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Indice

Proceedings of the First Civil Law – Common Law Forum in Legal Theory. *Methodology and Legal Theory*

Saggi (Essays)

Proceedings of the First Civil Law – Common Law Forum in Legal Theory

Methodology and Legal Theory

Methodology and Legal Theory. Foreword

Andrea Dolcetti, Jordi Ferrer Beltrán**, Giovanni Battista Ratti****

In 2009, the first Oxford-Girona annual seminar in Legal Theory was organised with the purpose of providing an occasion to discuss work-in-progress by legal philosophers based in these two Universities[1]. After four successful seminars, the University of Genoa was invited to join this initiative. As a result, an international workshop on legal interpretation and legal philosophy, with speakers from the Universities of Oxford, Girona, and Genoa, took place at St. Hilda's College, Oxford, on 10 April 2015[2].

Most recently, our annual seminar evolved into the Civil Law - Common Law Forum in Legal Theory, with the aim of facilitating the exchange of ideas between legal philosophers trained in civil and common law traditions. In developing this new format, we decided to broaden participation in the event, while maintaining a single theme to guide discussion. This year, the Forum focused on methodology and legal theory.

The following section includes articles based upon papers presented and discussed at the Civil Law – Common Law Forum in Legal Theory, which took place on 19-20 June 2019 at the University of Genoa, under the auspices of the Tarello Institute for Legal Philosophy. The authors of these articles are: Stanley Paulson (Washington University of St. Louis and the University of Kiel); Pablo Navarro (University of Girona and Conicet, Argentina); Corrado Roversi (University of Bologna); Lucila Fernández Alle (University of Girona); Dan Priel (York University, Toronto); Luca Malagoli (University of Genoa); and Carolina Fernández Blanco (University of Girona).

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[1] The first Oxford-Girona seminar in Legal Theory took place at the University of Girona on 14-15 December 2009.

[2] Most of the papers discussed at this workshop were subsequently published in the 2016 issue of *Analisi & Diritto*.

By approaching the theme of methodology and legal theory from a variety of perspectives, these authors offer the readers of *Analisi & Diritto* thought-provoking articles on Kelsenian methodology (Paulson, Navarro), the artifact theory of law as a methodological tool (Roversi and Fernández Alle), the methodology of naturalism and realism (Priel and Malagoli), and current approaches to the rule of law (Fernández Blanco).

Despite the breadth of methodological and theoretical issues discussed, all these articles share a commitment to the rational reconstruction of legal phenomena through the fundamental tools of analytical jurisprudence – most importantly, a focus on conceptual analysis, attention to the is-ought dichotomy, and an appreciation of the distinction between empirical and analytical propositions.

Over the course of the two days, in this year's Forum, the original ideas and arguments at the core of these articles benefitted from the insights of scholars with different legal backgrounds and philosophical sensitivities. The academic conversation sustained by our Forum thrives on diversity – for this reason, we are planning to strengthen the plurality of views that animate our meetings. In publishing these articles, we hope that this conversation will continue and be enriched by further ideas and contributions.

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

Stanley L. Paulson *

Abstract

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

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

1. Introduction. Two Problems

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

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

* Christian-Albrechts-Universität zu Kiel, Juristisches Seminar, Leibniz Straße 6, D-24118 Kiel, Germany, *spaulson@law.uni-kiel.de*. As so often in the past, I have once again occasion to thank my colleagues in Genoa for their warm hospitality, welcome criticism, and generous support, to wit: Pierluigi Chiassoni, Paolo Comanducci, Riccardo Guastini, Giovanni Battista Ratti, and María Cristina Redondo. Warm thanks, too, to Bonnie Litschewski Paulson, who gave me discerning and sanguine advice. And I wish to thank Robert Alexy for his gracious hospitality and many good conversations.

ANALISI E DIRITTO
2019: 11-30

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

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

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

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

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

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

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1 Kelsen 1992, §31(a): 63-64.

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

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

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