity of law, but their incongruity with the coercive order that is called law.

If with Cohen scientific fact is a mathematical natural science, with Kelsen it is a science of law and there is an immense difference between them. For instance, in a triangle, the sum of the lengths of any two sides is greater than the length of the third side, or if one body exerts a certain force on another, then the second body will exert the same force of equal magnitude and opposite direction back on the first, and this is always the case, it is impossible to "see" anything else, and the legal science, which states that "Legally, theft is punishable", describes the legal norm, which can be appraised from different perspectives, both from the legal or anarchist's point of view, who will only see power relations in the law. The assessment of coercive order as the law is the result of normative interpretation, which is one of the possible interpretations (and not the only one).

As for Vaihinger, he finally established the fictitiousness of all thinking and stopped at the unknowability of the real world. With Kelsen, to define legal reality is problematic, because legal reality only becomes as such on the premise of the basic norm, so how can the basic norm be in contradiction with the reality it constitutes? Legal reality is not built by the senses, but it is construed by human being, and before assuming the basic norm, we only have subjective meanings.

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